HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

MAREK KULIGOWSKI APPELLANT

AND

METROBUS RESPONDENT

Kuligowski v Metrobus [2004] HCA 34
3 August 2004
P91/2003

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Supreme Court of Western Australia dated 24 June 2002 and in place thereof order that:*

   (a) *the appellant's appeal to the Full Court be allowed with costs;*

   (b) *the orders of the District Court of Western Australia dated 18 October 2000 (in WC 93 D 775 of 1997 and CIV 4575 of 1998) be set aside and the matter remitted to the District Court for hearing; and*

   (c) *the respondent pay the appellant's costs of the said District Court proceedings both before Deputy Registrar Harman and Commissioner Ley.*

On appeal from the Supreme Court of Western Australia

Representation:

B L Nugewela with G E Nairn for the appellant (instructed by D'Angelo & Partners)

G T W Tannin SC with B P King for the respondent (instructed by State Solicitor's Office (Western Australia))

CATCHWORDS

Kuligowski v Metrobus

Issue estoppel – Whether decision of Review Officer under the *Workers' Compensation and Rehabilitation Act* 1981 (WA) ("the Act") Pt IIIA Div 3 is a final decision for the purposes of issue estoppel – Application by employer under s 60 of the Act disputing liability to pay compensation for injuries incurred at work – Review Officer found that the worker's injury had "resolved" – Leave to institute proceedings under s 93D of the Act for damages at common law refused on the grounds of issue estoppel.

Issue estoppel – Whether the issues arising in District Court proceedings were the same issues decided by the Review Officer – Review Officer's findings were ambiguous.

Words and phrases – "issue estoppel", "final decision".

Workers' Compensation and Rehabilitation Act 1981 (WA), Pt IIIA and ss 5(1), 18, 21, 58, 60, 62, 71, 93D.

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ. On 23 March 1994, the appellant bus driver, Marek Kuligowski ("the worker"), suffered injuries in an accident at work. These injuries included a twisted left ankle. The worker failed in workers' compensation proceedings against his employer, Metrobus, in the Conciliation and Review Directorate of Western Australia. He then obtained two orders from a Deputy Registrar of the District Court of Western Australia. The first order granted leave to the worker to institute proceedings in the District Court for damages at common law in relation to the injury. The second order dismissed an application by Metrobus that the worker's claim be dismissed. Those orders were then set aside by a Commissioner of the District Court who accepted a contention advanced by Metrobus that an issue estoppel arose from a decision in the workers' compensation proceedings. The Full Court of the Supreme Court of Western Australia, by majority[1], dismissed an appeal from the Commissioner's orders, and the present appeal is brought, by special leave, against the Full Court's orders.

The background

2 After the accident of 23 March 1994, the worker missed a few days of work. On or about 22 December 1994, according to the worker, he suffered another accident at work, exacerbating the symptoms in his left ankle. The worker also claimed that in April 1995, while not at work, his left ankle gave way and he twisted his left knee, again causing an exacerbation of the symptoms in his left ankle and also causing symptoms in his left knee.

3 Section 18 of the *Workers' Compensation and Rehabilitation Act* 1981 (WA) ("the Act") provided:

> "If a disability of a worker occurs, the employer shall, subject to this Act, be liable to pay compensation in accordance with Schedule 1."

Two paragraphs of the definition of "disability" in s 5(1) are relevant:

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1 *Kuligowski v Metrobus* (2002) 26 WAR 137 (Malcolm CJ, Steytler and Templeman JJ; Wallwork and McLure JJ dissenting).

"(a) a personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions;

…

(d) the recurrence, aggravation, or acceleration of any pre-existing disease where the employment was a contributing factor to that recurrence, aggravation, or acceleration and contributed to a significant degree …".

Section 5(1) also provided that:

"'disease' includes any physical or mental ailment, disorder, defect, or morbid condition whether of sudden or gradual development".

Section 21 of the Act provided:

"An employer is liable to pay compensation under this Act from the date of incapacity resulting from the disability but clause 9 applies in any case."

Clause 9 of Sched 1 is immaterial, but sub-cll 7(1) and (2) made provision for weekly payments of compensation during total incapacity for work and partial incapacity for work respectively.

4 On 20 June 1995, Metrobus began paying workers' compensation to the worker. However, Metrobus later lodged a standard form entitled "Application Referring Dispute for Conciliation" ("the Application") in the Conciliation and Review Directorate. It was dated 19 June 1996 and filed on 21 June 1996. The Application stated, under the heading "Details of Dispute":

"The employer disputes that the worker is entitled to compensation payments and seeks an order suspending payments under s 60 until such time as the worker proves he sustained an injury on 23.3.94."

In substance Metrobus thus sought two things: a finding that the worker was not entitled to compensation payments, and an interim order suspending payments until the worker proved that he was entitled. Section 60 of the Act appeared in Div 5 (ss 56-72) of Pt III. The Division was headed "Commencement, Review, Suspension, and Cessation of Payments" and the heading to s 60 read

"Application for discontinuance or reduction of weekly payments". Section 60 provided:

> "(1) Where weekly payments are made to a worker pursuant to this Division, the employer may apply to the Directorate at any time for an order that such payments be discontinued or reduced.
>
> (2) If the employer satisfies the Directorate that there is a genuine dispute as to liability to pay compensation or as to the proper amount of such weekly payments, and in either case of the grounds of the dispute, the Directorate may order that the payments be suspended for such time as the Directorate directs or be discontinued or be reduced to such amount as it thinks proper or it may dismiss the application."

The reference to the "Directorate" was to the Conciliation and Review Directorate, a body established by s 104A and comprising the Director, conciliation officers, review officers and other staff. The s 60 application by Metrobus sought an order for suspension of payments under sub-s (2).

Part IIIA (ss 84A-84ZZB) was headed "Dispute Resolution", Div 2 (ss 84N-84Y) "Conciliation", and Div 3 (ss 84Z-84ZN) "Review". The term "dispute" was defined in s 84A as meaning in Pt IIIA "a dispute in connection with a claim for compensation under this Act", and as including, among other things, "a dispute as to liability to make or continue to make weekly payments of compensation". Section 84N, the first section in Div 2, provided:

> "Any party to a dispute may, by application, refer the dispute to the Director for conciliation."

As well as being an application under s 60, the Application document was also an application under s 84N. So much is clear from r 6 of the Workers' Compensation (Conciliation and Review) Rules 1994 (WA) ("the Rules"). Rule 6 provided that an application referring a dispute to the Director for conciliation (ie, s 84N) was to be made in the form of Form 1 (found in Sched 1 to the Rules). The document lodged by Metrobus was in that form and under the heading "Details of Dispute" Metrobus referred both to the substantive issue to be resolved under Pt IIIA ("[t]he employer disputes that the worker is entitled to compensation payments") and the s 60 application. Thus, Metrobus lodged both a s 60 application and an application for conciliation under s 84N. This is also

clear from the way the proceedings were dealt with by the Directorate, namely as two distinct applications each decided by a different review officer.

6 A conciliation officer of the Directorate conducted a conciliation conference under s 84P of the Act, which was held on 26 June 1996. However, it did not result in any agreement. The conciliation officer referred the dispute for review under s 84Y of the Act. Section 84Y provided that a conciliation officer was to refer a dispute for review if any of the parties so requested, and that officer could vary or revoke an order previously made by the officer under Div 2 of Pt IIIA.

7 On 15 July 1996, a "preliminary review" took place[2]. On that occasion, the parties agreed that the matter be adjourned to 21 August 1996, but Metrobus sought to have the application for an order suspending payments (the s 60 application) dealt with in advance, and independently, of the substantive issues (the s 84Y referral). After a hearing on 19 July 1996, the s 60 application was rejected: a review officer within the Directorate (the first review officer) ordered that Metrobus continue to make weekly compensation payments to the worker until further order. On 23 July 1996, he stated his reasons thus:

> "1. Given the conflict in the evidence provided during the course of the review I am satisfied the applicant has, pursuant to the provisions of section 60, established it has a proper basis to genuinely dispute its liability to pay compensation to the [worker].
>
> 2. However, whilst I find a genuine dispute exists the substantive issues in dispute between the parties are to be the subject of a review hearing to be conducted on 21 August 1996 where full and detailed evidence will be obtained so as to allow a final determination to be made. In those circumstances I do not believe it is appropriate that the weekly payments currently being made to the respondent worker should be suspended or reduced given the relatively short period of time until the review of 21 August 1996."

8 The reasons of the review officer illustrate the operation of a s 60 application as a gateway to the decision on the substantive issues in a matter.

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2 See r 12 of the Rules.

However, as explained above, the s 60 application made under Pt III is separate from the Pt IIIA application for conciliation made under s 84N and then referred for review under s 84Y. Accordingly, it is possible for an employer to make an application for conciliation without making an accompanying s 60 application, and vice versa. Section 84B of the Act, which appeared in Pt IIIA, provided that proceedings for the resolution of a dispute were not capable of being brought other than under Pt IIIA. However, this did not prevent a s 60 application being made independently and without an application for conciliation. This is because a s 60 application could be pursued not to resolve a dispute, but to discontinue or reduce weekly payments. It is a separate and independent species of application, although no doubt it may be in the interests of the employer to seek to have the weekly payments suspended under Pt III before the substantive issues are decided under Pt IIIA.

9 It has been necessary to deal with these basic structural aspects of the legislation at some length in the light of the disagreement between the parties in their submissions. An appreciation of the structure of the Act is required for the determination of the issues on the appeal respecting "finality" of decision-making under the statute and the identification of the issues decided.

10 Following the rejection of the s 60 application, the dispute (ie, the application under Pt IIIA) then became the responsibility of a second review officer. Section 84ZA(4) empowered the review officer, subject to the Rules, to give directions respecting the proceedings. The officer issued a notice of listing dated 23 July 1996, in which, among others, the following directions were given:

> "1. Whereas on 19 July 1996 a review officer made a finding that there is a genuine dispute as to the liability of the employer to pay compensation to the worker and the parties having agreed prior to that date to have the substantive issue determined at [a] review on 21 August 1996 I direct that the worker be excused from commencing a fresh application subject to this matter proceeding on the basis that the employer is entitled to require the worker to prove an entitlement to compensation under the Act.
>
> …
>
> 3. That the parties attend prepared to deal with the substantive issue with the onus of proof being on the worker."

Section 84ZF(1) of the Act provided: "The review officer may make such order as may be appropriate for giving effect to a decision made in the review."

11 The review hearing proceeded on 21 and 22 August 1996 and 4 September 1996. On 6 September 1996, the second review officer made the following orders:

> "1. That weekly payments to the worker shall be discontinued as from and including 4 September 1996.
>
> 2. That the employer's application at review for an order that the worker refund compensation paid, be dealt with by way of a fresh application referring the dispute for conciliation."

12 The source of power to make the second order was s 71 of the Act; this gave the Directorate power to make appropriate orders in relation to the refund application by Metrobus. The source of power to make the first order was a matter of dispute. However, as explained, the second review officer was dealing with the substantive issues referred for review under s 84Y of the Act. The source of power could not have been s 60 as the s 60 application had been rejected on 19 July 1996. The source of power for the first order was s 84ZF(1), the text of which has been set out earlier in these reasons.

13 The second review officer published the reasons for his decision on 19 November 1996. He noted that the worker bore the onus of proof, and identified various conflicts and inaccuracies in the worker's evidence. He posed the matter for decision in the following words:

> "I must be satisfied on the balance of probabilities that not only did the worker sustain an injury but that the injury or disability caused the worker to be incapacitated for work."

Plainly, he had in mind ss 18 and 21 of the Act.

14 The second review officer then made the following findings:

> "[T]he worker did sustain an injury of minor severity on 23 March 1994 and … he completed his shift that day before seeing his general practitioner.
>
> …

> *[T]he injury, described in the first medical report as a twisted left ankle and in the Final Medical Certificate as a strain to the left ankle joint, on the basis of the Final Medical Certificate, resolved*." (emphasis added)

These were findings that the worker had sustained a disability within the meaning of s 18, and that it had "resolved". But when? The Final Medical Certificate, which was based on an examination conducted on 25 March 1994 and which bore that date, did not say that the ankle injury had resolved: it said only that the worker had partially recovered, that he was fit to return to work on 28 March 1994, and that full recovery was "expected" and "imminent". The finding must be that it had "resolved" after 25 March 1994 but before 4 September 1996, the date from which the second review officer ordered compensation payments to be discontinued.

15 The second review officer said:

> "In regard to the period from the end of April 1994 onwards I am unable to make a finding that the applicant has proved his case. The conflict and inconsistencies in the evidence, I think, on the balance of probabilities, affect the applicant's credibility to the extent that I must consider all his evidence as questionable. The history given to the medical practitioners from December 1994 is also to be considered in this light."

16 After noting that the worker's evidence in general could not be relied on, the second review officer said:

> "*I believe the evidence fails to establish that the applicant's present injuries arise out of or in the course of his employment with MetroBus, nor do I believe that there are grounds for finding that a recurrence or aggravation of the ankle injury within the definition of disability under the Act has occurred*." (emphasis added)

The first half of this sentence is a reference to par (a) of the definition of "disability" in s 5(1). The second half of the sentence is a reference to par (d). Metrobus contended that the "findings" emphasised in this passage and in the passage quoted above created an issue estoppel.

17 Finally, the second review officer said, referring to s 21:

"It is also necessary for the applicant to prove incapacity for work and in this regard I am of the view that Mr Kuligowski has not satisfied the onus upon him on this point."

18 An appeal by the worker pursuant to s 84ZN(2) of the Act to the Compensation Magistrate's Court against the second review officer's orders was dismissed on 11 March 1997. The worker did not seek to appeal to the Supreme Court pursuant to s 84ZW.

19 On 29 June 1998, over the opposition of Metrobus, a Deputy Registrar of the District Court granted the worker leave, under both s 93D of the Act and s 47A of the *Limitation Act* 1935 (WA), to institute proceedings for damages at common law against Metrobus[3]. On 26 November 1998, the worker instituted those proceedings. On 1 February 1999, the worker alleged in his statement of claim that the 23 March 1994 accident was the result of negligence on the part of Metrobus, and that numerous medical difficulties flowed from it.

20 On 18 October 2000, Commissioner Ley allowed appeals by Metrobus against the Deputy Registrar's orders granting leave to the worker to institute proceedings at common law and rejecting Metrobus's application to have the proceedings dismissed on the ground of issue estoppel (inter alia). He concluded that the second review officer's finding that the injury suffered in the accident had "resolved" worked an issue estoppel. He did so on the ground that it was "legally indispensable to the conclusion that the [worker's] alleged disability did not arise out of or in the course of his employment". This was a narrower issue estoppel than that relied on in this Court.

Application of "issue estoppel": uncontroversial matters

21 In his speech in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*[4], Lord Guest, after noting that the doctrine of issue estoppel had been accepted by Australian courts for a number of years, indicated that, for the doctrine to apply in the second set of proceedings, the requirements were:

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3 Section 93D(4) of the Act, which was repealed and replaced with a new provision by the *Workers' Compensation and Rehabilitation Amendment Act* 1999 (WA), required the worker to obtain leave before commencing proceedings for damages.

4 [1967] 1 AC 853 at 935.

> "(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

22 There was no dispute about the satisfaction of requirement (3). The second review officer was not sitting as a "court" in any strict or conventional sense, but it was common ground that[5]:

> "The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties, even if it is not called a court, and its jurisdiction is derived from statute or from the submission of parties, and it only has temporary authority to decide a matter ad hoc."

The controversy centred on requirements (1) and (2). It is convenient to start by considering requirement (2), that there must be a final decision.

Was the second review officer's decision a final decision?

23 A principal question in the worker's appeal to the Full Court against Commissioner Ley's orders was whether the Court should overrule a line of its earlier decisions[6] on the ground that the second review officer's decision was not a final determination, or, to put the matter in other terms employed by the parties, on the ground that the provisions of the Act excluded the availability of issue estoppel. Malcolm CJ, Steytler J (with some doubt) and Templeman J considered that the second review officer's decision was final, that the Act did

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5 *The Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 453 per Gibbs J.

6 *McNair v Press Offshore Ltd* (1997) 17 WAR 191; *Waddington v Silver Chain Nursing Association* (1998) 20 WAR 269. See also *Re Monger; Ex parte Wilderness Equipment Pty Ltd* [2003] WASCA 202 at [46] and [50] per Wheeler J.

not exclude the availability of issue estoppel, and that the earlier decisions should not be overruled[7]. Wallwork and McLure JJ dissented[8].

24 The controversy in the Full Court, respecting the provisions supporting the review hearing on 21 and 22 August 1996 and 4 September 1996 and the orders made by the second review officer, should have been resolved in the fashion indicated earlier in these reasons. Wallwork and McLure JJ (and, in this respect, Templeman J) correctly reasoned that once the attempt to conciliate the dispute had failed, it was a "dispute" which s 84B gave a review officer exclusive jurisdiction to resolve by embarking on the procedures set out in Pt IIIA Div 3[9]. Section 84ZA gave the review officer power to commence and conduct the review, and s 84ZF(1) gave power to make any order which was appropriate to give effect to a decision made in the review[10].

25 A particular difficulty in assessing finality arises if the order made pursuant to the judgment in question can later be altered. In *Somodaj v Australian Iron and Steel Ltd*[11] Kitto, Taylor and Menzies JJ said:

> "The other additional argument which is now raised is concerned with the provisions of s 36(2) of the *Workers' Compensation Act*. By sub-s (1) of this section it is provided that the Commission shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under the Act and the action or decision of the Commission shall be final. But sub-s (2) provides that nothing in sub-s (1) shall prevent the Commission from reconsidering any matter which has been dealt with by

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7 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 155 [76] per Malcolm CJ, 179 [208] per Steytler J, 181 [226]-[229] per Templeman J.

8 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 170 [166] per Wallwork J, 195-196 [322] per McLure J.

9 Section 84A defined "review" as meaning "procedures taken by a review officer under Division 3 for the resolution of a dispute."

10 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 168 [139] per Wallwork J, 180 [219]-[223] per Templeman J, 189-190 [285]-[286] per McLure J.

11 (1963) 109 CLR 285 at 297-298.

> it, or from rescinding, altering or amending any decision or order previously made, all of which the Commission shall have authority to do. With this sub-section in mind it is said that an award of the Commission can never give rise to an estoppel because it does not finally adjudicate upon the rights of the parties before it."

Their Honours went on to reject the submission, making particular reference to the judgment of Isaacs J in *Ainslie v Ainslie*[12]:

> "As Isaacs J said in the latter case in relation to provisions such as those contained in sub-s (2): 'The true rule is to see whether or not the Legislature has by its enactment left the order entirely floating, so to speak, as a determination enforceable only as expressly provided and in the course of that enforcement subject to revision, or whether the order has been given the effect of finality unless subsequently altered'[13]. We are of the opinion that the legislation in question here plainly falls within the latter category and the award was an adjudication upon the rights of the parties, not of an interlocutory character, but completely effective unless and until it should be rescinded, altered or amended by the Commission. Some confirmation of this view may be found in the provisions of s 37 of the Act which provides that no award, order, or proceeding of the Commission shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any court of judicature on any account whatever."

A "final" decision, then, is one which is not of an interlocutory character, but is completely effective unless and until rescinded, altered or amended. The fact that an appeal lies from a decision does not make it any less final[14]. It must be

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12 (1927) 39 CLR 381.

13 (1927) 39 CLR 381 at 390. Isaacs J added: "This can only be ascertained by construing the Act as a whole."

14 *The Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 454 per Gibbs J.

"final and conclusive on the merits": "the cause of action must be extinguished by the decision which is said to create the estoppel"[15].

26 In the Act (in the form in which it applied in the present case) there was no explicit general power to reconsider the decisions of review officers in the light of further information (cf s 84ZF(3), introduced in 1999). However, apart from the facility given by s 60 for employers to apply for payments to be discontinued or reduced, s 62(1) gave a power to the worker and the employer to request a review of weekly payments and a discontinuance of, reduction in, or increase in them.

27 The worker relied on the reasoning of the dissenting judges in the Full Court, which turned on three points.

28 First, proceedings for the resolution of disputes in connection with claims for compensation under the Act could only be brought under Pt IIIA: s 84B. Where conciliation under Pt IIIA Div 2 either was not attempted or failed, and matters had to be determined by review officers under Pt IIIA Div 3, the Act established a procedure with the following features. It was intended to be speedy, informal and economical: ss 3(d) and 84ZA(2). The review officer was not bound by the rules of evidence: s 84ZD(1). There could only be legal representation if the parties consented or if, there being a question of law, the review officer permitted it: s 84ZE. Where there was a conflict of medical opinion, it was to be resolved by a medical assessment panel in an equally informal way, before which there was no right of legal representation at all: ss 84ZH and 145D(4).

29 Secondly, s 84ZN(1) provided:

> "Subject to this section, a decision or order of a review officer is not open to question or review in any court, and proceedings by or before a review officer may not be restrained by injunction, prohibition, or other process or proceedings in any court or by removal by *certiorari* or otherwise in any court."

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15 *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 935 per Lord Guest.

It was said to be significant that this sub-section did not describe the decision or order as final or conclusive, in contrast to statutes which had been held not to exclude issue estoppel[16], in contrast to ss 117[17] and 145E(5)[18] of the Act in their post-1993 form, and in contrast to s 116 of the Act in its pre-1993 form[19].

30 Thirdly, it was said that determinations under s 58(5) ordering, or refusing to order, weekly payments were probably not final[20]; that issues raised under

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16 For example, s 36(1) of the *Workers' Compensation Act* 1926 (NSW), discussed in *Somodaj v Australian Iron and Steel Ltd* (1963) 109 CLR 285 at 297: see above at [25].

That sub-section provided:

> "The Commission shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Act, and the action or decision of the Commission shall be final."

17 Section 117 provided that a determination of a compensation magistrate's court "is final and conclusive".

18 Section 145E(5) provided:

> "Unless rescinded under section 145F, the determination, or if the determination is varied under that section the determination as varied, is final and binding on the worker and his employer and on any court or tribunal hearing a matter in which any such determination is relevant and the written determination given under subsection (3) is, in the absence of evidence that the determination was so rescinded or varied, conclusive evidence as to the matters determined."

19 Section 116 provided that a determination of the former Workers' Compensation Board was to be "final and conclusive".

20 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 189 [282] per McLure J. Section 58(6) provided:

> "The fact that an application has been dismissed under subsection (5) shall not be taken into account by the Directorate in any other proceedings under this Act."

s 58(5) could be re-litigated under s 60[21]; and that s 62 determinations were not final[22].

31 This reasoning is flawed.

32 First, the non-judicial composition of the Directorate, its functions, its speedy and informal processes, the fact that the review officers were not bound by the rules of evidence, and the substantial exclusion of legal representatives – all these things are neutral on the question of finality. The defining feature of a final decision – complete effectiveness unless and until it can be amended – may be absent from proceedings of the most formal and elaborate character, and may be present in proceedings of the most informal and brisk character. Further, as Templeman J pointed out[23], the legislative goal of having workers' compensation disputes heard and determined in an informal, quick and cheap manner would not be assisted by a construction of the legislation which prevented the doctrine of issue estoppel from ever applying. That would increase the chance of double litigation of issues and vexation of parties.

33 Further, to ask whether decisions made under ss 58, 60 or 62 are "final" is to ask an incomplete question, because in fact no relevant decision is made under these sections considered in isolation. As discussed earlier in these reasons, these sections may, in effect, act as gateways through which parties wishing to obtain resolution of particular disputes then may pass. Once the parties have passed through those gateways, the proceedings for the resolution of the dispute are brought under, and only under, Pt IIIA, and if conciliation fails, they are resolved by review under Div 3. Metrobus utilised the s 60 gateway. The first review officer declined to suspend payments under s 60(2), but a "review" had to take place – that is, under s 84A, "procedures taken by a review officer under [Pt IIIA] Division 3 for the resolution of a dispute". Questions as to the finality of any decision or order made resolving the dispute depend on the construction of

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21 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 189 [282] per McLure J.

22 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 187 [271] per McLure J.

23 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 181 [227], following *McNair v Press Offshore Ltd* (1997) 17 WAR 191 at 198 per Owen J.

Pt IIIA Div 3, not ss 58, 60 and 62. But, in any event, the fact that certain decisions or orders can be reconsidered does not prevent them from being final.

34 Secondly, the argument resting on the contrast drawn between the presence of the words "final and binding" in s 145E(5), and their absence in s 84ZN(1), overlooks the special function of the words in the former provision. Section 145E(5) provided that, unless rescinded under s 145F, the determination of a medical assessment panel was to be "final and binding on the worker and his employer and on any court or tribunal hearing a matter in which any such determination is relevant". That is, the sub-section prevented parties from reagitating the panel's determination before the review officer. But it established no significant difference between a panel's determination and the review officer's decisions and orders: any determination of a panel would itself have been an element in those decisions and orders.

35 In evaluating the third argument relied on by the minority, resting on contrasts between the form of the legislation relevant to the present case (as enacted in 1993) and its form before 1993, it is necessary to remember the radical change in appellate rights that took place. Before the 1993 amendments, there was an appeal as of right from the Workers' Compensation Board to the Full Court of the Supreme Court from final determinations or orders of the Board made under s 116 on questions of both law and fact (s 136(1)), and an appeal with leave from determinations or orders made under s 116 which were not final, again on questions of both law and fact (s 136(2)). The 1993 amendments significantly narrowed the opportunities to appeal from review officers' decisions: on questions of fact, not at all; on questions of law, only to a compensation magistrate's court (s 84ZN(2)), and thence only by leave to the Full Court of the Supreme Court (ss 84ZW and 84ZX). Contrasts between the language of the pre-1993 s 116 and the post-1993 s 84ZN lack significance in these circumstances.

36 That leaves the argument resting on a contrast between s 84ZN(1) and s 117 in its post-1993 form. As Malcolm CJ[24] and Templeman J[25] pointed out, to have described the decision of the review officer as "final and conclusive" when

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24 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 151-152 [59].

25 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 181 [232].

an appeal as of right on a question of law lay against it to a compensation magistrate's court pursuant to s 84ZN(2) may have been thought inappropriate drafting. However, it is less inappropriate for the determination of a compensation magistrate's court to be described in s 117 as "final and conclusive" in view of the fact that there is no appeal as of right from it, but an appeal only by leave (s 84ZW).

37 The crucial question is the construction of the language employed in s 84ZN. To provide, as s 84ZN provided, that, subject to an appeal to a compensation magistrate's court on a question of law, decisions or orders of a review officer were not open to question or review in any court, was to provide that they were final – despite the non-inclusion of the words "final and conclusive". Section 37(1) of the legislation considered in *Somodaj v Australian Iron and Steel Ltd*, which bore some resemblance to s 84ZN, was said to provide "[s]ome confirmation" of the final character of the determination in that case[26].

38 Reliance was placed by Metrobus on the Second Reading Speech of the Minister responsible for the 1993 amendments in the Legislative Assembly of Western Australia on 21 September 1993[27]. That speech reveals a general determination to restrict the common law rights of injured workers, but it throws no light on the particular issue of statutory construction just discussed.

39 The decision of the second review officer was final, because it was "completely effective unless and until it should be rescinded, altered or amended"[28].

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26 (1963) 109 CLR 285 at 298 per Kitto, Taylor and Menzies JJ. Section 37(1) of the *Workers' Compensation Act* 1926 (NSW) provided:

> "No award, order, or proceeding of the Commission shall be … liable to be challenged, appealed against, reviewed, quashed, or called in question by any court of judicature, on any account whatsoever."

27 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 September 1993 at 4233-4240.

28 *Somodaj v Australian Iron and Steel Ltd* (1963) 109 CLR 285 at 298 per Kitto, Taylor and Menzies JJ.

Same question?

40 In *Ramsay v Pigram*[29], Barwick CJ encapsulated what was involved in answering that question by saying:

> "Long standing authorities, in my opinion, warrant the statement that, as a mechanism in the process of accumulating material for the determination of issues in a proceeding between parties, an estoppel is available to prevent the assertion in those proceedings of a matter of fact or of law in a sense contrary to that in which that precise matter has already been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties in the same respective interests or capacities, or between a privy of each, or between one of them and a privy of the other in each instance in the same interest or capacity. The issue thus determined, as distinct from the cause of action in relation to which it arose, must have been identical in each case."

41 The worker argued that the question before the second review officer was not identical to the question which will arise in the District Court proceedings. The question posed in the District Court proceedings by s 93D of the Act is whether the worker had a serious disability (s 93D(1)) and whether his "future pecuniary loss resulting from the disability is of an amount that is at least equal to the prescribed amount" (s 93D(2)(b)) – that is, $119,048.

42 The worker's statement of claim pleads that the accident of 23 March 1994 occurred as a result of the negligence of Metrobus, and caused the worker injuries. It continues:

> "6. On or about April 1995 and as a consequence of ongoing instability in his left ankle, the Plaintiff's ankle gave way causing him to twist and injure his left knee.
>
> 7. On 6 November 1995 and as a consequence of ongoing symptoms in his left ankle, the Plaintiff underwent surgery … for the repair of the peroneal tendons in his left ankle. During surgery the plaintiff

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29 (1968) 118 CLR 271 at 276.

aspirated some of the gastric contents of his stomach into his lungs causing post operative lung complications."

The statement of claim then pleads numerous items of damage resulting from the "accident related injuries".

43 The issue estoppel defence was pleaded in the following way in pars 9-11 of the Defence of Metrobus:

"9. Review Officer Cocker ordered that the weekly payments from the Defendant to the Plaintiff be discontinued as from and including 4 September 1996 and made the following findings:

(a) the Plaintiff's injury of 23 March 1994 was of minor severity;

(b) the Plaintiff's credibility was less than satisfactory;

(c) inconsistencies and contradictions existed between the documents and medical evidence which adversely affected the Plaintiff's evidence generally;

(d) the Plaintiff was not a credible witness;

(e) the evidence failed to establish that the Plaintiff's injuries arose out of or in the course of his employment with the Defendant;

(f) there were no grounds for finding that a recurrence or aggravation of the ankle injury within the definition of disability under section 5 of the Act had occurred.

10. An appeal from Review Officer Cocker's decision before Magistrate Heath heard on 4 March 1997 (Appeal No CM-69/96) was dismissed.

11. By reason of the matters pleaded in paragraphs 5 to 10 hereof and the Review Officer's findings in the Application, the Defendant says further, and in the alternative, that the Plaintiff is estopped from alleging that he suffers from a serious disability within the meaning of s 93D of the Act.

PARTICULARS OF ISSUE ESTOPPEL

(a) The Conciliation and Review Directorate is a competent tribunal.

(b) The circumstances and the evidence in this action are precisely the same as on the Application.

(c) Review Officer Cocker's determination was a final judgment.

(d) Review Officer Cocker's findings form the legal foundation or justification for the ultimate orders, and were not merely collateral or subsidiary to those proceedings."

It may be noted that par (b) of the particulars of issue estoppel does not in terms plead that the issues are the same.

44 In this Court, Metrobus adopted a more precise approach: it relied on the passages emphasised in the quotations from the second review officer's reasons for decision which are set out above[30].

45 The question is whether a finding that the 23 March 1994 injury had "resolved", considered with the other observations of the second review officer, is a finding on the same issue as the issue whether in April 1995 the worker had "ongoing instability in his left ankle". It is for Metrobus to demonstrate that the issues are the same. This it did not do.

46 The second review officer did not make any finding, as distinct from making general comments on the evidence, as to when the 23 March 1994 injury "resolved". Nor did the second review officer make it clear what was meant by the word "resolved". Let it be assumed that the second review officer's reasons for decision are to be read as containing findings that, although the 23 March 1994 accident occurred in the course of his employment, the worker's "present injuries" did not fall within pars (a) or (d) of the definition of "disability", and were not such as to render the worker incapable of work. Even on that assumption, it would not be inconsistent with the second review officer's findings

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30 At [14] and [16].

for the District Court to hold in the common law action that there was ongoing instability in the worker's ankle in April 1995 of a kind which, though it did not prevent him from being able to work, was capable of causing his ankle to give way, thus causing him to twist and injure his left knee in April 1995 in the manner alleged.

47 Obviously, if the reasoning of the second review officer is sound, there are considerable difficulties in the case that the worker wishes the District Court to consider. But the difficulties that the evidence which is accepted or rejected in reaching a decision in one set of proceedings may create in a second set, are immaterial in assessing whether the doctrine of issue estoppel applies. Not all estoppels are odious[31]. But all must be certain. It is for that reason that the law, as exemplified in the passage from the judgment of Barwick CJ in *Ramsay v Pigram*[32] set out above, has strict requirements for the application of issue estoppel.

48 It might have been possible for the second review officer to have made findings which would operate as issue estoppels in relation to the District Court proceedings. But he did not, whether because the worker's case before him was put in a particular way, or because the representative of Metrobus did not stipulate the findings which could be used as the foundation for issue estoppel, or because the issues in proceedings under the Act and in proceedings at common law in these particular circumstances are intractably different, or because of the informality of the proceedings before the second review officer.

49 The worker apparently did not submit to the second review officer that, whether or not the 23 March 1994 injury incapacitated him, it so affected him that he had an ongoing instability rendering him susceptible to further injury. And even if the worker did propound that issue, the second review officer said nothing about it. The issues which the second review officer did examine, namely whether the worker's "present injuries" could be characterised as a disability within pars (a) or (d) of the statutory definition of "disability" and whether they incapacitated the worker, are distinct from the issues raised in the

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31 *New Brunswick Railway Co v British and French Trust Corporation Ltd* [1939] AC 1 at 21 per Lord Maugham LC.

32 (1968) 118 CLR 271 at 276.

District Court. Those latter issues are whether the 23 March 1994 injury fell within par (a) of the definition at the outset, whether it was negligently caused, whether it created ongoing instability, and whether the injuries of which the worker now complains are causally related to Metrobus's negligence. It was arguably unnecessary for the second review officer to deal with those issues, and in particular the issue of whether an ongoing instability was created, since favourable answers would not have assisted the worker unless the second review officer also reached a favourable answer on incapacitation.

50 Metrobus argued that the worker's contentions overlooked two facts – the fact that the "disabilities" for which compensation was payable under the Act were the same "disabilities" as those for which s 93D permitted recovery at common law, and the fact that he continued to contend that he fell within par (a) of the definition of "disability". But these facts do not assist Metrobus. The second review officer did find an "injury of minor severity", and may have implicitly found, by his non-critical summary of the evidence, that there was an incapacity for a few days. But the issue of "incapacity" (for which the worker had to contend before the second review officer by reason of s 21) is different from those matters that he wishes to argue before the District Court. The disability that the District Court will be invited to find for the purposes of s 93D(1) and (2)(b) is not necessarily a disability causing an incapacity to work for the bulk of the March 1994–August 1997 period. In that respect, it is easier for the worker to succeed at common law than under ss 18 and 21 and Sched 1 cl 7 of the Act.

51 The mode of conducting, and the answer to, the inquiry whether there is a disability may vary depending on the reason why the inquiry is being made. A worker may be said not to have a disability if the inquiry is whether he should be paid workers' compensation for resulting incapacity. And he may equally be said to have a disability if the inquiry is whether he should be paid common law damages in relation to an accident which caused ongoing susceptibility to injury. The second review officer's statement that "the evidence fails to establish that the [worker's] present injuries arise out of or in the course of his employment with MetroBus" cannot work an issue estoppel unless it was made in the course of resolving a controversy which the worker is said now to be estopped from agitating.

52 The Full Court treated the second review officer's findings as denying that there was any causal link between the 23 March 1994 accident and the post-April 1995 symptoms. The Full Court said that the issue of whether the 23 March

1994 accident created a susceptibility to later injury was an issue before the second review officer that he had decided adversely to the worker[33]. There is nothing in the reasons for decision of the second review officer suggesting that the worker advanced, or the officer dealt with, any contention that the 23 March 1994 accident caused a susceptibility to later injury. A question on that subject was asked of one of the worker's treating doctors, was not responsively answered, and was then objected to[34]. To state the issue as being whether the 23 March 1994 accident had "resolved" is ambiguous[35]. If the stated issue is ambiguous, so is the finding. Neither the content nor the context of the second review officer's reasons for decision removed the ambiguity. Since the second review officer did not direct his mind to the relevant question arising in the District Court proceedings, namely whether the 23 March 1994 accident resulted in a latent susceptibility to injury, his general remarks, which the Full Court categorised as causation findings, cannot work an issue estoppel if only because of their vagueness[36].

53 Reference was made in argument to the *Hoysted* litigation in this Court and in the Privy Council[37]. The ultimate decision, that of the Privy Council upholding the dissent of Higgins J in *Hoysted v Federal Commissioner of*

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33 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 154 [69], 159 [102]-[103] per Malcolm CJ, 168 [139] per Wallwork J, 179 [209] per Steytler J, 182 [240] per Templeman J, 191-192 [297]-[301] per McLure J.

34 Apart from the transcript page containing that question, nothing in the material before this Court indicates the scope of the evidence before the second review officer. Hence no inference as to the issues can be drawn from the materials before him.

35 *Kuligowski v Metrobus* (2002) 26 WAR 137 at 191 [298] per McLure J.

36 As Coke said, "every estoppell, because it concludeth a man to alleadge the truth, must be certaine to every intent, and not to be taken by argument or inference": Coke, *First Institutes of the Laws of England or A Commentary Upon Littleton*, 18th ed (1823), vol 2, par 352b.

37 *Hoysted v Federal Commissioner of Taxation* (1920) 27 CLR 400; *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537; (1925) 37 CLR 290 (PC); [1926] AC 155.

Taxation[38], turned upon the text of the conditions specified in the legislation for the operation of the deduction provision in question. The Privy Council emphasised that unless it had been decided in the first High Court case that certain persons had held a beneficial interest in land or income "in such a way that they are taxable as joint owners", they could not have been taxed at all[39]. Higgins J had referred to the use of the phrase "actually litigated and determined" by the Supreme Court of the United States in *Cromwell v County of Sac*[40], and had continued[41]:

> "My view is that the point as to joint ownership was, by virtue of the formal objections, and from the nature of the judgment thereon, 'actually litigated and determined' in the former proceedings; and that whether the judgment in its actual form was due to the Commissioner's consent or admission or to his neglect, he is bound by the finding of joint ownership which the judgment necessarily involves."

In the present case, in the proceedings under the Act, no findings were made which operated in the manner alleged as issue estoppels, nor was the structure of the legislation and the nature of the proceedings such that it could be said, within the meaning of the *Hoysted* litigation, that the necessary findings must be treated as having been actually litigated and determined.

54 Findings in proceedings under workers' compensation legislation concerning the existence or non-existence of particular injuries sometimes have been treated as findings on ultimate facts in relation to the issue of whether a worker is incapacitated. *Egri v DRG Australia Ltd*[42] may be such a case. However, as has been indicated, the present appeal does not fall in any such category.

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38 (1921) 29 CLR 537.

39 (1925) 37 CLR 290 at 304-305; [1926] AC 155 at 171-172.

40 94 US 351 at 353 (1876).

41 (1921) 29 CLR 537 at 562-563.

42 (1988) 19 NSWLR 600 at 604-605 per McHugh JA, 612-613 per Clarke JA.

Immaterial matters

55 For the reasons just given, the doctrine of issue estoppel does not prevent the worker from pursuing the District Court proceedings.

56 In the course of argument other issues arose, which might have supported that outcome. But in the circumstances, it is not necessary to decide them.

57 One issue turned on the worker's argument that even if the second review officer's finding that the 23 March 1994 ankle injury had "resolved" created an issue estoppel, it did so only in relation to a closed period. A second issue also arose in argument as to whether the second review officer, though having jurisdiction to decide a particular class of matter, lacked jurisdiction to determine conclusively the correctness of ancillary matters which he had to decide in the course of exercising his jurisdiction[43]. Since the reasoning set out above precludes any issue estoppel, these two issues, on which there was very little argument, need not be considered.

58 A final issue was raised by the form of the second review officer's reasoning. In the passages quoted above, apart from the finding that the injury had "resolved", the second review officer did not make any positive findings that the worker did not have disabilities or that the worker did not have an incapacity for work. Rather, the second review officer's reasons speak of the evidence failing to establish the worker's case, of not believing that there were grounds for finding it, and of the worker not satisfying the onus upon him.

59 In the leading Western Australian decision, which the majority of the Full Court applied, and which it was the purpose of this appeal to test, Owen J said that where "a party has failed to prove a fact in workers' compensation proceedings that party may be estopped in a common law action from asserting the existence of that fact"[44]. With one exception, the authorities then cited do not

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43 See *Cachia v Isaacs* (1985) 3 NSWLR 366 at 386-390 per McHugh JA.

44 *McNair v Press Offshore Ltd* (1997) 17 WAR 191 at 197.

support that proposition[45]. The exception is *Egri v DRG Australia Ltd*[46], where Clarke JA rejected an argument that a failure by the worker to establish that he had a disc lesion was insufficient to create an estoppel preventing him from later contending that he did. The reasoning is not clear, and it was not supported by McHugh JA, who found that, in substance, there had been a positive finding that there was no disc lesion[47].

60 In general, disbelief in a witness's evidence does not establish the contrary[48]. Similarly, disbelief in the case presented by the moving party does not necessarily permit the court to conclude that the positive case of the opposing party is correct. In particular cases it may not be possible to reach a conclusion either way[49]:

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45 No question of issue estoppel arose in *Tiver Constructions Pty Ltd v Clair* (1992) 106 FLR 121. *David Jones (Canberra) Pty Ltd v Zapasnik* (1982) 42 ACTR 6 did not involve any failure to find a fact. In *Makowski v TVW Enterprises Ltd* unreported, Supreme Court of Western Australia, 16 December 1994, Owen J stated the proposition which he repeated in *McNair's* case, but again there was no failure to make a positive finding, and the case turned on other questions. *Green v Green* (1935) 37 WALR 76 was not a case in which common law proceedings followed workers' compensation proceedings, rather, the applicant sought to commence fresh proceedings in respect of the same injury in the same jurisdiction. No question arose as to whether issue estoppel could be based on a mere failure to be satisfied. Though part of the award in *Somodaj v Australian Iron and Steel Ltd* (1963) 109 CLR 285 referred to a failure to establish a fact, the majority of this Court treated the award (read as a whole) as containing a positive finding that the worker had not suffered a relevant injury: at 298-299 per Kitto, Taylor and Menzies JJ.

46 (1988) 19 NSWLR 600 at 608.

47 *Egri v DRG Australia Ltd* (1988) 19 NSWLR 600 at 605.

48 *Hobbs v Tinling (C T) and Co Ltd* [1929] 2 KB 1 at 21 per Scrutton LJ.

49 *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948 at 955 per Lord Brandon of Oakbrook; [1985] 2 All ER 712 at 718.

> "[T]he judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden."

A failure to find a matter alleged does not establish the truth of the contrary of that which is alleged. There are many general statements about the operation of issue estoppel, approved in this Court, which require more than non-satisfaction to establish an estoppel in later proceedings.

61 For example, in *Jackson v Goldsmith*[50], Williams J approved a passage from *Halsbury's Laws of England*[51] including the following:

> "A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him."

Much here turns upon what is involved in the phrase "solemnly found". The form of the first proceeding, particularly the issues joined or admitted on any pleadings, will be important. In *Hoysted v Federal Commissioner of Taxation*[52], Higgins J said:

> "A point or an issue may be actually controverted, may be in actual controversy, in actual litigation, although it is not argued, or argued properly. A point may be in controversy although counsel may address no arguments to it, or may overlook certain aspects."

62 An issue admitted on pleadings or other formal process or otherwise conceded at a hearing may, from the nature of the outcome, necessarily have been decided. But what of other questions arising in the first proceeding? In *Blair v Curran*[53], Dixon J observed that a "judicial determination concludes, not

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50 (1950) 81 CLR 446 at 460.

51 2nd ed (1934), vol 13 at 409.

52 (1921) 29 CLR 537 at 562.

53 (1939) 62 CLR 464 at 532.

merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue". His Honour went on to distinguish findings concerning only "evidentiary facts" not the "ultimate facts" which formed the very title to rights in dispute[54]. This analysis, with the emphasis on decision-making, would require more than non-satisfaction.

63 However, although this important issue was raised by the Court during argument, the primary submissions of the parties were not directed to it, the authorities were not examined and it is not necessary to decide it in the present case. Accordingly, like the other matters just identified, it may be put on one side.

Orders

64 The following orders should be made.

1. Appeal allowed with costs.

2. Set aside the orders of the Full Court of the Supreme Court of Western Australia dated 24 June 2002 and in place thereof order that:

   (a) the appellant's appeal to the Full Court be allowed with costs;

   (b) the orders of the District Court of Western Australia dated 18 October 2000 (in WC 93 D 775 of 1997 and CIV 4575 of 1998) be set aside and the matter remitted to the District Court for hearing; and

   (c) the respondent pay the appellant's costs of the said District Court proceedings both before Deputy Registrar Harman and Commissioner Ley.

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54 (1939) 62 CLR 464 at 532.