**39/13; [2013] VSC 414**

**SUPREME COURT OF VICTORIA**

# *DINATALE v SWEENEY RESEARCH*

**Beach J**

**8, 13 August 2013**

**ACCIDENT COMPENSATION – WEEKLY PAYMENTS – WHETHER NO CURRENT WORK CAPACITY – SUITABLE EMPLOYMENT – WHETHER WORKER ABLE TO RETURN TO WORK IN SUITABLE EMPLOYMENT – WHETHER FINDINGS OPEN – APPLICATION BY CLAIMANT DISMISSED – WHETHER MAGISTRATE IN ERROR – REASONS – WHETHER REASONS INADEQUATE: *ACCIDENT COMPENSATION ACT* 1985, SS5, 93C.**

**HELD: Appeal dismissed.**

**1. During the cross-examination of the claimant, counsel for the respondent put to the claimant each of the identified duties and demands of an inquiry officer. The effect of the cross-examination was that the claimant agreed that she could perform all of the relevant duties and cope with all the identified demands.**

**2. While the claimant was cross-examined about the "physical/psychological demands" associated with the position of an inquiry officer, no questions on this point were asked of the claimant's general practitioner Dr Navani. That said, it was difficult to see, in the light of Dr Navani's evidence, how he could have expressed an opinion as to sitting and standing at times, or working within timeframes and meeting deadlines, that was inconsistent with the claimant's evidence. Certainly, there was no re-examination on this issue by counsel for the claimant at trial; nor was any submission made by counsel for the claimant below that the respondent's counsel had failed to put any relevant matters to Dr Navani.**

**3. The Magistrate was entitled, on the evidence, to accept that the position of inquiry officer existed and was available to the claimant. Further, his Honour was entitled to conclude that the duties of that position were duties, on the evidence, which could be performed by the claimant. Indeed, the ability of the claimant to perform the duties of an inquiry officer was accepted by the claimant during her cross-examination.**

**4. The circumstances of this case did not require the Magistrate to set out and deal with each line in the tendered medical reports that might be capable of supporting the general proposition that the claimant had (or has) some relevant incapacity for work. The Magistrate carefully set out significant parts of the relevant evidence. Having done so, there was no doubt that his Honour accepted that the claimant was able to perform the identified tasks of an inquiry officer. Acceptance of this proposition mandated the dismissal of the claimant's proceeding.**

**5. It is a rare case in which it cannot be said that a court could have said more in its reasons for arriving at a particular conclusion. However, that was not the test. The question was whether the reasons adequately disclosed a path of reasoning enabling the Court on appeal and the parties to know why the particular result was reached. The Magistrate's reasons in this case satisfied that test.**

## BEACH J:

### Introduction

1. Between 1995 and 2007, the appellant was employed by the respondent as a market research interviewer. On 23 January 2007, the appellant lodged a WorkCover claim form pursuant to the provisions of the *Accident Compensation Act* 1985 ("the Act"). In the claim form, the appellant described her injury as "RSI" affecting "both hands and right elbow". The claim was accepted.

2. Weekly payments were made to the appellant, in accordance with the provisions of the Act, until terminated on 25 October 2009. The appellant's weekly payments were terminated on the basis that she had been paid for a total of 130 weeks and had a current work capacity; alternatively, the appellant had no current work capacity but it was not likely that this would continue indefinitely.[1]

3. On 19 October 2011, the appellant, as plaintiff, commenced a proceeding against the respondent, as defendant, in the Magistrates' Court. In the Magistrates' Court proceeding, the appellant sought an order for weekly payments of compensation pursuant to s93CC of the Act[2] from the date of the termination of her payments, and an order for such payments to continue into the future. The respondent resisted the appellant's claim, contending that the appellant had a current work capacity within the meaning of the Act; alternatively, that any lack of current work capacity was not likely to continue indefinitely.

4. The Magistrates' Court proceeding was heard by Magistrate Lauritsen[3] on 30 and 31 October 2012. On 19 November 2012, his Honour dismissed the appellant's proceeding and ordered the appellant to pay the respondent's costs.

5. Pursuant to s109 of the *Magistrates' Court Act* 1989, the appellant appeals to this Court, on a question of law, from the orders made by Magistrate Lauritsen on 19 November 2012. This is the hearing of the appellant's appeal.

**The grounds of appeal**

6. In her amended notice of appeal, the appellant seeks an order that the orders of the Magistrates' Court be set aside and that the matter be remitted to the Magistrates' Court to be heard and determined, according to law, by a different Magistrate.

7. As set out in her amended notice of appeal, the appellant's grounds of appeal are as follows:

> 1. The learned Magistrate erred in his interpretation of the definition of suitable employment in s5 of the *Accident Compensation Act* 1985 ("the Act").
>
> 2. The learned Magistrate erred in law in his application of the definition of suitable employment in s5 of the Act to the facts before him, having regard to the evidence as to:
> (i) the nature of the Appellant's incapacity;
>
> (ii) the nature of the Appellant's pre-injury employment;
>
> (iii) the Appellant's age.
>
> 3. The Learned Magistrate erred in concluding that the Appellant had a current work capacity, in that such a conclusion was not reasonably open on the evidence especially having regard to:
>
> (i) the uncontradicted evidence of the Appellant as to her symptoms in her hands, wrists and right elbow caused by her injury and the physical restrictions her injury caused;
>
> (ii) the uncontradicted evidence of the Appellant as to her failed attempts to find suitable work in light of her physical restrictions and her age;
>
> (iii) the absence of evidence of the existence of an occupation that was wholly suitable for the Plaintiff in light of her restrictions;
>
> (iv) The uncontradicted opinion and medical reports of Dr Navani dated 15 May 2008, 26 May 2009, 18 September 2009, 22 July 2011, and 10 May 2012;
>
> (v) The uncontradicted opinion and medical reports of Mr Miller dated 2 June 2011, 28 May 2012;
>
> (vi) The uncontradicted opinion and medical reports of Dr Littlejohn dated 11 June 2010, 13 July 2011, and 24 April 2012.
>
> 4. The learned Magistrate erred in law in failing to hold that, the Appellant having established a *prima facie* case that no suitable employment as defined in the Act was available to her, an evidentiary onus passed to the Respondent to adduce evidence that there was employment available in the community which the Appellant was capable of performing.
>
> 5. The learned Magistrate erred in law in treating evidence, that the Appellant would be capable of performing some aspects of the job of inquiry officer, as establishing that there was suitable employment available in the community which the Appellant was capable of performing.
>
> 6. The learned Magistrate erred in law in that his reasons do not disclose precisely what

> evidence he accepted, the precise findings of fact made by him or the logical process by which he proceeded from those findings of fact to his conclusion.

**The issues at trial**

8. In order to succeed in her claim before the Magistrates' Court, the appellant had to establish that she had "no current work capacity" and that this was "likely to continue indefinitely".[4]

9. The expression "no current work capacity" is defined in s5(1) of the Act, in relation to a worker, to mean:

> A present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.

10. Prior to 1 July 2010, the expression "suitable employment" was defined in s5(1) of the Act as follows:

> [E]mployment in work for which the worker is currently suited (whether or not that work is available), 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 medical information including the medical certificate supplied by the worker;
>
> (e) the worker's return to work plan, if any;
>
> (f) if any occupational rehabilitation services are being provided to or for the worker.

11. From 1 July 2010,[5] "suitable employment" has been defined in s5(1) as follows:

> ***Suitable employment***, in relation to a worker, means employment in work for which the worker is currently suited—
> (a) having regard to—
> (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, the certificate of capacity supplied by the worker; and
> (ii) the nature of the worker's pre-injury employment; and
> (iii) the worker's age, education, skills and work experience; and
> (iv) the worker's place of residence; and
> (v) any plan or document prepared as part of the return to work planning process; and
> (vi) any occupational rehabilitation services that are being, or have been, provided to or for the worker; and
>
> (b) regardless of whether—
> (i) the work or the employment is available; and
> (ii) the work or the employment is of a type or nature that is generally available in the employment market.

12. There was no debate at the trial in the Magistrates' Court concerning which version of the definition of "suitable employment" was to be applied. However, s4A(1)[6] makes it tolerably clear that the earlier definition of "suitable employment" applied to the plaintiff's claim for weekly payments from 25 October 2009 to 30 June 2010, and the later definition applies to her claim for weekly payments from 1 July 2010.

**The evidence at trial**

13. At trial, three witnesses were called and cross-examined: the appellant, the appellant's general practitioner Dr Navani and Dr Littlejohn (a rheumatologist who examined the appellant at the request of the respondent on three occasions). Further, a number of medical reports and other documents were tendered, including medical reports from Dr Navani, Dr Alex Stockman, Mr Martin Richardson, Mr Russell Miller, Dr Littlejohn, Dr Entwisle and Dr Clayton Thomas. Additionally, vocational assessment reports compiled by consultants employed by Konekt were tendered without objection.

**The Magistrate's reasons**

14. The Magistrate commenced his judgment by describing the background circumstances of the proceeding, before then dealing with the evidence called and tendered at trial. In dealing with the evidence, his Honour first summarised the evidence of the appellant, before coming to the evidence of Dr Navani, then Dr Stockman, Dr Clayton Thomas, Dr Littlejohn, Mr Miller and Mr Entwisle. In the course of summarising the evidence, his Honour set out some of the opinions of the doctors, including the following:

> Mr Littlejohn said of her capacity for work:
>
> "I think the plaintiff is capable of work activity. I think she could do a number of duties which would likely not aggravate her symptoms. If she did light or sedentary work activity without significant repetitious actions I think this would be unlikely to cause aggravation of her claimed symptoms. Hence, jobs such as an inquiry officer, purchasing clerk, administrative assistant, reception work and the like would be within her capacity. In contrast, actions that involved protracted postural activity such as keeping her arms in one position for several minutes or doing significant repetitive work such as typing or writing then this might cause more impact on her work ability. Hence in that context I think she could do the major aspects of the jobs talent pool conductors, box office attendant, administrative service officer, inbound consumer sales, customer service consultant, pharmacy assistant or pharma staff dispensary technician."
>
> Russell Miller is an orthopaedic surgeon. He saw Ms Dinatale at her solicitor's request on 23 May 2011. He found diagnosis difficult but believed she suffered from "what is effectively an overuse syndrome with overlying Chronic Pain Syndrome". As to capacity for work, he said:
>
> "This lady has significant problems with both upper extremities, particularly the right upper extremity. I believe she will have difficulty with work that involved repetitive arm actions, lifting weights more than 2 kg with either upper extremity and in particular would have difficulty with data entry tasks. She is not fit for pre-injury duties and a return to work would be problematic in this case due to work related injuries. I note her more severely affected right side in the dominant extremity."[7]

15. After dealing with the opinion of Dr Entwisle, his Honour went on to deal with the vocational assessment evidence – before coming to his reasons for dismissing the appellant's claim. His Honour said:

> An organisation called Konekt vocationally assessed Ms Dinatale three times, the last being 20 March 2009. Each time the assessor identified four "suitable employment options" in the same order of priority. The first was an inquiry agent, followed by a receptionist/front office clerk, stock and purchasing clerk; and office/administration assistant.
>
> I will not examine each option here except the first. The tasks of an inquiry officer could include – providing information on the services or goods provided by an organisation and assist and advise people on their use; answer inquiries about the organisation's products and services; and issue forms, information pamphlets, product or service brochures. The job would require sitting, standing and an ability to work to a schedule. The assesor's comment Ms Dinatale and this job (sic):
>
> "...has good communication, organisational and time management skills in addition to customer service and general administration experience which would transfer to a position of this kind".
>
> **Discussion**
>
> The defendant ended Ms Dinatale's weekly payment by notice. It said her second entitlement period had ended and she did not fitted (sic) into one of two circumstances. If Ms Dinatale is to succeed in obtaining weekly payments, she must prove two things – she has "no current work capacity"; and she is likely to continue indefinitely to have no current work capacity. The Act defines "no current work capacity", which raises the expression "suitable employment", also defined. No one suggests Ms Dinatale can return to her pre-injury employment. The question is whether she is unable to return to work in suitable employment.
>
> Ms Dinatale has had a strong, enviable employment record in service industries. She ran TAB branches for about 15 years. She worked as a research interviewer for another 15. She demonstrated innate skills as an interviewer and manager. These are not lost, or even diminished by the injuries to her arms. She can still interview people. She can still manage people. She can give people information. Even Dr Navani saw her doing 15 hours each week provided she did not use her hands "to any great extent". Frankly, the 15 hour restriction was somewhat rubbery, after hearing his answers in cross-examination. The upshot is that Ms Dinatale retains enough capacity for work to exclude a

> "no current work capacity".
>
> I was referred to this paragraph from *Public Transport Corporation v Pitts*:
>
> "The case was one where it was plainly open to the learned magistrate to conclude that the plaintiff had established a prima (scil *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 ..."
>
> There is no room for the application of this principle here. She does not raise a *prima facie* case of no current work capacity.
>
> Counsel referred to parts of the decision of my colleague, Mr Garnett, in *Manthopoulos v Spencwill Nominees Pty Ltd*. I agree a degree of realism is needed. But in rejecting Ms Dinatale's contention of no current work capacity, that flows from a realistic appreciation of the case.
>
> In terms of s93C, she does not have "no current work capacity" at any stage since the ending of her weekly payments. Ms Dinatale's claim must fail. I will hear the parties on the question of costs.[8]

**The appellant's arguments on appeal**

16. At the hearing of this appeal, Senior Counsel for the appellant submitted that there were three primary issues and a subsidiary issue in this appeal. The appellant's principal complaint was that the judgment below did not disclose a path of reasoning to the ultimate conclusion. In support of this submission, the appellant relied upon, amongst other authorities, two Court of Appeal decisions: *Fletcher Construction Australia Limited v Lines Macfarlane & Marshall Pty Ltd (No 2)*[9] and *Kapiris Bros (Vic) Pty Ltd v Zausa & Anor*.[10]

17. Secondly, it was submitted by the appellant that the Magistrate did not make findings of fact sufficient to justify his Honour's conclusion. Thirdly, it was submitted that the Magistrate misconstrued the requirements of s93CC and s93C of the Act. Finally, the subsidiary point referred to by the appellant was a complaint that the Magistrate wrongly did not find that the appellant had made out a *prima facie* case of incapacity for work, which finding if made would then, it was submitted, have passed an evidentiary onus to the respondent in respect of the existence of suitable employment or a real job which the appellant could perform.

**The reasons point**

18. During the hearing, Senior Counsel for the appellant took me to the following statements in a number of the medical reports of Dr Navani:

> Ms Josephine Dinatale has work capacity for modified duties at reduced hours at this stage.
> She needs to limit her typing, data entry and perform assorted light administrative work with structured breaks to rest her upper limbs.[11]
> ...
> In practical terms, I remain of the opinion that firstly, it would be highly unlikely that she would find work within her medical restrictions which limit her to working five hours per day, three days per week on a very light sedentary work with restricted keyboard/typing and self paced work.
> Secondly, I very much doubt that Mrs Josephine Dinatale would even sustain any kind of work.
> Thus in [a] practical sense, Mrs Josephine Dinatale has no work capacity and the insurer should continue to support her financially for her payment impairment caused significantly due to her work.[12]
> ...
> Josephine has no pre-injury work capacity.
> She has very limited alternative work capacity of five hours, three days per week of very light sedentary work with minimal typing. The likelihood of finding such work at her age is remote.[13]
> ...
> I believe that Josephine has no work capacity. She has suffered permanent impairment which will need long-term management.
>
> Theoretically, very light work with quite severe restrictions to her dominant right limb is possible but applying the 'task of suitable employment' and taking her skills, previous work, age and education background, I believe Josephine has no work capacity and this is unlikely to change in the foreseeable future.[14]

19. It is true that the Magistrate's reason for decision make no reference to each of these passages in Dr Navani's reports. However, one cannot reason simply from that proposition to a

conclusion that the Magistrate's reasons were somehow inadequate: one needs to look at the way in which the trial was conducted and the issues that were truly presented for resolution by the parties.

20. The respondent tendered vocational assessment evidence which it submitted, when taken with the plaintiff's evidence and the medical evidence, disclosed the existence of jobs for which the appellant was suited. One of these jobs was a position described as "inquiry officer".[15]

21. The vocational assessment evidence disclosed that the duties of an inquiry officer were:

> – Provide information on the services or goods provided by an organisation and assist and advise people on their use.
>
> – Answer inquiries about the organisation's products and services.
>
> – Issue forms, information pamphlets, product or services brochures.

22. The "physical/psychological demands" of this position were described as:

> Periods of sitting and standing at times.
>
> Ability to work within timeframes and meet deadlines.

23. A "labour market analysis" of the position apparently disclosed "job prospects: good", and the vocational assessment evidence was that there were two advertised positions of this kind "within reasonable proximity" to the respondent. The following opinion was then expressed in the vocational assessment material:

> Ms Dinatale has good communication, organisational and time management skills in addition to customer service and general administration experience which would transfer to a position of this kind. Identification of suitable employment would enable Ms Dinatale to rotate between tasks as required.

24. The appellant was cross-examined about her ability to perform work as an inquiry officer. She was asked and answered the following questions:[16]

> I want to ask you about one which is called an inquiry officer, now in the vocational assessment report it says the tasks may include, "Provide information on the services or goods provided by an organisation and assist and advise people on their use". That's one task, so there's nothing physical there?---I don't know. May I just say this is the first I've heard of this little task - - -
>
> All right?--- - - - or this job.
>
> All right, well - - -?---They never told the result of the assessment.
>
> All right?---They just sent me to do the course - - -
>
> All right, well - - -?--- - - - and I thought will I understand that, I'm computer illiterate?
>
> HIS HONOUR: What's the name of that job?
>
> COUNSEL: Inquiry officer?---And - - -
>
> I'm going to ask you about some of these jobs and the tasks the (sic) involve and you need to tell His Honour whether it's something you can do or not?
>
> ---I don't know if it's something – I don't know anything about it. I mean who would employ me? Who would be - - -
>
> HIS HONOUR: He didn't ask you who'd employ you. Just listen to what he describes the job as - - -?---Right, OK.
>
> - - - and then tell (indistinct) - - -?---So that one sounded good to me.
>
> COUNSEL: Yes, is that sounding like something you can do?---Well I can answer questions, certainly.

> All right, - - -?---You've seen the proof of that.
>
> - - - and the next task is similar in, "Answer enquiries about the organisation's, products and services"?---Yes.
>
> You could do that. "Issue forms, information pamphlets, product or service brochures"?---Yes.
>
> All right. Now in terms of the physical and cognitive demands it says periods of sitting and standing at times, that would be no issue for you?---No.
>
> [An ability][17] to work within timeframes and meet deadlines?---Absolutely.
>
> That's something you would have at TAB or?---Absolutely.
>
> All right?---As long as I'm not carrying around heavy boxes of pamphlets and things - - -
>
> Yes?--- - - - that would be fine.
>
> All right, so if - - -?---They delivered the pamphlets, they put them in, I can hand them out. Lovely, yes.
>
> So if that was a job that was available in the market place?---I'm happy to do it.

25. During this cross-examination, counsel for the respondent put to the appellant each of the identified duties and demands of an inquiry officer. The effect of the cross-examination was that the appellant agreed that she could perform all of the relevant duties and cope with all the identified demands.[18]

26. Dr Navani was cross-examined about the appellant's ability to perform the tasks of an inquiry officer. Dr Navani was asked and answered the following questions:[19]

> All right. I just want to ask you about a couple of jobs that have been identified as possible jobs for the plaintiff and get your view on those?---Sure.
>
> The first is of an inquiry officer. Now, these are the tasks that are involved with an inquiry officer, "Provide information on the services or goods provided by an organisation and assist and advise people on their use". They sound like things that she'd be able to do?---Yes, she could do that.
>
> "Answer enquiries about the organisation's products and services"?
>
> ---Correct. She can do that.
>
> "Issue forms, information pamphlets, product or service brochures"?---Yeah, she can do that.
>
> All right. Now, is there any limitation in terms of hours that she could do in that job?---If – if she had to speak to someone and do that and read up on a website and do that I think she can do the whole – full-time.
>
> Full-time, all right?---Yeah.

27. It might immediately be noticed that while counsel for the respondent below cross-examined the appellant about the "physical/psychological demands" associated with the position of an inquiry officer,[20] no questions on this point were asked of Dr Navani. That said, it is difficult to see, in the light of Dr Navani's evidence, how he could have expressed an opinion as to sitting and standing at times, or working within timeframes and meeting deadlines, that was inconsistent with the plaintiff's evidence. Certainly, there was no re-examination on this issue by counsel for the appellant at trial; nor was any submission made by counsel for the appellant below that the respondent's counsel had failed to put any relevant matters to Dr Navani.

28. In my view, the circumstances of this case did not require the Magistrate to set out and deal with each line in the tendered medical reports that might be capable of supporting the general proposition that the appellant had (or has) some relevant incapacity for work. The Magistrate carefully set out significant parts of the relevant evidence. Having done so, there can be no doubt that his Honour accepted that the plaintiff was able to perform the identified tasks of an inquiry officer. Acceptance of this proposition mandated the dismissal of the appellant's proceeding.

29. It is a rare case in which it cannot be said that a court could have said more in its reasons for arriving at a particular conclusion. However, that is not the test. The question is whether the reasons adequately disclose a path of reasoning enabling this Court and the parties to know why the particular result was reached. In my opinion, the Magistrate's reasons in this case satisfied that test.

**Was the decision open on the evidence?**

30. In ground 3 of her amended notice of appeal, the appellant makes complaint that the Magistrate's conclusion that she had a current work capacity was not reasonably open on the evidence having regard to what she describes as "uncontradicted evidence", an "absence of evidence" and "uncontradicted opinion" as particularised in that ground of her amended notice of appeal.

31. There is nothing in this point. The Magistrate was entitled, on the evidence, to accept that the position of inquiry officer existed and was available to the appellant. Further, his Honour was entitled to conclude that the duties of that position were duties, on the evidence, which could be performed by the appellant. Indeed, the ability of the appellant to perform the duties of an inquiry officer was accepted by the appellant in the cross-examination I have set out above.

**The Magistrate's construction and application of the relevant provisions of the Act**

32. In grounds 1 and 2 of the amended notice of appeal, the appellant makes complaint about the Magistrate's interpretation and application of the definition of "suitable employment" in s5 of the Act. Additionally, in argument, it was said that the Magistrate misconstrued the requirements of ss93CC and 93C.

33. There is nothing in any of these points. The fact that there was evidence given below which, if taken on its own, could have justified a conclusion in favour of the appellant in the proceeding below does not mean that, in not accepting that evidence (to the exclusion of other relevant evidence to which I have already referred), the Magistrate made an error of law either in the construction or application of any of the relevant provisions of the Act. Put shortly, the appellant has failed to establish that there was any error in the Magistrate's construction or application of the relevant sections of the Act.

**The appellant's remaining grounds and arguments**

34. Ground 4 asserts that the Magistrate erred in law in failing to hold that, the appellant having established a *prima facie* case that no suitable employment as defined in the Act was available to her, an evidentiary onus passed to the respondent to adduce evidence that there was employment available in the community which the appellant was capable of performing. This ground must also be rejected.

35. First, on the evidence to which I have already referred, the Magistrate was not bound in law to hold that the appellant had established a *prima facie* case that no suitable employment was available to her. Secondly, even if any relevant evidentiary onus passed to the respondent, this was discharged by the tendering of the vocational assessment evidence to which I have already referred. Again, the short point is that, on the evidence, the appellant failed to make out her case.

36. In ground 5 it is asserted that the Magistrate erred in law in treating evidence that the appellant would be capable of performing some aspects of the job of inquiry officer, as establishing that there was suitable employment available in the community which the appellant was capable of performing.

37. This ground must also fail. The evidence of the appellant was that she was able to perform all of the identified tasks associated with the position of inquiry officer. To the extent that the appellant's counsel submitted to the contrary below, that submission was rightly rejected by the Magistrate. The evidence was that the appellant could perform each of the identified duties of an inquiry officer. Further, the vocational assessment evidence was that the appellant could perform the tasks associated with this position, and that the position in fact existed and was relevantly available to the appellant.

**This appeal generally**

38. For the reasons given above, this appeal must be dismissed. For the sake of completeness

I should say that it is to be remembered in cases of this kind, that a question of law is not involved in a decision simply because a tribunal or court makes one or more findings of fact that are not supported by evidence; nor is it sufficient that the reasoning whereby a conclusion of fact is reached is demonstrably unsound.[21] That said, there is nothing in this case that leads me to conclude that the Magistrate's findings were not supported by evidence, or were unsound in any way, or were insufficiently reasoned.

39. Similar to the view taken by JD Phillips J in *Nikolic v Schultz*,[22] in my view the present proceeding appears to be a case where the appellant has laboured to convert what was essentially a question of fact into a question of law. As JD Phillips J said:

> Finally, I simply observe that while an appeal now lies from the Magistrates' Court to this Court ... , such an appeal lies only on a question of law, and this seems to me to be a case in which the appellant has laboured to convert what was essentially a question of fact into a question of law. Such attempts have not gone unnoticed by the courts which have tended to deprecate the practice of "attempting to magnify or inflate questions of fact into questions of law and trying to obtain decisions from the courts on matters which the legislature would appear to have thought suitable for decision by" some other body.[23]

**Conclusion**

40. The appeal will be dismissed.

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[1] Cf s93CC of the Act as it was prior to 5 April 2010 (see now s93C of the Act).
[2] As it was prior to its repeal on 5 April 2010 by s31 of the *Accident Compensation Amendment Act* 2010 (the provisions of which (s93CC) were substantially re-enacted in s93C of the Act by s31 of the same 2010 amending Act).
[3] As his Honour then was.
[4] See s93CC of the Act as it was prior to 5 April 2010 and s93C of the Act from 5 April 2010.
[5] When s74(3) of the *Accident Compensation Amendment Act* 2010 commenced.
[6] Section 4A(1) provides:
"If a worker commences or has commenced to receive compensation in the form of weekly payments, the entitlement of that worker to continue to receive weekly payments and the amount of those weekly payments depends upon the provisions of this Act as in force from time to time".
[7] References to exhibit numbers omitted.
[8] Citations omitted.
[9] [2002] VSCA 189; (2002) 6 VR 1, [99]-[106].
[10] [2006] VSCA 15, [24]-[27].
[11] Report dated 15 May 2008.
[12] Report dated 18 September 2009.
[13] Report dated 22 July 2011.
[14] Report dated 10 May 2012.
[15] Referred to in the reasons for decision below.
[16] T56.15 – T57.27 of the trial below.
[17] The transcript records the word "Inability", but it is tolerably clear from the context that counsel's question began with the words "An ability".
[18] Indeed, so much appeared to be the Magistrate's view during final submissions below (see T126.22 – T126.28).
[19] T80.13 – T80.30.
[20] Periods of sitting and standing at times; and ability to work within timeframes and meet deadlines.
[21] See *Transport Accident Commission v O'Reilly* [1998] VSCA 106; [1999] 2 VR 436, [58]; (1998) 28 MVR 327; (1998) 14 VAR 189 (Callaway JA).
[22] (Unreported, Supreme Court of Victoria, JD Phillips J, 22 October 1991).
[23] Ibid 11 (citations omitted).

**APPEARANCES:** For the appellant Dinatale: Mr PG Nash QC with Mr CE Hangay, counsel. Slater & Gordon, solicitors. For the respondent Sweeney Research Pty Ltd: Mr RP Gorton QC with Mr R Kumar, counsel. Wisewould Mahony, solicitors.

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