CITATION: *Smith v Hastings Deering (Australia) Ltd* [2003] NTMC 029

PARTIES:	DAVID JOHN SMITH
	V
	HASTING DEERING (AUSTRALIA) LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	*Work Health Act (NT)*
FILE NO(s):	20118381
DELIVERED ON:	19 June 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	28,29 November, 18 December 2002, 28 February 2003
DECISION OF:	Jenny Blokland SM

CATCHWORDS: WORKERS' COMPENSATION – WHETHER CURRENT CONDITION REFERRABLE TO PRE-EXISTING CONDITION OR AGGRAVATION – WHETHER EMPLOYMENT MATERIALLY CONTRIBUTED – NORMAL WEEKLY EARNINGS – EMPLOYER COMPULSORY SUPERANNUATION CONTRIBUTIONS – WHETHER PART OF NORMAL EARNINGS

Work Health Act (NT) ss 4(5), 4(6A), 4 (8), ss 49(1)(a),(d)(ii)
Workplace Relations Act, 1996 (CW)
Superannuation Guarantee Charge Act (CW);
Superannuation Guarantee (Administration) Act (CW);

AAT King's Tours Pty Ltd v Hughes (1994) 99 NTR 33;
Treloar v Australian Telecommunications Commission (1990) 97 ALR 32
Murawangi Community Aboriginal Corporation v Carroll [2002] NTCA 9
Condon v G James Extrusion Company, 4 April 1997, 313/97Print N9963;
Rofin Australia Pty Ltd v Newton (1997) 78 IR 78;
National Wage Case 1986 (1986) 14 IR 187;
National Wage Case 1987 (1987) 17 IR 65;
Re Manufacturing Grocers Employees Federation; Ex Parte Chamber of Manufacturers (1986) 160 CLR 341;
Reynolds v Southcorp Wines Pty Ltd [2002] FCA 712; Superannuation Test Case September 1994 (1994) 55 IR 447;
Annual Holidays Act 1944 (NSW); Rigby v Technisearch, unreported, IRCA, Marshall J, 156/96.

REPRESENTATION:

Counsel:

Worker:	Steve Southwood QC
Defendant:	Michael Grant

Solicitors:

Worker:	Mr Michael Grove of Ward Keller
Defendant:	Ms Peggy Cheong of Hunt and Hunt

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 029
Number of paragraphs:	44

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20118381

BETWEEN:

DAVID JOHN SMITH
(WORKER)

AND

HASTINGS DEERING (AUSTRALIA) LTD
(EMPLOYER)

REASONS FOR DECISION

(Delivered 16 May 2003)

Jenny Blokland SM:

Background

1. The Worker in this matter, Mr David Smith, suffers a degenerative condition of his back. The issue in this case is essentially whether that condition has been permanently aggravated, accelerated, exacerbated or has deteriorated as a result of his work for the Employer during the period August 1999 to June 2000. The worker lodged a claim for compensation on 15 June 2000. That claim was accepted and benefits paid. The Worker was subsequently reassigned to lighter duties and remains employed in that capacity: (*Employer's submissions, para 3).* Compensation was cancelled with effect from 6 November 2001 on advice from Dr Millons to the Employer: *(Employer's Submissions, para 4).* On 6 March 2002 the Worker filed a *statement of claim* in response to being served with a *Form 5* from the Employer who sought to cancel the payments that were being paid to the Worker under the *Work Health Act (NT): (Worker's Submissions, para 2).* It

is not in dispute the Worker suffers from the degenerative condition, nor that his condition was exacerbated, accelerated or aggravated during the course of his employment with the Employer. What is in dispute is whether the worker, after 23 October 2001, continued to suffer from the affects of an aggravation, acceleration etc of his pre-existing injury, or whether the progression of the degenerative condition has overtaken the previously acknowledged injury: (*Worker's Submissions paras 3-5, Employer's Submissions paras 5-9).*

Legal Principles Applicable to the Resolution of This Dispute

2. *Injury* is defined in the *Work Health Act (NT)* to include *the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease.* Further, *an injury shall be deemed to arise out of or in the course of a worker's employment where it occurred by way of a gradual process over a period of time and the employment in which he or she was employed at any time during the period materially contributed to the injury. : (s 4(5) Work Health Act (NT)).* Further, *a disease shall be taken not to have been contracted by a worker or to have not been aggravated, accelerated or exacerbated in the course of the worker's employment unless the employment in which the worker is or was employed materially contributed to the worker's contraction of the disease or to its aggravation, acceleration or exacerbation.: (s 4(6A) Work Health Act (NT).* As emphasised by Mr Grant for the Employer, the employment is not to be taken to have materially contributed to the injury unless the employment *was the real, proximate or effective cause of the injury, disease, aggravation, acceleration or exacerbation. (s 4 (8) Work Health Act (NT)).*

3. Clearly, the employer bears the legal onus to establish its justification for cancelling benefits: *(AAT King's Tours Pty Ltd v Hughes (1994) 99 NTR 33.)* The question is whether the Employer can prove, on balance, that the worker did not continue to suffer, after 23 October 2001, the effects of an

aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury. Even if the worker did continue to suffer the effects of the injury (as defined), the Employer may be entitled to cancel benefits if the Employer can show that the employment did not materially contribute to the injury as defined in *s 4(8) Work Health Act (NT).* In the circumstances of this matter, the employer can succeed if it can prove, on balance, the degenerative condition rather than the injury, is effectively the condition that continues (from 23 October 2001 onwards), to cause the worker's partial incapacity.

Admitted Facts

4. The following preliminary matters are admitted and I confirm they are proved:

The Worker is a worker as defined by the *Work Health Act (NT).*

The Worker's date of birth is 9 August 1961.

At the time he sustained his injury the Worker was employed by the Employer as a heavy equipment fitter.

As a result of the injury the Worker made a worker's compensation claim which was accepted by the Employer.

On or about 24 October 2001, the Worker sought mediation of the cancellation of his worker's compensation benefits.

The mediation was unsuccessful.

Summary of Evidence Given by the Worker

5. Very little of the Worker's evidence is contentious or under challenge in any significant way. My impression of him giving evidence was that he was honest, reliable, and straight-forward. He obviously understands his industry well and has developed a high level of skill across different aspects of his

trade and the general industry. I have no difficulty accepting his evidence as is summarised here.

6. The Worker is currently employed as a parts interpreter for the Employer; he currently lives and works in Darwin. He completed six years of high school and obtained a senior's certificate. After school, between 1979 and 1983 he commenced and completed an apprenticeship as a *fitter, heavy earthmoving equipment* with his current Employer, Hasting Deering, in Rockhampton. Duties as a heavy earth moving equipment fitter included repair and maintenance of mining equipment, power generation units and some marine applications. Most of the work is regarded as *heavy* work. This involves a significant amount of lifting, handling heavy components and dealing most of the time with very large equipment, a lot of climbing and working at height in confined spaces. Much lifting and bending is required. *(Transcript pages 3-4).*

7. In 1984 he left Hasting Deering and was employed as a general mechanic for John Hatch and son where his duties included maintenance and service of dozers. This employment lasted three months. He reported no difficulty with his back at this time. *(transcript page 4).*As a result of a steel fragment caught in his eye he was left with a serious permanent eye injury, leaving him with 20% vision. He then worked again as a heavy fitter for the Employer, Hastings Deering in McKay, commencing in 1984. He moved to field services with Hastings Deering doing on site machine maintenance and repair in various regional areas in Queensland, still involving heavy work. He became leading hand of field services in McKay for the Employer, Hastings Deering. In the capacity of leading hand, throughout 1986 to 1989, he no longer needed to do heavy work. He still had no difficulties with his back. Between 1989 and 1990 he was promoted to the position of foreman of the engine rebuild facility of the Employer at Rockhampton. This position involved primarily administrative duties. *(transcript pages 5-6*)

8. Between 1990 and 1991 he became a partner in a small mechanical business. He did however continue to work for the Employer on the basis of four days on, four days off at 12 hour shifts. He did not engage in heavy or mechanical work during that period and sold the business and resigned from the Employer. He then became involved in an oil cooler franchise for six months and was employed again by the Employer in Darwin as a leading hand involving light duties. He felt no stress on his back at that time.

9. Between 1993 and 1995 he was employed as a leading hand by BHP, Groote Eylandt. This position mainly involved supervision but there was also fairly light, infrequent physical work. Between 1995 and 1997 he was employed by Guninan in McKay maintaining drag line equipment in Central Queensland. He performed shut down repairs. In 1997 he became nightshift leading hand. The duties were primarily supervision. In October 1997 he was promoted to day shift workshop supervisor. That position involved primarily clerical work. He had not experienced any problems with his back. In September 1998 to August 1999 he commenced employment with Westrack as a heavy equipment fitter, maintaining heavy equipment for Roach. He provided repairs and assistance and for about 50% of the time, worked as a leading hand. When not working as a leading hand his worked was *fairly heavy work,* comprising lifting and handling weights of 20-30 kgs, climbing and working in confined spaces *(transcript page 6- 10).*

10. It is during this time he reports *some discomfort* at times in his back, in the lower back (belt level) and hip area (right hip at the top of the right leg – at the side); the *discomfort* was more frequent in the cold during long shifts at night in wet clothes; the discomfort involved a fatigue – type cramping that he attributed to the cold; it was not painful, more uncomfortable; he would experience this once or twice per week; he had physiotherapy and chiropractic therapy; the discomfort did not prevent him from working. *(transcript pages 10-11).*

11. He obtained employment with the Employer, Hastings Deering in about August 1999 in Darwin. He moved back to Darwin because he thought the cold contributed to his discomfort, but primarily he thought his financial prospects were better in Darwin. He thought he would have been able to continue working in Kalgoolie if not for the better opportunity in Darwin. His position with the Employer in 1999 was as a field service fitter. This involved travel to various mine sites and perform on site maintenance and repair of earth moving equipment, marine work on the trawling fleet and power generation work on Aboriginal communities. *(transcript pages 11 and 12).* This position involved heavy duties, lifting components of a weight around 20-30 kgs, working unassisted, climbing, working in confined spaces on boats and marine work. He was required to bend his back frequently. Shifts of 12-14 hours were not uncommon; he was on call seven days/week. At first he had no back or hip discomfort during this work. He first experienced pain or discomfort in his back in January 2000 while doing a repair on a cylinder head on a prawn trawler; the entire shift involved being crouched over, lifting heavy weights and working strenuously in a confined space; after two or three days he was quite sore in the afternoons and uncomfortable after getting home; the soreness was in the lower back (belt level) and hip area (outer side of the right hip); he rated the pain at about 2/10; it did not, at that time disable him from doing his work. From that time, the back pain would come and go, appearing when he performed heavy work but not having a problem when he performed light work.; the pain was experienced in the same area; the pain increased to level 3/10; there was further deterioration and the pain became more regular and more easily triggered; repetitive lifting of weights around 20kgs would trigger the pain and he became restricted; by August 200 his ability to tolerate pain became more difficult; he was concerned the work he was doing was triggering the pain; he based this on the fact he started to be tight or uncomfortable on getting out of bed; the pain increased so that as at August he was placing the pain at 5/10 or 6/10 when carrying out some activities; he was unable to lift

the weights of 20-30 kgs without significant pain; stepping on and off of machines or slight jumping would trigger jarring and significant pain. *(transcript 12-14)* He did not have any days off due to this pain.*(transcript 15)*

12. As a result he sought and was granted a transfer to the workshop; this mainly involved work on small components removing the necessity to climb and work in confined spaces; he was able to avoid activities he believed caused the discomfort to increase; he still experienced pain in the lower back and right hip at about 3/10; working at ground level or picking up and carrying out repetitive tasks increased the pain to about 4/10. He transferred to being a parts interpreter, partly for job satisfaction but also there were some tasks he could not undertake in the workshop, for example, lifting heavy components, lifting and use of some of the tooling; he became more fatigued and had lower endurance levels. As parts interpreter he undertakes counter sales, orders, purchases and other related duties; with assistance, he undertakes some lifting of heavy parts. At the time of giving evidence (28 November 2002), he says he experiences pain constantly at 3/10; lifting still causes him pain and he can experience pain at 5/10 on a bad day; his current pain is significantly worse and more easily triggered than when he was in Kalgoorlie. He feels he can no longer perform work as a field service fitter due to the pain he would feel and the need to look after himself; he feels he is not fit enough to perform the work; he takes anti-inflammatory medication and Panamax and Panadol; he has had physiotherapy and utilises manoeuvres and exercises at home and previously went to the gym; he has had some counselling sessions with his GP and Northern Territory Rehabilitation Services; he experiences difficulties in the morning, its painful to pick things up and put on his boots; anything reaching down increases the pain to around 6/10-7/10; he experiences other discomfort concerning some domestic and family activities and has had to deal with feelings of depression about his career and his condition; he feels pain when

he sneezes or coughs; he has difficulty sleeping that did not previously exist.

13. In cross-examination it was suggested to him firstly that he had given one doctor a history of back pain for the previous five years; he said he didn't recall giving a time frame; he agreed he gave a history extending back beyond his employment with Hastings Deering; he agreed he advised Hastings Deering of previous trouble with his back in Kalgoorlie; he agreed he was x-rayed at that time; he agreed he had given histories to Dr Millons and a Dr Nyunt; he agreed he told Dr Millons he came back to Darwin because his back was worse in wet weather; he didn't recall using the words *the last few years* when describing back pain to Dr Nyunt; he agreed when he made his claim for worker's compensation he said it was a *gradual onset.(transcript pages 23-26).*

Medical Evidence

(a) Evidence Called on behalf of the Worker

14. The worker called Professor Marshall, a highly qualified surgeon whose report was tendered to the Court: *(Report of Professor Marshall, 24 April 2002, Exhibit W2).* Professor Marshall had viewed x-rays from March 1999, revealing *early degenerative disc disease* at L4-5. He observed this again in x-ray in June 2000 and noted in his report that the CT of the lumbar spine in June 2000 *shows mild generalised disc bulging, particularly at the L4-5 level: (Exhibit W2* at 2*).* Professor Marshall explained that in pathology in a disc in trauma or degeneration, *it tends to slit or rupture around the margins... allowing the more fluid material inside to bulge the disc (transcript p 29),* Further, he said, the affected disc can bulge anteriorly or posteriorly where it will be in contact with the nerve roots; as the disc degenerates, the space between the two vertebrae becomes less as the disc narrows resulting in the damage to the disc: *(transcript p 30).*

15. Professor Marshall's report *(Exhibit W2* at 2*)* notes: *The CT of the lumbar spine in June 2000 shows mild generalised disc bulging, particularly at L4-5 level. The MRI done in July 2000 confirms the degenerate L4-5 disc, but shows no abnormalities of other discs, and the last CT scan of August 2001 shows further progression of L4-5 disc pathology bulging both into the vertebra above and posteriorly.* He explained in evidence: *(transcript, page 31),* the X-ray of 1999 showed early change in the discs; there was evidence of thinning of the margin of the discs; through use of the CT scan and X-ray in June 2000 he observed there was generalised disc bulging; the MRI of July 2000 shows the same degeneration of those discs but no abnormalities of other discs are observed; both the June 2000 CT scan and the MRI in particular showed soft tissue change; a further CT scan in August 2001 showed further bulging of the discs and a tendency to herniate upwards into the softer part of the vertebrae above; there was further thinning and bulging of the discs from March 1999 to 2001; an MRI done in July 2001 noted the Schmorl's node bulging into the vertebra above from the disc below. Professor Marshall explained the MRI done at July 24 2000 detected for the first time, *some movement upwards and downwards in relation to the content of the disc,* being evidence of further degeneration of that part of the spine since March 1999: *(Transcript, page 31).* Importantly Professor Marshall agreed that the progression is qualitatively different to what was present in March 1999. He said: *It indicates there has been progression of damage to that particular disc between L4 and L5 over the time between March 1999 and August 2001.* He accepts the worker developed lower back pain from around January 2000 that was a work related aggravation of a pre-existing lumbar spondylosis: *(Exhibit W2, page 4).* In evidence he said that *he suffered in addition and on top of pre-existing changes, an aggravation of pre-existing changes caused by his work or associated with his work in relationship to an aggravation of a pre-existing condition or injury.* He noted that the Worker's history indicates exacerbation from the end of 1999 and over the subsequent course of the year. Most significantly, his opinion

was the aggravation would have a permanent effect in causing *acceleration of a pre-existing rate of deterioration. It would have increased his incapacity by a degree which would have in my opinion, persist. It would not progress further once he had stopped the aggravating heavy work, but I believe the effects would be continued and persist.* He was also clear that the *effect[s]* he referred to meant the incapacity to do the pre-injury employment which was of a heavy mechanical nature: *(Transcript page 32).*

16. In cross-examination Professor Marshall agreed one might be expected to be able to detect the Schmorl's node on X-ray in March 1999; he agrees that there was higher sensitivity of later procedures being the CT scan and MRI that show greater definition. He agreed with Mr Grant that Schmorl's node *could* have been present in March 1999. In answer to the question on whether the degenerative change was referrable only to its own progression, Professor Marshall said, *(Transcript page 33*): *Well, one couldn't have said specifically just from the imaging appearances, whether they were due to constitutional change or degenerative change or to trauma. The changes would be relatively similar and difficult to distinguish on radiological grounds alone. One point that maybe worth making there, is that the changes were almost entirely localised to a single disc, not to the discs between the other lumbar vertebrae. That to my mind is slightly more in favour of an additional traumatic event or chronic traumatic event, than to degenerative change which most often affects multi-level vertebrae and multi-level discs.* Professor Marshall agreed with Mr Grant that it is not unusual for pre-existing degenerative change to be so localised; he agrees the X-rays alone do not indicate change attributable to an incident of trauma; Professor Marshall relies on the history concerning the worker performing heavy manual work, often in confined spaces and requiring the Worker to shift heavy materials in support of his opinion; Professor Marshall disagreed with the proposition put by Mr Grant that an increase in disc pathology could only be referrable to trauma in circumstances of an

acute episode of trauma.: *(transcript, page 34).* Professor Marshall disagreed with the proposition that on his own thesis, it would be expected that any aggravation resolve within six to twelve weeks. He told the court the damage to that disc means the disc is not necessarily able to revert back to its pre-injury status and is therefore more liable to further progression as a result of the injury; that the exacerbation of the injury would accelerate the increase in the speed of the degeneration; the acceleration would cease after the aggravating work factors are removed but does not revert to the pre-injury level of incapacity; the acceleration ceased when the heavy manual labour ceased but this does not stop the rate of degeneration that had been moved, in his opinion a quantum higher than prior to the injury: *(transcript page 35).*

17. Tendered by consent on behalf of the Worker, (*exhibit w 3)* is the report of Dr Philip Hardcastle, essentially supportive of Professor Marshall's views on a number of matters. He made a diagnosis of *resorption syndrome;* this condition being a *work aggravation of a pre-existing condition;* the injury was the result of Mr Smith's duties as a *heavy equipment fitter* and the consequent view that he was unlikely to be able to return to full (previous) duties.

(b) Evidence called on behalf of the Employer

18. Dr Jackson's report was tendered: *(Exhibit E1)* and he gave evidence for the employer. Dr Jackson is also a highly qualified consultant orthopaedic surgeon. Dr Jackson saw Mr Smith on one occasion only, being 1 October 2002. In both his report and in evidence, Dr Jackson places significant weight on the fact that in his view there is no one specific incident of trauma reported in Mr Smith's history. He noted there was degenerative change at L4-5 from the X-ray of March 1999 but he was quite adamant throughout his evidence that the X-rays were quite inadequate for reasonable comment. He said the CT scan of 23 June 200 confirmed to some extent the findings of the

X-ray of 1999, namely reactive sclerosis, indicating degenerative change: *(transcript page 42).* He noted from the CT scan, broad based disc bulge *of sufficient dimension to cause pinching on the thecal sac* and at the L5-S1 level, there was a relatively small disc bulge, again causing some compression. He noted from the MRI the presence of *Schmorl's node, indicating a condition dating back many years: (transcript page 42).* On whether the disc was likely to irritate the L5 nerve roots bilaterally, he said this was more a *possibility* than a *probability.*

19. On whether there had been changes to the Worker's condition between March 1999 and mid-2000 when further investigations were undertaken, he said, as he said in his report, that he found it *impossible to compare the plain x-rays, as obtained in Kalgoorlie in 1999 with the plain x-ray obtained in the year 2000;* he concluded there was no substantial change; he referred to a radiology report indicating an increase narrowing at the L4-5 disc level and a slight increase in the posterior disc bulge at L405 level; he said that either of those changes *can be attributed simply to a time factor;* he said he believed those changes could not be attributed to work activities from August 1999 onwards: *(transcript page 43)* He is of the view that there was no incident of trauma reported that could have contributed to the change to the discs, although he believes there was a minor aggravation that would have resolved quickly, (in his view three months); that absent sever trauma, the deterioration in disc condition was consistent with the passage of time: *(transcript page 44).*He also said that work did cause an aggravation, but that aggravation resulted from poor ergonomics and placing stress on the already damaged lumbar spine; he considered the contribution of work to the Worker's current condition to be in the order of 10%, possibly as low as 0-1%, or to a non perceptible extent.

20. In cross-examination Dr Jackson agreed the Worker is not physically suited to the previous heavy work he was undertaking; that the work he was doing between the end of 1999 and June 200 was aggravating his condition,

including producing symptoms of pain: *(transcript page 47)* .He agreed that although he could not make adequate comparisons between the two sets of x-rays, there was a history of the Worker experiencing pain , particularly in January 2000; he agreed between June-August 2000 the symptoms had become worse, to the point that medical assistance was sought and that he changed to alternative duties; he stated he did not have *the intermediate events* concerning any further re-assignment to light duties: *(transcript page 47).* He agreed the heavy manual work engaged in by the Worker as a heavy equipment fitter may cause traumatic incidences; he was uncertain on whether the Worker was performing heavy equipment work in August 1999; he doesn't accept the work was a significant factor in the condition; he relies on there being multi-factorial contributions, significantly, the underlying degenerative condition: *(transcript pages 48-49).* In re-examination he said that any such trauma would manifest in acute exacerbation of pain to the extent that the worker would have ceased work: *(transcript page 53).* Dr Jackson was adamant that the development in the condition could not be revealed by a comparison between the X-ray of 1999 through to the CT scan, given the poor quality of the x-ray: (*transcript pages 50-52);* he disagreed that any aggravation was of a permanent nature and agreed on the importance of history in the evaluation of the condition; he agreed the history indicated significant back pain while undertaking heavy work after a period of not being engaged in heavy work and the pain persisting after cessation of heavy work; he disagreed that this history was consistent with a permanent aggravation: *(transcript pages 51 and 52).* Dr Jackson did not agree that there was any significance one way or the other in the fact that the degeneration was localised to two discs: *(transcript page 53).*

21. Dr Millons also gave evidence for the employer. Once again, a highly qualified medical practitioner specialising in trauma orthopaedics whose reports are tendered as *exhibit 4.* Dr Millons confirmed his opinion that the

degenerate disc may well have come about as a result of the normal processes of attrition, in other words, the attrition may be just part of the normal activities that they *do or may relate to – in part to occupational problems.*: *(transcript page 57).*He also noted there was no one incident that was referred to by the Worker, preferring to link the problem to *underlying attritional change which is the cumulative result of his employment over the years.: (transcript page 58).* He had not seen the x-rays of 1999.Considering the radiological investigations of June/July 2000, Dr Millons said they indicated degenerate change at L4-5; that the indications were they were of long standing; there was posterior bulging of the disc: *(transcript page 59).* Of the CT scan of August 2001 there was further narrowing of the disc; this may be suggestive of an advance in the degenerative change; the bulging had not changed; he presumed the advance to be due to the normal processes of attrition: *(transcript page 59).* He did not think the employment with Hastings Deering had substantially altered the pathology; he agreed the work may have caused some aggravation but that it was only temporary and it would not have accelerated the change; on balance the condition reflected the underlying condition: *(transcript page 60).* Dr Millons obtained much of the Worker's history from TIO including the Worker's resume; in his opinion the Worker's employment did not lead to a permanent deterioration of the underlying condition: *(transcript page 61).*

22. In cross examination he agreed with a number of propositions put to him by Mr Southwood, namely, that the lumbar vertebrae (L5-S1) is the area exposed to most stress in heavy lifting; that that exposure to stress may cause wear and tear; a single incident or series of heavy lifting may cause particular stress; not all such stresses are noted by a person; some incidents may cause symptoms, others not; disc bulge and disc protrusion of various degrees may result from heavy lifting; the level of pain may vary accordingly; he agreed that injury can damage a disc that may consequentially either heal or go on to develop chronic wear: *(transcript*

pages 61-63); he agreed there was progression of the degeneration of the disc since throughout the relevant period: *(transcript page 66).* In his notes on the Worker's history he acknowledged numbness along the lateral border of his foot and tightness in the sides of his legs to the knees; this history indicated pressure on the S1 nerve: *(transcript page 67).* Dr Millons also confirmed an opinion advanced in his report of 19 June 2001 to the effect that there's no one specific incident, but the nature and conditions of his work would have the potential to cause substantial aggravation of the underlying problem, the history concerning numbness and tightness to the foot and the legs being consistent with a substantial aggravation as a result of his work. He agreed that any acceleration that *possibly* could have occurred would be of *permanent effect.(transcript page 70)*

Discussion of the Evidence

23. Obviously all medical practitioners called in this case are highly qualified, respected and credible professionals. There are obvious differences in the ultimate opinions expressed by them, although I note that Dr Millon's initial opinion shifted somewhat during cross-examination, particularly once certain details of the Worker's history were put to him as identified in paragraph 22 in these reasons. Although it is true that this decision turns largely on medical evidence, that evidence must also be evaluated against the context of the largely unchallenged history of the Worker that is also before the Court.

24. On whether the Worker's condition was aggravated or accelerated during the course of his employment with the Employer, Dr Marshall noted the progression of disc pathology from March 1999 to August 2001 to be significant. This opinion is challenged firstly on the basis that the initial X-rays were far less sensitive than later diagnostic tools. The initial x-ray clearly showed, if nothing else, narrowing of the margin between the two vertebrae. It clearly represented the pre-existing degenerative disc disease.

Even if the initial x-ray is not conclusive, the progression of the pathology noted by Dr Marshall in the subsequent x-rays and CT scan is consistent with the Worker's history and evidence of the onset of further symptoms noted in paragraghs 11 and 12 above. Dr Millons also agreed that the radiology, (without viewing the 1999 x-rays), indicated a progression of the degeneration. Mr Jackson was adamant about the difficulties inherent in the x-rays, especially March 1999 for the purposes of comparison with later diagnostic processes. Clearly, he was able to and did make some use of the 1999 x-rays. In my view, his reasoning is problematic. He reaches his ultimate conclusion, (that the progression of the disease is primarily a matter of time), at least in part, because the radiological investigations (in his view), were not complete. The impression I obtained from the way Mr Jackson formulated his opinion was that he failed to have significant regard to the broader picture, namely, the history of work and the onset of symptoms.

25. Dr Marshall's opinion is further criticised on the basis that there was no evidence of a particular instance of acute trauma, although it is argued his opinion on aggravation of the pre-existing condition must rest on this fact. First, I note the Worker has in fact given particular examples of experiencing acute pain (noted primarily in paragraph 11 above). Although this was not of such a degree that he immediately ceased working, it was clearly significant. Dr Marshall was clearly influenced by these matters in the Worker's history. Dr Millons agreed that these types of activities cause stress and *wear and tear* of the lower lumbar; they may or may not manifest in obvious symptoms. The consequences were, he said, either healing or further progression. Dr Jackson's opinion was that to show an aggravation caused by work, there would need to be some specific trauma. First, it seems to me, there was some evidence of either trauma or serious escalation of symptoms during periods of difficult work activity. It may not be as acute in its immediate effect as Dr Jackson thought it should be, but the combined

reasoning of Dr Marshall and Dr Millons indicate to me on balance, that there was trauma significant enough to damage the lumbar spine further.

26. Dr Marshall believed it was significant that the disease was localised to L4-5, however, he acknowledged also that this may not be unusual in the given time frame. Dr Jackson completely rejected any significance being attached to this. I do not think Dr Marshall's ultimate opinion fundamentally rests on this observation. In my view it is put forward as one possible basis for the ultimate inference. I note Dr Millons agreed that the lumbar vertebrae (L5-S1) is the area exposed to most stress in heavy lifting and that such stress may cause wear and tear. Although it is not conclusive, there is some theoretical support for having regard to the location of the injury in the overall assessment.

27. In my view, a reasonable review of the whole evidence, including a parallel consideration of the history along-side the medical evidence does not support the Employer's contention that the Worker no longer suffers the effects of the aggravation to a material degree, or that the aggravation has ceased. Overall, I prefer the medical evidence called on behalf of the Worker that was given in close connection with the history. Some support for their reasoning can also be found in Dr Millon's evidence. Although I have no problem with medical practitioners advocating and arguing strongly in favour of their opinions, I found Dr Jackson to be quite defensive, at one point bordering on belligerent. It may be a matter of style, but it did not give me confidence that he was comfortable with having his opinion scrutinised, (as it must be) in an open and detailed way before the court. He made few concessions. Overall, I prefer the medical evidence called by the Worker. This includes the conclusion that on balance the aggravation was of permanent affect, causing an acceleration of the rate of deterioration. On balance, the relevant aggravation and acceleration occurred and was caused during employment with the Employer between 1999 and 2000. In coming to this and related conclusions I have had regard to *Treloar v Australian*

Telecommunications Commission (1990) 97 ALR 321 and the appropriate reasoning process indicated.

28. All the medical evidence indicates the Worker would be unable to return to his former position. To succeed, the Employer needs to show the Court that the underlying condition, rather than the employment with Employer contributes to this state of affairs. The employer bears the onus. In my view, on balance it was the work with the Employer that materially contributed to the aggravation and acceleration of the condition noted in the evidence. I find this explanation of the Worker's condition more credible than the alternative, relying as it does on the simple passage of time. To both the Worker's and the Employer's credit, the Worker has been provided with employment (light duties) as a parts interpreter. The Worker's loss of earning capacity is significant, and a version of the Worker's current remuneration in contained in the Worker's written submissions. I will be seeking assistance on the precise calculations.

Findings

29. The above analysis of the material before me justifies the following findings: the Worker suffered a pre-existing degenerative disc disease first manifesting in symptoms prior to employment with the Employer; symptoms first manifest in March 1999; while working for the Employer in Darwin in January 2000- August 2000 his symptoms increased; during this period he suffered an aggravation and acceleration of pre-existing changes to his lumbar spine; the aggravation/acceleration of the degenerative condition was caused by his work activity as a heavy equipment fitter with the Employer; the aggravation/acceleration is manifest in posterior bulge at the L4-5 and associated pressure S1 roots and indentation or flattening of the thecal sac; a Schmorl's node is placing pressure at L4; over the period of employment with the Employer there has been further narrowing of the disc and further bulging and associated symptoms consistent with suffering permanent

acceleration of the progression of the disc pathology; the effects include back pain and a higher susceptibility to further degeneration; this is the cause of his partial incapacity, resulting in a change of duties to light duties as a parts interpreter; the Worker is partially incapacitated for work as a whole as a result of a permanent injury and has suffered a loss of earning capacity. As I understand the situation, and is apparent from submissions, the Worker now receives substantially less by way of remuneration.

Normal Weekly Earnings – Superannuation

30. Counsel for both parties advised there has been agreement on *Normal Weekly Earnings* at $1506.43, however, there is one outstanding matter being whether compensation for superannuation paid by the employer to a superannuation fund ought to form part of *Normal Weekly Earnings.* I understand there is no authority dealing with that particular point.

31. The relevant parts of *Section 49(1) Work Health Act* state as follows:
"normal weekly earnings", in relation to a worker, means-

> *(a) subject to paragraphs (b),(c) and (d), remuneration for the worker's normal weekly numbers of hours of work calculated at his or her ordinary time rate of pay;*
>
> *(b) n/a*
>
> (c) *n/a*
>
> (d) *where-*
>
> (i) *by reason of the shortness of time during which the worker has been in the employment of his employer, it is impracticable at the date of the relevant injury to calculate the rate of the relevant remuneration in accordance with paragraph (a), (b), or (c); or*

(ii) *subject to paragraph (b) and (c), the worker is remunerated in whole or in part other than by reference to the number of hours worked, the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he or she was engaged in paid employment.*

32. The Worker relies primarily on the concept of remuneration, being a wider concept than merely wages, incorporating all reward and payment for service provided by the worker. In particular, the Worker relies on Murawangi Community Aboriginal Corporation v Carroll [2002] NTCA 9 and a number of authorities cited in that decision supporting the proposition that non-monetary benefits, (in that case, free accommodation, electricity and three meals per day) are to be regarded as part of the Normal Weekly Earnings by virtue of s 49(d)(ii) Work Health Act (NT).

33. I am advised by counsel that the statutory amount was paid by the Employer into a superannuation fund at the relevant time. The Worker argues that the fact that the superannuation payments are required to be invested or applied according to the fund, does not of itself mean such payments should be excluded from the concept of *remuneration;* such payments should still be regarded as remuneration for the purposes of the *Work Health Act (NT).*

34. Further, the Worker relies on a series of decisions of the Industrial Relations Commission of Australia concerning the concept of remuneration in the Workplace Relations Act, 1996 (CW), namely Condon v G James Extrusion Company, 4 April 1997, 313/97 Print N9963 and Rofin Australia Pty Ltd v Newton (1997) 78 IR 78 standing for the proposition that remuneration is properly defined as the reward payable by an employer to an employee for the work done by that employee in the course of his or her employment with that employer; it is a term that is confined neither to cash

payments nor, necessarily to payments actually made to the employee; it includes non-pecuniary benefits and payments made on behalf of and at the direction of the employee to another person out of moneys due to that employee as salary or wages; in Condon, it was clearly held to include superannuation.

35. The Employer argues superannuation cannot form part of Normal Weekly Earnings as superannuation is clearly distinguishable from those cases involving *keep* and other non-cash payments relied on by the Worker. The Employer argues superannuation is of a different nature, as it is a benefit not payable directly to the worker and is not accessed in a way contemplated by the *Work Health Act (NT).* As between *s 49 (a) and (d)*, the Employer argues the only way conceptually superannuation can be included is to argue it comes within *s 49(d).* The Employer argues that if such a course were permitted, all, or almost all Workers would potentially claim compensation for superannuation payments lost. Further, in this case and possibly others, there is potential for double dipping given this Worker is still employed by the Employer and statutory payments for superannuation continue to be paid.

36. I note that the *Work Health Act (NT)* commenced well before statutory obligations were imposed on employers to contribute by compulsion to superannuation schemes. The *Work Health Act (NT)* commenced in part in 1986 and in part in 1987. Both the *Superannuation Guarantee Charge Act (CW)* and the *Superannuation Guarantee (Administration) Act (CW)* were not introduced until 1992. Prior to any legislative changes concerning superannuation, however, The *National Wage Case 1986 (1986) 14 IR 187* accepted that employers, in general, should contribute at least 3% of their employees' salaries to a superannuation scheme. It is difficult to know, therefore, whether Parliament had contemplated employer superannuation contributions when the *Work Health Act (NT)* was drafted. Although no statutory obligation was in existence at the time, clearly, as a matter of employment practice, including examples of award coverage, (or lack of

coverage as noted in *National Wage Case 1987 (1987) 17 IR 65*), employer contributions were part of the legal industrial landscape. In 1986 the High Court recognised, (for the purposes of jurisdiction), that employer funded superannuation could form the basis of an industrial dispute: *Re Manufacturing Grocers Employees Federation; Ex Parte Chamber of Manufacturers (1986) 160 CLR 341.* Given these significant developments at the very time of the introduction of the *Work Health Act (NT)*, I simply note that there was no express exclusion of compensation for loss of employer funded superannuation contributions; nor is there any express indicator evincing an intention to *include* compensation for loss of such contributions, although I note that categories of certain other benefits are expressly ruled *in* by virtue of *s 49(2) Work Health Act. Section 49(2)* in my view raises another potential complication in that *over-award payments* are expressly covered for, yet it is silent on whether that might include over award payments in the nature of superannuation contributions. Sensibly, the drafters must have envisaged that different categories of workers' benefits may be brought into existence over the life the *Work Health Act (NT)* and it would never be possible to deal with the variety by legislation for each. Essentially, it comes down to whether statutory employer contributions, (or contributions equivalent to the statutory minimum made under an award as confirmed permissible in *Superannuation Test Case September 1994 (1994) 55 IR 447*), made to a fund that cannot be accessed by the worker for some time or in restricted circumstances can be regarded as *remuneration* as it is understood in the *Work Health Act (NT*).

37. The comparison made on behalf of the Worker with the concept of *remuneration* as it is presently understood in the *Work Place Relations Act (CW)* is illuminating. There is no doubt that the term *remuneration* is broader than *wages* or *relevant wages* being the repealed term in the *Work Place Relations Act (CW).* I note a number of decisions, including from the Industrial Court of Australia cited in *Condon v G James Extrusion Company*

that conclude that superannuation payments made by an employer to a fund are liable to inclusion in remuneration. In *Condon's* case, that inclusion had the consequence of excluding the applicant from relief for alleged unlawful termination. A consequence of this reasoning is that if an employee in that jurisdiction is successful in obtaining relief, the Court or Commission would need to assess compensation inclusive of employer superannuation.

38. On behalf of the Employer it has been argued that Justice Hely in *Reynolds v Southcorp Wines Pty Ltd [2002] FCA 712* provides competing authority militating against the incorporation of superannuation in the context of a common law, termination of employment action and the question of offsetting severance pay against damages. At pages 22 and 23 Justice Hely refers to a possible entitlement (as a component of the whole package) under the *Annual Holidays Act 1944 (NSW).* The *Annual Holidays Act* provided entitlement for *ordinary pay* for holidays that had accrued at the point of termination. Under that Act, *ordinary pay,* means *remuneration for the worker's weekly number of hours calculated at the ordinary time rate of pay.* Of the superannuation it was stated by the Court *the employee cannot access the benefits derived from those contributions except in the circumstances permitted by the trusts on which the fund is constituted. The employer's contributions to that fund are not part of the employee's ordinary pay.* The similarity between the wording of that part of the *Annual Holidays Act 1994 (NSW)* and the relevant parts of *s 49 Work Health Act (NT)* is striking, however, the *Work Health Act (NT)* does refer to a concept of normal weekly *earnings*, not normal (or ordinary) *pay* which is I think, one reason for the exclusion of superannuation in that case. It would be wrong in my view to conclude that the compulsory employer superannuation was not *earnt*, even though the employee does not receive it as *take home pay.* That interpretation would unnecessarily restrict the concept of *remuneration* in the context of *normal weekly earnings.* There is nothing

before me to indicate that these payments are not regularly paid to the fund as they are earned, they are simply not paid to the worker.

39. I am bolstered in this conclusion that employer superannuation is *earnt* by the comments of Justice Marshall in the Industrial Relations Court of Australia in *Rigby v Technisearch, unreported, 156/96,* cited in *Condon (supra)* where he discusses the relationship between *remuneration* in the *Workplace Relations Act (CW)* and compulsory employer superannuation contributions where he says (references omitted): ....*Superannuation contributions by employers are in the nature of payments in respect of work performed by employees. The Australian Conciliation and Arbitration Commission, in its June 1986 National Wage Case, adopted a national wage principle dealing with superannuation.....The principle permitted awards to be varied to provide a requirement for employer contributions on behalf of employees to superannuation funds which (did) not involve an equivalent wage increase in excess of 3% of ordinary time earnings for employees....The claim for a superannuation payment was made by the Australian Council of Trade Unions as a claim in lieu of a claim for a 3% wage increase.....*

40. Superannuation is unquestionably, in my view, when paid into a fund by an employer on behalf of an employee, part of the remuneration of the employee. Award superannuation has grown since 1986 and in addition, the Superannuation Guarantee Scheme underpinned by the Superannuation Guarantee Charge Act 1992 and the Superannuation (Administration) Act 1992 has extended compulsory superannuation coverage to employees not employed under award conditions.

41. I have come to the conclusion that the arguments currently available to me militate in favour of allowing compensation for the employer funded contribution component to be included in normal weekly earnings. In coming to this conclusion, I fully appreciate that the contribution originally

under s 20 Superannuation Guarantee (Administration) Act was 3% and by 2002-03 had increased to 9%. In making relevant calculations, the parties will need to ensure that the correct and relevant percentage is applied, and even then, must not be calculated to double up with any part of the contribution this Employer currently continues to make on behalf of the Worker.

42. I have come to the view that the Worker may well be entitled under *either s 49(1)(a) or (d)(ii) Work Health Act,* that is, the superannuation contributions may be regarded on one view as remuneration *simpliciter.* Alternatively, it may be more readily grounded in *s 49 (1)(d)(ii).* Initially I thought there may be a strong point in the Employer's argument that *all workers* could claim superannuation under this section but my researches since argument before me reveal at least one category of *exempt* employees being persons who work predominantly in a private or domestic nature for less than 30 hours per week: *(Superannuation Guarantee (Administration) Act 1992 (CW), s 12(11)).*

43. As a general principle I do bear in mind that the Work Health Act (NT) is beneficial legislation and I should not readily interpret it in such a way to restrict access to benefits. The structure of the Work Health Act readily permits remuneration such as that discussed to be incorporated into the calculation of normal weekly earnings.

Relief

44. I formally find for and enter judgement for the Worker. I request the parties confer and construct minutes of order to give effect to my findings that involves calculations of normal weekly earnings including a component for superannuation. In terms of the relief sought in the pleadings, I have not had the benefit of submissions specifically on the question of some of the paragraphs in the statement of claim being paragraphs 14.1-14.4 and request this be addressed if possible in the minute of orders, or failing agreement, to

be listed for argument. I am aware from the Court file that interim payments have been ordered previously and it is not clear to me whether that will impact on the final orders.

Dated this 19th day of June 2003.

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JENNY BLOKLAND
STIPENDIARY MAGISTRATE