

CITATION: *McAllister v Kormilda College [2003] NTMC 033*

PARTIES: FRANK WILLIAM MCALLISTER

v

KORMILDA COLLEGE LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health Act

FILE NO(s): 9802093

DELIVERED ON: 9 July 2003

DELIVERED AT: DARWIN

HEARING DATE(s): 7 – 15 OCTOBER, 11 DECEMBER 2000

JUDGMENT OF: H. B. Bradley CM

CATCHWORDS:

WORKERS COMPENSATION – WORK HEALTH

Mental injury – incapacity – heard and lodging

REPRESENTATION:

Counsel:

Worker: Mr M Grant

Employer: Mr S Southward

Solicitors:

Worker: Hunt v Hunt

Employer: Cridlands

Judgment category classification: B

Judgment ID number: 033

Number of paragraphs: 46

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

No. 9802093

[2003] NTMC 033

BETWEEN:

FRANK WILLIAM MCALLISTER
Worker

AND:

KORMILDA COLLEGE LTD
Employer

REASONS FOR DECISION

(Delivered 9 July 2003)

Mr HUGH BRADLEY CM:

BACKGROUND

1. This is a claim by Frank Watson McAllister seeking compensation pursuant to the Work Health Act for physical and psychological injuries sustained by him as a result of a fall at work on 8 March 1997. Whilst the pleadings accept that the injury took place on the 15 March the parties have litigated the matter on the agreed basis that the fall actually occurred on the 8 March 1997. Leave will be granted to the worker to amend the particulars of the claim accordingly.
2. Much of the factual background is uncontested. The worker now 55 years of age was first employed by Kormilda College Ltd (Kormilda) in 1991. He was initially employed as a house parent but was later promoted to deputy head and head of the boys' residence. He was in this position for some years prior to the injury, which is the subject of this claim. Although there

is some dispute about this I find on the evidence that the job was both a rewarding one to Mr McAllister and his wife who was similarly employed in charge of the girls dormitory and formed a focal part of their lives. They lived on the premises and worked, or at least were on duty, for relatively long hours. In the words of counsel for the worker the duties of the head of residence were wide ranging in nature including “an administrative component in relation to running the boarding house and attending to matters such as staffing and rosters. The duties included stocking the dormitory shop, cleaning duties, laundry duties, running the disco on Saturday night, conducting foot patrols of the campus and generally overseeing the health, behaviour and welfare of the students”

3. At the relevant time the worker’s remuneration included a salary of \$43,336pa and in addition Mr McAllister was entitled to accommodation and meals, the value of which was agreed on, for the purpose of the litigation, at \$215.00 and \$25.00 respectively.
4. It was on the 8 March 1997 that a dispute arose between two students. The dispute spilled over onto the residence. It seems that whilst McAllister was talking to one of the students, the student pulled a large pair of metal scissors from his bed and ran towards the door of his room. As a result of an attempt to restrain the student McAllister fell onto the floor and onto his buttocks and coccyx.
5. Following the injury the worker attempted to remain at work but with deterioration in his condition he finally sought medical treatment and was certified unfit for work a week or two after the injury. A work health claim was submitted on the 27 March and subsequently accepted by the employer and Mr McAllister was paid benefits in accordance with the Work Health Act.
6. In early August 1997 a return to work program was attempted commencing with one or two hours per day. It seems that after attending a long meeting

one day the workers' condition was aggravated and the work program was abandoned.

7. The worker was subsequently served with two Form 5 notifications. The first of these was in October 1997 but it seems that this is not pursued at this time. The second Form 5 notice was served on the first of December 1997. That notice purported to cancel the weekly benefits on the basis that "the injury sustained by you on 15 March 1997 no longer materially contributes to any impairment or incapacity" (Exhibit W5). It is from this Form 5 that the worker appeals.
8. In early 1998 the worker's wife travelled to Adelaide and took up employment there at Westminster College, the worker remained in Darwin for the purpose of being able to return to active employment with the College. In about March 1998 the worker was referred to Dr Robert Fraser a spinal specialist in Adelaide. Dr Fraser recommended some therapy including a course of pilates. He was also referred to the pain management clinic in Adelaide and so his initial transfer to Adelaide for medical treatment continued and he has now made his life in Adelaide. He says however that the purpose of undertaking this treatment was to enable him to return to active employment. In the early days at least it was his expressed intention to return to his employment as head of house at Kormilda College.

THE ISSUES

9. Whilst the pleadings indicate a somewhat wider range, the issues arising in this case on the pleadings and by agreement of counsel include the following:
 - 9.1 Was the Form 5 served on 1 December 1997, a valid Form 5 within the meaning of the Work Health Act?
 - 9.2 If so, are there facts and circumstances stipulated by Form 5 made out by the employer?

- 9.3 Independently of Form 5 has the employer's counter claim to the effect that the worker has not been incapacitated by virtue of the work injury been made out.
- 9.4 Is the worker is suffering from some incapacity and, if so, is that incapacity due to a work related injury?
- 9.5 What, if any, loss of earning capacity has been sustained by the worker?
- 9.6 Do the workers' normal weekly earnings include the full value of board and accommodation or only 50% thereof?
- 9.7 Has the worker failed to instigate his loss?
10. Of all of these issues it seems to me that the first two can be reasonably quickly disposed of. There is some suggestion in the workers' evidence that at time of the serving of Form 5 there was no medical report accompanying it. The employer has not sought to offer any evidence in relation to this issue. The employer in any event submits that any problem arising from this is overcome by the employer filing and serving its counter claim, which is now permitted under the rules of the Work Health Court. See *Alexander v Gorey & Cole Holdings Pty Ltd* [2001] NTSC 74. The employer never really argued for the validity of the Form 5 and on the basis of the information before me I find that the Form 5 was not a valid Form 5 for the purposes of the Act. Therefore neither it nor the grounds stipulated in it become relevant to these proceedings. The employers case if it is to be successful must rest on the basis of its counter claim.
11. The gist of this case is therefore whether Mr McAllister is incapacitated as a result of the work related injury and if so what is the extent of that incapacity and any loss of earning capacity.

THE EVIDENCE

12. In the worker's case the worker gave evidence supported by his wife, Dr Wright, Dr Fraser and Anne Thornton, a clinical psychologist. The employers' case relied on Drs Awerbuck, Dr Baddeley and Dr Millons supported by Ms Bakjac and Ms Lock, psychologists; by Meredith Saunders, the business administrator of Kormilda college and Ms Sandra Doig a private investigator with Rydel Services. Further evidence was presented to the court on the activities of the worker.

13. Mr McAllister gave evidence on the background to his employment and the fact that he was involved in it approximately 50-60 hrs per week. He says his duties involved administration, maintenance to the dorm, supervision of study, sleep, sport and activities, assisting in the carriage of boxes of fruit and clothing and generally many of the duties with which parents are familiar. He said that he attempted to lead by example by giving a lead to other staff and to the children. To do this he involved himself in mopping the floors, cleaning the toilets and supervising many of the children's activities even on weekends. As he described it, it was a "full-on active position". He said that he was sitting down about 2% of the time and the rest of the time he was on the move including separating fighting students. He said that this happened on an average of about 4 to 5 times per week. The children involved were aged between 11 and 22 with the majority between 15 and 17 years of age. They were athletic strong young men. He described the incident referred to above. He says he fell onto a concrete floor on his "tail bone". Following the fall he was unable to continue to assist in relation to the disturbance but he did not cease work. He said that he withdrew from physical activities and had a feeling of nausea. He said that the next day he felt bad but went back to work but confined himself to office duties. Mr McAllister said when he first sought medical assistance a few days later he thought he had pain in the back and possible a kidney infection. He went to see Dr Linko who has since ceased practice and

unfortunately all of his records are not available to the parties. He says Dr Linko thought he had muscular strain and recommended exercises and prescribed medication to settle the bruised tissue. On subsequent visits to Dr Linko he says he was given a Certificate for employment purposes. Mr McAllister said that over time the injury got worse and it resulted in him being hardly able to move. At times he describes himself as being on his hands and knees and needing assistance to walk. He sought physiotherapy but it did not help. Dr Linko referred him to Mr Baddeley an orthopaedic surgeon in Darwin who, he says, told him to have six weeks bed rest. This does not appear to me to be consistent with Dr Baddeley's evidence, which substantially indicated that he was expecting Mr McAllister to undergo a physiotherapy program to mobilise his back.

14. Mr McAllister's evidence went on to describe the ongoing difficulties over many months and he says that during the time saw Dr Linko, Dr Baddeley, Dr Schmidt, Dr Millons and other doctors, some for his own assistance and some for and on behalf of the employer. In December 1997 when he received the second Form 5 notice he says he was still suffering headaches, backaches and back pain. He said that he could sit or stand for five to ten minutes but walk less than 50 metres. If he walked for 20 minutes or so he would be stumbling and feel that his legs would not be connected to the body. He suffered increase of back pain consistent with an increase in activity. He says that neck pain will also increase with activity.
15. Over the months at the end of 1997 and early 1998 there were discussions with Kormilda College on the question of whether or not he would continue to be employed under the terms of the contract he had signed about 12 months before. He was told he would have to apply for a fresh position created by the college. There was some dissatisfaction regarding this and he says that whilst his wife left Darwin to work in Adelaide as a result of this and other matters he stayed in Darwin "to get fit and get back into

employment". He says he continued with hydrotherapy, physiotherapy with Mr Gable and swimming.

16. In about March or April 1998 he says Dr Linko referred him to Professor Fraser in Adelaide and that Dr Fraser recommended participation in a pilates program to strengthen his muscles. He undertook the course after advising the college and receiving no objection. He underwent two 12 week programs of pilates plus hydrotherapy and was also subsequently referred to the pain clinic and treated there by a number of people. It was in the course of treatment at the pain clinic that he was told that he was extremely depressed and prescribed an anti-depressant. He said he saw Ms Thornton fortnightly and Dr Wright monthly, which still at the time of giving evidence was a continuing activity. He says that his current difficulties include:

- 16.1 difficulty bending, requiring him to have no lace up shoes;
- 16.2 he could not walk beyond 20-30 minutes because he became exhausted and was losing the feeling in his right leg;
- 16.3 he says he gets uncomfortable driving a motor vehicle for a long time;
- 16.4 he has trouble sitting resulting in him using Dencorub and massage machines;
- 16.5 although he loves his guitar and has 23 of them he cannot play the guitar for more than 10-15minutes at a time;
- 16.6 although photography is a major interest he has not pursued it since he has lived in Adelaide as he is no longer able to carry the bag;
- 16.7 he says he has no social activities, no friends, only doctors and lawyers;

16.8 he says he cannot sit through a movie or go out for dinner; and

16.9 his relationship with his wife has been effected and he has no meaningful sexual congress.

17. As a result of all his complaints Mr McAllister says that although he tried to fix himself he has been unable to do so. The more he tried the worse he felt, he found the less he did the better he felt. His usual day is made up of resting and minor domestic duties at home with occasional outings either on foot or in one of his cars. He says he has been certified unfit for the whole of the period that he has lived in Adelaide and that these certificates were given to the employer. This is not denied. My overall assessment of Mr McAllister was that whilst he had a tendency to exaggerate his condition, he believed he suffered from these disabilities described. In cross-examination some matters were drawn to his attention including the circumstances of his travel to Sydney his involvement in the restoration of cars the driving of vehicles and attendances around Adelaide which establish in my view only that there has been a reasonable degree of exaggeration in his complaints. The four films show only that on particular days he is able to carry out reasonably light activities.
18. When asked about his capacity to undertake various jobs he indicated that with most of them he was not sure whether he could carry out the duties or have the necessary training for them. Given that some of these jobs involve such things as a teachers aid and a picture framer I am not surprised that he expressed some doubts. He did however indicate that he thought he could carry out the duties of a sales manager or sales assistant in a toy shop or a photographic processor. In the end however he expressed the view that he did not think he was physically able to do these things on a full time basis.
19. At the end of the day it seems that Mr McAllister has now been unemployed for five years and has for the last three of those years been referred to and treated by the pain management clinic in Adelaide.

20. Mr McAllister says, and there is no evidence to contradict this, that prior to the injury he had no problems with his back and that although a couple of years before he had injured his neck in separating students the strain was treated and there was no ongoing difficulty. He sustained no other injuries and he was active for his age participating in camping, travelling and other activities. In addition to the physical incapacities Mr McAllister says that the effect on his life has been devastating. It has effected his relationship with his wife, he is unable to sleep properly, that his personality has changed and he feels he is no longer worthy of being loved. He has feelings of inadequacy and that although he used to be the boss this is no longer the case and he is totally dependent on his wife. He doesn't feel comfortable in going out with his wife on social occasions and has been treated psychologically since his referral to the pain management unit in Adelaide. He has mood changes and is highly emotional and does a lot of crying and is anxious about himself and his life. He says that he does not enjoy life, that his condition appears to have got worse, he has a loss of concentration, suffers panic attacks and collapsed once at a meeting with the physiotherapist
21. On the subject of prior training and employment it seems that he travelled from Scotland to Sydney when he was approximately 25 years of age. He was initially employed by Polaroid, became a self-employed photographic agent for processing. A partnership in Perth ultimately broke down and the business went into liquidation. He then travelled to Darwin where shortly after he was successful in obtaining employment with Kormilda.
22. Mrs McAllister supports the evidence given by the worker and says that he was previously a very positive person and the man of the house. His mood and personality do not appear to be improving. She describes him as being generally unwell and unable to do normal things such as lifting, carrying, driving and housework. She says she has seen him suffer from panic attacks

on many occasions, they rarely go out now and he has no interaction with other people.

23. Overall, I believe that Mr and Mrs McAllister gave their evidence honestly albeit with a degree of exaggeration which is perhaps not unusual given the litigious atmosphere the long period of incapacity and the dispute with his employer.

MEDICAL EVIDENCE

24. The Workers case was supported by his treating medical team. Dr Wright who has seen Mr McAllister regularly over the years, is an Occupational Physician. He held the view that:

- 24.1 There were injuries to L4/5 and L5/S1 and these can be slow to settle,
- 24.2 That Mr McAllisters condition was not solely due to his physical injury; there were psychological and social forces at work as well,
- 24.3 He was clearly depressed and had no joy in life; if his problems were purely physical then he could probably return to work,
- 24.4 Mr McAllisters panic attacks are not uncommon in a person of his age and circumstances,
- 24.5 His apparent bonhomie is his way of trying to cope with anxiety,
- 24.6 He believed Mr McAllister was genuine and honest in his presentations; that the abnormal responses were explained by psychological and social complications,
- 24.7 That functional restoration and real help by the employer/insurer could lead to a return to work.

25. Dr Fraser, a spinal surgeon, said that his recovery being delayed by a lack of muscle support and a lack of activity. His degenerate disc had been aggravated by the fall. The doctor had noticed behavioural signs during his examination but held the view that these are an expression of the way in which an individual reacts to a condition and whilst there may be a degree of magnification this does not mean that the condition does not exist. He held the view also that Mr McAllister has back pain initiated by the injury on 8 March 1997. Dr Fraser was of the view that Mr McAllister was not totally incapacitated and will be able to carry out part time work of a light nature. The current incapacity he said was related to the fall at work.

26. Ms Ann Thornton, a clinical psychologist, (whose evidence I receive over objection) has been a consultant to the pain unit in Adelaide since 1991. She sees hundreds of patients each year and has been involved with Mr McAllister's treatment since 1999 when he was first referred to the pain unit. In summary her evidence is that he has an underlying disability causing enormous worry. He suffers from anxiety, depression and a panic disorder. It seems that the depression is showing signs of improvement but that the anxiety/panic disorder is a growing concern to her. Ms Thornton says he is highly motivated to return to work and it is possible but his progress in the work environment needs to be carefully structured. Although he has expressed a desire to return to Kormilda this is a long way away and she feels that he would be better placed to seek work closer to home. She says that even then that would be "a very difficult undertaking which will require close psychological supervision and intervention". Ms Thornton believes that Mr McAllister is genuine and that indications of malingering has been misinterpreted by some medical practitioners who have interpreted a positive result to the Waddell signs as being evidence of malingering rather than as an indicator of psychological factors. That view appears to have been reinforced by Dr Fraser who has annexed an article on a reappraisal of

the interpretation of non-organic signs to his report dated 2 February 2001 (W24).

27. The worker also tendered 3 Reports by Dr Blackmore, a psychiatrist who was engaged by Kormilda. His initial diagnosis was that the Worker suffered from a “mental injury, best categorised as an adjustment disorder with anxiety and agoraphobia, a panic disorder”. He said he was substantially handicapped by his emotional condition, which was a reaction to the physical injuries sustained at work. After viewing the films he indicated (without seeing the worker again) that there may be an exaggeration if the extent of his disability. He felt that the worker would improve within 12 months of this litigation being finalised.
28. The respondent’s case on medical issues rests on the evidence of three doctors and two psychologists who tested Mr McAllister for employment and surveyed for labour market information.
29. Mr Baddeley was the initial treating orthopaedic specialist who gave evidence of the early stages of his treatment. He had then formed a view that Mr McAllister had suffered an exacerbation of a pre-existing condition to his spine and that it should resolve in the ordinary course in six to twelve months. Contrary to some comments made by Mr McAllister in his evidence and to other doctors it seems that he was keen for Mr McAllister to be active and to do exercises to strengthen the muscles supporting his back. He formed the view that Mr McAllister did not understand the importance of putting effort into his own recovery. He said in cross-examination that if the symptoms continued now then it does not necessarily mean that the exacerbation has continued. Mr Baddeley has not seen Mr McAllister since the early days of his incapacity.
30. Mr Millons, a surgeon from Macquarie Street Sydney, also gave evidence of what he believed was a pre-existing condition aggravated by the fall (E46). He said also that he thought the symptoms should have “settled” well prior

to the present time. He thought Mr McAllister could resume work as long as it was not of an “excessively heavy nature”. In reaching his conclusions as to Mr McAllisters ability to work the doctor indicated that he had excluded psychological factors which were not in his field of expertise.

31. Dr Awerbuch, a physician, rheumatologist and medical director of the Adelaide Pain Management Unit, gave evidence also for the employer. He held the view that Mr McAllister suffered from no present organic injury and that the clinical presentations were non-organic. He thought that Mr McAllister was fit to resume full time employment back at his old job at Kormilda College. Dr Awerbuch as a director of the pain unit in Adelaide is familiar with cases such as Mr McAllister. He said he was not wholly or partially incapacitated by any organic injury. He undertook on more than one occasion a series of tests to determine his view as to the genuineness of the organic injury. In his report date 3 December 1997 (E32) Mr Awerbuch said;

“Mr McAllister’s clinical presentation was non-organic. In 1980, Waddell and others published a paper entitled “non-organic physical signs in low back pain” (spine 1980;5:117/123)”. These authors described a number of physical signs indicative of non-organic illness. They included superficial and/or non anatomical tenderness, pain reaction to stimulation tests (that is tests that give the patient the impression that a particular examination is being carried out when in fact it is not), the elimination of painful/leg raising on distraction, regional (that is non-anatomical) weaknesses or sensory disturbance and over reaction or other abnormal illness behaviour. The authors considered that a score of 3/5 constituted objective evidence of non-organic illness. Mr McAllister scored 5/5.”

32. Dr Awerbuch stood firm in cross-examination and said that most of the complaints of Mr McAllister were subjective evidence only and that he was not prepared to accept Mr McAllisters version of events. He reached this view because of the clinical examinations, the X-Rays and the non-organic signs. Whilst he acknowledged that organic and non-organic signs can coexist to create incapacity he said that in his entire experience he had never

come across non-organic signs where there was a true organic basis for pain and incapacity. This was even though he accepted that most people with pain have some level of simulated or behavioural signs.

33. In light of the evidence, I am reasonably satisfied that Mr McAllister suffers little physical injury as a result of his fall and this has probably been the case for some time. Such pain and discomfort as has been experienced is more likely to be the result of a lack appropriate exercise and perhaps the complications of other medical conditions recently experienced by him. The real issue seems to me to be whether he has a genuine psychological condition, however described, which inhibits his capacity to work and whether that condition is due to his employment. Having heard all of the evidence (and in this regard I find his treating doctors to be persuasive) and having carefully watched both Mr and Mrs McAllister in the witness box I am satisfied to the requisite degree that he is genuinely incapacitated. The great preponderance of medical evidence including the defendants witnesses accept that there are physical and/or psychological factors limiting Mr McAllisters ability to work. Only Dr Awerbuck says he is fit to resume his pre-accident or full employment. His evidence alone is not persuasive enough to justify a finding that there is no physical incapacity nor genuine psychological factors affecting his ability to earn. In my view it is the combined effect of physical and psychological factors which inhibit work capacity and the evidence of Ms Saunders and the investigators do no more than show his limitations are not severe. It may be that there is an element of causation in the way in which he and his wife were treated by Kormilda after the injury nevertheless it is in my view that on the balance of probability the precipitating event was the fall at work on 8 March 1997.
34. The next question is the matter is past and present degree of incapacity. The worker having established an incapacity in the sense of limited ability to work the onus of establishing the earning capacity of the worker falls to the

employer (see *Northern Cement v Ioasa*, unreported, NTSC, 17 June 1994 at P 11-12).

35. The employer's evidence in this regard tended to focus on the present rather than the whole of the period from 1 December 1997. The evidence relies on the medical statements of Mr Awerbuck who states that Mr McAllister is fit to return to work including his duties at Kormilda. The other medical witnesses for the employer opine merely that they would have expected Mr McAllister to have recovered from his injury within a reasonable period of time and they do not offer any opinion on the question of incapacity arising by virtue of psychological factors.
36. As well the College called Ms Bakjak a psychologist who prepared a vocational assessment and Ms Lock another psychologist who has prepared a labour market research report.
37. The evidence of Ms Bakjak is provided in a fairly comprehensive report (E35). It is fair to say that the report indicates that injuries aside Mr McAllister has the capacity to perform at a superior level by comparison to the balance of the population. The report identifies a number of job areas which are potential fields of employment for Mr McAllister. Some of the potential areas of work such as sales supervisor and retail sales assistants carry with them a good outlook for obtaining employment on a National basis. In her overview however she also points to the potential barriers to employment including:
 - 37.1 no demonstrated sustainable work capacity since 1997,
 - 37.2 currently certified unfit for work,
 - 37.3 physical restrictions resulting from psychological and pain management issues,
 - 37.4 lack of formal qualifications – education or trade qualifications,

- 37.5 lack of key skills (ie. Computer/software applications),
- 37.6 the issue of whether job seeking would need to occur in South Australia or the Northern Territory,
- 37.7 Mr McAllisters age (53 years) maybe seen as a barrier by some employers.
38. She also identifies the need for the preparation for employment including the need for ongoing review and treatment in the “multi-disciplinary” pain management unit and a rehabilitation program aimed at maximising work capacity and participation in relevant work hardening programs. In cross-examination Mr Bakjak confirmed that his relevant experience appears to be limited to photograhics and confirms that there are a number of barriers to his employment. She indicated that he would need to be assessed and certified as fit before any employment could be arranged. She opined that Mr McAllister was not suitable for repetitive type employment – at least that was not her first choice and said that given the identified barriers for employment admitted that it would be difficult to find employment for Mr McAllister but that it might be achievable. She conceded that she was not readily able to identify a particular employment for the for the defendant. She made it clear that her task was to assess employability rather than to take the steps necessary to find actual employment for Mr McAllister.
39. Through Ms Lock the employer introduced a labour market report (E48) identifying job descriptions, personal requirements and outlooks for each occupation. Her evidence consisted of material obtained through a series of databases and she made no enquiries as to actual vacancies in the Northern Territory or South Australia. Ms Lock also identified a number of barriers to employment including:
- 39.1 having been out of work for 5 or more years,

- 39.2 work health history which in part indicated that a placement would be difficult to get without assistance and experience,
 - 39.3 no formal qualifications,
 - 39.4 limited experience in photos, toys and boarding master industries,
 - 39.5 no computer experience,
 - 39.6 his age of 55 years.
40. Ms Lock was also of the opinion that whilst employment was not impossible it would be difficult to arrange and that considerable assistance and support would be needed.
41. Given all the above I am satisfied that Mr McAllister is not presently employable without specific arrangements for him to undertake continuing treatment, training and work placement to allow the work hardening process to increase his capacity. For some inexplicable reason to date the employer/insurer does not appear to have provided this or any support as contemplated by Ms Bakjak or Ms Lock and it is for that reason I suspect he is not presently employed. It may be that with appropriate support in the future the position will be different. The worker has at all times co-operated with treatment and has been certified unfit to work. In the circumstances there has been no failure to mitigate.

NORMAL WEEKLY EARNINGS

42. As indicated above the agreement has been reached between the parties as to the annual salary which converts I am told to \$833.39 per week at the date of injury. The question remains whether or not the agreed values of \$215.00 for accommodation and \$25.00 for meals are to be added to that amount for the purposes of establishing his “normal weekly earnings” within the meaning of the Act.

43. There is little dispute that the principal of *Murwangi Community Aboriginal Corporation v Carroll* [2002] NTCA9 applies to Mr McAllister in that accommodation and meals is appropriately included within the concept of “remuneration”. The employer argues that since both Mr and Mrs McAllister were employed and both entitled to be housed by the College under the usual terms of their employment they were each entitled to fifty percent accommodation benefit. In my view the reality is that it was not a joint entitlement but that each of them were separately entitled to be accommodated. Because of the particular situation where both husband and wife were being employed in the positions of head of boys dormitory and head of girls dormitory they naturally chose to live in one residence. The terms of employment appear to be contained in a “letter of offer of contract” dated 18 December 1996. There is no direct preference to accommodation or the terms upon which it will be offered however the facts are that such accommodation was offered to Mr McAllister and it seems without argument that the same entitlement was available to the head of the girls dormitory. It is appropriate therefore in my view that a full allowance of the value of the accommodation be included in the calculation of normal weekly earnings. Normal weekly earnings I therefore find were \$1073.39.

CONCLUSIONS

44. I note that counsel have advised the court that it not required to make any decision with regards to arrears or medical expenses.
45. For the above reasons I find that:
- 45.1 The worker suffered injury to his back on 8 March 1997,
 - 45.2 The said injury was exacerbated by a further mental injury arising as a result of the initial physical injury,
 - 45.3 Prior to and subsequent to 1 December 1997, the said injury resulted in the worker being incapacitated for work,

45.4 In the absence of specific assistance his earning capacity past and present (at date of Hearing) is nil.

46. There will accordingly be judgement for the worker and I invite submissions from the parties of orders and costs.

Dated this 9th day of July 2003.

Hugh Bradley
CHIEF MAGISTRATE