CITATION:	*Beyan v Serco Sodexho Defence Services Pty Ltd* [2003] NTMC 59
PARTIES:	MOHAMED HAYREDIN BEYAN Worker v SERCO SODEXHO DEFENCE SERVICES PTY LTD Employer
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH ACT
FILE NO(s):	20102540
DELIVERED ON:	1 December 2003
DELIVERED AT:	DARWIN
HEARING DATE(s):	27 & 30 September 2002, 1, 2, 3, 4, 23, 24 & 25 October 2002, 5, 6, 7 & 15 February 2003, 20 March 2003, 8 May 2003 and 8 September 2003.
DECISION OF:	Mr V M LUPPINO SM

CATCHWORDS:

Legal professional privilege – Waiver - Waiver of associated material.

Evidence – Adverse inference to draw from the unexplained failure to call evidence.

Work Health - Notice of Claim – Whether notice was given in accordance with the statutory requirements - Whether subsequent psychiatric injury requires separate Notice of Claim. Validity of Form 5 notice.

Mann v Carnell [1999] 201 CLR 1; *Attorney-General for the Northern Territory v Maurice* [1986] 161 CLR 475; *Jones v Dunkel* (1959) 101 CLR 298; *Collins Radio Constructors v Day* (1998) 143 FLR 425; *Rupe v Beta Frozen Products* [2000] NTSC 71; *Ju Ju Nominees Pty Ltd v Carmichael* (1999) NTSC 20; *Alexander v Gorey* [2002] NTCA 7; *Maddolozzo v Maddick* (1992) 108 FLR 159; *Shorey v PT Ltd* [2003] HCA 27; *Ansett v Van Nieuwmans* (1999) 9 NTLR 125.

Work Health Act ss69(1), 69(3), 80, 82.

REPRESENTATION:

Counsel:

Worker:	Mr M Grant
Respondent:	Mr C McDonald QC

Solicitors:

Worker:	Halfpennys
Employer:	Cridlands

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 59
Number of paragraphs:	222

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

No. 20102540

BETWEEN:

MOHAMED HAYREDIN BEYAN

Worker

AND:

SERCO DODEXO DEFENCE SERVICES PTY LTD

Employer

REASONS FOR DECISION
(Delivered 1 December 2003)

Mr LUPPINO SM

Introduction

1. This matter commenced as an appeal by the above named Mohamed Hayredin Beyan ("the Worker") in relation to the decision of the Employer to cancel benefits pursuant to s69 of the *Work Health Act* ("the Act").

2. The final pleadings before the Court were the Worker's Further Amended Statement of Claim filed 5 September 2002, the Employer's Amended Notice of Defence and Counterclaim, filed in Court with leave on 30 September 2002, and the Worker's Defence to Counterclaim, also filed in Court with leave on 30 September 2002. The Worker seeks an order for reinstatement of his benefits, back payment to the cancellation date (28 December 2000) and payment of medical expenses. The Employer seeks an order that the Worker is not, and has not, since January 2001, been

incapacitated for work and that the Worker has been able to undertake employment on offer from that date.

Preliminary point.

3. At the commencement of the hearing an issue arose in relation to production of documents. The Employer held a number of investigators' reports, some of which included video footage. In all there were five separate videos taken on different dates. The Employer had shown two of those videos to Dr Hardcastle, the specialist who provided the Employer with the certificate for the Form 5 notice subsequently served on the Worker. Those two videos were then provided to the Worker.

4. Mr Grant, counsel for the Worker, applied for an order for production of the remaining videos on the ground that the Employer had waived its right to legal professional privilege over all of the videos. That the videos were otherwise the subject of privilege was not in issue as I understand it. Mr McDonald, counsel for the Employer, opposed the application. After hearing argument I ruled that the Employer was obliged to produce the remaining videos to the Worker and I indicated that I would give reasons at a later time. I now do so.

5. The starting point is that investigators' reports obtained after the commencement of proceedings, being obtained for the purposes of the proceedings are covered by legal professional privilege. They remain discoverable as such but production of same cannot be compelled in ordinary circumstances.

6. It is a recognised principle however that a party can be compelled to produce material otherwise the subject of legal professional privilege. The principle of waiver of the privilege is one such example (see *Mann v Carnell*

[1999] 201 CLR 1 (*"Mann"*) and *Attorney-General for the Northern Territory v Maurice* [1986] 161 CLR 475 (*"Maurice"*).

7. The principle, per the majority of the High Court in *Mann*, is that it is the doing of an act inconsistent with the claim for privilege which results in a waiver of the claim to privilege. Some authorities suggest that this is based on a principle of fairness (*Maurice*). The majority decision in *Mann* however makes it clear that fairness is only one factor to take into account. In that case the majority (Gleeson CJ, Gaudron, Gummow and Callinan JJ, said at p 13:

> "At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that 'waiver' is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which affects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against the lawyer, in which the lawyer's evidence as to advice given to the client will be received.
>
> Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide where the particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect....This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege.... <u>What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large</u>." (Emphasis added).

8. Therefore, fairness is not the overriding principle but is simply a criteria to take into account in determining whether the owner of the privilege has done

or permitted an act inconsistent with the claim for privilege. In *Maurice* Mason and Brennan JJ said at pp 487-488:

> "The limiting effect of legal professional privilege on the availability of evidence otherwise relevant is confined, inter alia, by the doctrine of waiver. A litigant can of course waive his privilege directly through intentionally disclosing protected material. He can also lose that protection through waiver by implication. An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. ....The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication. ... In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject-matter;"

9. Although the statement of the law in *Maurice* needs to be read in light of the succeeding decision in *Mann*, the application of the principle remains the same.

10. In this case the Employer has specifically waived privilege in respect of two of the videos and has other videos in relation to the issue of the Worker's capacity. Those two videos have been produced but not the remainder. The issue is whether partial disclosure can result in waiver of associated material. In *Maurice*, Gibbs CJ concluded that the fairness test should be used when deciding whether there had been waiver of associated material. Mason and Brennan JJ considered the fairness test to be relevant but not necessarily conclusive. Dawson J approved a fairness criterion to be applied in cases of potential associated waiver.

11. I was of the view that in all of the circumstances there would be significant unfairness if the associated material was withheld and on that basis I determined that the Employer is taken to have waived its otherwise rightful claim to legal professional privilege over that material.

Admitted matters.

12. A number of facts were admitted either on the pleadings or in the course of the hearing. Those were:

    1. The employer/employee relationship and the Worker was a PAYG worker.

    2. The injury on 10 May 2000.

    3. That notice of the claim was given for the physical injury sustained on 10 May 2000.

    4. That the claim for the physical injury sustained on 10 May 2000 was accepted by the Employer.

    5. That the Employer cancelled benefits by notice purportedly given pursuant to s69 on 28 December 2000, but not that the notice was valid.

    6. Various periods of incapacity, incidental admissions regarding incapacity and return to work attempts and the like.

    7. The Worker's normal weekly earnings were $592.27.

    8. That as at 15 November 2002, outstanding medical expenses amounted to $3,236.85.

    9. The report of Sean Mahoney dated 16 September 20002, which was tendered into evidence by consent and was marked Exhibit W64.

Background facts.

13. The background facts were largely not in issue. I am prepared to find accordingly. In summary form, those facts are that the Worker is a thirty-two year old man born in Ethiopia. He left that country in 1991 due to various ethnic disturbances and travelled to Kenya where he spent a number of years in refugee camps. There was much cross-examination on events leading up to his departure from Ethiopia and during his time in the refugee camps in Kenya. He migrated to Australia in 1998. He became an Australian citizen in November 2000.

14. The Worker had some work history as a cook and once in Australia, he secured employment in a number of places as a cook leading up to his employment with the Employer at the Darwin RAAF base. The Employer had a contract to provide meals to Defence Department personnel.

15. On or about 10 May 2000, while stationed at the naval base at Larrakeyah, the Worker was tasked to clean out a cool room. During that process he slipped on a mossy substance which had accumulated on the floor of the cool room. The Worker suffered an injury to his back. On his return to work, he was transferred to the Coonawarra Naval Base and suffered a further injury on or about 26 June 2000. He was tasked to move a number of jerry cans containing detergent. The Worker claims that that work aggravated the back injury that he sustained in May of 2000.

16. After the initial injury in May 2000 the Worker had some days off work before taking some pre-arranged leave. After the injury on 26 June 2000 the Worker was certified unfit to work from that date through to a date sometime in August 2000.

17. His claim for compensation was submitted on 24 July 2000 and liability for that claim was accepted on 31 July 2000. On his return to work in August of 2000, the Worker was certified fit for restricted duties and was working four hours per day, five days per week. He claimed to experience some difficulties during the course of that return to work program. It was during that time that the Worker formed the belief that his workmates, who had treated him appropriately until that time, were treating him less favourably as a result of his compensation claim. In my view and I so find, there was no basis for such a perception. By the end of October 2000 the Worker's return to program had been reduced to three days on and two days off per week.

18. The Employer arranged for the Worker to be examined by an orthopaedic surgeon, Dr Phillip Hardcastle in November of 2000. Dr Hardcastle's evidence is summarised below. He provided a report dated 21 November 2000 and on 12 December 2000 he purported to issue a certificate pursuant to s69 of the Act certifying that the Worker had ceased to be incapacitated for work. That certificate formed the basis of the Employer's cancellation of the Worker's benefits by Form 5 Notice dated 28 December 2000. The Worker's appeal to this Court is in relation to that cancellation.

19. The Worker claims to be incapacitated beyond the date of cancellation of benefits. That is disputed. The Worker claims that the physical injury he sustained gave rise to a consequent psychiatric injury which manifested itself in approximately August of 2000. The Worker's case is that his psychiatric condition includes a genuine belief that he continues to suffer pain as a result of the physical injury and that he has an ongoing incapacity by reason of that psychiatric injury.

20. The issues for decision in this case are as follows:-

1. Whether or not the Worker suffered either a psychiatric injury arising out of or in the course of the employment as alleged in the Statement of Claim;

2. Whether the Worker was totally and/or partially incapacitated for work by reason of his back injury and/or his psychiatric injury as at 28 December 2000 and whether such incapacity continued to the date of hearing or some other date;

3. The extent to which any incapacity of the Worker arises from the employment or is an unrelated or pre-existing condition;

4. If it is arises from an unrelated pre-existing condition, then the extent, if any, to which the employment aggravated the condition;

5. Whether or not the Worker made a claim in accordance with the Act in relation to the second injury and the psychiatric injury;

6. If not, then whether the Worker is entitled to maintain his claim in so far as it relates to the psychiatric injury;

7. Whether the Worker has mitigated his loss;

8. Whether or not the Employer validly terminated the Worker's payments by the notice given dated 28 December 2000 purportedly pursuant to s 69 of the Act.

21. The issue referred to in sub–paragraph 5 of the preceding paragraph, insofar as it relates to the injury in June 2000 can be quickly dealt with. There does not appear to be any dispute that any separate written notice was submitted

in relation to that injury. It also appears that the Employer has never really taken issue that a separate incident occurred. Indeed the Employer seems to have accepted that the incident occurred and that the Worker at least then suffered an aggravation of the injury sustained on 10 May 2000. Bearing in mind that the Act does not specifically require that notice be given in writing or for that matter that notice be given by the Worker personally, then there is ample evidence to show that the notice requirements have been complied with.

22. My summary of the evidence and my assessment of witnesses follows.

Evidence of the Worker.

23. The first witness called was the Worker on his own behalf. His evidence spanned a number of days and the evidence of a number of witnesses was interposed in the course of the Worker's evidence. His evidence was given through an interpreter. The usual types of problems when evidence is given through an interpreter were apparent. Clearly some difficulties were experienced where words or concepts did not easily translate from Amhraic, the Worker's native language, into the English language.

24. The Worker identified a statement declared by him on 24 September 2002. That statement became Exhibit W1. There were a number of inconsistencies between the Worker's evidence in Court and the contents of the statement. Some were significant. These are discussed in more detail in the body of these reasons. These inconsistencies contributed to the adverse impression I ultimately formed of the credibility of the Worker.

25. I regularly observed the Worker while he gave evidence. At times he gave the impression that he was physically uncomfortable while giving his evidence. Initially at least I thought that this discomfort was not feigned.

As his evidence proceeded however the extent of the inconsistency in his expressions of discomfort caused me to reassess this. I would not have expected variations between different times (often close in time) on the same day. On one occasion the Worker demonstrated in Court, without any apparent discomfort or apparent disability, the type of reaching motion which he said caused him great discomfort on an earlier occasion. All this led me to query and doubt the claimed level of discomfort. Grimaces which occurred mostly when the Worker was looking at me, yet not when he was concentrating on his answers to questioning, were very unimpressive.

26. I was similarly unimpressed with the extent of what I thought was conscious exaggeration on the part of the Worker. There were some areas in the Worker's evidence where I thought he was obviously exaggerating. For example, when describing the pain he experienced while he was in Melbourne shortly after the first injury, he described it as an unusual pain. He said that he had leg pain, back pain and pain "everywhere". There is no pathological reason for that, nor did I consider it likely to be the case after hearing the medical evidence. Similarly, when he described a bodily sensation where his body felt cold and he felt "almost paralysed". I also thought he was exaggerating when he described the severity of his back pain following his work trial at the Hidden Valley Tavern. He described having very serious pain for two to three months and being very sick. After a short period in that placement, the Worker claimed that his back was the worst it had ever been. He went on to say that he could not cope with any activities. He said that he consulted his doctor (who incidentally was not called to give evidence) who he claims directed him to stop work.

27. There were many instances where the Worker was not responsive in his answers and instead volunteered material which I think he perceived was in his favour. During cross-examination my impressions of the Worker's presentation were reinforced. Although I had some concerns about the

reliability of his evidence up to that time, his presentation was at least acceptable. Thereafter the Worker became evasive in his answers. He regularly failed to actually answer a question. He claimed at various times to misunderstand questions and asked to have questions re-put. Frankly I found some of the times when that request was made to be quite puzzling and lacking genuineness.

28. Furthermore, there were a number of other instances in his evidence that were objectively not credible. For example, his evidence that his pain following work at Coonawarra base was so bad that he could not get up to board the bus to go home, was inconsistent with his claim that as a result, he then flagged a taxi. Obviously he managed to get up to board the taxi. I had trouble believing his claim that he was unable to move for a full two days after that episode. Similarly his claims that he had to lay down for the whole two days and had to sleep facing down. This was particularly as it later transpired that the bulk of the medical evidence and other evidence seriously questioned the claimed severity of his symptoms. It is also inconsistent with such severe pain that he chose not to call his doctor for a day or so after that incident.

29. In his evidence, the Worker described the injury that occurred on 10 May 2000 as discussed above. He said he slipped, skidded and fell down. He said he fell very heavily. He described the motion as skidding forward (by this I assume he means that his feet skidded to the front of him and that he then fell backwards and fell on to his buttocks). He was in very great pain and an ice pack was put on his back. The Worker says that he went to see his own doctor (who was not called to give evidence) who he says prescribed medication and gave him three days off work and a medical certificate to that effect.

30. The end of that three day period coincided with a period when the Worker had some leave booked. He had to travel to Melbourne on 13 May 2000 for the wedding of a friend. He travelled by plane and said that he did not feel well while travelling, nor for the whole time that he was in Melbourne. He described the pain he experienced as an unusual pain but said that it was in his legs, in his back and it was "everywhere". He said he was in Melbourne for two weeks and had to attend for treatment at hospital while in Melbourne. At a later point he said that on his return from Melbourne he continued to have back pain, but it was a pain which he could tolerate and he did so by not thinking about it. I thought this was odd ie. that the pain was tolerable then, given his evidence of pain levels and discomfort while he was in Melbourne.

31. The Worker said that on his return from Melbourne he rang the Employer to ascertain his rostered times and was told by someone that he would be telephoned when required to work. He waited a week and in the absence of a phone call telephoned his Employer again and was told that there was work for him and he attended. He said he was rostered on for two days that week and he worked for that period. He said that he was again rostered on for two days in the following week. He says that during the third week he was told to attend at Coonawarra Naval Base and he attended as required.

32. He then described the further injury which occurred towards the end of June 2000. He said it was on a Monday but he could not recall the date. The circumstances of this further injury is that he was given a job which required him to move twenty litre drums of cleaning materials from one store room to another. He said the cleaning detergents were contained in cartons varying in weight from one to twenty kilograms. He said it took him two to three hours to move those items and he said that at the end of that period his back was painful and bending caused pain. He said he ended up stooped forward 30 degrees off the vertical and that he could not straighten up.

Notwithstanding that, which I thought was odd, he said that he continued to finish the task and then struggled to the bus stop to go home. He then described a feeling that his body felt cold and "almost paralysed", a rather obvious exaggeration. There then occurred the episode where he claimed he could not get up to board the bus and hence he flagged a taxi instead referred to in paragraph 28.

33. He said that the pain got worse, although that is hard to imagine given the symptoms that he described up to that point. He said that he rang his doctor after one or two days. Why he waited that long if his pain was as bad as he suggests is puzzling. He said that his doctor, who I repeat was not called, told him that he had a serious back injury. This is one of the numerous instances where the Worker introduced hearsay concerning the apparent advice given him by his doctor rather than calling that doctor to give evidence. He said that he ultimately made a claim for compensation with help of interpreters and a social worker who attended at his home to help him fill in the form. The claim form lodged was produced and tendered by consent and became Exhibit W5. The Worker identified his signature at various places on the form although he could not specifically recall signing that form.

34. He then says that he was off work for a period of some eight to nine weeks all up. The relevant medical certificate was tendered as Exhibit W6. The Worker said that he gave many medical certificates in to his Employer and he identified W6 as one of those.

35. He said that after his return to work the other employees treated him differently after the first week. He said that their attitude towards him changed. He says he later he came to understand that it was because he was given light duties. He elaborated that the changed attitude amongst his fellow employees involved primarily one lady working in the kitchen. He

described the change in attitude by saying that those employees showed him "bad faces", were generally unco-operative with him and some called him "compo". Later evidence called by the Employer would contradict this claim.

36. He says that his original return to work program was working full time five days a week for the first week. It was then changed to less, he said two or three days per week. Each day involved working six hours per day. He said that the reduction occurred at the suggestion of his doctor. Again I mention that the doctor was not called.

37. He said that the back pain was always there even after his return to work but it became worse after the return to work. The Worker was very vague when describing what his restrictions were or precisely what light duties he was given to do.

38. The Worker gave evidence of his consultation with Dr Hardcastle on 14 November 2000. He said that the attitude of his Employer changed again, presumably for the worse, after Dr Hardcastle submitted his report. The Worker claims that he was given the work of an extra person rather than restricted duties. He said that the work was getting harder. He was still getting "bad faces" from his fellow employees. Later evidence called by the Employer, credible evidence in my view, contradicted this.

39. The Form 5 Notice dated 28 December 2000 was tendered by consent as Exhibit W8. He said he had been working at the time that his benefits were cancelled. He said that after the cancellation there was a change in his rostered hours and that a question mark symbol appeared against his name on the roster. That had never been there before. This also formed part of his perception of less than optimal treatment at the hands of his Employer. The Worker claims to have been told by Mick Flanders on the Monday that a

new person would be starting work and that he (the Worker) could stay at home until called. He said that when he hadn't been called by the Wednesday he rang in, asked the chef to check his roster and the chef told him that he was rostered on and should come in the next day, which he did. When he got there he started working and he then was approached by Fred, (that at least is what I noted that he said but in hindsight I think he must have said Brad, ie., Brad Campbell) his supervisor, who came in to say that he had not expected him to attend. Mr Campbell later gave evidence which contradicted this and I believe him in preference to the Worker. The Worker said that that made him so upset that he then went to Parliament House seeking to be sent back to Kenya as his refugee rights were being violated. He said that this reaction was brought about by the way in which Brad spoke to him, although again his evidence on this point was vague and confusing. He said that Brad spoke to him in a way which gave him despair and that Brad had used very cheap words. Mr Campbell subsequently gave evidence, which I found credible in preference to the Worker, and refuted any such behaviour on his part.

40. The upshot of his attendance at Parliament House was that his general practitioner referred him to Dr McLaren, a psychiatrist, and at some point he was admitted to hospital, presumably to the mental health facility. The Worker said that he had once before experienced an "upset" like one that had occurred that day and that was while he was a refugee. He said that this "upset" was a very serious one and was pushing him to despair. However, he said that from the time of his arrival in Australia until the end of his work with the Employer he had not experienced any psychiatric problems. He said that he had been punctual in both his other employment in Australia as well as with the Employer.

41. The Worker described events concerning a couple of work trials arranged by the Employer. The first was at the Hidden Valley Tavern where he was

meant to trial five days per week working four hours per day. He described the work he was given as of medium intensity, although in Exhibit W1, he has described it as heavy work. He said his back was feeling better and he therefore told his doctor that he could perform the work. He said that the first two days did not present a problem. However, he found the third and fourth days harder and that he couldn't cope by the fifth day and hence he left. He said, I think with a considerable amount of exaggeration, that after the job at the Hidden Valley Tavern that the back was the worst that it had been ever and that he couldn't cope with anything (see paragraph 26 above). He reported this to his doctor and he claims that his doctor then told him to stop work. He described the duration of the pain post that trial as very serious and that he was "very sick" for a period of two to three months afterwards. I thought this was most unlikely especially in light of subsequent credible evidence about the extent and nature of that work and the prior approval of the medical team including his own doctor. That he was untroubled for two days yet he apparently deteriorated sharply over the next three days is also unusual in light of all of that. He was not credible in this claim.

42. He then said that he attempted another work trial arranged through the efforts of a friend, Mick Fox at the Bakhita Centre. Fox was also part of the Worker's support group and he was not called to give evidence either. The work lasted for approximately one month, involved four hours per day five days per week. He described the work as very light. In a confusing response he said that he stopped however because he was "sick" and his back was "harmful". Oddly however this is contrary to what he said in Exhibit W1 where he said that he thought he could have continued with that work.

43. At the time of giving his evidence, he said that his back gave him much pain. He says that he can stand for up to one day but if he does, his back is

very sore the next day. The video evidence casts a significant doubt on this claim. He says that unless it involves work, he can sit for a maximum of one hour before pain sets in. He said that the pain keeps coming, the location of the pain varies but he generally demonstrated the base of the spine when asked to identify the location. He said the intensity of the pain varies.

44. He said that he has been a long distance runner from the time that he was at school. Before the injury he would run at least twice per week. He was a member of the Darwin Runners Club and was also involved in competitions including the City to Surf Run. He said that his physiotherapist suggested that he should try running after the accident in May of 2000, but he said that he had tried it for ten minutes to show the physiotherapist that it was painful.

45. In relation to the two videos that he had viewed before giving evidence (the two videos provided by the Employer prior to my preliminary order), he noted that one shows him carrying two bags, putting one in the boot and one in the back seat of his car. He said the contents were clothes from Kenya and East Timor which he was sending on to Ethiopia. He said both bags only had a small amount and were virtually empty and was therefore very light. I have my doubts about this from what I viewed but in any event I thought that even if that were true, his ability to perform that task without difficulty belied the claimed difficulty in performing his light duties with the Employer and the duties at both Hidden Valley Tavern and Bakhita Centre. In relation to the second video said to have been recorded some time in August or September 2001, he said it was after the five days work at the Hidden Valley Restaurant. He volunteered that he actually saw the surveillance officers filming him.

46. As I said above, my impression of the Worker fell away dramatically during cross-examination. He became evasive in his answers and regularly failed to

actually answer a question. He claimed at various times to misunderstand questions and asked to have questions re-put. I found most of the specific instances to be quite puzzling and lacking genuineness. Also, many of his answers were unresponsive and there were a number of objective difficulties with the answers that he gave in cross-examination. The most significant of these were:-

1. When asked whether he could bend easily in the period post May 2000 he said that bending caused pain. He added that the pain was so intense that he was unable to work and that although he tried to bend, he could not bend normally. He said that bending was very hard to do from the year 2001. He said sometimes he could not bend over to rinse his mouth out when brushing his teeth and claimed he had to spit it out from a standing position. He also confirmed that the pain affected the way that he walked in the period post May 2000. This evidence was very much inconsistent with my own observations of the Worker while in the witness box. Particularly I noted a number of occasions when he bent quickly from his seated position in the witness box down to the ground to pick up a document. A number of times this motion was repeated all within a short time. This was all without any apparent difficulty. His claim was also later to be seen to be very inconsistent with the various motions he was observed to be performing under surveillance.

2. On the separate but related topic of whether he could bend forward after the accident, there were number of curious responses. He said that bending forward brought on pain, and he therefore tried to avoid bending from and after the time that he was shown Dr Hardcastle's report. Again this is inconsistent with my own observations of him referred to in sub-paragraph 46.1 hereof ie., the occasions when he bent from a seated position in the witness chair to pick up something from the floor without any sign of apparent pain or discomfort. The bending evident in the

video taken on 14 November 2000 is also inconsistent. Both inconsistencies remain seriously anomalous.

3. Although there was an apparent difficulty in translation of concepts in relation to the term “restriction”, when asked about his restricted movements he said that his restrictions were that he could not stand or sit as he would like, that he could not walk vigorously, that he could not bend and that he could not bend forward. That again is significantly inconsistent with my observations of his bending whilst seated in the witness chair and his movements on video footage.

4. Mr McDonald attempted to cross-examine the Worker as to his ability to squat during various periods after the accident in May 2000. This was one topic on which I thought the Worker was particularly evasive. He did volunteer at one point during a very extensive discourse that many times while he has been walking he has simply collapsed and people have had to take him home. I was absolutely amazed to hear this coming out in cross-examination for the first time. No mention of this was made in his evidence neither in chief nor in his statement. Nor were the people who assisted him identified or called to give evidence. It is so dramatic that he could not conceivably have forgotten this. I think he is lying. It subsequently transpired that part of the video surveillance of the Worker showed him squatting without any apparent discomfort. I think that explains why it was that securing appropriate responses to questions in this topic was such a long drawn out process. Ultimately he initially said that he was able to squat in the year 2001 but could only do it for a short time, the motion was without pain and that he accommodated this by improvising somehow by favouring his right hand side, a motion which was not entirely made clear. I later observed though that he was seen to squat on his haunches for extended periods in the surveillance video. Those occasions were not, as far as I could see, accompanied by any

signs of discomfort or pain. Furthermore even allowing for the absence of a clear explanation as to how his improvisation enabled him to manage his pain while squatting, I really could not see how somehow supporting one side or the other would make the task any more easier to perform given that, according to Dr Kelly, the same mechanical stresses appear to be involved.

5. At one point the Worker agreed to demonstrate his squatting ability and what movements he utilised. It is certainly a pity that this was not immediately taken up. Shortly thereafter evidence concluded for the day. As it turned out, the Worker claimed on the next day that he had had a particularly painful night, that his back was particularly painful and that he thought it inadvisable to attempt to demonstrate the squat as he had offered to do the previous day. I do not believe his claim of pain and I am of the view that he deliberately thwarted the demonstration for fear that he might compromise himself.

6. There were many evasive and non-responsive replies during questioning in relation to his running. He said he was a fairly good long distance runner, at least before the injuries. He suggested that the only time he has run since the accident was occasionally to avoid missing a bus, when directed to do so by his physiotherapist for a trial and a one off occasion when he was caught in a storm and had to run to shelter. I thought the evidence of running for a bus to be particularly odd. If he experienced the pain he claimed, I query why he would even attempt to run for a bus and suffer the pain he claimed rather than simply wait for another bus. In relation to the running at the direction of his physiotherapist he said the he ran for a period of 10 minutes. I think it is odd that he can maintain running for a period of ten minutes when directed to by his physiotherapist yet makes an issue of running an apparently short distance to avoid missing a bus. I thought his answer, extracted after

some more evasiveness, regarding his best estimate of the number of times he had run at all in the year 2000, was peculiar. If he was truly experiencing the pain he claimed while running, I would have expected greater precision in his evidence of the occasions that he has run at all. When pressed, his response that in his estimation he has not run or that he was not sure whether he had run was simply not credible in my view. It seemed to me to be a very guarded and cautious response. Added to that were his rather vague and imprecise reasons as to why he was not sure. As I said, if his pain was as bad as he suggested, I would expect that the occasions would have been absolutely minimal and that he would have therefore recalled those occasions.

7. The Worker gave some confusing evidence as to which hand or arm movements caused pain. Paradoxically while giving this evidence and when it became clear that he was not explaining himself well, he actually demonstrated in Court the actual movements which apparently caused pain. Again, he showed no sign of discomfort or pain at all.

8. The Worker obviously had a very traumatic background. Apart from the civil unrest in his country, his father (and possibly also his mother) and two of his siblings were murdered, his home was burnt to the ground, he was forced into National Service, he fled the National Service and escaped to Kenya, he then spent time in refugee camps in Kenya, there suffering separation from his girlfriend and an attempt on his life culminating in the destruction of his home and all his possessions. That is clearly a very traumatic background. The Worker however attempted to play down the impact of this background. He certainly placed a different emphasis on these traumatic type problems in Exhibit W1. He resisted the suggestion that he was heartbroken when his girlfriend left the refugee camps and was repatriated to Canada. He must have been shattered and his suggestions to the contrary are not plausible. Likewise

he resisted the suggestion that he had emotional and mental breakdown following the loss of all his possessions in the fire while in the refugee camps. I was very suspicious of his very imprecise and vague responses to questions as to whether he had been referred to a psychiatric hospital. Claims that he was not sure or he did not remember lacked credibility. It is not the sort of topic which one could readily mistake or forget. There were subsequently times when he admitted attending at a psychiatric hospital but playing down the purpose of that suggesting at one point that it was a routine examination or for accommodation purposes. I thought it very unlikely that persons in refugee camps would routinely be taken from the refugee camps to Nairobi to attend a psychiatric hospital for routine purposes.

9. This was highlighted by his refusal to make any concessions in relation to documents given to him by Medicin Sans Frontiers ("MSF"), an association of medical personnel allied to the United Nations. Copies of the documents had been subpoenaed. At one point he said that he had the originals of those and others at his home. At another point he suggested that he had given these to Dr Forrest, his then general practitioner, (who was also not called and clearly could have offered some very useful evidence about those documents, their relevance and contemporaneous events). Notwithstanding that, he stubbornly refused to concede he had psychiatric treatment or suffered a psychiatric condition. The credible psychiatric evidence establishes this. He conceded that he was placed in the UN compound in one of the camps, originally denying that it was for his protection and originally claiming it was because he was then working for MSF. He later conceded that it was at least partly due to the fact that he did not feel safe in the camp. At another time he conceded that a psychiatrist was "helping him to relax". This suggests multiple treatments and suggests a position very much inconsistent to his refusal to concede mental or emotional problems. Answers such as "refugees

have mental agony" were I think an evasive and guarded response to the question as to whether he was treated for stress after his house was burnt to the ground. I remind myself that he conceded that the arsonists had also barricaded him into the house in a way which suggested they were attempting to also kill him. To suggest that this is stress of the same type as suffered by all refugees is simply minimising the position unrealistically.

10. The Worker confirmed he was interviewed by a Worker with UNHCR in relation to his application for refugee status and a number of things were put to the Worker that he had told that person. Amongst those were that arsonists had set his house and photographic business alight, that those arsonists had barricaded him in the house at the time, and that nearby people rescued him from the burning house. This time he conceded the truth of that. Other concessions that he made was that he was persecuted for changing religion to Christianity, that a group of Somalis had seriously assaulted him with an iron pole, that on two other occasions people had threatened his life if he did not reject Christianity. These are all traumatic events in my view.

11. I was particularly unimpressed with his claim, in relation to his application for refugee status (Exhibit W16) that there was no adequate communication between him and the person who translated the document for him. The Worker said that the person translating completed most of the document without reference to him. Having examined the document and the detailed information it contained, unless the person translating was a very close friend of the Worker and aware of the Worker's background, the majority of the information could only possibly have come from the Worker. Questions such as his marital status, background regarding parents and siblings, details of his education etc could only come from the Worker unless the person translating was as I said person

who knew his background sufficiently well. Similarly answers to questions such as the Worker's links to Australia, whether he had any convictions, whether he had been deported and the like were all apparently correctly answered which makes it inconceivable that he was not the source of the information. Even when he was asked whether the answer to a particular question in the application for refugee status, (number 78) was correct, in his by then very typical non-responsive way, although conceding the answer was correct, he would not admit giving that answer. He said instead, presumably maintaining the suggestion the translator completed that part of form without reference to him, that had he been asked the question the answer as recorded would have been the answer he would have given. This highlighted the extreme lengths the Worker went to avoid making what I think would have been an obvious concession.

12. The Worker would not even concede that it was necessary for him to tell the truth in the application. He was very evasive when this question was asked and I had to specifically direct him to answer. When blankly asked whether or not he told the truth when completing the application for refugee status, after an initial long drawn out, non-responsive reply, ultimately he said, much to my surprise, that he could not say which answers on the form contained the truth.

13. Much questioning occurred in relation to the Worker's attempt to sponsor his sister, her husband and one of his friends from Ethiopia to live in Australia. Although the Worker conceded that it was a dream of his for this to occur, I thought he was unconvincing in refusing to acknowledge that he was devastated when that application was rejected. His response that he was somehow prepared for it because he knew there was no certainty that the application would be granted and secondly that he could appeal against the rejection was lacking in credibility in my

view. Anyone in that position would be pessimistic after falling short at the first hurdle whether they had a right of appeal or not. The timing of that event is also noteworthy in my view.

14. I thought the Worker was also unconvincing when he claimed he could not remember whether he told Dr Forrest of a family history of psychiatric disorder. Similarly he claims that had he been asked by Dr Forrest in relation to a past medical history of depression and psychosis that he would have given him that history. This is in itself inconsistent with his claim of lack of a psychiatric problem in his history or background. He claims however that he only ever recalls discussing a gastric problem and a migraine with Dr Forrest. Given that Dr Forrest was given the two MSF documents (Exhibits W13 and W14), this is unlikely to say the least. Later the Worker again claimed the lack of recall when asked whether Dr Forrest discussed with him, in December of 1998, the possibility of a referral to a psychiatrist. Similarly when this was discussed with the Torture And Trauma Centre. On the other hand however he can, apparently without trouble, remember discussing minor problems such as gastric problems, migraine and loss of appetite. There is a suspicious pattern to what he claims he cannot recall compared to what he can.

15. He was very evasive when answering questions about whether he discussed his problems with doctors in Kenya particularly as to whether he was placed on medication. He was not responsive to a question as to whether he was actually put on anti-depressant medication and when reput he answered that he did not recall any anti-depressant medication. Given all of my concerns about his evidence overall I thought this was a rather convenient way out for him and I was suspicious of this claimed lack of recall given his evasiveness to the question as originally put.

16. The Worker was very evasive as to the purpose that the documents from MSF were obtained. Specifically it was put to him that the purpose of the documents was to be used if he needed to refer to doctors or counsellors for treatment in Australia. He refused to concede this yet it appears that amongst the first thing he did with those documents after arriving in Australia was to give the documents to doctors. Subsequently he explained that he had a stomach condition and it was for that purpose that he required that documents. Clearly however those documents go beyond stomach problems. Again his credibility is seriously questioned. Thereafter and despite claiming the documents were obtained for the purposes of a stomach problem, the Worker claimed that he gave the documents to the Torture And Trauma Centre. He said this was to convince them of the troubles that he experienced in the camps. Why this should be necessary was not explained. That his responses are inconsistent however is obvious. When it was put to him that the documents refer to severe mental problems he denied that he had any serious medical problems. He added that if he had, he would not have been able to come to Australia as a refugee. When it was specifically put to him that his condition was severe enough to develop auditory and visual hallucinations, after initially refusing to answer, he agreed that he may have had a visual illusion but said that it was as a consequence of the anti-malaria medication. I was unimpressed by this answer and found it very suspicious and convenient that this answer followed such obvious evasiveness. In some very unconvincing evidence which followed, the Worker elaborated that he obtained that medication on the black market and not through doctors, suggesting that the possible poor quality was the reason for his hallucinations. I thought this to be unconvincing. I was suspicious of the fact that some concession was only made when he was directed to answer and yet he then seemed to concede the existence of hallucinations but attempted to rationalise them and to find an excuse for why they occurred.

17. He was questioned about his relationship with his fellow employees subsequent to his injuries and in particular whether he began to avoid people. Specifically it was put that he stop talking to Kathleen Parkhill without giving any reason. He said that he did start avoiding her but it was because she started making comments about him particularly that she called him "compo". This answer is inconsistent with his evidence in chief when he said it was Sarah who called him "compo". In his evidence in chief he suggested it was only Sarah. He specifically said in cross-examination that no-one else ie. other than Kathleen Parkhill called him "compo". That in itself is also inconsistent with Exhibit W1 where he says, at page 8, that "other people" also called him by that name and said that he was lazy. Evidence later called by the Employer from a number of the Worker's former work colleagues contradicts this. It is evidence I am prepared to accept. The Worker therefore must be lying about this and could not simply be mistaken. It cannot possibly be the result of the psychiatric illness claimed as it is one of the matters taken into account to diagnose that condition and therefore logically must precede it. A deliberate lie translates to conscious feigning and most importantly, seriously questions the genuineness of the psychiatric illness as claimed. That of course translates to a detrimental view of the opinions of Dr McLaren, Dr Kenny and Dr Burrows who accepted the truth of the history given them by the Worker.

18. The Worker was also questioned about his relationship with Brad Campbell. The Worker's evidence was that it was Brad Campbell who was against him and was trying to make him leave. It turned out and the Worker conceded that Brad Campbell was his supervisor for the purposes of a food and safety handling course that he undertook while at Serco. He confirmed that Brad Campbell gave him a very high performance assessment on 1 September 2000. This would seem to cut across his claim that Mr Campbell was attempting to force him to leave.

It is at least inconsistent with that as Mr Campbell, if that were his intent, would more likely have given him a poor assessment. I thought the Worker's answer to the suggestion that Brad Campbell was very complimentary to him for his performance in the lead up to the certificate was extraordinary. After initially failing to answer it and having the question re-put, the Worker said that Campbell had to give him a good certificate because he deserved it. He said he therefore did not admire Mr Campbell for giving him the certificate.

19. When questioning turned to the Worker's disabilities particularly in relation to exercise and activity, the answers he gave were inconsistent with what is his apparent ability as observed on the videos. He was particularly asked about his level of pain on 14 November 2000. This was the day that he was seen by Dr Hardcastle. He described his pain at seventy to eighty percent but claimed that he was tolerating it. The video subsequently showed no signs of discomfort at all.

20. When questioned in relation to variations in his level of pain the Worker confirmed his pain levels vary from day to day and sometimes that they vary during the day. That answer was not entirely unexpected but of course it presents significant difficulty when attempting to co-relate that to objective evidence of his disability, particularly the video. It became interesting later when the video was viewed and during all the occasions that the Worker was observed, and sometimes for extended periods, he was seen walking, getting in and out of his car, driving his car talking to people etc. At no time did he show any apparent discomfort. It is too much of a coincidence to assume that on all the days that he was observed that they were all good days in terms of his pain levels. Similarly in relation to his so-called depressed mood, he is seen on a number of occasions to be interacting with people, conversing for extended periods, smiling as normal and generally appearing happy.

21. During cross-examination on the topic of the Worker's discussions with the Torture And Trauma Centre, it was put to him that he told them that his back was improving. Dr Ding considered this relevant in determining that the Worker had no psychiatric illness and no incapacity for work. He conceded that he could have said that although he qualified that by saying that he had received a big moral boost. He did not elaborate on this and his failure to properly respond to subsequent questions led me to the conclusion that he was attempting to retreat from the concession that he made.

22. There then followed what I thought was an obvious example of the Worker being evasive or defensive. It was put to him that at one point he turned on Dr Chin and called him "another insurance doctor". Again he did not directly answer this saying instead that on the second occasion when he saw Dr Chin that Dr Chin was in a bad mood and was completely different towards him. His rambling went further and he somehow suggested that the whole episode had something to do with whether Dr Chin was to charge him as a medicare patient or as a private insurance patient. I thought this was an extraordinary thing to say. He would not even concede that he had been referred to Dr Chin by his own doctor. He said that Dr Chin was OK to him on the first occasion but not the second. All this becomes quite significant in terms of inferences to be drawn from the failure to call Dr Chin. Similarly in relation to Dr Sharland. When questioned about his referral by his own doctor to Dr Sharland at Royal Darwin Hospital, he was not responsive to the question but volunteered, with some force, that the way Dr Sharland treated him made him angry. He claimed to have been upset by Dr Sharland telling him that he could not operate on him. Why this should accept him when no other doctor has suggested surgical intervention is puzzling. He claimed that he did not know what else Dr Sharland said to him because he had upset him. I thought he was deliberately lying. These

episodes make me extremely suspicious of the failure of the Worker to call various doctors as part of his case. I have some concerns about the number of doctors he attended at different times and of the occasions where he apparently reacts against doctors.

23. During questioning on the return to work trial at the Bakhita Centre it was put to the Worker that the work was very gentle. The Worker agreed that it was low level work but he claimed that the work was too much for him. Despite this he says that he lasted there four months, although there seems to be some doubt as to whether that is correct. Interestingly in Exhibit W1, he also refers to a four month period. The comment is entirely inconsistent with his claim in Exhibit W1 that he could do the work but only stopped because the insurer refused to continue the program. This is irreconcilably inconsistent with the answers he gave in cross-examination on this point. Interestingly he was also asked whether he made any attempts himself to secure suitable employment after finishing at Bakhita. Again, and again contradicting what he said in Exhibit W1, he said that he made no such attempts because he knew that the work at Bakhita was very light, that he knew that he could not do it and therefore knew that he would not be able to find suitable work. Further questioning lead to another inconsistent answer in any event where the Worker said that he had been looking around for work. This was immediately after it had been put to him that he had not looked at all. He gave the rather feeble response that it was his caseworker's responsibility and that he had asked his caseworker for work but had heard nothing from him.

24. He was also questioned regarding an apparent attempt to do voluntary work for Greening Australia in September 2002. The Worker agreed that he could only work one day and gave three reasons. Firstly, he had to travel long hours by bus and take two buses. Why he had to or the

significance of that was not explained and I think that part of the answer is meaningless. Secondly, he claims that he got a skin reaction from the plants. This is not confirmed by any medical evidence and in any event it is odd given that one of the videos shows him gardening for a period. Thirdly, and most relevantly, he said that all of the work required bending and he could not continuously bend. He then went further and said that he could not sit on the ground as it was wet and could not squat to avoid sitting on the wet ground. Despite these claims, video showed him doing some gardening and which appeared to contradict his claimed inability to bend. The relevant video was taken in August 2002 and is therefore contemporaneous with the time enquired of. Mr McDonald again took the opportunity to try and extract answers from him as to his ability to squat and again failed. In answer to the question as to whether he is now able to bend, his answer was that he could bend once or twice but not multiple times. That still remains inconsistent with his apparently true capability as shown in the various videos.

47. The video surveillance evidence was an important part of the Employer's case. Various video recordings of the Worker were put into evidence. Much time in cross-examination concerned the various videos. During this, the Worker continued his non-responsive and evasive answers. He resisted answering questions that suggested that the video surveillance showed him walking without any apparent restriction or discomfort. That was self evident in my view. I thought the video surveillance showing him bending and lifting suitcases to be particularly significant. That evidence clearly shows that the actions he performed were inconsistent with his claimed physical incapacity. Yet the Worker attempted to rationalise it, largely by non-responsive answers. For example he said that he did not consider his actions as a “bend”. However the video clearly showed an extensive bend. His attempt to play down the weight of the suitcase likewise was unimpressive.

48. Video recordings which were subsequently tendered as Exhibit W22 showed the Worker on 1 May 2001. It showed the Worker in a number of situations including driving his car, walking, seated while consuming a meal, walking briskly and bending over for extended periods while checking the progress of the refuelling of his vehicle. All these indicated free flowing movements without any apparent pain, discomfort or restriction of movement. He resisted for a long period the suggestion that the various videos showed him walking without any difficulty. He would not concede that what the video showed was a normal walk. He questioned the meaning of "normal" in this context. I on the other hand believe that what is shown in the video speaks for itself. The refusal to concede what I consider to be obvious, notwithstanding that it would detrimentally affect the Worker's case, does nothing to improve the Worker's credibility in my view.

49. A summary of the video evidence follows. Firstly the two videos which were tendered as Exhibits W20 and W21. These show:-

    1. On 25 October 2000 the Worker is seen to get out of a car, walk around then get back into the car without any apparent discomfort or restrictions.

    2. On 26 October 2000 the Worker is seen to be walking along with a female, he is seen to turn his head to look backwards and he is seen to chat with a male person for an extended period. At all times he shows no apparent signs of discomfort or restriction of movement.

    3. On 27 October 2000 the Worker is again seen walking. Later he is in his car reversing and looking back fully over both shoulders. Again there are no apparent signs of discomfort.

4. On 31 October 2000 he is observed over an extended period in a large variety of situations such as walking, driving getting in and out of his car, seated, sitting down and getting up. All of the foregoing movements are made without any apparent signs of discomfort. He is also observed at a public swimming pool. He is seen to bend forward. He enters the pool by climbing down the stairs. He is seen sitting on the edge of the pool and lowering himself into the water. He is also seen propping himself backwards and out of the pool to sit on the edge, then to perform that motion in reverse to prop himself in with a slight jump. After he exists the pool he picks up his towel and clothes and walks off, again without any apparent restriction.

5. On 2 November 2000 the Worker is seen walking and climbing a step. His motions seem rigid. Later on the same day he is observed again walking this time with no apparent restriction of movement.

6. On 4 November 2000 the Worker is seen sitting in his parked car. He subsequently gets out without any apparent difficulty. He is seen walking off, looking back over his right shoulder. Although he is seen walking along slowly there are no apparent signs of restriction or discomfort.

7. On 9 November 2000 the Worker is observed going to his car, getting in and driving off. Later he is seen parking his car and later again walking briskly into an office building. Again no apparent signs of restriction or discomfort are evident.

8. On 14 November 2000 the Worker is seen walking normally along Cavenagh Street. He enters Carpentaria House. A short time afterwards he is seen walking back to his car and again his walk appears normal. On arrival at his car he is seen to bend for an extended period and reach into

the back seat of his vehicle without any apparent discomfort. He is then seen getting in the car and driving off. A short time later he is seen walking along the street with two females. He opens the boot and puts a suitcase in during the course of which he bends over into the boot to position the suitcase. He carries another suitcase to the back seat and he performs an off centre lift to put that into the back seat. No sign of restriction, pain or discomfort is evident. He then gets in and drives off. He is then next observed outside an apartment complex, again with the two females. He is observed to reach into the back seat to lift out the luggage. He wheels the luggage. He is observed to lift the luggage when it stumbles. This lift is again off centre and while reaching slightly behind himself and to the right. He then gets in and drives off. At no time does he show any sign of discomfort. This is the day that he saw Dr Hardcastle and I bear in mind the Worker's claims as to his level of pain and discomfort on that day.

9. On 24 April 2001 the Worker is observed walking into the magistrate's court building, apparently without restriction. A short time later he is observed chatting with a female person. He appears to know the female well and seems to be interacting very normally. He is then seen walking carrying a folder. He walks the distance from the court house to the Darwin City Council car park where he is observed getting into his car backing out and driving off. Again he is not observed to have any sign of discomfort, restriction or pain.

10. On 26 April 2001 the Worker is briefly observed walking with a bag over his left shoulder again exhibiting no sign of discomfort, pain or restriction.

11. On 27 April 2001 the Worker is again seen walking with the bag over his left shoulder. He is subsequently seen walking entering a doctor's

rooms. Later that day he is observed walking normally in Casuarina Shopping Centre and is observed chatting to a person for an extended period.

12. On 30 April 2001 the Worker is again observed walking, apparently normally, with a bag over his shoulder. Later that day he is observed going to his car. There is a prolonged bend forward while he puts something in, he then gets in backs out and drives off, all with no signs of discomfort. Later that day he is observed in the car park at Casuarina Shopping Centre looking at a car. He then walks up the ramp escalator. A short time later he is seen walking back with a friend. He is seen opening the boot which then obstructs the view of him. Some time later he is observed removing the jack from the boot of his vehicle. He then bends right down and looks underneath the vehicle and he squats while positioning the jack under the vehicle. Immediately thereafter he is observed to get up quickly to bend over to get the wheel brace, to bend over again to position the wheel brace. He has shown no signs of discomfort at all in this manoeuvre. He then appears to put his left foot on the wheel brace and pauses. He then bends again. He then puts the jack away closes the boot and walks back into the centre. Approximately 15 minutes later he is seen walking back to the direction of the car with another person. The Worker is seen opening the boot. The helper is seen undoing the wheel nuts. The Worker again brings out the jack, squats down and places the jack in position. The Worker then goes out of view. The helper continues to remove the wheel nuts and jacks up the car. The Worker is next seen wheeling a tyre. He must have removed that from the boot which necessarily must have involved a lift of a relatively heavy item. He is bent over as he wheels the tyre around. He remains bent over while propping up the tyre. Both he and the helper are then seen to go to the boot and the Worker is seen again to be bending into the boot. There appears to be some problem with the tyre and both the Worker and his

helper stand around talking and looking at the tyre. The Worker is also seen putting both hands up to his head (involving a stretch action) bending down, squatting and getting up. The helper puts the tyre away and the Worker bends over and appears to repack the boot. He bends over twice and both times right down to ground level with no apparent signs of discomfort. The Worker is then seen to be exiting the shopping centre carrying a wheel rim. He bends and squats to put the wheel rim on the ground. He unpacks the items again from the boot. He is observed to bend and stay bent for a period of approximately 20 seconds. He picks up the rim with his left hand and puts it into the boot. The helper changes the tyre and the Worker then repacks the items into the boot. In doing so he bends twice more, quite easily and without any signs of restriction. The Worker then squats to check the new tyre then gets in and drives off. He is next seen at a tyre shop. His stance appears slightly abnormal. He is seen to get into his car, back out and drive off. He is seen to drive into a service bay where he gets out and in again to inch his vehicle forward. He then gets out and he is seen squatting by the rear right wheel and apparently checking the tyre pressure. He is then out of view for a little while, presumably while he checks the right front tyre, the view of which is obstructed by a parked vehicle. He is then seen pulling the hose around to the left side of the vehicle. The hose apparently does not reach and he gets in and edges the car forward. He is then seen again squatting right down by the rear left tyre for a long period. He then apparently calls for help and he is seen squatting down with the helper. His squat is right down on his haunches. He then gets back into the car and drives off.

50. Video footage taken at various times between 30 August 2001 and 6 September 2001, which were tendered as Exhibit W43, show:-

1. On 30 August 2001 the Worker is seen stretching and squatting, supporting himself using a guard rail, walking with a stoop, walking slowly and getting into a car very gingerly. He is then shown exiting from the car, stopping to bend slightly and walking off in a stooped fashion. He is then shown in Casuarina Shopping Centre where he is seen to walk with a distinctive hobble. He is then observed in the cold foods section of one of the supermarkets where he is shown to lean forward with a bent back and pick up a two litre carton of milk.

2. On 5 September 2001 he is shown bending and reaching into the boot of a car. He seems restricted and he has an odd stilted and gingerly walk.

3. On 6 September 2001 he is observed taking a bus and exiting at Casuarina Shopping Centre. He is then observed sitting on the ground on the footpath with his knees up almost to his chest whereupon he squats up using the fence that he is leaning on to pull himself up. This time he walks away with what appears to be a normal walk. Later that day he is seen walking along a park area with a reasonably quick gait but again with a stilted walk. He is later seen sitting on a park bench with his head down and as he gets up he grimaces and walks off gingerly. Later he is seen squatting and holding that squat for a short time then he rises with a straight back and walks off with a slow stilted walk. Later he is seen again walking with a hobble this time now with his hands on his hips but with a slightly brisker pace.

51. Video taken of the Worker on the 28 and 29 August 2002 which was tendered as Exhibit W45, shows:-

1. On 28 August 2002 the Worker is seen standing holding his back, he then squats down and it appears that he sits on the ground and then gets up rather quickly

2. He is subsequently seen to squat beside a bush apparently doing some gardening such as picking up leaves and other refuse. He is seen sidling from one plant to another in the squatting position, continuing this task. This continues for approximately sixteen minutes. He is then seen getting up and carrying the refuse and he appears to be walking with a normal gait. There was none of the stoop or hobble evident in Exhibit W43.

3. Later on the same day he is seen walking around normally. Again he squats down and does more gardening and on one occasion he is observed getting up quickly and easily.

4. A short time later, he stands up holding his back with both arms. He is then seen to bend down and continue to work at ground level. Approximately five minutes later, he is seen to get up gingerly this time holding his back.

5. On 29 August 2002 he is seen walking gingerly with a pronounced hobble.

6. Later that day, he is seen squatting and again he appears to be undertaking some gardening tasks. He then stands with both hands on his back but then squats down apparently easily although he grimaces immediately before squatting.

7. Approximately five minutes later he is seen squatting and apparently laughing with someone else although the other person cannot be seen. He is seen rocking backward and forward on his haunches.

52. The Worker confirmed that the videos depict him on the stated days. The Worker resisted the suggestion that he was aware of the presence of people

filming him and that he modified his behaviour accordingly. Yet he had previously claimed to have observed persons filming him. However I discerned an apparent change in behaviour. The Worker maintained that he did not change his posture at any time on any day.

53. In re-examination firstly in relation to his visa application documents, he produced what he says was his copy of his visa application that he was given. This has some alterations in different handwriting compared to the actual application submitted. He could not offer any explanation for that and simply produced the inconsistent copy. He was not asked to, nor did he identify the handwriting. He said that he did not see anyone make the change.

54. The Worker was taken through a number of the questions and answers he gave in cross-examination regarding the visa application. Particularly he was asked whether he understood the question that sought information about serious diseases. His answers in cross-examination had showed a level of understanding of what the question was about. He went on to say that at the time, i.e., during the cross-examination, that he didn't understand the question but now understands it. That question followed a question in cross-examination where he gave a rather lame explanation for why he omitted malaria as a disease in answer to the question in the form. That explanation was that to him, malaria is as insignificant as a cold is in Australia and therefore did not think to put it in. That is a most convenient answer and one I have grave suspicions about. I note that it is a convenient rationalisation for omitting a matter which may otherwise have been thought to have had a detrimental effect on the success of the application.

55. There was also re-examination in relation to his mental state. The Worker maintained that he did not have a mental illness while in Kenya contrary to the indications in the MSF documents. Despite I think conceding a number

of very traumatic events including while living in the refugee camp, he maintains that although he went to the Mathari Hospital, he only went there for the purposes of obtaining medicine for his gastric condition.

56. Similarly in relation to his attendance at the Coptic Clinic. His answer that people were accommodated there temporarily while being resettled when they had nowhere else to stay appears to me to be extremely unlikely. It is unlikely that hospital resources would be used for refugee accommodation purposes only. The Worker however was quite insistent that that was the case.

57. When re-examined in relation to cross-examination of his apparent anger when Dr Myerscough informed him of the contents of Dr Hardcastle's report, he qualified that by saying that it was not anger but that it was sadness about the prospects of an ongoing future disability prohibiting him from work. This backtracks on the answer he gave in cross-examination. The question in cross-examination was put and answered through the interpreter and I am thoroughly unimpressed by the Worker's attempt to qualify that answer.

58. Most of the re-examination in relation to other matters was largely uncontroversial. He did say however that in relation to the video footage taken of him with the flat tyre in the Casuarina shopping centre that he had been able to change a tyre before his injury, but he tried it on this occasion, felt pain and couldn't do it. Accordingly he arranged to pay to have the tyre changed. I accept that the cost thereby incurred was a significant expenditure for the Worker having regard to his limited income.

Evidence of Dr James Burrows, Neurologist.

59. Dr Burrows was one of only three medical witnesses called on behalf of the Worker. He is a neurologist and has been practising solely as a neurologist since 1989. He had prepared two brief reports in relation to the matter dated 12 June 2002 (being a report to the Worker's general practitioner) and a medico-legal report dated 16 September 2002. These two documents were received in evidence as Exhibits W10 and W11 respectively.

60. Dr Burrows first became involved with the Worker on his admission to Royal Darwin Hospital on 29 November 2001. The only other time he saw him was on 12 June 2002. He is one of the Worker's treating doctors. He expressed the view that he considers that the Worker does suffer pain and that it is continuing. He said that this opinion is based on both the history given to him by the Worker and physical examination. Much therefore depends on the credibility of the Worker in terms of whether Dr Burrows' evidence and opinions are to be accepted. He particularly relied on wasting of the foot muscle as well as the report of pain through the back of the leg and foot. That muscle is related to the L4-5 area of the spine. He said this is consistent with some sort of effect on the S1 nerve root. He diagnosed some form of mechanical instability of the facet joints or bony structures and/or possibly some nerve twig irritation at the L4-5 level. He said he thought there was protrusion of disc material on to the nerve roots. He said that he subsequently noticed the Worker's ankle reflex was depressed in his left foot as opposed to his right. He said that this is also consistent with an S1 nerve root injury. This is the "jerk" referred to in paragraph 3 of Exhibit W10. He said that this "jerk" is impossible to feign. He said that he could not specifically say where the pain came from. He said that the "jerk" indicates a pain somewhere along the sciatic nerve. However, he said that the point where the nerve exits the spine is the most common location.

61. He was asked what the relevance was of radiology which showed nothing relevant to support the injury. He disagreed with that proposition at the

start and said that it showed at least an annular tear. He said that just because the radiology showed nothing wrong did not mean that there is no injury. He expressed the opinion that a number of people with pain don't show anything at all on radiology. He said that radiology was not sophisticated enough to show all injury. Particularly he said that the nerve root branches are the size of a piece of cotton thread and an irritation on those cannot be seen on radiology. He expressed the view that what has occurred in the Worker's case is an annular tear from the fall followed by protrusion of disc material resulting in pain which is aggravated by movement.

62. By way of prognosis he said that the Worker's chances of recovery are slight. He says that any mechanical stress to the site of the pain will aggravate the pain. This includes bending, walking or lifting. As such, he considers that the Worker is unable to perform any physical work. He was unable to comment much on the various videos of the Worker showing the Worker bending, walking and lifting as he only bothered to view a small part of it and then mostly in fast motion. This is despite that it could significantly impact on his opinion and despite his significant reliance on the truth of the history given him by the Worker. He would not concede that the Workers' condition might have resulted from pre-existing degenerative change and confirmed his view that the annular tear resulted from the fall and was not pre-existing. He said that it was significant that the Worker was asymptomatic before the injury in May of 2000. Finally he said that annular tears do not heal well and therefore that condition is consistent with ongoing pain. These views were later to be contradicted by the various medical witnesses called by the Employer.

63. In cross-examination he conceded that some 20%-30% of the population over the age of 30 have degenerative changes without any trauma having occurred. In terms of diagnostic tests, he refused to concede that the fact

that the MRI showed no nerve root impingement ruled out the existence of that impingement. He said MRI does not show all impingements and he relied on the muscle wastage which is an indicator of impingement.

64. He was asked whether he had seen and considered reports from Dr Kelly, Dr Hardcastle, Mr Haig, Ms Schirmer and various videos taken of the Worker. He initially said that he had "briefly" read the reports of Dr Kelly and Ms Schirmer. He said that he had also "briefly" considered the reports of Dr Hardcastle and Mr Haig. He later explained that that consideration was when he discussed those reports "briefly" with Mr Grant before giving evidence. He also said that he had viewed parts of one of the videos (the video covering the period of August and September 2000) that morning, saying that he saw most of it "in fast motion with selected bits". He does not appear to have gone to a lot of trouble in preparation for his giving evidence. It was therefore futile to seek his comments on the views of those doctors. I was frankly surprised that he took that approach especially since he confirmed that his opinion was based in a significant part on the history he took. Given the depth of material in those reports and in the videos that would have given him cause to question the accuracy of the history he was given, the position he has taken is quite remarkable. It gives me reason to doubt his objectivity. Likewise he was asked whether he had arranged a functional evaluation of the Worker and indicated that he did not as he accepted the Worker's history at face value. This further led me to question his objectivity given his role as an expert witness and the duty to the Court that that role engenders. Whereas clinically he may be entitled to accept the history a patient gives him at face value, his role as an expert witness is to assist the Court and his lack of objectivity is a serious impediment to that role.

65. I have significant concerns about Dr Burrows' evidence. He has relied significantly, albeit not exclusively, on the veracity of the Worker. That

being so then quite simply, my rejection of the Worker's credibility translates to a rejection of the bulk of Dr Burrow's views. Also relevant is the evidence from Dr Burrows that he has only seen the Worker twice and both were apparently brief consultations with cursory examination, one at least (and possibly both times), in the course of his busy ward rounds. He first saw him in November 2001 (approximately 18 months after the original injury) and the last time was in June 2002, over two years after the original injury. He has not had the benefit of the extended examination time of the orthopaedic specialists (and I include Dr Kelly in this term for descriptive purposes notwithstanding it is not precisely his specialty) who contradict his opinions. The importance of the orthopaedic opinion is obvious from his referral of the Worker to an orthopaedic surgeon. This is despite his rejection of the proposition that that referral acknowledged that the Worker's condition was outside his specialty (neurology). It shows at least that Dr Burrows considered an orthopaedic opinion to be important. It is indeed curious that the orthopaedic surgeon to whom the Worker was referred was not called to give evidence as part of the Worker's case. If that was Dr Sharland then the matters in paragraph 46.22 probably explains that. He has not apparently had the time then, nor has he found the time since to consider the formidable material that seriously questions his views. For all of the foregoing reasons, I am not prepared to accept the opinions of Dr Burrows where they contradict the opinions of Dr Hardcastle, Mr Haig and Dr Kelly.

Evidence of Br Barrie Kenny, Psychiatrist.

66. Dr Barrie Kenny, a consultant psychiatrist was called on behalf of the Worker and gave evidence by video conference link. He is a consultant psychiatrist of some 30 years practical experience. He said that he saw the Worker in May 2002 on referral from the Employer's solicitors. He identified a report that he prepared dated 29 May 2002 and this was then

tendered and became Exhibit W15. He said that the Worker was very hostile and aggressive towards him and uncooperative throughout. He said that the Worker was. Given the importance of a proper history for an effective psychiatric diagnosis, particularly a history of previous psychiatric illnesses, I believe this is a serious impediment to a proper diagnosis. Dr Kenny conceded this.

67. Dr Kenny accepted that there was likely to be some organic basis for the Worker's complaints. He said that from his assessment of the Worker and by having regard to the Worker's complaints of whole body pain, his opinion is that there is a psychological functional accentuation of his underlying physical problem. Dr Kenny said that this points to two alternatives namely, either a deliberate exaggeration, or a genuine psychiatric condition. He conceded that there was no way of excluding one or the other but his opinion favoured the latter. It should be clear by now that I however have come to a different view of the veracity of the Worker and this therefore will impact detrimentally on Dr Kenny's conclusion.

68. Dr Kenny said that if there is an organic basis for the pain but that it is accentuated by psychological factors (as opposed to conscious exaggeration) then in his view this amounts to a somatoform disorder. He described the Worker as being "very vulnerable" during his early years and this in his view had some significance to his overall condition. Dr McLaren had a different view at that time and he was seeing him regularly. He considered that the Worker was severely depressed since the time of his accident as a result of his symptoms and the overall uncertainty of his position. Dr Kenny considered this to be part of an adjustment disorder. He considered that drinking to excess and gambling were simply behavioural manifestations of the adjustment disorder. He confirmed also that an adjustment disorder is a recognised psychiatric condition and is classified in DSM IV.

69. Dr Kenny conceded that much of his opinion was based on his acceptance of the history given to him by the Worker. He relied on the history as to how the Worker was managing before the accident, namely that he was happy, he was participating in running, and he was apparently working well and getting on with employees. Dr Kenny conceded that the Worker may have lied to him and although he could not rule this out he did not believe that that was the case. He said that the Worker had an attitude that he thought everyone was hostile to him but he did not think he was delusional. He thought it was just an exaggerated response. He said that the Worker would not talk about his social emotional or religious background and he confirmed that the Worker told him that he had no psychiatric history. Dr Kenny conceded that the lack of co-operation and the Worker's level of hostility and anger made his assessment of the Worker very difficult. He agreed and confirmed there was a significant speculative component in his assessment.

70. Overall, and although unlike Dr Burrows I thought that Dr Kenny maintained his objectivity, like Dr Burrows, the difficulty with Dr Kenny's evidence is the heavy reliance on the veracity of the Worker. It states the obvious to say that a valid history has a greater significance as a diagnostic tool for a psychiatrist as opposed to a physical medical expert. The Worker's lack of co-operation with Dr Kenny and the hostility he showed to him does not form the basis of an acceptable psychiatric diagnosis. Most importantly however is my rejection of the evidence of the Worker. For these reasons I cannot accept Dr Kenny's views.

Evidence of Dr Niall McLaren, Psychiatrist.

71. Dr McLaren was next called on behalf of the Worker. He is also a psychiatrist. He said that he was treating the Worker on referral from Dr Myerscough. He first saw the Worker on 23 January 2001 and thereafter on

a number of occasions throughout 2001. In all I noted approximately over twenty consultations.

72. A number of documents were tendered through Dr McLaren. These comprised his report to Dr Myerscough dated 29 January 2001 (Exhibit W23), his medical certificate dated 30 March 2001 (Exhibit W24), his report to Dr O'Shaughnessy dated 30 May 2001 (Exhibit W25) and his three reports to the Worker's solicitors dated 11 November 2001, 28 August 2002, and 30 August 2002, (Exhibits W26,W27, and W28 respectively).

73. In summary form, the salient points evident from these documents are firstly that as of the first consultation on 23 January 2001, the Worker showed symptoms of distress and recently had suicidal ideation but showed no "convincing signs" of an anxiety state or a paranoid state. He was unhappy but not clinically depressed. He noted his social isolation. He commented that "…this is just another case of very poor selection of immigrants." Secondly, as at 30 May 2001, Dr McLaren considered that the Worker's problems were a combination of industrial and orthopaedic. He again noted that the Worker was socially isolated and that although he was seeing him regularly at the Worker's request, he did not feel that he could help the Worker very much.

74. In the report of 11 November 2001 (Exhibit W26), Dr McLaren describes some paranoid thoughts by the Worker in relation to his fellow workers. He said that there were then no signs of psychotic disorder or organic brain impairment. He observed that the Worker's mental state had deteriorated over the preceding six to eight weeks and noted increased paranoid ideation such that he was commenced on anti-psychotic medication. Dr McLaren then expressed the view that the Worker appeared to have reached the current state of his life without developing significant psychiatric symptoms, having survived some very upsetting life events such as the murder of his parents,

being exiled from his country and the like. However, he had no information (at that stage at least) to suggest that the Worker's mental balance before the back injury was disturbed. He had not then seen the MSF documents. Importantly he pointed out that there was clear evidence that the condition has been poor more or less since the accident and became worse after benefits were discontinued in December 2000. This however was applicable in January 2001 and May 2001 when he considered there was no psychiatric illness. He opined that the Worker then showed symptoms of a paranoid psychotic state associated with persisting depressive symptoms. He by now appears to accept these were directly related to the back injury. Dr McLaren expressed the view that the social isolation on the Worker put him at higher risk of developing psychiatric symptoms following adverse events, regardless of the nature of the physical injury. In summary he considered that the back injury and its relationship to the Worker's then present mental state was causative and not coincidental. He expressed the opinion that the Worker's prognosis was poor and that he would require long term psychiatric treatment. His view was that there was significant risk of further breakdown following further adverse events.

75. In his report of 28 August 2002 Dr McLaren notes continuing paranoid ideation by the Worker of being followed by persons with sinister intents. He noted that the Worker continued to be socially isolated in Darwin. Dr McLaren referred to further documentation provided to him, apparently then for the first time. This included the MSF documentation. He described them as being of interest as they outline a considerable level of psychiatric disturbance prior to his emigration. Dr McLaren however maintained that the Worker's present mental state was contributed to by the difficulties that he had following his injury. The Worker's then present mental state showed features of variable reactive type of depressive state with suicidal ideation utilised for manipulative purposes and overt paranoid features. He referred to the perception of persecution and harassment. Dr McLaren opined that it

was not likely that he would recover to a point where he could start to live and work independently in the larger community.

76. It is clear to me that Dr McLaren was very convinced as to the Worker's present mental state and the contributing nature of the initial back injury. In cross-examination, questions were put to suggest that the Worker had a pre-existing psychiatric condition and that his current mental state related to that pre-existing condition. Questions were specifically put to him regarding the contribution of events such as the rejection of the visa application for the Worker's sister, her husband and a friend, his existence in the refugee camp and his shunning of work colleagues.

77. Dr McLaren countered this by pointing out the significance of factors such as being able to socially interact before the injury, the fact that he was able to obtain and hold down a job before the injury, and the fact that he was able to function well in his work and earn the respect of his workmates. He said quite simply that the Worker could not have worked for Serco as he did for the period that he did if, preceding the injury, he had the mental state noted to exist subsequent to the injury. He conceded that although he may have had a predisposition before he came to Australia, the fact that he did well in Australia showed a significant shift in the Worker's mental state subsequent to the injury. Accordingly his symptoms must at least be attributable in part to events from and subsequent to the injury. This however disregards the possible contribution of events such as the death of his mother, the failed visa application of his sister and the social isolation. The former two of these also accentuate the last.

78. Dr McLaren resisted the suggestion that it is not possible, by reason of the Worker's background, for him to say, on the balance of probabilities, that it is the Worker's back condition as opposed to any other contributing factor which most contributes to the Worker's current mental state. Dr McLaren

however was firm in his view. He said that he assumed the existence of a pre-existing condition but relied largely on the fact that he showed no symptoms contemporaneous with his residence in Australia and his commencement of work at Serco. Given the significance he put on the Worker's social isolation in his first two reports, it would appear that he has placed undue significance on this factor. Further, he said this was followed by a marked deterioration in symptoms following his back injury. In my view however this rationalisation cannot be maintained given the comments he made in his first two reports which discounted any psychiatric condition and highlighted his social isolation. This was approximately one year after the injuries.

79. The dramatic change in Dr McLaren's view from that expressed in his first two reports is difficult to fathom against this background. Nothing new to warrant the change of view has occurred. The claim of sub-optimal treatment preceded even the first of the reports. There is nothing new in connection with the employment which has occurred which justifies the change in his views. Although acknowledging other stressors of a non-employment nature, i.e., the effect of the failure his sister's visa application, he however does not consider this significant despite its apparent contemporaneity and despite the connection to the problem of the Worker's ongoing social isolation which he considered so significant in his first two reports.

80. It is also detrimental to the acceptance of Dr McLaren's views that he was unaware of the existence or extent of the previous psychiatric illness of the Worker, notwithstanding that he knew of the various life stressors in the Worker's background. Also relevant is my finding that the Worker consciously fabricated the "compo" taunts. This deliberate act generated one of the symptoms relied upon by Dr McLaren. I have serious doubts about Dr McLaren's views given also his own evidence of manipulative behaviour on

the part of the Worker. I refer here to Dr McLaren's evidence where the Worker used a pretence to secure an appointment, continuously showed signs of discomfort during that appointment, and then seemed to have made a remarkable recovery at the end of the appointment by walking out without showing any signs of discomfort. Dr McLaren is a very forgiving person if he can overlook this sort of conduct on the Worker's part. In any event, Dr McLaren's opinions need to be bluntly looked at in the context of his apparent reliance on the history given him by the Worker and my rejection of the Worker's evidence. Having regard to the foregoing, I also reject Dr McLaren's evidence. The net result is that I have rejected all the evidence in support of the Worker's claim to a psychiatric illness arising out of the employment and of a claimed incapacity for work arising from that. There is the evidence also of Dr Ding which I discuss in more detail below. Briefly however, he did not consider that the Worker had any psychiatric injury or incapacity for work as at 2 July 2002. I note that that finding however is more consistent with the known facts and history.

Evidence of Mr Stephen Blake.

81. Mr Stephen Blake was called by the Worker. He gave evidence that he first became acquainted with the Worker when the Worker joined his training group with the Darwin Runners Club at the end of 1998. This was not long after the Worker first came to Australia. He said that they became good friends and that the Worker attended a number of Mr Blake's family functions.

82. Mr Blake said that the Worker was an active member of the club and attended training three or four times per week. He considered him to be a good runner, was reliable in his attendance at training and expressed the view that he could have been a top runner had he been able to continue that activity. This is significant in terms of the existence or impact of any pre-

existing psychiatric condition. Both Dr Kenny and Dr McLaren relied on this to a significant extent. Dr Ding was also of the view that this was significant.

83. He confirmed that he spent some time socially with the Worker. This included times when the Worker attended the family functions as aforesaid and times spent chatting before, during and after training sessions. The latter could not have been extensive in my view. He considered that he was a likeable person, full of life, active, happy and a keen runner. He got on well with other runners in the club.

84. He said that after his injury the Worker still came to the club where he chatted and helped keep times.

85. After the injury on one occasion that he saw the Worker walking at the beach, he commented that he appeared to then be in pain. This was one occasion only. At this point I wondered what Mr Blake might have said if he had observed the extensive video footage of the Worker showing a clear lack of discomfort and pain over a long period of time. In any event I view this evidence in light of the video footage. He said that he now walks like a person with a sore back. I am not precisely sure how a person with a sore back walks or how Mr Blake is qualified to make that connection. I note in fact that Dr Haig said that the Worker's gait and stoop are not consistent with a person with a back problem.

86. Mr Blake went on to say that he has noticed a change in attitude in the Worker, presumably since the injury. His manner suggests that he is upset and not happy. Mr Blake said he noticed this for the first time approximately one month after the accident and he saw him thereafter at intervals of between one and two months. He formed the view that he was progressively becoming worse.

87. In cross-examination Mr Blake confirmed that he communicated with the Worker in English even from the time when the Worker first came to the Darwin Runners Club in late 1998. Mr Blake confirmed that the Worker's English improved thereafter.

88. When asked whether he had seen the Worker limping post September 2000 Mr Blake described the action more as walking with a stoop as opposed to a limp. He could not be more precise than saying that this was some time in 2000.

Evidence of Dr Philip Hardcastle, Orthopaedic Surgeon.

89. Dr Hardcastle was called by the Employer and gave evidence by video conference link. He is a well qualified orthopaedic surgeon of some seventeen years experience and currently works as a consultant orthopaedic surgeon. He gave evidence that he examined the Worker on two occasions namely, 14 November 2000 and 25 June 2001. He prepared reports in relation to those examinations. He also prepared supplementary reports and reports commenting on the views of Dr Burrows as well as in relation various videos taken of the Worker.

90. His report dated 21 November 2000 followed his examination of the Worker on 14 November 2000. That was tendered as Exhibit W33. A further supplementary report dated 23 November 2000 was tendered as Exhibit W34. His report following the examination of the Worker on 25 June 2001 was dated 30 June 2001 and was tendered as Exhibit W37. A further report he prepared dated 5 December 2001 was tendered as Exhibit W39. A supplementary report where he commented on the Worker's clinical notes as well as two reports of Dr Burrows being a report dated 10 October 2002 was received as Exhibit W40.

91. A further report dated 19 October 2002 commented on various videos taken of the Worker in October 2000, November 2000, April 2001 and August 2002 was tendered as Exhibit W41.

92. Various other documents were tendered through Dr Hardcastle comprising a certificate pursuant to s69 of the Act dated 12 December 2000, (Exhibit W35), the report of a CT Scan dated 26 September (Exhibit W36) and a report of an MRI scan performed 5 December 2001 (Exhibit W38).

93. In relation to his first examination of the Worker, Dr Hardcastle said this was unremarkable. Particularly there were no neurological compression signs and no neurological objective signs. Significantly also he said was that the Worker was able to perform a bilateral straight leg raise and hold that position for five seconds. Dr Hardcastle explained that this is an important test because a person with a severe back pain would not be able to perform that. His overall conclusion of his first examination was that the Worker had some pain from the lower sacral level. The CT scan showed a bulge and he concluded a minor strain. He found no evidence of protrusion either by examination or by CT scan. He said that the bulge shown on the CT was consistent with degeneration and was of long standing origin. Specifically he said this could not have been caused in the falls in May or June of 2000. He commented on the Oswestry Disability Index, an index used to assess disability and pain levels without interrogation of the patient. He confirmed that it is a well recognised test used by orthopaedic surgeons and is an accepted standard. The Oswestry Disability Index at the time of the first examination was thirty four. This put the defendant in the moderate category of pain intensity. He expressed the view that the Oswestry Disability Index on that occasion was consistent with his own clinical assessment.

94. He indicated that (after reviewing the CT films which showed a bulge at L5-S1), he concluded that the fall probably caused a small annular tear and

aggravated a pre-existing degenerative disc condition which then caused some pain at the time. He did not consider that any further investigation was necessary and recommended the continuation of an exercise program. By way of prognosis he expected a full recovery. He confirmed in evidence that these small annular tears heal. He expressed the view that the Worker would have had some annular tears already as this is normal in a pre-existing degenerative condition. He also opined that further tears could later occur. In conclusion however he expected a return to full duties within two to three months, ie. by mid January-February 2001.

95. In relation to Exhibit W34, (ie, the reports following his viewing of the videos of the Worker), he confirmed that the video confirmed his own clinical assessment of the Worker and the correctness of the Oswestry Disability Index at that time. He particularly relied on the video of the Worker shown lifting a luggage bag, leaning forwards in a semi flexed position and generally moving in an unrestricted fashion.

96. By comparison he said that by the time of his second examination of the Worker (30 June 2001), the Oswestry Disability Index was then in the sixties. This put it into the severe, bordering on the crippling, category. This time he noticed that the Worker had generalised tenderness whereas previously the tenderness was localised to the sacral area. He was surprised to find that the range of movements of the Worker had in fact increased. He expected a significant drop in the movements given the Oswestry Disability Index on that occasion. Despite that, he found that the clinical signs were all unchanged and he specifically noted one non-organic sign, namely a pain reflex when he compressed the Worker's head. He could only offer psychological factors to explain the Worker's diffuse complaints. Obviously he had no reason then at least to consider conscious feigning to explain those complaints.

97. He said that the various videos gave him no reason to change his views as expressed in his first two reports. Of the video footage taken on 14 November 2000, 30 August 2001 and 6 September 2001, Dr Hardcastle said there was nothing in the videos to show that the Worker demonstrated any external signs of disability from a low back injury. Likewise the observations he made from the remaining video lend to a similar conclusion.

98. In cross-examination Dr Hardcastle confirmed that the difference between a slip and a fall is a significant difference. He said that it was uncommon for a fall onto the buttock to disrupt the spine but confirmed that it could cause a small annular tear if there was a degenerative condition. He said that it could not possibly result in a severe spinal disruption unless the person that was already osteoporotic.

99. He conceded, quite properly in my view, that the Worker's symptoms were consistent with his examination, that annular tears heal at various rates albeit that he maintained that they usually heal. He conceded that statistically some do not resolve although he could not state what percentage that was. He confirmed that he expected the Worker's tear to resolve over a few months but he acknowledged that some would take longer. He also conceded that there is a percentage which do not resolve and which result in situations where the patient does not become entirely asymptomatic.

100. In relation to the certificate he gave dated 12 December 2000 (Exhibit W35) he confirmed that he had not seen the Worker subsequent to seeing him on November 2000 and before he gave that certificate. How he felt able to give these certificates certifying the matters contained therein approximately one month after seeing the Worker and apparently without any further information was not explained. That is of course relevant to the argument concerning the validity of the Form 5 notice.

101. The proposition was put to Dr Hardcastle that the Worker has a genuine belief of having a pain condition due to a psychiatric condition. Dr Hardcastle qualified his answer to the extent that it was outside his area of expertise. He however made what I consider to be a very important point namely that the videos show unrestricted movement over an extended period which he thought was inconsistent with the Worker having a genuine belief in his pain levels. This was a view which Dr Haig shared and it was also stressed by Ms Schirmer in her evidence. It appears logical and sound in my view.

102. In conclusion Dr Hardcastle remains of the view that the injuries in May and June 2000 aggravated the Worker's existing but asymptomatic lumbosacral degenerative condition causing a soft tissue injury or annular tear which would have healed by November 2000. He expected a return to normal duties within two to three months of that date. His view was confirmed by the video footage which he said showed nothing to support the claimed ongoing lower back pain or disability. There is a certain consistency between Dr Hardcastle's view and the independent objective evidence of the video footage. His views are consistent with the bulk of the orthopaedic evidence and that of Dr Kelly and Ms Schirmer. I think his views are credible.

Evidence of Mr Ronald Haig, Orthopaedic Surgeon.

103. Dr Haig was the next witness called by the Employer and also gave evidence via video conference link. He is a well qualified orthopaedic surgeon who has been in practice for some 27 years. He examined the Worker approximately 13 June 2001 at the request of the Worker's solicitors and prepared a report to those solicitors dated 14 June 2001. That report was tendered in evidence as Exhibit W44.

104. He said that he found very little on examination. He found some general retardation ie. slowness of movement but generally he thought the back was normal. Some loss of flexion was indicated but for reasons which he explained, he questioned whether the Worker was compliant. This I think becomes very relevant to determination of the issue as to whether there is any conscious feigning as opposed to a genuine psychiatric condition. Compliance was questioned because on the first test the Worker was able to touch his toes but when asked to do that from the sitting position he claimed that he couldn't. Dr Haig said that it should make no difference at all that the test is conducted in the sitting position. This is highly suggestive of conscious feigning.

105. Dr Haig had the benefit of the MRI. He indicated that according to the MRI the back pain would have come from the last disc which was reduced in height and degenerate. He was able to conclude therefore that in the absence of other pathology, and given the Worker's complaint of pain, that was the source of the back pain.

106. In conclusion however, he said that the Worker complained of low back pain but there was a significant non-organic element and he doubted the severity of the pain. He confirmed that he thought the injury was of a soft tissue nature and that at the time of his examination the Worker was not totally incapacitated but should have avoided heavy repetitive lifting or bending.

107. He confirmed that he saw the video taken of the Worker on 14 November 2000 and the videos spanning the period 30 August 2001 to 6 September 2001. He observed that the former video showed the Worker walking with a normal brisk walk, freely entering the car, putting the case in the boot while leaning forward, putting another case in the back seat while leaning forward, all of which he appeared to do quite comfortably. He confirmed that this

reinforced his views. He was very specific in saying that those movements were not the movement of a person with a significant back problem.

108. He noted that in the latter video the Worker is seen walking with a stooped gait, getting in and out of a car in a stooped position, walking slightly stooped with a short stepped gate. He pointed out the rather obvious that the two videos showed a different walk by the Worker in each case. He confirmed that the second video particularly showed a different walk to when he saw the Worker three months before in June 2001. He said that it is not common for people with a back pain to stoop unless they are suffering a very specific condition (spinal canal stenosis). He confirmed that the MRI ruled this out in the case of the Worker. This therefore tends to suggests that the stoop is feigned and supports the finding that the Worker was surveillance aware at this time and consciously modified his behaviour to suit. The inconsistency in the presentation before and after that time also supports that finding.

109. He said that from the MRI he concluded that the Worker's pain derives from the lumbar sacral disc. He expressed the opinion that if the Worker's disc was normal in May of 2000, it could not have deteriorated to the extent indicated on the MRI by that date. As result he believes that the Worker had a pre-existing, albeit asymptomatic, back condition until the fall.

110. In cross-examination he quite properly conceded that the fall would have aggravated the degenerative condition making it symptomatic. He agreed that the aggravation is most likely to be in the form of an annular tear the healing time of which can vary but is mostly in the range of twelve to eighteen months and a small proportion take even longer.

111. In relation to the video taken in August 2001 showing the Worker stooping, Dr Haig was asked to assume that the Worker had just effected five days of

a return to work trial in a busy kitchen. He was asked to indicate whether it is possible that what he saw in the video was simply manifested signs that he had aggravated his condition by that return to work program. Dr Haig agreed, qualifying that though by saying that it would depend on the work. However it is my view that the work in question was not onerous despite the Worker's claims that it was "busy". The evidence I am prepared to accept is to the contrary. This concession by Dr Haig therefore achieves nothing for the Worker's case in my view and only serves to accentuate Dr Haig's objectivity.

112. Dr Haig also confirmed that where a person is asymptomatic, aggravates a condition and the symptoms then continue, that it is then fair to assume that the effects of the aggravation are continuing. I note however that this assumes that the claims of continuing symptoms are true and I have serious doubts about that.

113. Dr Haig concluded that the Worker had pre-existing degenerative changes in his lumbar spine and some pain in the lower back but he questioned the severity of the pain and rightly so in my view given my assessment of the Worker's credibility. He was firmly of the view that the Worker was not totally incapacitated and suggested he should avoid certain lifting and bending. Nonetheless he was of the view that the Worker could have returned to his employment as at June 2001 when he assessed him. The video surveillance of the Worker did not alter his view. It appeared that the video reinforced his view as he said, with which I agree and accept, that the movements exhibited by the Worker in the video were not those of a man with significant back problems. I found Dr Haig to be objective and credible. He accepted the existence of some pain but rightly questioned the claimed severity. His views are consistent with the objective evidence of the video. His conclusion as to the Worker's capacity to work fit in with the evidence and opinion of Dr Hardcastle and those of Dr Kelly in conjunction

with Ms Schirmer's testing. Importantly, his views also fit well with the objective evidence of the videos.

Evidence of Dr Christopher Kelly, Occupational Physician.

114. Dr Christopher Kelly was next called by the Employer and also gave evidence via video conference link. He is a specialist physician in occupational medicine and has worked full time in that specialty since 1995. He principally manages work injuries, principally musculo-skeletal injuries. Through him various documents were tendered. First was his report dated 19 November 2001 which became Exhibit W48. Subsequently some correspondence between him and Dr O'Shaughnessy was marked Exhibit W49. Thirdly an executive summary prepared in consultation with Ms Schirmer, a physiotherapist, became Exhibit W50. Discussion of the evidence of Ms Schirmer is to come. For present purposes it suffices to note that her role was the conduct of a functional capacity evaluation following extensive testing of the Worker. A report prepared at the request of the Employer's solicitors dated 5 September 2002 became Exhibit W52 and the solicitor's letter requesting that report became Exhibit W51.

115. Dr Kelly was of the view that there were many subjective complaints and findings in the Worker's presentation. Although he accepted that there had been an original injury, he was of the view that the Worker suffered no ongoing disability. He said that in his view there was no real restriction from the back problem point of view to prevent the Worker's return to work. He confirmed that he was subsequently shown an MRI which did not cause him to change his view.

116. He said that his findings following examination were that although the Worker had a slow walk pace, his gait was normal, his posture was normal and straight leg raising was 80 degrees. This was well within the normal

range. He said that on straight leg raising the Worker complained of pain on the left lateral side of the abdomen which was an inconsistency in any event. He explained that there is no connection between the straight leg raising and any possible abdominal pain. He said that he found subjective reports of pain on palpitation which he said were an exaggeration. The tickle test resulted in inconsistent responses. He confirmed therefore his opinion, expressed at page 4 of Exhibit W48, that there was no evidence of any ongoing back injury. He formed that view that the Worker was grossly exaggerating his complaints. He said that that remains his current view and it has been reinforced by the video recordings of movements of the Worker.

117. He said that he examined the duty statements for the Worker's attempted return to work at Larrakeyah Base and at Hidden Valley Tavern. He expressed the view that those duties were suitable. Following his consultation with Ms Schirmer after she had performed a functional capacity evaluation, he concluded that there were multiple inconsistent findings on the functional capacity evaluation, that there was no objective evidence of any back injury and that the Worker at least had a capacity for light to medium level work.

118. He was then questioned in relation to the videos taken of the Worker. He had originally only viewed two of the videos. He said that the movements indicated thereon were consistent with his findings and inconsistent with an injury. He said that he has since viewed all the other videos. He said of the further videos viewed the videos covering the period 23 October to 14 November 2000, separately on 14 November 2000 and thirdly covering the period from 24 April 2001 to 30 April 2001 showed a normal lumbar spine activity and showed nothing to suggest a back injury. He said that in fact they showed the converse. He said that the video taken on 1 May 2001 was less significant.

119. He said that the video of the Worker gardening taken 28 and 29 August 2002 was significant in that he was able to squat for a period of approximately 10 minutes. He said that this would be difficult for someone with disco genic or sciatic pain as squatting increases the inter-discal pressure in the lumbar spine which would in turn increase pain.

120. In cross-examination he conceded that annular tears can give rise to pain or they can be pain free. He confirmed that annular tears take some time to resolve. He said it is possible that they can take many months although the frequency of that is considerably less. He confirmed that pain from the condition will not necessarily cease when the annular tear heals. He said that musculo-ligamentous injuries will usually resolve in a short period, of the order of a couple of weeks. He said it is unusual for them to take months to resolve.

121. He conceded that it was a reasonable assumption that there would be some incapacity after the Worker's first injury. He agreed that it could have given rise to the annular tear but pointed out that the examination findings did not support that. He conceded that the annular tear could have come from either of the two work injuries and that the annular tear could give rise to pain. He could not categorically say that the Worker did not experience any pain but he said that the inconsistent findings contradict the existence of a disco genic lesion. He agreed that his opinion on the issue of incapacity does not have regard to psychological factors. He conceded the possibility that the Worker genuinely believed he had back pain as a result of a psychiatric condition, albeit that he did not agree with it. He also conceded that although he did not consider it to be probable, that it was possible that the Worker has ongoing pain from the incidents at work.

122. I was impressed with Dr Kelly's evidence. He conceded matters where appropriate. He was, I thought, convincing and was not swayed in cross-

examination. I thought it telling and important that he had formed his view of the Worker's capacity before seeing the bulk of the videos and that his view was then reinforced when he viewed the subsequent videos which indicated movements and capacity, which in his view, were inconsistent with the claims of the Worker. In summary his view was that the Worker had an initial musculo-ligamentous injury or disco genic back pain but any incapacity for work that resulted had ceased at least at the time of his examination of the Worker in November 2001. He considered that the duties required of the Worker in the duty statements for the various return to work programs to have been suitable. Although he suggested a graduated return to work program for the Worker, this was due to his deconditioning rather than any incapacity. He also said there was no evidence of any ongoing back injury at the time of his examination and his view was also reinforced on viewing the video footage. I thought Dr Kelly presented as objective and his evidence was credible. His views are consistent with the objective evidence of the video. His conclusion as to the Worker's capacity to work fits in with the evidence and opinion of Dr Hardcastle and Dr Haig who I was found to be credible.

Evidence of Mr Brad Campbell, Serco employee.

123. Mr Brad Campbell, an employee of Serco, was next called by the Employer. He said that he worked with the Worker while he was employed as a kitchen hand and assistant chef in the Other Ranks mess. He said there were five to six other employees at that mess at that time. The employees formed a very diverse ethnic mix between 2000 and 2001, the mix was between East Timorese and African ethnicity.

124. He spoke highly of the Worker. He said he was a good Worker and got on very well with him. He said that he was very conscientious and even when working on lighter duties, he had to be constantly reminded of his

restrictions. He said there were no tensions between himself and the Worker, nor on his observation with any of the other employees at Serco at the time.

125. He said that he was not aware of anyone taunting or making fun of the Worker as a result of his injury. His opinion of him at all relevant times was that the Worker was a very valuable employee and he was not aware of any behaviour designed to discourage the Worker continuing in his employment.

126. He explained the roster system and particularly explained the relevance of the question mark as a reference to the Worker at the relevant time. As I expected this indicated that there was some uncertainty as to when the Worker would be working because of his restrictions. This is reinforced by the fact the rosters were prepared one month in advance. All that sounds very credible and quite logical to me. He said that he knows Kathleen Parkhill, a fellow employee at Serco. He said that of his own observations Parkhill's behaviour with the Worker was appropriate and that the two got on well. He said that all of the employees got on well.

127. He said that Serco encourages all employees to undertake further training and he confirmed that Exhibit W18 was a certificate which recognises the training that the Worker undertook. He said that the Worker was encouraged to undertake courses like all other employees. He couldn't recall giving a performance assessment of the Worker although he was required to do so as part of his role. He further said that if he had he done one, he expected it would have been favourable. He reiterated that he regarded the Worker well and would have liked to have more employees like him.

128. He was specifically questioned in relation to the occasion attested to by the Worker when the Worker said that he attended work early one morning to be told that he was not required and sent home. Mr Campbell said that this did not occur. In the overall context of things, given that it refers to a relatively

unusual event, I would have thought that had it occurred he would have recalled it, unless clearly he is lying about that. However, I formed the view that he was very fair and genuine in relation to his feelings regarding the Worker and of his abilities and his work ethic. He denied any suggestions that any particular employee was taunting the Worker or making his work life difficult for him.

129. A letter which subsequently became Exhibit W53 from IMC to Allianz (the insurer) dated 10 October 2000 was provided to Mr Campbell. He noted a reference therein to the fact that the Worker had said a female employee was derogatory and questioned his genuineness. He iterated that he had absolutely no knowledge of this. Of course I must put this in the context of the fact that it appears to be simply reciting what the Worker reports not that it is an acceptance by IMC or Allianz or Serco for that matter that that conduct occurred. If I were to accept Mr Campbell's evidence, as I do, then clearly that is not the case.

130. Similar questions in relation to the same suggestion in another document met with the same response and again I consider that that is all quite logical and consistent with his earlier evidence. I remind myself that it doesn't establish the truth of the references in that. Questions and answers in relation to a letter from IMC to Dr Myerscough to the same effect (Exhibit W58) were consistent.

131. Mr Campbell confirmed that the claims of the Worker that he enjoyed his workplace and preferred not to stay at home were consistent with his own assessment of the Worker. He agreed that he was a hard Worker and did not believe him to be a malingerer. He agreed that the Worker would work in the absence of a good reason not to do so.

132. In cross-examination a number of matters were put to him largely which involved matters not involving any direct involvement with Mr Campbell. Not surprisingly his answers were that he had no knowledge of that. Mr Campbell however was quite certain that in one discussion that he had with the Worker when he rang to check on his absence, that the Worker had said to him that he was "too busy" to attend to work. This was an occasion when he said the Worker had not turned up and he telephoned him to ascertain why and was offered that explanation. He said that he specifically recalled that because it was very unusual for the Worker to say something of like that. All this was later confirmed when, in further cross-examination he was shown another document dated 2 April 2001, which was tendered as Exhibit W61. It was from Mr Campbell to his superior (Mr Patterson). Mr Campbell agreed that he wrote it but did not have a recollection of it. This aided him in resolving the date of the relevant discussion that he had with the Worker and it also confirmed the event given that he made mention of it in that correspondence with Mr Patterson. He conceded that it may have been possible that the language difficulties meant that the Worker meant something else by that. Again this is all logical and credible and again indicates no animosity towards the Worker.

133. He was also questioned about various medical certificates submitted by the Worker. Mr Campbell said that he could not recall any of those. In fact he said that he could not recall the Worker being unfit for work between March and April of 2001. Clearly the certificates had been provided to the Employer. What is not clear however is whether Mr Campbell saw them. The Worker however claims to have given them to Mr Campbell and it was put to Mr Campbell that after the Worker provided his certificate covering the period up to May 2001 that he told the Worker not to bother submitting any more. Mr Campbell's answer was that he did not recall this occurring.

134. Overall, I thought Mr Campbell was a truthful witness. I cannot agree with the submission of Mr Grant that Mr Campbell's evidence should be rejected because it was tailored to suit the Employer's interests and that he deliberately fabricated parts of his evidence. Frankly that is not my assessment of Mr Campbell. I thought he was very fair to the Worker. If he wanted to advance the Employer's interests in this case, he could easily have refused to make the concessions he did of the Worker's work ethic if that was the case.

Evidence of Ms Kristy Thompson, Occupational Therapist.

135. Ms Kristy Thompson was next called by the Employer and she gave evidence via a video conference link. She is a qualified occupational therapist and in June of 2001 was working with Advanced Personnel Management. In that employment she said that she saw the Worker and prepared a report comprising two parts. The first part was a work performance evaluation dated 4 June 2001 and the second part was a workplace assessment report dated 20 February 2001.

136. She said that the work performance evaluation is a physical assessment to evaluate a person's overall physical capacity. It is done over a two and half to three hour period. She performed the test in Darwin on 4 June 2001 and had the services of an interpreter to assist.

137. She described how the test is conducted and importantly she indicated that the results are monitored as the test proceeds. She said that the tests performed were very standard and well recognised in Australia and the results showed that the Worker self limited in nine of the eighteen tasks involved. She explained that self limiting in these cases meant that she could not see any physical sign that the Worker had reached his limit. She indicated that his reported reasons for limiting himself were his fear of re

injury as well as his claims of pain and fatigue. She said that as a result she concluded that psychological factors were present.

138. In summary her conclusions were that the demonstrated physical capacity of the Worker did not match the accepted job demands. Based on those tests and she accepted he would have trouble with some activities.

139. In relation to the workplace assessment on 20 December 2001 she said that this related to the Bakhita Centre. The aim of the assessment was to review the work environment and suggest appropriate modifications to the employment having regard to activities and required demands. She said that she reviewed his duties as well as to review the work environment. Photos were taken of the work environment to give doctors an overview of the environment to better assess a return to work program eg relationship of the height of the benches, the location and height of storage shelves for lifting etc.

140. In cross-examination specifically on the claim that the Worker was self limiting she confirmed that that assessment is her own and is based on the absence of physical signs. She confirmed that there are no tests which can show or definitely exclude the presence of pain.

141. She agreed that there were some barriers in relation to the Worker entering the workforce and in relation to the specifics she agreed that these were his language, the fact that he was a recipient of compensation, his limited skills and his claimed high pain levels.

Evidence of Mr Mark Cassidy, Case Manager

142. The next witness called by the Employer was Mark Cassidy. He was an employee on IMC Pty Ltd at the relevant time. That company was engaged

by the Employer as a consultant to manage the Worker's case. He said that he first became involved with the Worker on 1 of August 2000 and was engaged to advise the insurer initially as to whether the services of an occupational therapist were required. He submitted a first report to the insurer at which time the file was transferred to a Mr Steve Langer for five weeks. The file was transferred back to Mr Cassidy in November 2001 apparently because the Worker had complained about Mr Langer, particularly blaming him for cutting back the availability of physiotherapy. Mr Cassidy said that the Worker accused Mr Langer of coercing the physiotherapist to cut back the physiotherapy. Mr Cassidy however said that it was in fact the physiotherapist's own suggestion to cut back physiotherapy consultations. The Worker also accused Mr Langer of working with the insurer's interest in mind and not those of the Worker.

143. He said that his firm was next instructed to report on and arrange a return to work for the Worker at the Hidden Valley Tavern. Mr Cassidy said that his relationship and communication with the Worker were excellent and he said he expected that there would have been a successful outcome to the return to work.

144. Mr Cassidy assessed the Hidden Valley Tavern worksite and conferred with the Worker's doctor. That doctor's recommendations were addressed by Mr Cassidy. He confirmed that it was ultimately agreed that the Worker would work Monday, Tuesday, Thursday, Friday and Saturday. This was with the approval of the Worker's doctor. He confirmed that the Worker commenced at Hidden Valley Tavern on 22 August 2001. He said that on or about 23 August 2001 the Worker claimed that he was under too much pressure and wanted to leave work. The host employer however had commented that the Worker had worked well all week and was very capable. The host spoke highly of the Worker and told Mr Cassidy that the Worker had said nothing to suggest that the work was too heavy or that he couldn't manage it.

145. Mr Cassidy said that as a result he spoke to the Dr O'Shaughnessy on 30 August 2001. She told him that she put him off work due to his complaints of pain in the back. Mr Cassidy then visited the Worker at home where he found the Worker lying on the floor in a state of distress. He saw empty medication containers and was concerned that the Worker may have taken an overdose. He therefore rang the Tamarind Centre and arranged for them to see him. He stayed with the Worker for four hours. He found a letter written by the Worker listing grievances against Serco. The Worker was finally taken to Tamarind where he was assessed and he was admitted to Cowdy Ward to stabilise his medication. Shortly thereafter, Dr O'Shaughnessy certified him unfit for work.

146. Mr Cassidy said that he saw the Worker at home on 18 September 2001. The Worker then indicated that he didn't think the work at Hidden Valley Tavern was suitable and asked Mr Cassidy to secure an alternative. He told Mr Cassidy that the insurer was harassing him and having him followed. He also expressed the view that the Government was having him followed in connection the September 11 terrorist attacks.

147. A placement at the Bakhita Centre was next considered and assessed. Mr Cassidy said that some reviews were done for this purpose again involving the Worker's doctor and Kristie Thompson, the occupational therapist. In consultation with the doctor, a return to work program was devised. He said that things were going well in the lead up to Christmas and progress was good. However, on 17 December 2001 the Worker booked himself into hospital and would not disclose why. I suspect this is the occasion of one of his admissions to the mental health facility given the reference to this in Dr Ding's report. He was apparently blaming IMC, particularly Steve Langer in that firm, and Serco for all his problems.

148. A workplace interview at Bakhita was conducted on 20 December 2001 during which day the Worker worked two and a half hours. He then worked three hours on 21 December and three hours on each of Christmas Day and Boxing Day. Mr Cassidy next saw the Worker at Bakhita on 2 January 2002. The Worker then told him that he was bored but was coping despite a minor back problem which was evident mainly when he was standing.

149. On 15 January 2002 the Worker called Mr Cassidy to advise that he didn't go to work that day as his legs and back were too painful. On 17 January 2002, the Worker then told him that he had been to hospital but had been sent home. He told Mr Cassidy that his legs and back were very painful and his left leg felt paralysed. Mr Cassidy therefore rang the Worker's doctor and arranged an appointment for the Worker. Following that appointment, the doctor issued a certificate certifying ongoing total incapacity. It is important to again note in this context that despite the extensive involvement of the Worker's various general practitioners, none were called to give evidence.

150. Mr Cassidy said that at about this time, the Worker had issues about payment for the hours that he worked on Christmas day and Boxing Day. He was insisting that he should have been paid a penalty rate for those days but the insurer declined. Mr Cassidy says that the Worker then said that he wouldn't go back to work at Bakhita as a result of that. It is suspiciously coincidental that the Worker's doctor had issued a certificate certifying him as totally incapacitated. Again it is a significant matter for that doctor not to be called to give evidence.

151. In cross-examination Mr Cassidy was referred to a number of documents on his employer's file, particularly a letter from Mr Langer to the insurer dated 10 October 2000 containing a reference to a complaint about a female. He said that he had not been aware of this until that very moment. Similarly in

relation to a letter from his employer to Serco dated 11 October 2000. This is the same letter that is discussed at paragraph 129 above and similar comments therefore apply.

152. There was not much issue taken with the evidence of Mr Cassidy. He impressed me as objective, fair and truthful. His evidence provided useful background material concerning the extent of investigations relating to the various return to work attempts. This is also relevant to the issue of failure to mitigate loss. In addition the apparently persecutory allegations levelled at Mr Langer by the Worker, which proved to be unsubstantiated, was illuminating in the context of the Worker's claimed conditions.

Evidence of Ms Kathleen Parkhill, Serco employee.

153. Kathleen Parkhill, another employee of Serco was next called by the Employer. She worked with the Worker and said she got on well with him. She said that the Worker interacted well with the other staff.

154. Ms Parkhill confirmed that she saw the Worker sustain his injury in May 2000. She confirmed that he went off work for a period and then returned. She recalled that he then again went off work in June of 2000 and subsequently returned to work after that. On that later return to work her observations of the Worker were that he was in a lot of pain and she was aware, from him, that he was having a lot of trouble sleeping. She said that he still interacted well with the staff at that stage. A change in that occurred in September of 2000. She said that he then became very withdrawn, he did not wish to talk to the others, was very unhappy and wouldn't mix with the other staff during breaks. He declined to join other staff despite being invited to do so.

155. She denied that he was taunted by any derogatory remarks or racial slurs. She said that during the period he worked at Winnellie in 1999 that she was not aware of nor witnessed any racial remarks. She had heard that someone was difficult with him but she was not sure who this was. She said she never heard anyone call him “compo”. She insisted that after the accident she did not see any member of the staff taunt him.

156. She said that after Christmas 2000 the Worker would not speak to her at all and this surprised her and she could not understand why. She said that on the days that he came to work, he did a good days work and there was no real change in his work attitude when he attended. She accepted the amount of time off that he had from work and said that her understanding of this was that the Worker was not in fact well enough to work. She agreed that in September and October 2000, during his return to work trial, that the Worker was definitely in pain, but that he tried to do his work. She said that he is not the sort of person to malinger. She was quite certain of that assessment. She agreed that he often worked in excess of his restrictions and had to be pulled up for this. She said that he was sullen, withdrawn and apparently paranoid but not aggressive. She was credible and did not come across as a person who had it in for him as the Worker had suggested in his evidence.

157. In cross-examination she agreed that the Worker had difficulty with one female and she agreed that that difficulty had racial overtones to it. The extent of that and the precise details were not put. Particularly, nothing is known of the basis and source of the racial overtones. For example, was her knowledge of it based on an account given to her from by the Worker or was it investigated and/or substantiated. Absent that, although this scant evidence goes part way towards corroborating one of the Worker’s allegations I do not feel it appropriate to review my assessment of the Worker’s credibility. This is because of the state of that evidence and also

because this allegation was only one of many aspects of the Worker's evidence that lead me to conclude he was unreliable.

158. She refuted the suggestion that someone in the workplace may have jokingly used derogatory terms relating to compensation cases. She insisted that she had never used such derogatory terms herself nor had she ever heard of it at Serco. Mr Grant was later to suggest this as a possibility in his submissions. However, I thought that Ms Parkhill was credible and her evidence refuted that and there was no evidence taking that suggestion of Mr Grant any further. The exception of course is the evidence of the Worker which I do not accept. I therefore reject Mr Grant's submission on this point.

159. Overall I thought she was a truthful witness. She answered spontaneously throughout her evidence. She conceded where appropriate and she bore no obvious animosity to the Worker. It beggars belief in those circumstances that the Worker could rationally come to any conclusion to the contrary. If anything I think she was a supporter of his. I have no reason to suspect she is not truthful and I accept her evidence.

Evidence of Ms Sam Schirmer, Industrial Physiotherapist.

160. Ms Sam Schirmer then gave evidence on behalf of the Employer by video conference link. She is an industrial physiotherapist and currently and for the last 21 years has been the Director of Muscular Fitness Development Unit at the Memorial Hospital in Adelaide. She has worked in the field of industrial physiotherapy for twenty five years and has performed functional capacity evaluations for over fifteen years.

161. She said that the Worker had been referred to her for evaluation by Dr O'Shaughnessy on 25 October 2001 via Mr Mark Cassidy. Her task was to define the Worker's capacity for work and to make recommendations to

progress his rehabilitation. Her report and an evaluation were tendered as Exhibit W63. She confirmed that she conferred with Dr Christopher Kelly and that she and he collaborated together in preparation of the executive summary which had already been tendered through Dr Kelly as Exhibit W50. She confirmed that she also was a signatory to that document.

162. As to the tests conducted, she reported a number of inconsistencies in the Worker's reports of pain. Firstly, the location of the Worker's claimed sites of pain was inconsistent in terms of the range of lumbar movement and she gave details. She also looked at muscle wasting in his quadriceps. She said that sciatica effects gait and muscle diameter on one side but in the case of the Worker the left and right were the same. She said the Worker claimed tenderness on palpitation, not just in the lumbar area, but also in the thoracic area. She said there was no pathology for this.

163. She said that neurology was consistent with compression around the nerve root. She said that he exhibited voluntary muscle weakness which was inconsistent with true muscle weakness. He also reported increased back pain on calf raising but this is also an inconsistent presentation. Similarly in relation to simulated rotation tests. Such movement causes minimal lumbar movement yet the Worker reported pain to the right and very little to the left. She said this is inconsistent and there should not be any pain at all. He claimed pain on light touch and head compression, when there should not have been any pain.

164. Straight leg raising tested caused her to come to the view that while he may have had some disco genic pathology, it was not impacting on his movements.

165. In relation to the static tests that she performed, she was of the view that the Worker was not genuine in his claim to not be able to hold a bar weighing

1.5 kilograms. Similarly in relation to his claim of dizziness when he got up. The graphs of the Worker's test did not fit the expected pattern. His results were well outside the standard ten to fifteen percent variation which is expected where a genuine effort is made. All the static tests showed variations well above fifty percent. When the leg lift test was performed the Worker's heart rate went to 80, which she said is not particularly high. Yet the Worker reported back pain. She said that if he was genuine he would have a very high cardiovascular effect, much more than an 80 heart rate would indicate. She said the validity testing showed poor effort and invalid results. The Worker also ranked poorly in the pushing test despite the fact that pushing is generally quite comfortable for a person with back condition. Material handling tests also ranked the Worker poorly.

166. Hand tests also gave very low rankings, yet the Worker had no claimed hand problems. Similarly he had claimed increased back pain on flexion and extension of the fingers and there is no possible cause for this connection. At one point he reported that his heart was "racing" yet his pulse at that time was seventy-five and his blood pressure was 120/80.

167. Ms Schirmer concluded that all the test results were inconsistent. Overall she thought the Worker had more capacity than he admitted. According to the Worker's responses he would be rated in the sedentary category. She confirmed that a kitchen hand requires a rating in the medium category.

168. In cross-examination she agreed that the self limiting behaviour she observed could be explained by any of either fear of pain, fear of injury, depression, anxiety or lack of familiarity with a safe physical maximum. She qualified this however by saying that for those issues to be present she would have expected the self limiting to be consistent. The Worker's results were inconsistent and therefore she doubted the influence of those factors.

169. She agreed with the proposition that where a patient has a mistaken belief as to his level of pain, that fear or distress at not coping militates against a finding of conscious malingering. However, she said that in this case again the indications support such a finding given the extent of the variations previously referred to.

170. She agreed that it is possible the Worker's pain comes from a facet joint or bony structure even absent any disco genic pathology. She also agreed with the proposition that had the Worker returned to work without conditioning that there would have been some likelihood of aggravation. She also agreed that she identified signs of previous disco genic injury.

Evidence of Dr Leslie Ding, Psychiatrist.

171. Dr Leslie Ding was called by the Employer and gave evidence by video conference link. He is a consultant psychiatrist. He confirmed that he saw the Worker on 2 July 2002 and prepared a report for the Employer's solicitors dated 9 July 2002. This was tendered as Exhibit W66. He confirmed that he was provided with various materials including the two MSF documents. He did not say whether he had been provided with, or viewed, the various videos. He made no reference to the videos, either in his report or in his evidence. He confirmed that the Worker was co-operative and presented in a straightforward manner.

172. He concluded in his report that there was then no current psychological disorder evident in the Worker and no incapacity for work. In his evidence he confirmed this view and said that barring any change in the Worker's psychological state post that interview, that view remains unchanged. He did say that he considered that the Worker suffered from a pain disorder. In cross-examination he confirmed that the reference to pain disorder referred to a claim of pain without an organic cause. He said that the disorder in this

case in fact qualified as a chronic pain disorder. Although at times his explanation was unclear as to whether the pain disorder was a psychiatric disorder, his final conclusion on that topic is clear, namely that the Worker had no psychiatric disorder and no incapacity for work. Furthermore, his insistence that he should defer to the physical specialists on the relevance of the pain disorder makes it clear that his view is that it is not a psychiatric disorder. The physical specialists, other than perhaps Dr Burrows, do not consider that the Worker suffers that condition. Moreover Dr Burrows said that pain cannot have a psychological cause.

173. He was questioned about the relevance of the news of the failure of the visa application for his sister and family. Dr Ding expressed the view that the significance of this related to the disappointment factor. Although he considered it would have been stressful for the Worker given his past traumas (including the death of family members, the ongoing trauma of living in a refugee camp, the loss of his girlfriend and the destruction of his house), the significance of the failed visa application was that it rendered him psychologically vulnerable to further disappointment only. This is consistent with his view that the Worker did not suffer from a psychiatric condition.

174. He accepted that there were two possibilities to explain the pain claimed by the Worker, firstly that there was pain from a pathological basis which was not evident from radiology. The second explanation is that the pain is a somatoform disorder. Dr Ding however said that the latter could not apply to the Worker as he didn't consider that the Worker's pain complaints emanated from a psychological disorder. That again makes it clear that Dr Ding's view is that the pain disorder is a physical, not a psychological, disorder.

175. Dr Ding confirmed that he had material which indicated to him that the Worker considered that he was not being treated fairly at his work. He also confirmed that the Worker's claim to pain, his humiliation and his perception of sub-optimal treatment at the hands of his employer all contributed to his psychological condition in January of 2001. In light of this he was asked to opine as to whether the claimed injury was an aggravation of the depressive condition which he found the Worker to have suffered in 1995. He thought this was difficult to answer but he leant towards the view that it was a fresh episode and that it was referrable to the combination of pain, humiliation and perception of sub-optimal treatment. He also relied significantly on the fact that before January 2001, he would not have diagnosed a major depressive disorder on the information that he had.

176. He was asked to consider the significance of the Worker's regular employment. He said that the indication of regular employment, a good work record and good work relationships made it most unlikely that he had any psychological disorders. Similarly, his membership of the Runners Club was a significant indicator. This view is consistent with that of Dr McLaren.

177. He confirmed that the MSF documents are the most material that he has in relation to the Worker's 1995 condition. He confirmed that he does not know who the authors are, what their qualifications are or what the validity of those comments are. He agrees therefore that his assessment of the 1995 condition is subject to these vagaries.

178. Dr Ding agreed with the proposition that the relevance of any mental disorder in 1995 was that he was more vulnerable to the development of a relapse. Notwithstanding that, he maintained his opinion that there was no psychiatric disorder at or subsequent to July 2002 or any incapacity for work based on psychological factors. He was firm and clear on this view.

179. At the end of the day he agreed that the Worker suffered a chronic pain disorder. He however confirmed that this is outside his area of expertise and that he defers to the physical specialists, particularly musculo–ligamentous and pain management specialists. I note that this is Dr Kelly's area of expertise and Dr Kelly's assessment, which is unfavourable to the Worker, has been noted. Mr Grant submitted that I should look away from the characterisation of the condition as either a physical or psychological disorder. He submits that then Dr Ding's view is not far removed from the views of Dr Kenny and Dr McLaren. Mr Grant submitted that on a proper analysis, the evidence of Dr Ding was consistent with that of Dr Kenny and supported the Worker's case. He reasoned that despite Dr Ding's "suggestion" (I think though that Dr Ding's assessment is much stronger than a mere suggestion) that the Worker did not have a psychiatric condition, he accepted that he had a chronic pain disorder. He noted that Dr Ding defined this as an intensity of and preoccupation with pain. He said that Dr Ding accepted that the Worker's injury in May 2000 resulted in the Worker experiencing an increased level of pain in his back. Dr Ding also accepted that the Worker's perception of unfair treatment at work following his return to work intensified the pain symptoms and gave rise to a pain syndrome. He surmised therefore that whether the chronic pain condition is a physical or a psychological injury, Dr Ding accepted that the condition resulted from the initial injury and the psychological and social consequences of that injury. It was for this reason that Mr Grant therefore submitted that it was appropriate to ignore the issue of whether it is a physical or psychological disorder. He submitted that it follows then that Dr Ding's view is not far removed from the views of Dr Kenny and Dr McLaren. However it is clear to me that Dr Ding considers the pain disorder to be a physical condition. Dr Ding clearly qualifies his evidence in a way that would not enable me to prefer his view over that of the physical specialists, particularly Dr Kelly. I cannot therefore accept Mr Grant's submission. In any event, the entirely different conclusion that Dr Ding

comes to compared to Dr Kenny and Dr McLaren dramatically illustrates this. Finally, it remains the case that I have rejected the evidence of both Dr Kenny and Dr McLaren.

180. Moreover the difficulty with Mr Grant's submission in respect the evidence of Dr Ding is that he clearly accepted that the Worker was genuine in his complaints of pain. His opinion about the existence of the chronic pain disorder is based on that. I, however have come to a different conclusion. I have the benefit of a complete picture from the totality of the evidence. Particularly I have regard to the objective evidence of the videos which seriously questions how genuine the Worker is in relation to the extent of his pain. I have doubt as to whether Dr Ding has seen the videos by reason of the absence of comment about them either in his report or in his evidence. The inconsistencies in the Worker's evidence and his presentation in Court and the effect on these factors on the Worker's credibility are also very significant.

181. In re-examination Dr Ding was asked about the MSF documents. He said that although he is aware of the organisation he is not overly familiar with it. He said that he was not able to get enough history from the Worker to make a diagnosis of his condition while in the refugee camps. He was referred to the first of the MSF documents namely Exhibit W13 and noted a reference to "laroxyl". He confirms this is an anti-depressant. In Exhibit W14 he notes the reference to "chloropazamene". He confirmed that this is a psychiatric drug used for its anti psychotic properties as well as its sedating effect. He said it has been used by psychiatrists for over forty years. The reference therein to "100 mg bd" means 100 milligrams twice per day which he says is a significant dosage of that medication.

182. In summary Dr Ding found no psychiatric disorder or incapacity for work as at July 2002 when he examined the Worker. He agreed however that the

Worker suffered a chronic pain disorder. I reject his basis for arriving at that conclusion. In any event that view is inconsistent with the evidence of the very specialists that Dr Ding defers to on that issue. The overall effect of that is that it does not advance the Worker's case.

Evidence of Ms Margaret Anne Earle, Serco employee.

183. Margaret Anne Earle, another employee of Serco during the relevant period, was next called by the Employer. She said that she had worked with the Worker and she got on well with him as did the Worker with other colleagues.

184. She confirmed that in her discussions with the Worker he had spoken about his background. She said that he had told her that his father had been murdered as a politician, that he had been brought to Australia by the United Nations, that his brother had been taken somewhere by the United Nations but does not know where, that his mother and sister were still in Ethiopia and that he could not go back to Ethiopia for fear of being murdered.

185. She said that the Worker communicated readily and easily with her. She said that she mixed socially with the Worker and chatted with him when she saw him at Casuarina. She said that one day on 2000 the Worker came to her and told her that his mother had died, that she had been dead for a few weeks but that he had only just learnt of it as he had lost contact with his sister. He said his sister was now in Kenya and was ill. She tried to console him. She estimates that this was in March or April of 2001, in any event before the accident the subject of the claim.

186. She said that the Worker never referred to having a grandmother. She recalls the Worker mentioning that attempts were being made for his sister to come to Australia and she also recalls him later mentioning that that was

unsuccessful. Lastly she said that there was no racial tension at Serco particularly any involving the Worker.

187. In cross-examination Ms Earle resisted the suggestion that the Worker's comment was that the murder of the Worker's father was political. She was clear that the Worker had claimed that his father had been in parliament. She said she had spoken more than once with the Worker about this.

188. I accept her evidence despite the general submission made by Mr Grant concerning the evidence of the Serco employees as a whole. Her evidence was consistent with the evidence of the other employees who were called, all of whom I thought were credible.

Evidence of Mr Jason Nielson, Hidden Valley Tavern employee.

189. Jason Nielson was called by the Employer. He said that in August of 2001 he was employed at the Hidden Valley Tavern as the head chef. He said there were three staff in the kitchen namely the head chef, a second chef and the kitchen hand come waitress.

190. He said that he met the Worker in August 2001 when he attended for a work hardening program. He confirmed that he met with Mark Cassidy before the Worker started. He confirmed that the Worker was employed as a kitchen hand but had some restrictions. He said that he worked a maximum of four hours per day. He said his duties were preparing vegetables and salads, not cooking as the Worker said in his evidence. He said he was aware that the Worker was being eased back into the workforce and was conscious of his injury and the need to control lifting. He said that he told the Worker he could take a break whenever he felt he needed it and that it would not inconvenience anyone as he was an extra staff member in any event.

191. He said that the Worker's workload was minimal. He said that the Worker worked at a slow pace which he accepted was due to his injury. He said that many times he had occasion to tell the Worker to take a break and sit down if he needed to. He said that the Worker never complained that the work was too hard or difficult. He confirmed that he only worked there for some four to five days although the trial was intended to have been of two weeks duration.

192. He was asked whether he ever discussed personal matters with the Worker and he said that he once spoke to him about his family. He was of the view that the Worker was upset that his family were not with him and that he missed them.

193. He did not recall the Worker favouring his right leg when he walked.

194. In cross-examination he agreed that the work that the Worker performed at Hidden Valley Tavern would have been performed while standing. He said however that the Worker was offered a stool if he needed it or wanted it but that the Worker never took up this offer.

195. He was asked to elaborate as to what he meant by the comment that the Worker "didn't do much". He said that the Worker took thirty minutes to do what should have taken ten minutes.

196. He was asked if he ever recalled telling staff at IMC that the Worker was an excellent worker but that he didn't take breaks. He did not recall any of this. He resisted the suggestion that he may have said this. He said that he would not have described him as an "excellent" worker. He conceded however that he may have told IMC that the Worker did not take breaks. Finally he said that based on the Worker's performance there during that short time, he would not have offered the Worker a position.

197. That then concludes the summary of the evidence in this matter.

Discussion of the evidence and findings.

198. For the reasons given above it should be clear that I do not consider that the Worker is a credible or reliable witness. The net result of that is that I do not accept his evidence nor do I accept any consequent evidence or opinion which is based on the truth of the claims made by the Worker where they are in dispute. Importantly the video evidence indicates a capacity on the part of the Worker inconsistent with the claims that he makes. That rules out a genuine physical incapacity. That would not have precluded a genuine psychiatric incapacity however the inconsistency evident at different times in the various video footage leads me to the conclusion that there is no genuine psychiatric condition. As both Doctor Hardcastle and Ms Schirmer said directly, and as Mr Haig suggested indirectly, if there was a genuine psychiatric condition then it would be evident at all times and there ought not to be any inconsistent presentation.

199. As the case developed and as the overall picture of the Worker's case developed, I was quite surprised in the wash up as to the extent of the witnesses who were not called in support of the Worker's case. He has changed his general practitioner a number of times yet not one of his general practitioners was called. I have specifically alluded to this at various times in these reasons where I consider the omission has the greater significance. In summary, the general practitioners were practitioners that he saw regularly. Those general practitioners were consulted in relation to return to work programs and it was they primarily who gave certificates of the Worker's incapacity. I have no doubt that they had regular contact with him and would be in a position to provide useful evidence as to his incapacity. In addition he was referred to Dr Chin at the Royal Darwin Hospital and to an

orthopaedic surgeon on referral from his neurologist, Dr Burrows. Neither was called.

200. Much was also said in relation to the Worker's support group at the Torture And Trauma Centre. Given particularly the timing of certain stressors in the Worker's life, given the dispute as to whether the Worker suffered a psychiatric injury while in refugee camps, given the possible overdose come possible over medication of the Worker, given his admission to Cowdy Ward and treatment by Northern Territory Mental Health practitioners, given the contemporaneity of symptoms with the failure of the visa application submitted on behalf of his sister and her family and another friend, given the Worker's apparent social isolation and its relevance to his overall mental condition, I am very surprised that the Worker did not call anyone from that support group. Likewise I would have thought that more evidence (ie more than Mr Blake), of his social interaction would have been called.

201. The only medical evidence called by the Worker was Dr Burrows, Dr McLaren and Dr Kenny. Mr Grant has suggested in his submissions that Dr Burrows should be preferred as he is the only specialist called in relation to the physical condition who attended him in a therapeutic context and not solely in the medico-legal context. That bare statement however needs to be viewed against the failure to call the other doctors involved in the therapeutic context who had more significant involvement than Dr Burrows. In any event, Dr Burrows conceded that he only saw the Worker twice in circumstances and for a duration which would at the very least neutralise any advantage, if there was one, of seeing the Worker in the therapeutic context. The first occasion was approximately 18 months after the first injury and the second occasion was more than two years after the first injury. The opinions of Dr Burrows, Dr Kenny and Dr McLaren are in question given their acceptance of the Worker's claims (which I do not consider reliable or believable). The evidence presented to support the

Worker's case is therefore quite scant. It is for the Worker to decide which witnesses will be called. I am not able to of course infer anything from his unexplained failure to call witnesses other than those witnesses evidence would not have been helpful to the Worker's case. That in itself is quite a damming inference given the overall issues in the case. There are numerous references in the Worker's evidence amounting to obvious hearsay comments as to what he was supposedly advised or told of his condition by his doctors. I am not prepared to give any weight at all to this, especially given my adverse view of the Worker's credibility. If evidence of that is to be lead then it should come from the doctor concerned. I am of the view that it is appropriate to draw an adverse inference from the failure to call a number of witnesses, particularly the Worker's treating doctors. I am permitted to and do infer that had they been called, they would not have supported the Worker's case. *Jones v Dunkel* (1959) 101 CLR 298.

The section 69 issue.

202. As to whether the Employer has complied with s 69 of the Act entitling it to cease payments of compensation, I have come to the conclusion that the section has not been complied with. Section 69(1) of the Act provides, in summary, that once a claim is commenced, compensation cannot be varied or cancelled unless the Worker has been given 14 days notice of the intention of the employer to do so. That notice must be accompanied by a statement setting out the reasons for the proposed variation or cancellation. In turn s 69(3) requires that where the basis is that the Worker has ceased to be incapacitated, the statement of reasons must be accompanied by a medical certificate to that extent. Section 69(3) must be strictly complied with. *Collins Radio Constructors v Day* (1998) 143 FLR 425.

203. The Form 5 was put in evidence as Exhibit W8. The statement of reasons specified in the form attaches and refers to a medical certificate of Dr

Hardcastle dated 12 December 2000. That certificate in turn acknowledges Dr Hardcastle's examination of the Worker on 14 November 2000 and states that in respect of that injury "... Mr Beyan has ceased to be incapacitated for work."

204. The Worker relies on *Rupe v Beta Frozen Products* [2000] NTSC 71 (*"Rupe"*). That case is authority for the proposition that compliance required by s69 is more than just compliance with form. It is mandatory that the certificate specifies cessation of incapacity for work. In that case there was an element of speculation or expectation on behalf of the doctor giving the certificate as to when the worker would be able to resume full time work. That his certificate was subsequently given without further enquiry or subsequent examination of the worker was criticised by the Court.

205. In this case the initial examination by Dr Hardcastle was 14 November 2000. His report following that consultation (Exhibit W33) acknowledges the injury and expresses the opinion that the Worker should be able to resume full time duties over the succeeding two to three months. He then describes the restrictions that ought to be observed in the interim. It is clear that there was, in the opinion of Dr Hardcastle, ongoing incapacity for work, albeit not a total incapacity, as at November 2000 and that the incapacity would gradually reduce over the next two to three months. Thereafter his view was that the incapacity for work would cease although there would be ongoing restrictions for a time.

206. After providing that report, Dr Hardcastle was provided with some video footage taken of the Worker. That included the footage of the Worker placing the two suitcases in the boot of the car and the video footage of the Worker on the actual day of the consultation. As indicated earlier in his reasons I consider that video footage to be very significant and very damming of the Worker's then claims of incapacity. After he viewed those

videos, Dr Hardcastle provided a further report dated 23 November 2000 (Exhibit W34). After describing in detail the video footage, Dr Hardcastle states that he has no reason to alter the comments made in his earlier report, by which he clearly refers to the report dated 21 November 2000 ie. Exhibit W33.

207. The difference in this case compared to *Rupe* therefore is that Dr Hardcastle had some further material in between the time of his assessment on 14 November 2000 and the date he provided his certificate for the purposes of the Form 5 Notice. He clearly states however that further video evidence did not in any way alter the opinion he expressed in his report of 21 November 2000 (Exhibit W33). In my view therefore that would not appear the take the matter any further. The fact remains that Dr Hardcastle found the Worker to be suffering an incapacity as at 14 November 2000, he expressed the expectation that that would resolve in two to three months such as would enable the Worker to return to his he pre-injury employment albeit with some further restrictions. He then provides the certificate forming part of the Form 5 Notice without any further examination or without any further information to confirm his expectation.

208. I am of the view therefore that this case follows *Rupe* squarely. The Employer submits that *Rupe* is distinguishable in that in this case Dr Hardcastle had additional evidence available to him upon which to base his opinion. However it is clear that he places no significance on that additional evidence and therefore that submission cannot be maintained. The Employer ought to have arranged a further examination of the Worker by a medical practitioner, not necessarily Dr Hardcastle, when the incapacity had ceased and obtain a fresh certificate confirming the cessation of incapacity. A fresh Form 5 notice would then have to be given.

209. The net result is that the Form 5 notice was not valid and nor was the cessation of payments by the Employer. As such the Employer was obliged to continue to make weekly payments of compensation until there is either a fresh notice or until a substantive application is made *(Ju Ju Nominees Pty Ltd v Carmichael* (1999) NTSC 20).

210. Notwithstanding that finding the Employer is entitled to rely upon its Counterclaim to assert independently of the Form 5 Notice that the Worker has ceased to be incapacitated as of November 2000. *Alexander v Gorey* [2002] NTCA 7. The effect of this is that my finding does not pre-emptively require resumption of benefits from 28 December 2000. My finding therefore becomes largely academic in terms of the substantive proceedings as I find, despite the ineffective cancellation, that the Worker was not incapacitated for work as at 28 December 2000.

Failure to give notice of claim.

211. One of the issues in this matter is the Employer's contention that the Worker is precluded from entitlement to compensation to the extent that it relates to a psychiatric injury by reason that no specific notice of claim was made for psychiatric injury.

212. This argument has its genesis in s80 and s82 of the Act. These sections provide as follows:

> 80. Notice of injury and claim for compensation
>
> (1) Subject to this Act, a person shall not be entitled to compensation unless notice of the relevant injury has, as soon as practicable, been given to or served on the Worker's employer.

(2) An employer who receives a claim for compensation shall be deemed to have been given notice of the injury to which it relates

82. Form of claim

(1) A claim for compensation shall –

(a) be in the approved form;

(b) unless it is a claim for compensation under section 62, 63 or 73, be accompanied by a certificate in a form approved by the Authority from a medical practitioner or other prescribed person; and

(c) subject to section 84(3), be given to or served on the employer.

(2) If the claim and certificate are not given or served at the same time, the remaining document shall be given or served on the employer within 28 days after the first document is given or served and the claim for compensation shall be deemed not to have been made until the day on which the remaining document is given to or served on the employer.

(3) A defect, omission or irregularity in a claim or certificate shall not affect the validity of the claim and the claim shall be dealt with in accordance with this Part unless the defect, omission or irregularity relates to information which is not within the knowledge of or otherwise ascertainable by, the employer or his or her insurer.

(4) A Worker shall authorise the release to his or her employer of all information concerning the Worker's injury or disease, if the claim form specifies that the Worker is required to authorise the release of that information, and the claim for compensation by the Worker shall be deemed not to have been made until the authorisation is given.

(5) An authorisation under subsection (4) is irrevocable.

213. It has been held that the provisions of s80(1) of the Act are a precondition to a claim and not a mere procedural requirement. *Maddolozzo v Maddick* (1992) 108 FLR 159.

214. My findings effectively obviate the need to consider this point but I do so in the event that it becomes relevant. To do so I will assume for the purposes of the argument that the Worker does in fact suffer from a psychiatric condition that derives from the course of his employment. Again, for the purposes of argument only, I assume acceptance of the views of Dr McLaren and/or Dr Kenny. Dr McLaren stated the proposition that the Worker's psychotic symptoms were precipitated by the Worker's pain and discomfort following the injury combined with a lack of self esteem, sense of humiliation and perception of sub-optimal treatment at the hands of his Employer. Dr Kenny described the psychiatric condition as a reaction to the physical injury and the circumstances into which that has precipitated the Worker. Had I accepted this evidence then it is clear that the psychiatric injury, if directly attributable to the initial injury, is properly characterised as a sequela to the initial injury in the absence of any intervening act. To me this logically follows in the same way that for example a limp which develops some time after a broken leg can be directly attributable to the initial breakage of the leg. I see no reason why this same interaction cannot be apparent between an original physical injury and a consequent psychiatric injury, as long as the psychiatric injury is established and again absent any other intervening causal factors. As a matter of principle this has been accepted by the High Court in the common law context in *Shorey v PT Ltd* [2003] HCA 27. On my reading of that authority there is no reason why that could not be applied in the context of a statutory scheme of workers compensation.

215. Moreover it is clear from the evidence of Ms Parkhill and Mr Campbell, and to a lesser extent that of Ms Earle, that shortly after the Worker's commencement of the return to work program, the Worker was exhibiting signs of psychological disturbance, most notably paranoid features. (I leave aside for the present whether the Worker was genuine in that regard or the issue as to whether those symptoms if genuine arise out of the course of the

employment.) In addition there can be no doubt that medical certificates were provided to the Employer which were given by Dr Di Bella and Dr McLaren. Both a psychiatric professionals. There was some evidence from Mr Campbell which doubted whether he had been provided with those certificates. I think he may be wrong in his recall of events there, but in any event there can be no dispute that they were provided to the Employer. Mr Cassidy, the case manager appointed by the insurer also directly observed events which lead him to suspect an overdose and arranged for the Worker to be seen by Mental Health workers from Tamarind Centre. That alone, in any event, would dispose of the issue of notice in relation to the claimed psychiatric issue in my view.

216. In my view therefore the notice given by the Worker satisfied the requirements of s80(1) of the Act.

Failure to mitigate.

217. On this issue the Employer relies on the evidence of Sean Mahoney. His report (Exhibit W64) was tendered by consent and without requiring him to attend for evidence. His evidence is therefore unchallenged. Interpreting his evidence in light of my findings concerning the Worker's capacity for work, the conclusion must be that there is a high demand for workers with the skills and experience of the Worker in the local work market. The report suggests in fact that the Worker's prospects of securing employment are good even if the Worker is disabled. However, I do not consider that the evidence in relation to the return to work attempts at Hidden Valley Tavern and Bakhita Centre is relevant to this issue. That evidence alone cannot support any conclusion concerning availability of work.

218. Mr Grant's submission that the failure to mitigate has not been made out as the Worker genuinely felt that he was incapable of engaging in employment

can have no foundation given my findings. Absent my findings to the contrary, that submission would have been a very valid answer to the Employer's case. The submission based on the ongoing certification by the Worker's treating doctors also has no basis in light of my findings.

219. Given my findings as to the Worker's incapacity and given the evidence of the availability of work, it is inconceivable to conclude other than that the Worker has failed to mitigate his loss. His total effort since approximately February 2001 has been to secure a part days work, as a volunteer no less, at Greening Australia. He has the obligation to mitigate his loss (*Ansett v Van Nieuwmans* (1999) 9 NTLR 125) and he has failed in that obligation.

Findings.

220. In summary form my findings are:-

1. That the Form 5 notice dated 28 December 2000 was ineffectual to cancel the Worker's then benefits pursuant to s69 of the Act.

2. That proper and valid notice of the Worker's injuries on 10 May 2000 and on or about 26 June 2000 was given by the Worker including in relation to his claimed psychiatric injuries.

3. That on 10 May 2000 and on or bout 26 June 2000, the Worker suffered a soft tissue injury being an aggravation of his pre-existing degenerative condition of the lumbo-sacral spine, possibly with an annular tear.

4. That the Worker did not suffer from a psychiatric condition arising out of or in the course of his employment.

5. That the Worker is not incapacitated for work either from a physical injury or a psychiatric injury as and from 28 December 2000.

6. That the Worker has failed to mitigate his loss.

221. Essentially therefore, I dismiss the Worker's claim and I find for the Employer on its counterclaim.

222. I will hear the parties as to costs and any ancillary orders.

Dated this 1st day of December 2003.

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V. M. LUPPINO
STIPENDIARY MAGISTRATE