CITATION: *McFarland v NT Drilling Pty Ltd* [2003] NTMC 62

PARTIES:	GARY JOHN MCFARLAND
	v
	NT DRILLING PTY LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO(s):	20113035
DELIVERED ON:	8 December 2003
DELIVERED AT:	DARWIN
HEARING DATE(s):	9 – 11 JULY 2003
DECISION OF :	R. J. WALLACE SM

CATCHWORDS:

Workers Compensation – Work Health Act (NT) – "normal weekly earnings" – whether fringe benefits included – whether compulsory superannuation payments included – interest and rate of interest on unpaid payments.

REPRESENTATION:

Counsel:

Worker:	C McDonald QC
Employer:	S Southwood QC

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2003] NTMC 62
Number of paragraphs:	47

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20113035

[2003] NTMC 062

BETWEEN:

GARY JOHN MCFARLAND
Worker

AND:

NT DRILLING PTY LTD
Employer

REASONS FOR DECISION

(Delivered 8 December 2003)

Mr Wallace SM:

1. This is a claim for worker's compensation pursuant to the *Work Health Act* ("the Act"). The hearing proceeded on the basis of mainly agreed facts, recited in Ex 1 :

"1. Mr McFarland was at all material times a worker under the *Work Health Act* (the Act).

2. Mr McFarland was employed as a driller operating drilling rigs in the Tennant Creek region of the Northern Territory.

3. On or about 10 November, 2000 Mr McFarland suffered an injury to his back. He sustained a further disc prolapse at the *L415* area of the lumbar spine leading to continued low back pain and radicular symptoms affecting the right leg.

4. Mr McFarland made a claim under the Act in respect of the injury and the employer accepted that claim.

5. Mr McFarland is totally incapacitated for work from and including 16 December 2000 to the present date and continuing.

6. The wages component of Mr McFarland's normal weekly earnings in his employment with the employer was $951 gross per week.

7. The amount of rent paid by the employer on behalf of Mr McFarland was $180.00 per week.

8. The amount paid for by the employer for food and groceries on behalf of Mr McFarland was $197.06 per week.

9. The employer paid the rent for the premises occupied by Mr McFarland directly to the landlord until 29 September, 2001. Thereafter, Mr McFarland has been responsible for paying his own rent.

10. Mr McFarland's employer provided him with a motor vehicle for his use in work which was a 1998 Nissan Patrol DX Diesel tray top with bullbar and airconditioning.

11. Mr McFarland returned the motor vehicle to the employer on 1 August, 2001.

12. At all material times the employer had an obligation to make contributions of superannuation on behalf of Mr McFarland in accordance with its obligations under the *Superannuation Guarantee Charge Act (Commonwealth)* and / or the *Superannuation Guarantee (Administration) Act (Commonwealth).*

13. As at 10 November, 2000 the superannuation contributions were calculated at 8% of Mr McFarland's salary or wage of $951.00 gross per week.

14. At all material times the taxation payable in respect of the superannuation contributions was different from the rate of income tax and was 15%."

2. A further fact was admitted during the course of the hearing: that the claim had been accepted by TIO on 27 March 2001.

3. These facts being agreed, the issues left in dispute were helpfully listed in a document handed up by Mr McDonald QC, counsel for Mr McFarland:

"1. Whether Mr McFarland's normal weekly earnings (NWE) within the meaning of the Work Health Act at all material

times included the value to him of non-cash benefits (except for food and groceries which is now admitted) provided to him by the employer.

2. Whether Mr McFarland's NWE includes the rent paid on his behalf by the employer for Mr McFarland and his family's personal accommodation.

3. Whether Mr McFarland's private use of a motor vehicle and free petrol for that motor vehicle at all material times is to be included as part of Mr McFarland's NWE.

4. What is the value to Mr McFarland of his personal use of the motor vehicle and free petrol at all times.

5. Whether the value to Mr McFarland of non cash benefits forming part of his NWE should be treated as gross and tax deducted or be treated as net with the employer to pay the additional tax.

6. Whether Mr McFarland's NWE also included superannuation contributions payable by the employer to a fund on behalf of the worker such contributions being payable and calculated pursuant to the Superannuation Guarantee Charge Act (Commonwealth) and/or the Superannuation Guarantee (Administration) Act (Commonwealth).

7. What is the net value to Mr McFarland of the superannuation contributions."

4. The questions of costs, and any interest due on unpaid compensation, are also in issue.

5. Apart from the agreed facts, and a number, of documents tendered by consent, I heard evidence, pretty well confined to the area of the issues left in dispute, from Mr McFarland in his own case, and from Mr Martin Westveld, a director of the Employer company, in its case. Mr Westveld is based in Perth Western Australia. It seems that the Employer company was created to take advantage of a contract Mr McFarland had won, but was unable to perform on his own, to do drilling exploration work for the Granites Gold Mine. Mr McFarland thus became the man-on-the-spot for the

Employer, and the Employer's supervision of him was, it seems, loose. Mr Westveld paid at least one trip to Tennant Creek, where Mr McFarland was domiciled, and at least one to the Granites work area. They may have been the same trip. Otherwise, it seems, Mr McFarland was left to run the show. Consequently, Mr Westveld had very little grasp of the Employer's day-to-day operations. I am sure he had a very good grasp of its finances.

6. Mr McFarland, who would have known all there was to know about the Employer's operations, was, unfortunately, a witness with a very poor memory. For example, giving evidence in July 2003, he was unable to remember with any certainty the year, let alone the month when he had started to work at the Granites. Nor did he have any recall of the date, or indeed the place, of his injury, (which is not all that surprising: the injury which, it eventuated, was The Injury for the purpose of these proceedings was last in a series of backaches going back years). The event about which all other dates pivoted in Mr McFarland's mind was an operation on his back in April (or perhaps March) 2001. I assume the operation did him no good, and that after it Mr McFarland came to recognise that he had a problem that was not going to go away quickly, if ever.

The Car

7. In his examination in chief Mr McFarland was asked to recite the terms of his employment. Some - salary and some non-salary conditions – he recalled spontaneously. On others – the car and superannuation – he needed to be mildly led. From p 15 of the transcript

> "MR McDONALD: Thank Your Worship.
>
> Was there any discussion about a motor vehicle?---Yeah, there was. He knew I liked Nissans and - to Toyotas 'cause they're a lot better in the bush and that as far as I'm concerned. He asked me did I want a Toyota or a Nissan and I told him a Nissan. And he asked did I want a spring leaf or a coil leaf and I said coils and so he sent me over a new Nissan to use for myself plus work.

all right?---(inaudible).

And that was the subject of actual discussion with Mr Westfield?---Yeah.

And from p 16

"Now, in relation to the car, what discussion did you have about your use of the car? What did Marty say to you'---well, to class it as my own, plus use it for personal. He knew - he knew I had no vehicle, so there was no vehicle in Tennant Creek at the time. I had none and he told me I could use it for myself as well as work, as long as I looked after it, which he knew I would anyway."

Now did you discuss the type of car that you'd get?---Yeah, I discussed the Nissan because I - I liked Nissans and he'd of bought anything for me at the time, you know.

Was there any discussion about fuel ?---Yeah, he opened an account up at the NT -at the BP Service Station in Tennant Greek and told me I could get all my fuel from there.

What did Mr Westveld say to you about the fuel?---He told me he was going to open an account. He rang me up and told me he'd opened up an account at the BP Service Station in Tennant Creek and all my fuel would come from there.

Right. And ---?---Fuel and oil.

--- did you have to pay anything ?---No.

What about registration?---Nothing, no. The registration and insurance and whatever was ---Repairs?---No.

So who was to look after repairs, rego, insurance?---Whatever. NT Drilling paid for all that."

8. Mr McFarland went on to give some details of his private use of the car. I will touch on that evidence later.

9. The employer's contention is that it provided the car to Mr McFarland for work purposes. Mr Southwood QC, counsel for the Employer, did not put to Mr McFarland that he, Mr McFarland, was supposed to use the car only for work. Here is the relevant cross-examination (p23 –24):

“Yes, but the only things that were discussed at the time that you commenced employment with NT Drilling was the payment of $3000 per month, or thereabouts?

---Yep.

The payment of rent?---Yep.

And the payment of food?---Yeah.

And no more?---And the car.

Well, the car wasn’t discussed in that context at all ---?--- Yes, it was. It was discussed about a month before that, before the - we knew we had no vehicle there and he said - he even asked what car I wanted.

Yes? If I’d have said anything, he’d have bought it, you know.

Wasn’t the position this: that in order to fulfil the contract at the Granites mine site, NT Drilling needed a ute at the mine site?---Yeah.

In other words, you couldn’t do your job at the Granites mine without the Nissan, could you?---No, no, that’s for sure, that’s right.

So what happened was this: that NT Drilling purchased the Nissan?---Yeah. It at all times was the owner of the Nissan?---Yeah.

And for the whole of that six month period between February of 1999 and when that contract ended the Nissan was used at the Granite mine site for the purposes of NT Drilling, wasn’t it ?---The Nissan - the Nissan arrived about two months before we even went to the Granites.

Yes?---And we used it for everything, you know.

I’ll just ask you in relation to the Granites. That’s where my question is confined to?

---Yeah.

You’ve agreed, haven’t you, that in order for that contract to be fulfilled the ute needed to be purchased?---Yeah, for work, yeah.

> Yes, and for the whole of that six month period while you were at the Granites that's where the ute was used?---Yeah.
>
> Wasn't it?---Yep.
>
> And it was because ---?---The six months - excuse me. Like you work on - I think the longest stint we had was about six weeks straight, or something like that. But then you'd go back to - go back to your breaks and that, you know. You were off for a week - a week or so and then you'd go back out again.
>
> Yes. Now NT Drilling didn't have an office in Tennant Creek at the time it commenced the Granites contract, did it?---They were using my house. It was classed as the office, sir.
>
> Yes, so apart from your home which was used as an office for them, there was no other area that they had? ---We had - couldn't park the rig there. When the rig was in we couldn't park that, so we had it usually at my mates' places, parked the rig on that property because it's industrial, see, and you can't park the heavy rig there.
>
> That's right. But the only place, in effect, that the ute could be kept while you were in Tennant Creek was at your home?---Yeah, or else out at the---"

10. And from p25

> "So the ute was by and large kept where?---At my place and we had the rig parked at the - on Kevin Hingston's place and when work had to be done on the rig we used to go out there - go out there and do it in his yard.
>
> Yes, to work on the rig?---To work on the rig, yeah, and whatever.
>
> Thank you. The vehicle, that is the Nissan, was really, wasn't it, NT Drilling's work vehicle?---Yeah. Well, the agreement was with Marty, as he told me, was to use it for work and myself He knew I had no vehicle for getting around in.
>
> But your use was merely incidental---?--- Mm mm.
>
> - - - to the use of the motor vehicle for the purposes of NT Drilling, isn't that the case?---Yeah."

11. Mr Westveld's evidence on the point was brief. In chief he said (p51)

"If I can then move to the Nissan Patrol motor vehicle that was used for the purposes of doing the work you've described at Dead Bullocks Soak, ferrying men and equipment between the accommodation and Dead Bullock Soak, in relation to that ute was anything at some point in time discussed about— perhaps you go to that I will withdraw that question. That Nissan, who was it owned by?---NT Drilling.

As to the use of that Nissan utility or truck, at some point in time did you and Mr McFarland have discussions about what use he may personally be able to make of that truck or not?---Well, you know I don't think there was at any time - you know, it was my understanding that he could use the vehicle to drive to and from work.

When you say 'to and from work', is that to and from the accommodation at Granites to Dead Bullock Soak or what was the position?---Yeah, in a word, and plus he used to drive it back to Tennant Creek."

12. And in cross-examination (p 54 – 55) :

"In relation to the car, you discussed obviously the motor vehicle?---No, that was part of his package.

All right, the car was part of the package?---l mean, you know, he drove to work and

- to take the guys out to the job and ---

And it was a car that he had at 38 Eldorado Crescent in Tennant Creek?---Well, he wasn't living at 38 Eldorado Crescent, he was working at the Granites.

But in relation to the claim form, you've got him based at 38 Eldorado Crescent in Tennant Creek? ---That's where the vehicle was registered too because it was his home address and it was the only address we had in the Territory.

But you also said to him that he could use it for his personal use?---No, I didn't.

Well, Mr McFarland says quite definitely that there was a discussion that the vehicle could be used for his personal use?---Well, that's not true.

Well, Mr McFarland continued to have the vehicle for quite a period of time after his injury and used it according to him, for a number of personal ---? --- Well, that was probably because we didn't know it, you know, I'm in Perth and he's in Tennant Creek, what am I going to do? You know, what people do - you know, you're thousands of miles away - I mean, what would you do?

Well, what I'm saying is - you see the agreed evidence in the case is that from 16 December 2000 right up until 1 August 2001 when Mr McFarland returned the car to the employer, that's to NT Drilling, he was not working and he still had the car?

---We stored it there.

But you permitted him to use it to take his kids to school?---Listen, I'm in Perth, he's in Tennant Creek, I don't know what happens. I mean, I don't know what he - what was going on.

You opened an account at the BP petrol station in Tennant Creek?—-That was to buy fuel for the rig.

And provide for the repairs and other incidents in relation to the Nissan Patrol? --- No, it was fuel for the drill.

And that was paid?---Yeah, we paid it.

And that was paid?---Yeah, we paid it.

By NT Drilling?---Yes.

And it was paid consistently over the period until the end of the Yes, it was."

13. I am not able to conclude that it was an explicit term of Mr McFarland's contract of employment that he enjoy unrestricted private use of the car. I am not persuaded that Mr Westveld ever told Mr McFarland that he could use it for himself, as long as he looked after it. I am satisfied that Mr McFarland honestly believed that he was permitted to use the car, and that, acting on that belief, he did so use it. To some extent his belief was not only honest but, in my opinion, reasonable, in that I am persuaded that Mr Westveld would have been neither surprised nor upset to discover that Mr McFarland, during the currency of the Granites contract was using the car ad

lib around Tennant Creek, when he was home – driving his sons to school etc. I am not so clearly of the view that Mr Westveld would have been equally indifferent had he known of Mr McFarland's trips to Alice Springs and Darwin, most of which were made in order to deliver his sons who were participating in various sporting events. My impression of Mr Westveld is that, had he known of these trips, he would have been concerned that Fringe Benefits Tax might be payable on the value of the use of the car.

14. As long as Mr McFarland was working at the Granites there was not much scope for his making private use of the car. He took a week off every now and again timing these weeks off, according to his evidence to fit in with his sons' sporting events in Darwin or Alice Springs as the case may be. His work at that time was valued highly enough by Mr Westveld for the latter to offer to pay, over and above Mr McFarland's agreed salary, Mr McFarland's rent and grocery bills. In that context it is easy enough to imagine Mr Westveld approving, or not caring about Mr McFarland's use of the car for fairly long private trips. This is all the more strongly the case if I accept - and I do – Mr McFarlands' evidence that Mr Westveld knew that he, McFarland, had no other vehicle available to him when he was at home in Tennant Creek.

15. After the Granites contract came to an end Mr McFarland returned to live in Tennant Creek. He still had no vehicle of his own. His evidence is wretchedly confused as to how much work he did, and where he did it, between the end of the Granites contract and the occurrence of his injury. It may be that he did none. But, on any version of the many he gave in his evidence, he was working for only a minority of the time available. Otherwise he was at a loose end in Tennant Creek, looking for work for the rig (and once driving the Nissan to Mt Isa in pursuit of work). During that period, and *a fortiori* after Mr McFarland was injured, I am persuaded that Mr Westveld must, if he turned his mind to it, have realised that Mr McFarland would be using the car for sundry private purposes.

16. My conclusion is that it was a term, understood or implied, of Mr McFarland's contract of employment that he enjoy reasonable private use of the vehicle when it (and he) were not required for work purposes. As I interpret the evidence of what I took to be two honest men, the Employer would be liable to pay most, but not all, of the costs of running the vehicle. Thus if Mr McFarland needed to refuel in the Alice Springs or Darwin when going about his own business, I am fairly sure he would have paid out of his own pocket: not so when going about company business in Mt Isa; and never in Tennant Creek where he could and did refuel on the company's account held at a service station in that town. I have no reason on the evidence to believe that any other cost of the vehicle – tyres etc - was ever paid by Mr McFarland during the time the Employer provided the vehicle to him.

17. It is not easy to work out, from the evidence, the exact periods that Mr McFarland would have had opportunity to make private use of the vehicle. The periods fall in to three groups :

    (i) After his employment began, and before he commenced work at the Granites.

    As regards this period, the evidential difficulties are that it is uncertain how long the period was, and also uncertain what proportion of the period Mr McFarland spent working for the Employer – or for example, preparing the rig, and also , perhaps , in carrying out one or more small drilling contracts at Giant's Reef, or other sites near Tennant Creek.

    The combined effect of these uncertainties is that I can do no more than blindly guess how much private use was had by Mr McFarland during this period. While I think it is fair enough to assume that there would have been some – trips to the shop, perhaps, or dropping his children off at school – I can find no sound basis from which to

hazard such a guess. The burden of proof on the issue is borne by the Worker: in relation to this period, nothing has been proved.

(ii) During the currency of the Granites contract, in Mr McFarland's occasional week off.

Here the uncertainties are three: for how long that contract was current; how often Mr McFarland took a week off, and how much use he made of the vehicle during those weeks. On p 16 of the transcript Mr McFarland said he "was at the Granites for 6 months".

This figure was repeated by him in cross-examination - see p 21, for example. However, on p 31, Mr McFarland, in what is a fairly typical example of the looseness of his memory, was prepared to concede that the period may have been nine months. In re – examination he reverted to six months.

He was supposed to work three weeks on, one week off during those months, however many there were – see p 41. In practice he worked longer brackets than three weeks, and took fewer weeks off – on p 24 he said

> "... I think the longest stint we had was about six weeks straight, or something like that. But then paid to go back too – go back to your breaks and that, you know. You were off for a week – a week or so and then you'd go back out again."

No wonder, then, that when asked in re-examination (p41) how many breaks he had had, approximately, Mr McFarland answered.

> "It's hard to say. No, I couldn't say the exact amount of breaks."

Doing the best I can with evidence of this quality, I am satisfied that Mr McFarland probably had one week off after about a months work, on average. The weight of Mr McFarland's evidence, if weight is the

right word, suggests that the Granites contract ran for six months. So, five breaks of one week, more likely than not.

As to what use he made of the vehicle during these breaks, I accept from his evidence generally that he did use the vehicle in and around Tennant Creek – shopping and so on; that he did usually use it for weekend activities, for example the drives out to the Warrego mine, or Noble's Nob that he spoke of on p17 of the transcript.

I also accept that he used the vehicle six times for more substantial trips, three to Alice Springs and three to Darwin, for the purposes that he detailed on p 17 of the transcript. It is less clear how many of those six trips were made during the six (or it might be nine) months of the Granites contract. I accept that at least two were, from Mr McFarland's evidence during cross-examination on p 32 of the transcript. My impression when listening to the evidence was that one of these was to Darwin, one to Alice Springs, but I cannot locate in the transcript the source of this impression.

[I assume that the Nissan vehicle could do the 1000 kilometre round trip to Alice Springs, or nearly all of it, without Mr McFarland's needing to refuel. I assume that it would not do the 2000 - odd kilometre trip to and from Darwin without refuelling. I assume for reasons already expressed that Mr McFarland would have brought the necessary fuel out of his pocket. Ideally any calculation of the net benefit to Mr McFarland would allow for his paying for some fuel, but there is simply no evidence permitting me to begin to make such an allowance.]

It seems to me that it is unlikely that Mr McFarland's sons were attending school during the two particular weeks that these longer sports trips happened – in school holidays I assume. So, of the five weeks off, only three would have involved Mr McFarland driving his

sons to school, and, for the same sort of reason, it does not seem likely that any more than three weekends would have been available for trips out to Noble's nob etc. During the school term weeks, the evidence satisfies me that Mr McFarland would have used the vehicle for at least 40 km per hour week in Tennant Creek, and about 100 km on the weekends. Three such weeks makes 420 km. Further, he probably drove about 3,050 kms to and from Alice Springs and Darwin, a total of 3,470 km during the period of the Granites contract.

1. Between the end of the Granites contract, and 1/8/01 (when it is agreed Mr McFarland ceased to have the use of the vehicle).

   Here the uncertainties are two: how long this period was; and what use Mr McFarland made of the vehicle during it.

   If it is correct (and it may not be) the that term of the Granites contract was six months, then it probably finished in about October 2000. Taking the end of October as the starting point, Mr McFarland would have had the use of the vehicle for some 39 weeks. Some of the weeks were working weeks - his injury occurred in November 2000. Some of the weeks after that would have been school holidays, with no call for him to use the car to drive his boys to school. For some time he cannot have used the vehicle because he was away having his back operation in April (or perhaps March) 2001. I assume there was some period of convalescence following that operation.

   On the evidence before me it seems reasonable to guess at 6 weeks work during this period. Such work, being in the Tennant Creek area, permitted Mr McFarland to return home each night, and thus to make some private use of the vehicle. However, given his long working hours, that use cannot have been much. I assume there would have been about 11 weeks' school holidays during this period during

which Mr McFarland's need privately to use the vehicle would be diminished by about 20k per week on the school run. (That need may, of course have been increased during the school holidays by whatever activities his sons then got up to, but there is no evidence of this, and no basis even to guess.)

Overall I cannot be persuaded on the evidence that Mr McFarland would have averaged more 30 kms per week of private use during this period, say 1200 km overall. In addition, I place the other two trips to Darwin and two trips to Alice Springs in this period. (Some of these trips may have happened earlier, but I am persuaded that they did happen, which is the essential thing. Two round trips to Alice Springs is 2000 km, and two to Darwin is 4068. I find that Mr McFarland had 5268 km of private use from the vehicle during this period.

18. I am satisfied then that Mr McFarland had 8738 kms of private use of the vehicle during the time he possessed it. It is not clear on the evidence when this period started, that is, when Mr McFarland took delivery of the car, but 1/2/2000 is perhaps a reasonable guess on the evidence - if not for his receiving the car, then for the start of the period during which private use could be counted; and has the arithmetical attraction of leaving Mr McFarland in possession of the car for exactly 18 months, 78 weeks. On average during those 18 months, I find that Mr McFarland had 5825 kms per year, or 112 kms per week, private use of the vehicle. According to the Valuation Report, Ex 5, an appropriate method of evaluation of this use to Mr McFarland is to apply the Australian Taxation Office rate for a car of the relevant engine capacity – 55.8 cents per kilometre. Application of that rate values the fringe benefit to Mr McFarland at $3150.31 per annum, or $62.50 per week.

ACCOMMODATION

19. It is agreed that the Employer paid $180.00 per week direct to Mr McFarland's landlord being the entire rental on the house in which Mr McFarland and his children were living at 28 Eldorado Crescent, Tennant Creek. The Employer went on paying the rent until 29 September 2001, long after the occurrence of Mr McFarland's injury in November 2000.

20. It is less certain when these payments started: whether at the commencement of Mr McFarlands employment, as he seemed to be implying (see transcript p 14-15), or a little later, as a gesture of recognition of Mr McFarlands value, as Mr Westveld's evidence has it (see p 51). Again, on my assessment of the evidence of the two men, the probabilities are that Mr Westveld's version is more nearly correct, and I think I would prefer it. Mr McFarland, I suspect, has telescoped time in his memory, bringing together two times that were somewhat apart, namely, the start of his employment by the Employer, and the start of his work at the Granites. Just before that latter time, as Mr McFarland remembers it, Mr Westveld came to Tennant Creek and that is when the offer to pay the rent was made and accepted. Even if Mr McFarland is right about Westveld's visiting just before work started at the Granites, that date would still be some time – a couple of months perhaps - after his employment had begun. Again, I cannot see that it makes any difference when the Employer commenced to make rental payments. Mr Southwood argued for the Employer that the payments were properly characterised as an "allowance". If he were right about that, s 49 (2) of the Act provides :

> "(2) For the purposes of the definition of "normal weekly earnings" and "ordinary time rate of pay" in subsection (1), a worker's remuneration includes an over-award payment, climate allowance, district allowance, leading hand allowance, qualification allowance, shift allowance (where shift work is worked in accordance with a regular and established pattern) and service grant, but does not include any other allowance."

21. Had the Employer stopped the rental payments as soon as the contract at Granites ended, then it would be at least arguable that the rental payments could be characterised as some sort of hardship allowance not within the rubric of s 49(2). But on the evidence before me that it not what happened. The Granites contract finished, Mr McFarland may have done some work around Tennant Creek; looked for work around Mt Isa; stopped working because of injury, and still the rental payments continued. On balance, in my judgment they must be characterised as part of Mr McFarland's regular remuneration, a fringe benefit.

22. Having come to that conclusion, I am clearly bound by the Court of Appeal's decision of *Murwangi Aboriginal Corporation v Carroll* (2002) 171 FLR 116 to treat these rental payments as part of the remuneration of the worker. An identical conclusion had previously been arrived at by my colleague Mr Trigg SM in *Fox v Palumpa Station Pty Ltd* 1999 NTMC 024 (7 June 1999).

23. In my opinion, by exact parity of reasoning, the amount of $197.06 paid for by the Employer for food and groceries on behalf of Mr McFarland, and the $62.50 per week value of the benefits of private use of the Nissan vehicle, were likewise part of Mr McFarland's remuneration.

TAXATION OF FRINGE BENEFITS

24. All three of these items – rent, groceries and car – would appear to be fringe benefits upon the value of which the Employer is liable to pay taxation to the Commonwealth at the prescribed rate. Consequently the impact of taxation is felt by the Employer, and not by the employee, who takes the benefits net.

25. If, however, the value of the benefits, having been characterised as part of the worker's remuneration, is added to the worker's wages to arrive at a figure for normal weekly earnings, from which compensation payments may

be calculated pursuant to the Act, then from the viewpoint of the Commonwealth taxation system the benefits component would be indistinguishable from the wages component of normal weekly earnings, and any compensation payments base upon normal weekly earnings would be subject to income tax. Accordingly, a worker would no longer receive the net value of the benefits, but rather, a value reduced by whatever income tax rate applies to the worker's marginal earnings. The top rate is not much less than 50%.

26. The Commonwealth's tax gatherers may be presumed to be implacable. If the worker receiving compensation is not to lose perhaps nearly half of the value of her fringe benefits, the award of compensation would need to "gross up" the value of these benefits to a figure that, income tax having been deducted therefrom, would have the original value in the worker's hand net of tax. Mr McDonald argued that such a grossing up was authorised expressly or impliedly by the Act. As far as express provision is concerned, he drew my attention to the definition of "normal weekly earnings" contained in s 49 of the Act, and, in particular to paragraph (d) of that definition which provides:

> "(d) where –
>
> (i) by reason of the shortness of time during which the worker has been in the employment of his or her employer, it is impracticable at the date of the relevant injury to calculate the rate of relevant remuneration in accordance with paragraph (a), (b) or (c); or
>
> (ii) subject to paragraph (b) or (c), the worker is remunerated in whole or in part other than by reference to the number of hours worked,
>
> the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he or she was engaged in paid employment;"

27. I can see no reason to interpret the word "gross", as it is used in paragraph (d) to mean "grossed up" as used above. In my opinion there is no express basis in the Act for Mr McDonald's submission. Mr McDonald argued for there being an implied basis for "grossing up", pointing out that the Act was beneficial legislation and should be interpreted consistently with the broad beneficial intention properly to compensate injured workers. Granting the general beneficial purpose, there must in my opinion be some basis in the language of the statute to found the interpretation argued for, and I find none such in the Act. Apart from that, the practical difficulties of grossing up, in a world where the incidence of taxation changes frequently and unpredictably, would render such an exercise unlikely to yield a judgment which would be defensible for long – by any change of tax rates or thresholds, an award so based would come to incorporate either a shortfall or windfall.

28. An argument similar to Mr McDonald's was rejected in the judgment of Mullighan J (with which the other two judges of the Full Court of the Supreme Court of South Australia, King CJ and Bollen J, concurred.) in *GH Michell & Sons (Australia) Pty Ltd v Bockman,* an unreported judgment (13/5/94), Mullighan J said (BC 94000628 in the Butterworths on line service, SCGRG – 93-1127, 54547) in the last two paragraphs of his judgment:

> "In my view the decision of the Tribunal is correct in that it necessarily meant that the amount of compensation was not to be increased to allow for the amount of fringe benefits taxation paid by the appellant when the respondent was working. I would express the reasons for that conclusion in a different way. The respondent is entitled to income maintenance to be assessed in accordance with principles laid down in the Act. The amount of that benefit depends upon weekly earnings. Those earnings may include other than a cash component but they do not include the incidence of taxation upon those earnings. There is no reason to interpret the relevant provisions in the Act as to the method of assessment of income maintenance in that way. The obligation of the appellant is to pay income maintenance based upon earnings.

> If the taxation laws provide that the liability for taxation falls upon the employer in some respect, that does not affect the amount of the worker's earnings. Such is the case with the Fringe Benefits Tax Assessment Act. If there is a change in circumstances so that the liability for taxation falls upon the worker, that also does not affect his earnings. The liability for taxation arises independently of the Worker's Rehabilitation and Compensation Act and is irrelevant in the assessment of the level of income maintenance to which a disabled worker is entitled. The respondent is obliged to meet his taxation obligations, as is the case with all persons in the community with a taxable income, and the fact that the appellant was previously obliged to pay taxation with respect to a benefit which had formed part of the salary package of the respondent is of no significance in the assessment of the amount of income maintenance."

29. It seems to me that the concepts and structure of the South Australian *Rehabilitation and Compensation Act 1986* are close enough to those of the Act in the respects pertinent to this question, and in particular its concept of "average weekly earnings" to the Act's "normal weekly earnings" for this to be extremely persuasive authority.

SUPERANNUATION

30. Commonwealth legislation has forced employers, for some years now, to contribute sums for the benefit of each employee, to one fund or another. Employers' minimum liability is fixed by the legislation. Payments made into the funds pursuant to the legislation are in addition to amounts payable to the employee. Payments are taxed, on their way into the funds, at a rate which some may call low – I believe it is 15%. In any event, it is lower that any rate of income tax.

31. The Employer in this case paid the enforceable, minimum in respect of Mr McFarland. Mr McFarland's evidence about the superannuation arrangements was as follows:

> "All right. Now did you have any discussion at any stage about superannuation?

---Yeah, the forms - he rang me up and told me to send the forms across. This is before I went to the Granites. I had to fill the forms out, superannuation forms, and send them back to him. That's for myself plus my offsider.

You said earlier in your evidence that you'd run your own business in the drilling industry. Had you employed people?---Yes, yeah.

All right, and had you - you were familiar with superannuation?---Yes. In relation to after you'd filled in the forms what was your belief in relation to superannuation? ---The natural thing, you think it's going to be paid automatically.

That's what I was expecting anyway. Once you fill the form out, sign the form and send it away, that's part of the deal."

32. As I listened to Mr McFarland give the evidence I gained a clear impression that he was saying that he had sent the forms off, as requested. Reading the words in the transcript does not give anything like so clear an impression.

33. Mr Westveld's evidence was to the contrary. He said (at p 55 & 56 respectively):

"In relation to the superannuation, do you recall ringing Gary and sending him some forms?--- I rang him – I don't know whether I rang or we sent it up or Rhonda sent it up or what.

Your memory is not precise enough to ---? Well, I do recall because Rhonda said "What are we going to do, we just can't get this guy to get onto super, what are we going to do?' and I said, "Well, the company is going to get wound up, we've got to lodge this thing". I said "What do we do in this case?" and she said "Well there's a place in Canberra where they hold all the money to this client".

"MR SOUTHWOOD: Perhaps just in relation to the superannuation, you said there was a place in Canberra where monies could be sent to. Was it the position then that because he didn't complete the forms you simply sent the money to Canberra?

---We give up, we just couldn't —-there was no paperwork, it was just - it was non-existent and we couldn't get anything back from him."

34. Mr Westveld's recollection seemed to me to be very unlikely to be wrong. It was informed with a sort of mild but amused exasperation. If anything turned on the question, I think I would conclude that Mr McFarland never did send off the forms. But I can't see that anything does turn on it. One way or another, the Employer provided (as it was bound to) superannuation payments at the statutory rate, then 8%. The question is, whether that payment was part of Mr McFarland's normal weekly earnings within the meaning of that term as defined in s 49 of the Act. The answer to that question does not depend upon my finding that Mr McFarland greatly prized, or prized at all, his beneficial interests in the superannuation payments.

35. In her recent decision in *Smith v Hastings Deering (Australia) Ltd* (matter no. 20118351 [2003] NTMC 029, 19 June 2003 my colleague Ms Blokland SM had to rule this very question. The relevant part of her decision is in paragraphs 30-42 (pp 19-25): she decided that the compulsory superannuation payments are part of a worker's remuneration, and part of normal weekly earnings. I am grateful for her marshalling of the relevant law (a gratitude which may be owed to Mr Southwood QC, counsel for the worker Smith in Ms Blokland's case, as Mr McDonald QC, counsel for the worker in this case, was pleased to note). I agree with her conclusion (paragraph 41 p 25):

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

36. It seems to me that superannuation contributions are remuneration *simpliciter* as Ms Blokand puts it, following the *Murwangi* usage. They are paid by the employer, just like wages, and from the employer's point of view cannot usefully be distinguished from wages. They are paid to the worker's benefit, unlike, say, payroll, tax; and from the worker's point of view seem more beneficial, more remunerative than, say, that fraction of wages deducted at source under the PAYE tax scheme. It is agreed between the parties that the then rate of compulsory superannuation payment was 8% of wages, \$76.08 per week gross. Less 15% tax, \$64.57 net would have found its way for Mr McFarland's benefit.

37. Again, for the reasons given above, it seems to me that Mr McFarland's normal weekly earnings included the gross amount of his superannuation payment, not the net. I therefore find that Mr McFarland's normal weekly earnings were \$951 (wages) + \$180 (rent) +\$197.06 (food and groceries) + \$62.50 (vehicle) + \$76.08 (superannuation), a total of \$1466.64.

INTEREST

38. It follows from my conclusions above that the weekly payments of workers' compensation, which the Employer has been making since it accepted the claim, have been less than they should have been because those payments have been calculated from the wages component alone of Mr McFarland's remuneration, without having brought into account, as they should have, the remainder of his remuneration – rent, groceries, car and superannuation.

39. Of these extra components of the remuneration, it is clear that the Employer knew all the relevant details concerning the payments in respect of rent and groceries. The Employer's failure, in the light of that knowledge, to allow for those items in the calculation of the weekly payments is, in my judgement, exceptionally excusable, for a couple of reasons. The first reason derives from the genesis of the payments, concerning which I accept the evidence of Mr Westfield. That is, the employer unilaterally decided to

top up Mr McFarlands wages in this way. The Employer's argument that these payments were an "allowance" has failed, but the peculiar genesis of the payments perhaps explains why the Employer could be understood in its belief that those payments were not part of Mr McFarlands remuneration.

40. Secondly, and rather more weightily, the law relevant to the point so far as it could reasonably be known at the time the weekly payments commenced, differed from the law today. The leading case then was *Palumpa StationPty Ltd v Fox* (1999) 132 NTR 1, a decision of Bailey J delivered 20 December 1999, in which His Honour concluded apropos of the class of "allowances" excluded from the calculations of remuneration by s 49(2) of the Act that (p6):

> "….The genus constituted by the provision in that on monetary allowances. I am satisfied that the legislature intended to exclude from calculations of a workers normal weekly earnings only such allowances paid to a worker (other than those expressly referred to in the provision)".

41. *Palumpa Station Pty Ltd v Fox* was followed by Thomas J in *Murwangi Community Aboriginal Corporation v Carroll* (2001) NTSC 85, judgement delivered 5 October 2001, and it was not overruled until the appeal from Thomas J's decision was decided by the Court of Appeal, judgement delivered under the same name on 16 October 2002. The initial Application in the present matter was filed on 21 August 2001, and the Statement of Claim based on 16 November 2001. As the law stood then, the claims based upon the payments for rent and groceries were optimistic and the Employer can hardly be blamed for joining issue on them.

42. In relation to the value to Mr McFarland of his private use of the car, I am persuaded that the Employer was essentially unaware of it, and consequently, again, can hardly be blamed for not taking that into account. Even after the Statement of Claim was filed alerting the Employer to that

aspect of the claim, I have no reason to believe that the Employer was in any position to know the value of that use.

43. In relation to the item of superannuation the Employers' default is again excusable. To the best of my knowledge it was not customary for workers to claim superannuation as part of their remuneration. The first decided case in this jurisdiction where such a claim was made *was Smith v Hastings Deering (Australia) Ltd* the decision of Ms Blokland SM referred to above reasons published 19 June 2003. The solicitors for the worker lost no time and filed an Amended Statement of Claim to include a claim in respect of superannuation on 23 June 2003. The hearing in the present case commenced on 9 July 2003. The status of superannuation payments was hardly settled law by then, and may not be for some time. (For that matter, Mr Southwood indicated during addresses in this matter that the Employer has it in mind to relitigate the questions settled, for my purposes, by *Murwangi*, at an appropriate curial level.)

44. All things considered, the Employer's failure is therefore about as blameless as it could be in a losing litigant. Having said that, the successful litigant has, as the facts and law have turned out, been deprived of the benefit of payments rightfully his and is in my judgement entitled to be paid interest on the outstanding amounts, by virtue of s 109(1) of the Act. The question is, at what rate? Mr McDonald, counsel for the worker, puts forward the prescribed rate – 20% as it happens - and referred me in particular to the decision of Mildren J in *Wormald International (Aust) Pty Ltd v Ahearn* (No's 28 of 1994, 48 of 1994 and 65 of 1994), judgement delivered 23 June 1995. In my opinion the present case must be distinguished from *Ahearn*, in that the conduct of the Employer therein was to some degree reprehensible, whereas in my opinion the conduct of the Employer herein has not been. It is also the case that times have changed: a 20% rate of interest in 1995 was no doubt high (though less than the banks then charged on many loans, eg. credit cards), but today, and during the period this claim has been on foot, it

is punitive. I see no reason of policy or equity why this Employer should be punished by the imposition of such a rate.

45. Other suggestions were put forward by counsel – the bank overdraft rate, for example (assuming that there is one and not many).

46. It seems to me that in the circumstances of this case the most appropriate basis from which to fix an appropriate interest rate is the rate prescribed by the Supreme Court Rules as the rate at which interest is payable on judgement debts. I do not know what that rate is or has been, nor am I confident that I could do the arithmetic to establish the amounts owed and owing to the Worker pursuant to these Reasons. I will leave it to the parties to see if they can work out the figures to their joint satisfaction. The matter can be relisted before me if any disputation remains.

47. On the question of costs, given the complexity and number of questions of law involved in this matter, my initial inclination is to order the Employer to pay the Worker's costs taxed at 100% of the Supreme Court scale, but I will also hear the parties on that question if one of them so wishes.

Dated this 8th day of December 2003.

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R J WALLACE
STIPENDIARY MAGISTRATE