CITATION:	*Sharon Louise Spellman v Returned Services League of Australia Alice Springs Sub-branch Incorporated* [2004] NTMC 087
PARTIES:	Sharon Louise Spellman v Returned Services League of Australia Alice Springs Sub-branch Incorporated
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20118793
DELIVERED ON:	7.12.04
DELIVERED AT:	Darwin
HEARING DATE(s):	12-15.7.04, 30-31.8.04, 1.9.04
DECISION OF:	D TRIGG SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff:	Ms Gearin
Defendant:	Mr Barr

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2004] NTMC 087
Number of paragraphs:	302

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

No. 20118793

BETWEEN:

SHARON LOUISE SPELLMAN

Plaintiff

AND:

RETURNED SERVICES LEAGUE OF AUSTRALIA ALICE SPRINGS SUB-BRANCH INCORPORATED

Defendant

REASONS FOR DECISION

(Delivered 7 December 2004)

Mr Trigg SM:

1. Throughout these reasons the Work Health Act is referred to as "the Act".

2. The hearing in this matter commenced before me on 12 July 2004. In the course of that hearing a number of preliminary issues arose that required resolution. As a consequence the evidence ceased and legal argument commenced. I delivered my written decision on these preliminary issues on 13 August 2004. That decision (hereinafter referred to as "Dec-1") should be read as forming part of the decision herein. In Dec-1 I made a number of findings. Some of these findings are relevant to this decision, and are referred to hereinafter.

3. In Dec-1 I have set out the history of how this matter progressed up until the evidence was ceased to enable me to rule on the various preliminary issues

which were raised. The worker made five attempts to finalise her Statement of Claim, which led to a number of changes to the Defence. A Counterclaim was also eventually relied upon. At the time the evidence concluded the pleadings finally set out the issues that I was required to determine. I will firstly set out the pleadings herein. Then I will consider what issues are raised on the pleadings. Then I will consider the evidence and make any necessary findings of fact. Then I will consider the expert medical evidence and make any necessary findings thereon. Then I will consider any time limitation issues that may arise. Then I will make any consequential or other findings, and finally make conclusions, and consider what orders may be appropriate.

THE PLEADINGS

4. The worker's final Statement of Claim was in the following form:

> 1. At all material times the worker was employed by the employer as a cook working 25 hours per week at $15.00 per hour.
>
> 2. At all material times the worker's normal weekly earnings within the meaning of Section 49 of the *Work Health Act* in her employment with the Employer were a combination of her wages and the 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 (C'th)* and/or the *Superannuation Guarantee (Administration) Act (C'th)* ("the superannuation contributions").
>
> 2A. In about August/September 1999, the superannuation contributions were calculated at 7% of the Worker's wages in her employment with the Employer.

3. In or about August/September 1999, the Worker developed an injury first in her right hand, forearm and elbow, and then in her left hand, forearm and elbow. ("the injury").

Particulars of injury

Bilateral Epicondylitis.

3A. The injury to the Worker's left hand, forearm and elbow was a consequence of the injury to her right hand, forearm and elbow in that the injury to the right hand, forearm and elbow led to the Worker's overusing her left hand, elbow and forearm.

4. The injury arose out of or in the course of her employment with the Employer in that the employment caused the injury, or, in the alternative, it was the real, proximate or effective cause of the injury or of its aggravation, acceleration or exacerbation.

5. The worker made a claim on or about 14 October 1999 pursuant to the *Work Health Act* in respect of the injury, and the employer initially deferred accepting liability for the compensation claimed.

PARTICULARS OF DEFERRAL

Letter from CGU Insurance to the worker dated 21 October 1999.

5A. The employer commenced payment of weekly benefits to the worker following giving notice that it deferred accepting liability for the claim and thereafter continued making payment of such weekly benefits to the worker up until 8 November 2001.

5B. The employer did not subsequently notify the worker that it accepted or disputed liability for the compensation claimed.

5C. As a consequence of the employer's failure to notify the worker that it either accepted or disputed liability for the compensation claimed, the employer is deemed pursuant to section 87 of the Work Health Act to have accepted liability for compensation.

PARTICULARS OF DEEMED ACCEPTANCE

Letter Hunt & Hunt to Ward Keller 7 July 2004".

6. At all material times the payment to the Worker of weekly benefits under the *Work Health Act* was not correctly calculated.

PARTICULARS

(i) The payment did not include superannuation contributions as referred to in 2 and 2A herein.

(ii) After the first 26 weeks of incapacity, the calculation did not correctly index the normal weekly earnings pursuant to Section 65(3) of the *Work Health Act.*

7. On 12 April 2001, the Worker was examined on behalf of the Employer by orthopaedic surgeon Dr T R Parkington who provided a report dated 17 April 2001 and who subsequently on 22 October 2001, signed a medical certificate that the Worker had ceased to be incapacitated for work as a result of the work injury.

8. By a Notice of Decision and Rights of Appeal dated 25 October 2001 and served on the Worker, the Employer purported to cancel payment of compensation under the *Work Health Act* to the Worker effective after 8 November 2001.

PARTICULARS OF CANCELLATION

The Notice of Decision provided the following reasons for the decision to cancel payment of benefits:

(a) You are no longer incapacitated for work as a result of the work-related injury on or about 1 September 1999.

(b) Annexed to this Notice are copies of a report from Dr R Parkington dated 17 April 2001 and a certificate from Dr Parkington dated 22 October 2001.

9. The employer has made no payments to the Worker of any compensation under the *Work Health Act* after 8 November 2001.

10. The purported cancellation of payment of benefits was not in accordance with Section 69 of the *Work Health Act*, and was invalid.

PARTICULARS

(a) Dr Parkington's report dated 17 April 2001 identifies continuing symptoms suffered by the Worker;

(b) Dr Parkington's report dated 17 April 2001 states that the worker remained partially incapacitated for work;

(c) Dr Parkington's report dated 17 April 2001 and medical certificate dated 22 October 2001 are inconsistent with the Notice of Decision dated 25 October 2001 which states that the Worker is no longer incapacitated for work;

(d) Dr Parkington did not further examine the Worker after 12 April 2001 and before signing his certificate on 22 October 2001, 6 months and 1 week later;

(e) the medical certificate signed by Dr Parkington on 22 October 2001 only identified that the Worker had ceased to be incapacitated for work in relation to the injury to her right arm, namely hand, forearm and elbow, in the circumstance of the Employer being notified of and making payments for the injury of bilateral epicondylitis and Dr Parkington examining her for that condition.

10A. The purported cancellation of benefits was not in accordance with the requirements of the Work Health Act.

PARTICULARS

(a) The employer failed to notify the worker of the decision as to eligibility for compensation as required by Section 85(1).

(b) The employer as a consequence was deemed to have accepted liability pursuant to Section 87.

(c) The employer has never notified the worker of a decision as to eligibility for compensation such as to cease the deeming pursuant to Section 87(a).

11. The worker sought mediation in respect of the Employer's decision to cancel payment of weekly benefits pursuant to the *Work Health Act.*

12. The attempt to resolve the dispute by the said mediation took place on 22 November 2001 and that attempt was unsuccessful, and a Certificate of Mediation issued dated 22 November 2001.

13. As a consequence of the injury the Worker had been totally, or in the alternative partially, incapacitated for her work with the Employer and for any employment reasonably available to her, from September 1999 to date and continuing.

14. The worker hereby appeals from the Notice of Decision to cancel payment of benefits to her under the *Work Health Act.*

AND the worker seeks the following remedies:

A. A ruling as to the value of the Worker's normal weekly earnings in her employment with the Employer and as to the value of her entitlement to weekly benefits.

B. Payment of arrears of the Worker's entitlement to weekly benefits under the *Work Health Act* as at all times from 8 November 2001 to date.

C. Interest pursuant to Sections 89 and/or 109 of the *Work Health act* in respect of such arrears of weekly benefits.

D. Payment of ongoing weekly benefits in accordance with the *Work Health Act.*

E. Payment of medical and like expenses pursuant to Section 73 of the *Work Health Act.*

F. Payment of interest on medical and like expenses paid of incurred by the Worker since 8 November 2001 pursuant to Section 109 of the Act.

H. An order that the Employer pay the Worker's costs of and incidental to this proceeding at 100% of the Supreme Court Scale to be taxed in default of agreement.

I. Such further or other Order or Orders as this Honourable Court deems meet.

5. The employer's final Defence was as follows:

1. The employer admits the allegations contained in paragraph 1 of the worker's Further Amended Statement of Claim in relation to the period 1 August 1999 to 12 October 1999.

2. The employer does not admit the allegations contained in paragraph 2 of the worker's Further Amended Statement of Claim.

2A. The employer admits the allegations contained in paragraph 2A of the worker's Further Amended Statement of Claim.

3. As to paragraph 3 of the worker's Further Amended Statement of Claim, the employer admits that the worker sustained an injury to her right hand, forearm and elbow in the course of her employment with the employer as a cook, as particularized below, but the employer otherwise does not admit the allegations contained in paragraph 3 of the worker's Statement of Claim. If the worker developed an injury to her left hand, forearm and elbow (which is not admitted), she did not develop such injury until early January 2000.

Particulars of admitted injury to right hand, forearm and elbow.

The injury was an exacerbation and/or aggravation of the worker's right side epicondylitis.

At some time in or about August or September 1999, the worker developed the condition of epicondylitis in her right elbow, a spontaneously arising degenerative condition of inflammation of the tendinous insertion of the extensor muscles on the lateral aspect of the right elbow. The said condition was exacerbated and/or aggravated in the course of the worker's employment.

3A. The employer denies the allegations contained in paragraph 3A of the worker's Further Amended Statement of Claim. If the worker developed an injury to her left hand, forearm and elbow (which is not admitted), it was a spontaneously arising degenerative condition of inflammation of the tendinous

insertion of the extensor muscles on the lateral aspect of the left elbow.

4. Save that the employer admits that the worker's injury admitted in paragraph 3 hereof arose out of and in the course of her employment with the employer as a cook, the employer otherwise denies the allegations in paragraph 4 of the worker's Further Amended Statement of Claim.

5. The employer admits the allegation in paragraph 5 of the worker's Further Amended Statement of Claim that the worker made a claim on 14th October 1999 in relation to an injury to right hand, forearm and elbow, but denies that the worker made a claim in respect to any injury to the left hand, forearm or elbow. The employer deferred accepting liability pursuant to s.85(1)(b) *Work Health Act* on 21 October 1999

5A. The employer admits the allegations contained in paragraph 5A of the worker's Further Amended Statement of Claim.

5B. The employer admits the allegations contained in paragraph 5B of the worker's Further Amended Statement of Claim.

5C. The employer denies the allegations of fact and/or law contained in paragraph 5C of the worker's Further Amended Statement of Claim. The employer says that s.87 *Work Health Act* applies only to the situation where an employer does not notify of its decision to accept, defer or dispute liability within the period of 10 working days specified in s.85(1), and that s.87 does not apply to the employer in the circumstances pleaded and admitted herein.

6. Save that the employer admits that calculation of payment of compensation paid to the worker did not take into account

superannuation contributions as part of normal weekly earnings, the employer does not admit the allegations contained in paragraph 6 of the worker's Further Amended Statement of Claim.

7. The employer admits the allegations contained in paragraph 7 of the worker's Further Amended Statement of Claim.

8. The employer admits the allegations contained in paragraph 8 of the worker's Further Amended Statement of Claim.

9. The employer admits the allegations contained in paragraph 9 of the worker's Further Amended Statement of Claim.

10. The employer denies the allegation contained in paragraph 10 of the worker's Further Amended Statement of Claim that the cancellation of payment of compensation was invalid.

Particulars

a. The worker had ceased to be incapacitated for work as a result of her work related injury referred to in paragraph 3 hereof.

b. If the worker remained incapacitated for work, then such incapacity was not related to, caused by or materially contributed to by the worker's work related injury referred to in paragraph 3 hereof but was caused by the spontaneously arising degenerative condition there pleaded and particularized.

c. The certificate provided by Dr Parkington certified the worker as having ceased to be incapacitated for work as a result of her work related injury referred to in paragraph

3 hereof as at the time that Dr Parkington examined the worker in April 2001.

d. The certification in relation to the right arm only did not render the cancellation invalid, because the only injury in respect of which the worker had claimed compensation was an injury to her right arm.

10A. As to paragraph 10A of the worker's Further Amended Statement of Claim, the employer denies that the cancellation of compensation by the employer was not in accordance with the requirements of the *Work Health Act*. Further as to paragraph 10A, the employer refers to and adopts the allegations contained in paragraphs 5, 5A and 5B of the worker's Further Amended Statement of Claim, and:-

10A.1 admits that it did not notify the worker as to her "eligibility for compensation", but denies that s.85(1) Work Health Act so required;

10A.2 denies that it was deemed to have accepted liability pursuant to s.87, for the reason that s.87 only applies where the employer fails to notify a person of the employer's decision under s.85(1) to accept, defer or dispute liability, and the employer did defer liability under s.85(1)(b) *Work Health Act*;

10A.3 admits that it has not to date accepted or disputed liability for compensation save insofar as it paid compensation upon deferring accepting liability, and continued to pay compensation until 8 November 2001.

11. The employer admits the allegations contained in paragraph 11 of the worker's Further Amended Statement of Claim.

12. The employer admits the allegations contained in paragraph 12 of the worker's Further Amended Statement of Claim.

13. Save that the employer admits that the worker was totally or partially incapacitated for work from September 1999 to some time prior to 12 April 2001, the employer denies the allegations contained in paragraph 13 of the worker's Further Amended Statement of Claim.

Particulars

a. The worker had ceased to be incapacitated for work as a result of her work related injury as referred to in paragraph 3 hereof.

b. If the worker remained incapacitated for work, then such incapacity was not related to, caused by or materially contributed to by the worker's work related injury as referred to in paragraph 3 hereof but was caused by the spontaneously arising degenerative condition there pleaded and particularized.

14. The employer is not required to plead to paragraph 14 of the worker's Further Amended Statement of Claim.

15. To the extent that the worker claims compensation and other relief for the alleged injury to her left hand, forearm and elbow:

15.1 The worker is not entitled to compensation because she failed to give notice of the injuries as soon as practicable as required by s.80(1) *Work Health Act*;

15.2 Proceedings for the recovery of compensation are not maintainable under s.182(1) *Work Health Act* because the worker did not make a claim for compensation within 6 months after the occurrence of the injury.

16. The employer denies that the worker is entitled to the relief sought in paragraph 16 of the worker's Further Amended Statement of Claim or at all.

6. In addition, the employer raised a Counterclaim which stated as follows:

17. The employer refers to and adopts paragraphs 5, 5A and 5B of the worker's Further Amended Statement of Claim and refers to and repeats the matters alleged in paragraph 10A hereof, and says that the deferral period under s.85(4) *Work Health Act* expired on or about 26 December 1999, that is, 56 days after the employer deferred accepting liability.

18. Within the period 21 October 1999 to 26 December 1999, the employer did not notify the worker that it accepted or disputed liability for the compensation claimed.

19. In the circumstances, the employer is not deemed liable at law for the worker's claim for compensation and any payments made by the employer under s.85(4)(b) are deemed by s.85(7) to have been made without prejudice and cannot be construed as an admission of liability.

20. The employer claims an order or determination that the employer is not deemed liable at law for the worker's claim for compensation and that the worker bears the onus of establishing that she is entitled to compensation with respect to the injury to her right upper limb and left upper limb; alternatively with respect to the injury to her left upper limb.

21. In the alternative, if the employer was liable at law for the worker's claim for compensation as at 25 October 2001 (whether deemed or otherwise) and if the employer's cancellation of compensation on 25 October 2001 was defective for any one or more of the reasons that:- there was inconsistency between the Notice of Decision dated 25 October 2001 and the reports and medical certificates of Dr Parkington dated 17 April 2001 and 22 October 2001

respectively; or for the reason of the time lapse between date of examination of the worker by Dr Parkington on 12 April 2001 and the issue of a certificate on 22 October 2001; or for the reason that the employer failed to provide reasons with sufficient detail to enable the worker to understand fully why her compensation was being cancelled or reduced; or for the reason that the worker's claim did include the alleged consequential injury to the worker's left elbow and that the certificate related only to the right-sided injury (all of which is denied) or for any other defect or invalidity which the Court may find in relation to the cancellation process, the employer counterclaims as follows.

22. The employer refers to paragraph 3 of the Particulars of Defence herein and says that the worker's injury under the *Work Health Act* arising out of or in the course of her employment with the employer was an exacerbation and/or aggravation of the worker's right sided epicondylitis, in circumstances where at some time in or about August or September 1999, the worker developed the condition of epicondylitis in her right elbow, a spontaneously arising degenerative condition of inflammation of the tendinous insertion of the extensor muscles on the lateral aspect of the right elbow, which said condition was not caused by but was exacerbated by and/or aggravated in the course of the worker's employment.

23. As at 12 April 2001, all incapacity resulting from or materially contributed to by the injury pleaded in the preceding paragraph had ceased.

24. The employer claims an order or ruling under s.94(1)(a) read with s.104(1) *Work Health Act* that the worker had ceased to be incapacitated for work as a result of the said injury.

The employer seeks orders as follows:

(a) The worker's application be dismissed;

(b) An order or determination that the employer is not deemed liable at law for the worker's claim for compensation and that the worker bears the onus of establishing that she is entitled to compensation with respect to the injury to her right upper limb and left upper limb; alternatively with respect to the injury to her left upper limb;

(c) An order or ruling under s.94(1)(a) read with s.104(1) *Work Health Act* that the worker had ceased to be incapacitated for work as a result of the said injury;

(d) The worker pay the employer's costs of and incidental to the proceeding at 100% of the Supreme Court Scale.

THE ISSUES

7. A number of the issues on these pleadings were decided in Dec-1. Hence, I have already decided on the issues raised in paragraphs 5C and 10A of the Statement of Claim, and the associated pleadings in the Defence to those paragraphs. In addition, I have as a consequence of Dec-1 struck out paragraphs 19, 20 and 24(b) of the Counterclaim.

8. In paragraph 94 of Dec-1 I said: "On the pleadings it is admitted that the worker was a "worker"; that she suffered an injury to her right hand, forearm and elbow which arose out of or in the course of her employment with the employer as a cook; that she made a claim for that injury on 14 October 1999; and that she was totally or partially incapacitated for work from September 1999 to some time prior to 12 April 2001. Accordingly, the requirements in s53 are all (with the exception that the injury occurred in the Northern Territory, which clearly is not at issue on the evidence) admitted on the pleadings." These matters are not in issue.

9. S53 of the Act states as follows:

> "Subject to this Part, where a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her –
> (a) death;
> (b) impairment; or
> (c) incapacity,
> there is payable by his or her employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed."

10. In paragraph 96 of Dec-1 I went on to hold that: “Accordingly, in accepting liability for the compensation claimed, an employer is simply accepting that a claimant has a valid entitlement under the Act. In a claim for weekly benefits this involves an acceptance that:

- A claimant is a worker as defined in the Act;
- A claimant suffered an injury as defined in the Act;
- the injury arose out of or in the course of the worker’s employment with the employer; and
- the injury results in or material contributes to the worker’s incapacity as defined in the Act.”

11. Injury is defined in s3(1) of the Act as follows:

> "injury", in relation to a worker, means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his or her employment and includes –
>
> (a) a disease; and
>
> (b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease,
>
> but does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment.

12. Accordingly, any injury to the worker must arise “out of or in the course of her employment” in order for it to be compensable under the Act. This is admitted on the p[leadings in relation to the right arm, but expressly not

admitted in relation to the left arm. I will return to this matter in more detail later in these reasons.

13. In paragraph 97 of Dec-1 I added that: "As noted in paragraph 94 of these reasons each of these matters is expressly admitted by the employer in it's Notice of Defence and this Notice of Defence has been served upon the worker (presumably via her solicitors). In my view, this is sufficient notice as required in s85(5) of the Act. I therefore find that upon filing and serving the original Notice of Defence (which was filed in court on 9 May 2002) the employer did in fact "accept liability for the compensation" claimed, and there is no need for any further or better "acceptance"."

14. In paragraph 130 of Dec-1 I said: "I therefore find that by the combination of ss85(1)(b) and (4)(a) once the deferral period has expired (and assuming no decision to dispute liability has been notified to the worker) then the deferral of accepting liability ceases to remain in force, whereby the employer is now legislatively presumed to have accepted liability." It is important to bear in mind that this acceptance of liability is only for the compensation claimed, and the claim form itself claimed an injury to the right upper limb only.

15. In addition in paragraph 131 of Dec-1 I went on to add that: "I would hold that the employer has by its conduct (in continuing weekly payments well beyond the 56 day deferral period) created a right in the worker to a continuation of such payments until the employer has liability determined in its favour."

16. In paragraph151 of Dec-1 I concluded: "It therefore follows, in the instant case, (and I find) that from or about the 17th day of December of 1999 the employer herein was deemed to have accepted liability for the compensation claimed. As the employer has never notified the worker of any decision to dispute liability the employer continues to be deemed to have accepted liability until this court orders otherwise (s87(b))."

17. In paragraph 152 of Dec-1 I said: “However, the Act contemplates that an employer who has accepted liability is in the same position as one which has been deemed to have accepted liability (with some financial differences during the deferral period: s85(7)(d)). Accordingly, it was open to the employer herein to serve and seek to rely upon a notice under s69 in order to seek to cease it’s obligations under the Act. The validity of the s69 notice and the correctness of the employer’s decision to cease payments are live issues on the pleadings.”

18. In paragraph 153 of Dec-1: “Where an employer accepts liability for compensation claimed it does not mean that it accepts a financial liability for all time. Circumstances change. An employer may wish to assert that a worker is no longer incapacitated for work as a result of the work injury, or may wish to reduce payments based upon an alleged ability to earn some income in work that might be reasonably available to a worker. In this event it does not involve a dispute on liability ab initio. Therefore it is not necessary for the employer (as part of any s69 notice) to now seek to dispute liability in accordance with s85(1)(c). As an employer who is deemed should be in no worse position than one who has accepted liability, I see no reason why the employer herein must notify the worker of a decision at this late stage. There is, in my view, no need as the employer was deemed to have accepted liability as soon as the deferral period ceased to remain in force. If the employer now wished to dispute liability ab initio (for example on the basis that it now had information that the claim was fraudulent; or that new medical evidence now showed that the original injury was not work related) then it would have been open to the employer to notify the worker of it’s intention to now dispute liability. But the pleadings herein do not suggest that the employer wishes to do that in this case. Rather, the Notice of Defence and Counterclaim make it clear that the employer does not dispute that it is liable for the initial injury to the worker’s right upper limb and the incapacity that followed there-from. However, it does dispute any ongoing

liability to pay in relation to that injury, and in addition disputes that it is liable to pay any compensation for any injury to the left upper limb, which was not part of the claim for compensation."

19. In paragraph 155 of Dec-1 I concluded that: "On the facts of this case, for the reasons that I have set out above, the employer was deemed to have accepted liability for the compensation claimed and therefore bears the legal and evidentiary onus to prove what it has asserted in it's s69 notice."

20. However, it needs to be borne in mind that the "compensation claimed" only related to the right upper limb. The worker has never (as there was no evidence to suggest that she had) served a claim form upon the employer in respect to the left upper limb. Accordingly, there is no deeming operating against the employer in relation to that limb. The Act clearly contemplates that a worker should give notice of every alleged injury that arises out of or in the course of employment. Further, a worker should serve a written claim (in accordance with sections 82 and 83 of the Act) if a worker asserts that he or she is entitled to any entitlements under the Act in respect to any alleged injury. Where a worker suffers multiple injuries in a single incident then clearly all such injuries should form part of the one claim.

21. In the instant case the facts as later set out herein disclose that the worker served a claim form upon the employer on 14 October 1999 relating to the "right hand, forearm and elbow". She had ceased work on 12 October 1999 and has never returned to any work with the employer since. Sometime between 22.12.99 and 5.1.00 the worker developed symptoms in her left upper limb. It is clear from her Statement of Claim that she asserts that this is also a work injury.

22. Ms Gearin asserts that the employer has the legal and evidentiary onus of proving on the balance of probabilities that the worker is no longer incapacitated for work in relation to both the right and left upper limbs. In making this assertion she relies upon the various medical certificates

tendered (ExP5) which (since the certificate of Dr Quinn of 26 March 2001) refer to "bilateral"; plus the fact that the employer continued to pay weekly compensation; plus the fact that the employer apparently paid for various medical expenses including physiotherapy; and the fact that the employer was aware that the worker was asserting an incapacity due to "bilateral" symptoms.

23. Mr Barr asserts (if I understand his submission correctly) that this is not necessarily the case. He asserts that the worker has the onus of proving that the left upper limb symptoms are a sequelae of the right-sided symptoms. Or, to put it another way, that (in accordance with s4(8) of the Act) the worker's employment was the real, proximate or effective cause of the worker's injury to her left upper limb. He goes on to concede (as I understand his submission) that if the worker does establish this then the employer does bear the onus thereafter. Otherwise it does not. On the facts of this case (as set out later in these reasons) I find that Mr Barr is correct in his submission.

24. In the case of *Evans v Northern Territory of Australia* (a decision of myself delivered on 31.1.96) I said:

> "The "injury" requires general description only in the claim form. In a non-disease injury it is generally linked to a particular incident on a particular day at a particular place. Thus, the employer in that case is deemed to admit liability for all the compensation to which the claimant is entitled under the Act for that general injury and it's sequelae. In my view, it is not open to doubt that the employer cannot pass the onus of proving liability for sequelae of injury back onto a worker if payments of compensation are continuing. For example if a worker breaks his leg and (whilst still receiving compensation payments for that injury) develops an infection as a consequence of the break the

> employer cannot turn around and say that they only admitted liability for the original break as there was no mention of any infection in the claim form and therefore the worker has the onus of proving the employer's liability for the infection afresh. Such a result would, in my view, defeat the clear aims of the Act."

25. I see no reason to depart from what I said in that case. However, it needs to be borne in mind that every "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury" is itself an injury under the Act. The issue I was dealing with in *Evans* was whether a new claim form was necessary every time an "injury" changed or progressed. I decided then that it did not. However, whether a new claim form is necessary will depend upon the facts of each case. Further, in my view, the onus of proving that a physical or mental consequence is itself part of the original injury (and by this I mean that there is a causal link between the original work injury and the consequence that is now being considered without any "novus actus") would be upon the worker in each case. In some cases this would be an easy task, but in others it may not be. In the example postulated in *Evans case*, it involved an infection to the same leg and in the area of the injury. That would be a very easy connection to prove. In the instant case, we are dealing with an injury to the opposite limb to the claimed work injury.

26. That does not mean that there cannot be a causal connection, but the onus is upon the worker to prove on the balance of probabilities that there is. If the worker fails in this regard, then if it is to be compensable it must be a new injury, and therefore the notice and claim provisions of the Act would apply to it.

27. The relevant portions of s4 of the Act are as follows:

> "(1) Without limiting the generality of the meaning of the expression, an injury to a worker shall be taken to arise "out of or in the course of his or her employment" if the injury occurs while he or she –

(a) on a working day that he or she attends at his or her workplace –

(i) is present at the workplace; or

(ii) having been present at the workplace, is temporarily absent on that day in the course of his or her employment or during an ordinary recess and does not during that absence voluntarily subject himself or herself to an abnormal risk of injury;

(4) An injury shall be deemed to arise out of or in the course of employment even though at the time that the injury occurred the worker was acting –

(a) in contravention of a regulation (whether by or under an Act or otherwise) applicable to the work in which he or she is employed; or

(b) without instructions from his or her employer,

if the act was done by the worker for the purposes of and in connection with his or her employer's trade or business.

(5) An injury shall be deemed to arise out of or in the course of a worker's employment where it occurred by way of a gradual process over a period of time and the employment in which he or she was employed at any time during that period materially contributed to the injury.

(7) In this section –

"working day", in relation to a worker, means any day on which he or she attends at his or her workplace for the purpose of working;

"workplace", where there is no fixed workplace, includes the whole area, scope or ambit of the worker's employment.

(8) For the purposes of this section, the employment of a worker is not to be taken to have materially contributed to –

(a) an injury or disease; or

(b) an aggravation, acceleration or exacerbation of a disease,

unless the employment was the real, proximate or effective cause of the injury, disease, aggravation, acceleration or exacerbation."

28. In the case of *Australian Frontier Holidays Ltd v Williams* (1999) 153 FLR 348, Martin CJ said:

> "When looking at the facts and considering the application of the statute to them, it is well to remember that ordinarily the worker must establish either a causal ("out of") or temporal ("in the course of") relationship between the employment and the injury (*Kavanagh v Commonwealth* (1960) 103 CLR 547). It is only necessary to establish one of those relationships. Since the amendments to the legislation in 1949, substituting "or" for "and" it is not necessary to show both. The words "out of" point to the cause of the injury and "in the course of" point to the time, place and circumstance in which the injury was suffered. These distinct bases for finding liability in the employer are not treated separately in the deeming provisions.
>
> [11] The various factual situations as described in s 4(1), which are non-exhaustive, are taken to supply the relationship. They do not restrain the liberal and flexible interpretation given by the courts to the expression "in the course of employment" so as to compensate an injury which arises when what was being done was an "incident" of the employment (*The Commonwealth v Oliver* (1962) 107 CLR 358), a slight connection will suffice, ibid p 362, and includes what the worker is reasonably required, expected, or authorised to do in order to carry out his duties (*Danvers v Commissioner for Railways (NSW)* (1969) 122 CLR 529 and *Henderson v Commission for Railways (WA)* (1937) 58 CLR at 293-294). In coming to a conclusion as to whether something is incidental to a worker's employment is a result reached "by reference to some principle or standard" *Hatzimanolas v ANI Corporation Limited* (1992) 173 CLR 473 at 478. At 479 their Honours referred to the flexible application of the test which had "enabled a satisfactory line of demarcation to be drawn between those injuries which are work related and those which are so remote from the notions of the worker's employment as not to call for compensation by the employer." The provisions contained in s 4(1) provide statutory examples of circumstances giving rise to the employer's liability presumably with the intention of further limiting the scope for uncertainty."

29. The expression "arising out of" signifies a causal relationship between the injury and the employment. Whereas the expression "in the course of" involves a temporal relationship, namely that the injury occurred whilst the worker was employed or doing something reasonably incidental to her employment. As the facts herein will later disclose, the injury to the worker's left upper limb first arose at least two months after the worker had ceased work, as she was on weekly benefits for her injury to the right upper limb. It follows, in my view, and I find that the injury to the left upper limb did not and could not arise "in the course of her employment" with the employer. S4 of the Act has extended the general meaning of the expressions. Accordingly, the left upper limb injury could only be

compensable under the Act if it arose out of her employment with the employer, or if the worker could establish (on the balance of probabilities) that (in accordance with ss4(5) and (8) of the Act):

- The injury occurred by way of a gradual process over a period of time;
- The employment in which she was employed at any time during that period was the real, proximate or effective cause of the injury.

30. In *Nunan v Cockatoo Docks* 41 S.R.(NSW) 119 at 124 Jordan CJ stated that the concept of "arising out of employment" will be satisfied where it can be said "that the fact of his being employed in the particular job caused, or to some material extent contributed to, the injury."

31. In *Kavanagh v The Commonwealth* (1960) CLR 547 @ 558-9, Fullager J said:

> "While the legislation stood in it's original form, it was clear that the words "out of" imported the necessity of a causal connexion between the injury and the employment or some incident of the employment….
>
> …the significant fact that the effect of requiring a causal connexion between employment and injury is always attributed to the words "out of"…
>
> If there was such a causal connexion, the injury was to be compensable even though it did not occur while the worker was engaged in his employment.

32. In the case of *Thom v Sinclair* (1917) AC 127 @ 124 Lord Shaw said:

> "The expression (arising out of the employment) in my opinion applies to the employment as such – to it's nature, it's conditions, it's obligations, and it's incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute "arising out of the employment" apply."

33. In *Goward v The Commonwealth* (1957) 97 CLR 355 @ 364 Dixon CJ, Williams, Webb and Kitto JJ quoted this passage with approval and went on to add:

> "To this must be added the explanation given by Lord Haldane in *Upton v Great Central Railway Co* (1924) AC 302 @ 306 and 308, to the effect that it will suffice if the accident arises out of circumstances the employee has had to encounter because it is within the scope of employment to do so."

34. I will apply this as the law in determining whether the injury to the worker's left arm arose out of her employment with the employer.

35. On the issue of who has the onus of proof, as a general proposition I find that (absent any special rule that may apply) whoever asserts must prove what they are asserting, unless it is admitted on the pleadings or formally admitted in the course of the hearing.

36. In the instant case the employer has, by force of my reasons in Dec-1, been found to have accepted liability for payments under the Act in relation to any incapacity arising from the admitted injury to the right arm. The employer seeks to be released from that liability pursuant to its section 69 Notice and/or its Counterclaim. Therefore the employer bears the legal and evidential onus with respect to the right arm. However, as the employer has never accepted liability in respect to the left arm, the worker bears the legal and evidential onus of proving that the left arm injury is causally related to

the admitted right arm injury. If the worker succeeds in doing this then the employer thereafter bears the legal and evidential onus to be released from it's obligation to pay in respect to both the right and left arms. If the worker fails in this regard, then she bears the legal and evidentiary onus in respect to the left arm on all issues.

37. I note that the employer has not pleaded in the alternative that the worker is partially incapacitated for work, and has chosen to base it's case solely on the assertion that all incapacity resulting from or materially contributed to by the injury has ceased on or before 12 April 2001. In the event that the employer is unsuccessful in this regard it has chosen not to have any fall back position.

38. I turn now to consider the facts herein.

FACTUAL FINDINGS

39. The worker was born on the 4th day of October 1962. Accordingly, she was aged 41 at the time she gave her evidence before me.

40. The worker was raised in Alice Springs and attended Alice Springs High School. She left school at the age of seventeen. She still has family who reside in Alice Springs.

41. After leaving school the worker started work in the hospitality industry. She worked at a motel in Alice Springs initially as a housemaid and then as a breakfast cook. The motel business renovated an old house into a restaurant and the worker then learned the skills of a kitchen hand and waitress. She later also learned how to serve drinks behind the bar.

42. I was not told what hours she worked in this employment or how long she held this employment for.

43. In about 1983 or 1984 the Worker was employed on a contract basis as a civilian cook with the Department of Defence. In this regard she travelled

to Darwin for an unspecified period of time. Apparently during exercises or busy periods when the regular army cooks could not meet demand civilian cooks were employed to assist. I was not told the basis of this employment, and therefore do not know whether it was a short term contract position. I was not told how many days, weeks or months she performed duties for the Department of Defence in 1983 or 1984.

44. The worker did say that the work she did was basic food preparation, grill cooking, pastry cooking. She went on to say that the following year (either in 1984 or 1985) she returned to Darwin and did the same thing again. Again I do not know for what period.

45. The worker has no formal qualifications as a chef or in cooking.

46. The worker apparently married at some stage, but I was not told who to or when. She did say that her maiden name was Matson, and she changed her name to Williams after her first marriage. I was not told how many times she has been married. I was not told how she came to take the surname of Spellman, but this may well have been from a subsequent marriage. The Worker is now separated, but I do not know when this separation occurred.

47. The worker did tell me that she has two dependant children. These children are Ryan who was born on the 22 day of October 1991 and Emily who was born on the 19th of September 1994.

48. The worker did not give any evidence of any employment between her last job with the Department of Defence in about 1984 or 1985 and her commencing employment with the employer herein. I am therefore unable to find that the worker performed any employment between about 1985 and 1997.

49. The worker said (T28) that she obtained a gaming machine manager's certificate "Back in '96". However, she may have been mistaken about the

year, as this may, in fact, have been after she commenced employment with the employer.

50. The worker commenced employment with the employer in November 1997 and she initially worked as a bar attendant.

51. As a bar attendant her duties were pouring drinks, cleaning behind the bar, cleaning glasses, restocking fridges, pouring draft beer, re-tapping and un-tapping kegs and general serving. She said (T18) that at times you had to move empty 50 litre kegs, but there was no evidence as to how heavy such a keg might be, nor how far she might be required to move it.

52. In addition, during her time with the employer she obtained experience as a TAB Operator, a Poker Machine Attendant and a Keno Operator. In order to become a Keno Operator she completed a course at the casino in Alice Springs as a Senior Keno Operator. She held a licence in this regard.

53. As a TAB Operator she would receive people's bets and place these in the machine and hand the resulting documentation back to the customer. She would take money and give change. At the end of her shift she would lift the till drawer insert out and balance the monies including the float. She couldn't say how much this would weigh (T17).

54. In relation to being a Poker Machine Attendant this required her to give change to the customers. In addition she had to open the machine and fix it if there was a "hopper" error or a coin jam. At the end of the day she would have to pull out the storage crate (which was apparently bigger than a milk crate) empty all the coins out into a bucket which would subsequently be weighed and bagged and put into a safe. She did not tell me how full this crate would become, how heavy it was or how far she had to move it. In addition, when she was a Poker Machine Attendant she had to insert a key into the top of the machine to do hard and soft "meter reads", but she now understood this was all done by computer.

55. In relation to being a Keno Operator the customer would hand a ticket over which would be fed through the machine by the operator and another ticket would be issued out of the machine and handed over to the customer. She would then pass over the necessary change after taking the customer's money. She also had to balance the keno drawer or till at the end of the shift (T18).

56. She said this work could be physically demanding as it involved the lifting of heavy amounts of cash. I am not sure on the evidence as to how or why, as this aspect was not explored or explained.

57. At some stage (I was not told when) the worker ceased her employment with the employer as she was offered a position with NT Freight – Ascot Haulage. She only held this job for about two or three months. In that position she did office work, answering the phone, filing consignment notes, locating freight. She said (T18) that it was a pretty mundane job and she mainly answered the telephone.

58. The worker found that she missed the customer contact that she had with the employer and accordingly returned to be re-employed with the employer. It is open to be inferred from the fact that the employer re-employed the worker that the employer was happy with her employment performance before she left. She resumed working behind the bar.

59. In addition to working behind that bar she also on occasions gave the kitchen staff a helping hand when they were busy.

60. The worker denied ever having a problem with either of her elbows prior to the alleged injury herein. Apparently in the medical notes of Dr Pevie there is reference to an elbow problem in 1997. I say apparently as the alleged note was not tendered in evidence and Dr Pevie was not called to give evidence. In examination in chief the worker was asked about this alleged note and she said that she could not remember ever having a stiff elbow or

an elbow problem in 1997. Also, she couldn't remember any time off work for any elbow problem, nor could she remember talking to Dr Pevie about such a matter in 1997. Apparently the notes also suggested that the worker told Dr Pevie that she was taking Voltaren which had been given to her by her mother. The worker had no recollection of any such conversation or event. Accordingly, the worker's evidence does not amount to an admission on any of these matters. In the absence of any other evidence I am unable to find that the worker did have any problem with any elbow in about 1997.

61. At some stage (according to the employer's pay records – ExP3, this was in about April 1999) the worker moved from bar work into the kitchen still in the employ of the employer.

> In the kitchen her duties were "cooking, cleaning, changing oil in deep fryers, accepting deliveries and putting them away, fruit and vegetables. I picked the meat up on my way to work from the butchers but would have to carry it from my car into the cool-room in the kitchen, cleaning" (T19). When asked what sort of cleaning she replied "floors, bench tops, utensils, meat slicers and pots and pans sometimes, *if you didn't have anybody to help*." (T19) (emphasis added).

62. The worker said that they had a basic a la carte menu, and they would have specials of the day. The menu included steaks and grills, fish and chips, seafood baskets, corned beef.

63. The worker said that she did all of the ordering for the kitchen and she did all of the cooking herself. In addition, she said that she did the majority of the preparation herself (T20).

64. In examination in chief the worker was asked what a typical day would involve in the kitchen. She started off by saying that "a lot involved food preparation"(T20). She went on to say "I would do lunches and then have a

break in the afternoon and then go back and do dinners, so say I worked from 9.30 until 2 and then – 9.30, 10 until 2, 2.30 – yes, lunches finished at 2."(T20). For some reason, Ms Gearin did not then go on to ask her questions about what the evening hours or duties were or how these may or may not have differed from the lunch time duties.

65. In relation to the morning duties she said "on that shift I would get the deep fryers switched on, prepare any salads that needed to be made and put them out. We had-like, it was a buffet style, help yourself and you had a choice between vegies and salad. Most lunches it was only salad and chips but of an evening the people would have a choice of vegetables or salad."(T20)

66. She would also put away the delivered stock. The deliveries included such items as "20 kilo bags of potatoes. The onions weren't as heavy, they were about, I would say, 10 kilos, bulk tinned foods of fruit and whatnot, frozen foods, seafood, boxes of fish, they came in, I think it was 5 kilo boxes, frozen fish fillets. I would have to make batters for the fish."(T20). She also agreed with the suggestion put to her by Ms Gearin that she was putting things in and out of the oven. By way of roasts, she said "I would get the big pieces of blade, sometimes cook up two pieces that would weigh between four and six kilos per piece and at times, like of a Friday evening we would have – you could order from the main menu or we would have a roast"(T20).

67. Other witnesses were asked some questions about the worker's duties in the kitchen. These witnesses were Michael Barrett (hereinafter referred to as "Barrett"), the manager of the employer, and Jason Barrett (hereinafter referred to as "Jason"), his son.

68. Jason gave evidence that he was employed by the employer as a casual in 1999 as the worker's "go-for". He was unable to recall (after 5 years) which months he worked in that year or for how long. He knew he worked there for longer than one month, and he guessed that he worked there for about three

or four months. No wage or other records were produced to assist. It would have been helpful to have known the dates during which Jason was employed in the kitchen. This information should have been within the knowledge of the employer, as I would expect that it should have had pay or other records that would establish the exact dates. The employer has not produced any such records, nor has it offered any explanation for not doing so. Jason's father who was (and still is) the manager of the employer at the relevant time gave evidence before me. I would have expected such evidence to have been introduced through him. It wasn't. I infer that the records may not have assisted the employer's case (*Jones v Dunkel* (1959) 101 CLR 298 @ 308). But, since the worker did not assert in her evidence that Jason had ceased working in the kitchen sometime prior to her going off work, this was not something the employer needed to address. Accordingly, the failure to produce Jason's work records does not give rise to an inference that he had ceased work prior to 12 October 1999.

69. However, I do know that he was working and assisting the worker on the day of the alleged baking dish incident. There was no suggestion that anybody else took over the kitchen after the worker went off work, or that Jason ever worked with anyone else in the kitchen apart from the worker. It also appears that sometime after the worker went off work the kitchen was closed for a time, but I do not know when this was or for how long. Jason could not recall whether he was still working in the kitchen when the worker went off on compensation. Given the way that Barrett described this as occurring (as referred to later in these reasons) I would have expected Jason to have had a memory of it if he was still working there at the time. He didn't. However, the worker wasn't much help either. If Jason had stopped work and she was left without assistance in the kitchen in the period leading up to her stopping work on 12 October 1999, then I would have expected her to have had a memory of this, and to have told me of it. She didn't.

70. Doing the best that I can with the evidence I find that Jason worked as the worker's assistant in the kitchen for about two to three months in the period leading up to the worker delivering her first worker's compensation certificate and going off work (to which I will turn shortly). I am unable to find whether Jason had ceased working in the kitchen sometime prior to 12 October 1999. The evidence remains unclear on this.

71. Jason gave the following evidence at T377-8: "

> "Well I was basically employed as Sharon's gopher, I was supposed to do all the prep work and get organised for them and an extra hand with the dishes and all that sort of stuff while the meals are being cooked.
>
> Thank you and do you recall what shifts you used to work in that position?---It was a split shift, we went in, in the mornings. I'm not sure of the actual time but it was for a few hours in the morning and a few hours – I think mainly four or five hours at a time.
>
> And just in terms of the duties that you did compared with the duties that Sharon did, could you please outline your respective functions in the kitchen at the time?---Well I basically did the prep work, cutting up the vegetables and all that sort of thing. Sharon did a lot of serve and actual cooking of the meals and the balancing of the till and all that sort of stuff, but I was basically – I did all the prep work and the dishes and that sort of stuff yeah…..
>
> Mr Barrett if I could just take you back to your earlier evidence about the prep work that you did in the kitchen, you talked about cutting up vegetables. What quantity of vegetable produce and what kind of vegetables did you used to cut up?---Well it was

basically – your basic vegies - pumpkin, potatoes, broccoli and they were the main ones that I can recall doing, a bit of salad, lettuce and what not but the quantities it sort of varies depending on what sort of night we were planning for.

And did Sharon also do the cutting up of the vegetables?---Not from what I can recall no.

And how long would you spend or are you able to indicate how much of your time was spent cutting up vegetables as distinct from the other tasks that you did on your shifts?---Well basically the morning – the morning part before lunch is before we went in that was basically when I did the prep, I did all the one prep then ready for the evening.

All right so is it the case that you didn't do any preparation in terms of cutting up vegetables whilst you were on the evening shift?---Well the majority of it was – I mean if we had to come back and do extra things maybe, but the majority of the time we were – we used that morning time to get organised for the night-time so we were ready to go when we got there."

72. In cross-examination it was put to Jason that he was casual and did not work every day. He denied this, and said (T379) "I worked every day for the period of time that I worked at the club I was actually working every day as Sharon's assistant." At T380 Jason went on to say that it was busy "on the odd night". On a Friday there were about 30 meals and sometimes there was a function. If he was feeding 30 or more people he said that it would take him "anywhere between two to three hours" cutting up vegetables, and then there would be salads on top of that.

73. I accept the evidence of Jason. For reasons which appear throughout this decision I am unable generally to accept the worker as an honest or reliable witness. I prefer the evidence of Jason over the evidence of the worker.

74. The other person who gave evidence about what happened in the kitchen was Barrett. He confirmed that Jason was employed to help the worker in the kitchen, and that he was there for a couple of months. He could not recall if Jason was still assisting her when the worker went off on compensation. He stated that Tuesday and Friday nights were busy and people often stayed for dinner. His recollection was that vegetables were in a bain marie and comprised peas, beans and mashed potato. He was a butcher by trade so he would cut up any meat that needed to be done. He agreed that there would have been cutting up of salad and vegetables to be done. On busy nights he said that Jason or someone was there to do a lot of the preparation work for her. On some nights during the week they might only serve three hamburgers by way of meals. With a function they might serve up to seventy meals, but he could not remember any specific functions during the time that the worker was in charge of the kitchen. He was unable to say that he had ever seen the worker chopping in the kitchen. However, he went on to confirm that he had no doubt that she did do some chopping, and there might be a couple of hours chopping on a Friday night or function. However, it is no part of his evidence that the worker did this amount of chopping.

75. At T121 the worker gave the following evidence:

> "Jason, Jason who was your – or was an assistant in the kitchen, in fact worked in the kitchen for 35 hours a week, didn't he?---Not to my recollection he did.
>
> He actually worked a longer worker week than you did?---No, he didn't.

One of his roles was to do preparation work for you, wasn't it?---He mainly did cleaning, he may've peeled vegetables and whatnot, but I did the majority of the cooking, and making of salads.

Did Jason, or did Jason not, do preparation work in the kitchen?---He did, but on a small scale.

That included cutting and chopping and so on, did it not?---Look, I can't remember. If he did do it, it wasn't on a grand scale, and he certainly didn't work more hours than what I did."

76. The worker was asked some questions in cross-examination at T81 as follows:

"In terms of the number of meals that you could cook per day, would I be right in saying normally there could be 20 to 25 meals a day?---Sometimes more.

On a Friday or a Tuesday you might get more than that?---Mm mm.....it was like a Tuesday and Friday night badge draw.

But it's not a huge catering load, is it?---Normally it wasn't but we did cater for functions, dinners. We – well, I had to feed over 100 people.

At a special dinner, on a special occasion?---Wedding receptions.

Yes?---The Anzac eve dinner.

But that wasn't every week, was it?---It wasn't every week but on occasions.

Anzac eve dinner, I take it, is just once a year?---That's correct; 21sts."

77. On the evidence of the worker, Barrett and Jason it appears that the kitchen of the employer was not consistently a busy place during the six month period that the worker ran it. On the contrary, I find that apart from Tuesday and Friday nights the workload in the kitchen generally would have been light, and sometimes very light. I find that generally during the week a salad bar was put out for lunches. There was no evidence to suggest that the salad range was extensive. Apart from lettuce no other specific salad was mentioned in any of the evidence, and I am unable to speculate. I find that lunch meals were not busy and did not require much physical activity. I find that on Tuesday and Friday nights the worker might do about 30 meals, but the evidence does not enable me to say what these meals were, but they do not appear to have been too complicated. On occasions the worker would do a roast. I do not find that the worker performed significant amounts of chopping every day. Rather, I find that when Jason was employed there, which I find was probably for about two or three months out of the six months that the worker ran the kitchen, he did the majority of the chopping of the vegetables and salads.

78. During the other period of about three to four months when Jason wasn't helping in the kitchen it was not suggested that the worker had any assistance. Accordingly it would follow that the worker did virtually all of the chopping, preparation and cleaning during this period. It follows that for at least half of the six months the worker was in the kitchen she did have a reasonable amount of chopping, food preparation and cleaning to attend to. The fact that it was decided she needed a full-time assistant (in the form of Jason) is an indication that the employer accepted that the work was too much for one person.

79. I now turn to how the injury to the right arm arose. As the employer admits that the worker did sustain an injury to her right arm arising out of or in the course of her employment, it may seem that it is unnecessary to make any findings as to how the injury arose. However, in my view, such a finding is

important for a number of reasons. Such a finding may assist to possibly understand the full nature and extent of an injury. Further, a finding is necessary in order to assess any expert medical opinion (when it comes to deciding whether the injury to the left arm is causally related to the right) which might rely upon any particular stated history. Further, knowing what caused the right arm injury may assist when it comes to deciding what caused the left arm injury (which injury is disputed on the pleadings). Further, it goes to the general credit and reliability of the witnesses in the case, including the worker.

80. The starting point is what the worker said in her sworn evidence before the court. The worker said in her evidence in chief (T20-21) that:

> "in or around the end of August or sometime in September where I was baking or roasting roast blade in the oven in quite a heavy big commercial size baking dish. It was around – I would say, from memory, and I think I've quoted it a couple of times to different specialists, but around about 12 kilos approximately, it could have been a little bit more, a little bit less, of roast blade.
>
> And what happened?---I went to take it out of the oven to check it and I lost strength in my forearm---
>
> Let's start at the beginning. You say you take it out of the oven. What did you actually do?---I nearly dropped it.
>
> Yes, but let's lead up to that?---Sorry.
>
> You went over to the oven, did you?---That's right.
>
> Can you tell us just step by step what you did?---I opened the oven door.

Yes?---I had folded up tea towels and oven mitts, or whatever they were at the time, I think I might have had a bit of both and went to slide the baking dish out of the oven.

What height was it?---Knee height, I would say, maybe just above my knees.

You were crouched down, were you?---Yes.

Right?---And I went to slide it out and I, well, almost dropped it and I hollered out to young Jason that was helping me at the time in the kitchen to grab some tea towels and grab the baking dish. I attempted to push it back in but I had pulled it out too far in order to push it back in and yeah, it was a pretty scary minute there and I could-I envisioned us having fat, hot fat all over my feet, but luckily it didn't come to that.

What symptoms did you experience? If we can just go back, you've got the oven, you've crouched down, have you?---Mm mm.

And you've got your hands on the corners of the baking dish?---Yes.

That satisfies your evidence?---Mm mm.

And you had pulled it out; what happened in terms of your symptoms? What symptoms did you---?---I had weakness in my forearm and pain in my elbow.

Which elbow?---My right elbow, and it was like I had lost feeling in my hands, not that I had lost feeling but the strength had gone that I normally had."

81. In her evidence she refers to elbow and forearm in the singular, and both apparently referring to the right side. However, when referring to hand she has spoken in the plural. This is either a slip or inconsistent with her

evidence before me, the history that she has given to Mr Mercorella (which I will turn to later), and also inconsistent with her Statement of Claim.

82. This scenario in the kitchen was put to Jason in his evidence and he could not recall any such incident having occurred (T377-8). He did have a vague memory of the worker mentioning some limb problem and at T380-1 gave the following evidence:

> "Now your father has told Mr Goode that you could – that you'd told him that you remember Sharon Spellman making various comments about a sore arm, is that right? Do you have a recollection of that now?---I've got a – yes a vague memory of what I thought was a sore wrist, not her arm.
>
> All right and she complained to you about that soreness did she?---Well, no, well I was friends with Sharon outside of work as well and I mean I remember her mentioning about it a sore wrist, I don't remember her ever complaining about it at work but I remember her mentioning about having a sore wrist.....I remember her mentioning once of that she had a sore wrist."

83. The worker went on to give the following evidence:

> "So after this incident, did you tell anyone about it?---Jason and I went to the office and told Michael Barrett, who was the manager at the time, what had happened, and yeah, he asked if I was all right and I said I was a bit spun out because, well, it frightened me. I went back, finished off my shift and I continued on although I still – I had pain in my forearm and elbow, continued to work."

84. This alleged report of incident was put to Barrett at T293-4 and at T294 he said:

> "I knew nothing of that situation until a couple of weeks ago when you actually rang me and said that over the phone. That's the first I've heard of that.
>
> Do you recall any incident where Sharon and Jason – Jason Barrett came to see you to complain about any particular injury or problem of a physical kind that Sharon had in the kitchen?---No."

85. When Mr Barr put to the worker that she did not mention any baking tray incident to Barrett the worker said (T77) – "well, I would expect him to deny that but that is not correct".

86. This alleged report of incident was also put to Jason (T378) and he could not recall any such incident.

87. Accordingly, the worker's sworn evidence before me was of a sudden onset of symptoms in the right elbow, forearm and hand(s) at work. She identified a specific activity in the kitchen that caused the sudden onset of symptoms, and nominated a witness to the incident, and an almost immediate reporting of the matter to her superior. This event should have been significant to the worker and stayed clearly in her memory.

88. However, as noted above, in paragraph 3 of the worker's original Statement of Claim she alleged:

> "In or about August/September 1999, the worker developed an injury first in her right hand, forearm and elbow, and then in her left hand, forearm and elbow. ("the injury")
>
> PARTICULARS OF INJURY
>
> Bilateral Epicondylitis"

89. Despite four Amended Statements of Claim being filed since then there has been no change to this pleading. "Develop" has a number of meanings but the one which would appear most appropriate in the context used in the

pleading herein is (according to *The Concise Oxford Dictionary of Current English*, eighth edition) is "begin to exhibit or suffer from (develop a rattle)." In my view, the pleading would be more consistent with a gradual onset rather than a sudden onset due to a specific and known event. On the worker's sworn evidence she did not "develop" an injury, rather she was suddenly injured due to an incident with a heavy baking dish. If she truly sustained a sudden injury while lifting a baking dish then I would have expected this event to have been specifically pleaded. It is possible that she did not tell her lawyers about the baking dish incident prior to the first statement of claim being filed.

90. The worker continued working and initially did not seek any medical attention. Her evidence as to any problems or difficulties that she had with her right arm after this incident and up to 12 October 1999 was limited to the following (T21-22):

> "The question was, what was the pain level that you experienced after you went back after the incident?---It was quite sore.
>
> Sore?---Yes.
>
> Was it sufficient for you not to be able to do your duties that afternoon?---I didn't think so, so I continued to work.
>
> Did you seek any medical treatment as a result of that incident?---Not straight away I didn't.
>
> Why was that?---Because I just soldiered on and thought that things would be all right.
>
> And were they?---No.
>
> What happened?---I continued to have pain and weakness in my forearm. I went and saw Dr Pevie, I don't know if it was a few weeks

later or not but I went and saw him and complained of this pain that I had."

91. That was the extent of the worker's evidence as to the problems that she had between the time of the incident and seeing Dr Pevie for the first time (which on the evidence was on 12.10.99, which appears to have been a month or more after the incident). In the absence of more specific evidence I am unable to conclude beyond the fact that she had some pain and weakness in her right forearm (not elbow or hand) from the time of the initial incident until she first saw Dr Pevie. I am unable to find whether this "pain and weakness" was continual or sporadic. I do not know whether it was aggravated by certain actions or not. I do not know whether the intensity or frequency remained the same or changed. I do not know what, if any, activities at work she had trouble performing.

92. Mr Goode (a claims investigator) spoke to the worker in relation to her claim herein on 29 November 1999. He asked her questions about her problems at work and recorded the following in his statement (ExD3):

> "14. Ms Spellman said that she lost power in her right forearm and elbow and that a large lump had developed just below the elbow on the outside of her arm.
>
> 15. Ms Spellman advised that she had no grip with her right hand and she could not lift pots or pans or pick up baking trays and had difficulty with food preparation.
>
> 16. Ms Spellman said that her right arm and hand was quite painful with this pain extending from the hand, up the forearm and into the right elbow."

93. The worker did not give similar evidence or adopt what Mr Goode recorded.

94. In addition, Barrett (whose recollections were generally poor, which was not surprising given that he was being asked about events that occurred about 5 years before he gave evidence) spoke to Mr Goode on 26 November 1999, when the events would have been fresher in his mind. At that time Barrett told Mr Goode (T373) "mentioned one day on the floor of the club, got sore arm for a couple of days, but was getting worse".

95. Apart from telling Jason something about a sore wrist (as referred to above) that is the extent of the evidence as to the worker's problems up until the time that she ceased attending work with the employer.

96. However, taking all the evidence as a whole I find that the worker did have right arm pain which she noticed was getting worse at work. I further find that she did "soldier on".

97. In cross-examination Mr Barr suggested to the worker that she first saw Dr Pevie (I apologise to Dr Pevie if I have misspelt his name, but no-one spelt it for the transcript, and no documents were put before me to enable me to ascertain the correct spelling) in relation to this injury on 28 September 1999. This was the first I heard of this. The worker agreed but it seems likely that she had no idea of what dates she might have seen this or any other doctor. I would be surprised if she could remember.

98. On 12 October 1999 she apparently worked up to the completion of her lunchtime shift and then saw see her General Practitioner, Dr Pevie during her break and before she was due to resume the evening shift. She was asked whether she remembered what she complained of to him and she said (T22) "that I had pain in my right elbow and forearm and yeah, I just lost my strength and had pain". As noted in the preceding paragraph she only told me about pain and weakness in her forearm, yet she told Dr Pevie of wider spread pain.

99. Dr Pevie provided the worker with a medical certificate on that date certifying her unfit for her work from 12 October 1999 to 16 October 1999.

100. After receiving the medical certificate from Dr Pevie on 12 October 1999, the worker took this certificate and gave it to Michael Barrett on behalf of the employer that same day. She did not return to work the evening shift of that day and has not returned to any work with the employer since. Indeed, on the worker's evidence she has not returned to any paid employment since.

101. Barrett gave evidence on this as follows at T294:

> "Then if I could ask you, please, this, Mr Barrett, when did you first learn that Sharon Spellman claimed to have injured her right arm – or right elbow in the course of her duties at the RSL club?---I'm not sure of – of the day it was. I was at my office, sitting at my desk. Sharon came in, flicked a piece of paper across, and I said, "what's this Shaz?", and she said, "I'm on compo. I've hurt my elbow".
>
> ……..
>
> Did she say anything about going to the doctors or having gone to the doctors?---No, I didn't know nothing about she was going to the doctors. That was the first I knew, when she came in with the certificate and saying she was on compo.
>
> And was there any further conversation between you and Sharon at that time?---I did – I did say, when she put it across, 'cause I knew nothing about it, I just said there was a function that night. "what goes on about the function?" Sharon's reply was it's not her concern, she's on compo.
>
> ……..

> Prior to the incident you just described, was there any complaint made to you by Sharon about any physical difficulties she was having with her right arm or right elbow?---No."

102. Clearly, given what Barrett told Goode on 26.11.99 this last answer is not correct. However, I don't believe that Barrett was trying to mislead the court, rather his memory after five years is faulty. This version of how she delivered the first medical certificate was put to the worker in cross-examination at T77 and she denied that it occurred in this way.

103. I was not told anything about this function by the worker or Jason in their evidence. I do not know how big the function was to be, what food was to be supplied, or what (if anything) she had done that day in preparation for the function. If she had been doing a lot of preparation on 12 October 1999 in preparation for the function, then I would have expected the worker to have told me. She has not given me any evidence that this was the case. I therefore assume that either there was no function later on 12 October 1999, or that if there was it was irrelevant to the worker's injury.

104. The medical certificate dated 12 October 1999 from Dr Pevie (which forms part of Exhibit P5) asserted that the worker was suffering from:

> "*Right lateral epicondylitis, unresponsive to conservative treatment"*.

The next box in the medical certificate states as follows:

> "…which the worker states was caused by: *meat preparation and cooking/cleaning etc*. on (date of injury) *12/10/1999*". (the matters in italics are the words added to the certificate by Dr Pevie)

105. I note that this history of injury as apparently given to Dr Pevie is different to her sworn evidence before me. The worker could not remember if she told Dr Pevie about the baking dish incident. At T75 she said:

"I take it you didn't mention to Dr Pevie this somewhat frightening incident that occurred?---I can't remember whether I did or not."

106. Unfortunately, as I have not heard from Dr Pevie, he was unable to give more information about what he was actually told by the worker. He notes the date of injury as 12.10.99, yet earlier he stated that the injury was "unresponsive to conservative treatment". This would suggest that for some time prior to seeing the worker she had been trying to treat the matter conservatively, which is consistent with her evidence before me. However, this certificate makes no reference at all to any incident with a heavy baking dish. The alleged stated cause is not consistent with the worker's evidence before me, and, in my view, is markedly different.

107. On 14 October 1999 the worker delivered a duly completed and signed claim for compensation to the employer's manager Barrett. This claim for compensation, which was in accordance with s82(1) of the Act, became Exhibit P1. Whether or not the worker had given earlier notice of injury to the employer, pursuant to s80(2) of the Act the employer had notice of the alleged injury by 14/10/1999 at the latest.

108. In accordance with s82(2) of the Act the claim for compensation was deemed to have been made on 14/10/1999 (as the relevant certificate had already been delivered on 12/10/1999, and the second relevant document was delivered within the required 28 day period).

109. The certificate and claim for compensation were both properly served upon the employer on 12/10/1999 and 14/10/1999 (respectively) in accordance with s83 of the Act

110. In this claim for compensation (Exhibit P1) the worker made the following assertions:

- That she worked part time.

- That the injury occurred at the workplace at which she is normally based.

- That the injury occurred in the RSL bistro kitchen.

- That the injury happened or she first noticed the disease on 1/9/99, but she did not specify a time.

- The description of how the incident occurred was "*I have had pain in my right hand and elbow for over a month from continual use of knife during food preparation, heavy lifting. It has been difficult to pick up deep fried foods with tongs as my joints ache in my hand*".

- In relation to part of body affected she replied, "*right hand, forearm and elbow*".

- For persons present at the time of injury she nominated "*Jason Barrett*".

- She indicated that she reported the injury on *28/9/99 at 5pm* to "*Mick Barrett*".

- She stated that she stopped work on 12 October 1999 at 2pm.

- The worker completed and signed the authorisation for medical information.

111. Accordingly, the worker asserts in the claim form that the injury occurred on 1/9/99 and that she reported it to the manager on 28/9/99. This is a delay of some four weeks before she says she reported the matter, and no explanation for this delay was offered in her evidence. Again this is different to her sworn evidence before me that she went almost immediately to see the manager to report the incident. The difference between these two pieces of evidence remains unexplained. Presumably events would have been fresher in her mind when she completed the claim form.

112. Further, the "description of how the incident occurred" as set out in the claim form is materially different, in my view, to her sworn evidence before me. In the claim form she makes no reference to a sudden onset of symptoms while lifting a heavy baking tray of roast. The description in the claim form would seem to suggest more of a gradual onset rather than a sudden one. This difference again remains unexplained except for her saying at T76 "I sort of – well, I would say condensed it". I find that she did more than that.

113. Further, in the "description of how the incident occurred" she only refers to her right elbow and hand, but says nothing about her forearm. However, when she is asked about the "part of body affected" she refers to all three.

114. The worker gave minimal evidence as to what problems, if any, she had between 1.9.99 and when she obtained her first medical certificate on 12.10.99. All she said was that she "soldiered on", and that she "continued to have pain and weakness in my forearm". In this evidence she doesn't mention the right elbow or hand. Nor does she offer any detail as to what activities caused her any, and what, difficulty. Nor does she say why she finally went to see Dr Pevie, but I think it is reasonable to assume that the right arm was not resolving as she had hoped.

115. Mr Barr asked the worker in cross-examination (T50-60):

> "what kind of restrictions did you have as a result of your either right or left elbows in your daily living activities?---Boy. Personal grooming for starters, cooking.
>
> Personal grooming, does that mean you had trouble brushing your hair?---Blow waving my hair, yeah, but the – you know, the lifts, you've got to lift your arms up and hold the blow drier and get the styling brush and all that sort of business. I had difficulty with that.
>
> What particular physical movements---?---Making beds.

What particular physical movements did you have trouble doing?---Lifting.

Any lifting?---Most lifting, yes.

Some people with tennis elbow or epicondylitis complain that they can't even lift a cup of coffee?---Cup of tea in the morning, yeah, I have had, not recently, but back early days and intermittently I do have trouble. I can't say I've had trouble recently with a cup of tea but there has been times where I've done it with difficulty and with pain, associated pain."

116. The employer complied at least in part with its obligations under s84(1) of the Act by immediately completing the employer's report section of the claim form, in that the manager of the employer completed and signed the same on 14/10/1999 as required. This was completed and signed by Barrett who described himself as manager. Barrett signed and dated his declaration on 14 October 1999. In that portion of the form he indicated:

- That the Workers Compensation insurer was CGU Insurance.
- That the workers gross weekly wage before the injury was $375.
- That the worker normally worked 25 hours per week.
- That the worker was first employed on 21/7/99.
- In relation to the question "do you query the validity of the claim?" the word "*maybe*" has been inserted.

117. I note that nowhere in that document does Barrett deny or dispute that the injury was reported to him on "28/9/99 at 5pm".

118. I do not know whether the completed claim form was forwarded to the insurer within three working days as required by s84(1) of the Act, but I do know that the same was allegedly received by the insurer on 20/10/1999.

119. On the evidence (and the admission in the pleadings) I find that the worker was paid $375 gross per week at the time she stopped work, and that she was employed for 25 hours per week.

120. By letter dated 21/10/1999 the employer (via the insurer) notified the worker of its decision to defer accepting liability for the compensation pending the receipt of further medical and other unspecified information.

121. Accordingly, the employer complied with its obligations under s85(1)(b) of the Act,

122. At some stage on or after 21/10/99 the employer commenced making weekly payments of compensation in accordance with s85(4)(b) of the Act, but I am unable to decided whether this was within the three working days required.

123. The employer has failed to ever formally notify the worker that it has accepted or disputed liability. The worker alleges that she was not paid her correct entitlements. I will return to this aspect later in these reasons.

124. Dr Pevie has not given any evidence before me, nor has any of his medical notes or reports (if any exist) been tendered in evidence. No explanation has been put forward. I do not know whether he was or was not reasonably available to give evidence. In the absence of any explanation I do not draw any adverse inference against either side for not calling him. I assume that he was not reasonably available, or neither side considered that his evidence would have assisted their case.

125. Dr Pevie apparently referred the worker to see Mr Schmidt (orthopaedic surgeon). At T76 Mr Barr put the following to the worker:

> "Your orthopaedic specialist and let me put this to you, Mr Schmidt says that your pain did not start in the elbow, it was of gradual onset – notice the gradual onset – with repetitive use, lifting as required of her job as a kitchen assistant. She described an onset of stiffness in the hand which, over a two to three week period spread up to her lateral right elbow?---If that's what he wrote, I can't recall though.
>
> What I suggest to you is you didn't tell Mr Schmidt with the 12 kilos much roasting beef almost falling on you as you got it out of the oven, did you?---Well, I can't remember. If he hasn't mentioned it well, who knows, I may not have."

126. Dr Schmidt did not give evidence and therefore I do not know what he would say about the history. If Mr Barr was reading from a document, it was not identified or placed into evidence.

127. According to the worker, when she went to see Mr Schmidt there was a lump on her right elbow. She was asked what happened about the lump and said (T26) "well, it was just left there. At that stage I didn't know whether it was part of the elbow problem or not and I wasn't told whether it was". The lump was referred to in passing later in evidence (at T41 where the worker agreed that she told Dr Parkington that she had a lymphoma removed from the lateral aspect of her right elbow in August 2000), but appears to be irrelevant to my deliberations.

128. The worker went on to say that Mr Schmidt suggested that she do some lifts with small weights and referred her for physiotherapy.

129. Hence, the worker was referred to Mr Mercorella (physiotherapist) in Alice Springs. He has practised since December 1996. At T26-27 the worker gave the following evidence:

Are you able to recall what pain level, if any, you had in your right arm at the time you went to see Dr Schmidt and commenced the fist they are by with Mr Mercorella?---Yeah, it was pretty painful.

And were you able to use it?---Yes, but I had – I was very conscious of the weights I was lifting, like what I was doing at the time.

Were there things that you were not able to do with your right arm?---I had difficulty with doing things around the home, tucking the children into bed, lifting washing baskets.

What did you do to overcome that problem?---I either used my left hand or if I was able to, I used my feet to move things around.

130. The first sentence does not make a lot of sense, but that is how it is transcribed. I have not listened to that segment of the tape myself as I think the general gist of the question is sufficiently clear.

131. Mr Mercorella did give evidence before me by video-conference on 13 July 2004. He first saw the worker on the 22nd day of November 1999 and began treating her. The history which he obtained and recorded in his notes (Exhibit P7) was:

"*Pain in right elbow for three and a half months. Slowly got worse*".

132. This history is not consistent with the worker's sworn evidence before me. She does not suggest any sudden onset, and there is nothing to suggest that she told Mr Mercorella anything about the alleged incident with the roast. The wording would be more consistent with a gradual onset. Further, the time-frame of pain is different. Three and a half months prior to 22.11.99 would take the onset back to early August 1999, when in her claim form she says 1.9.99, which is only two and a half months before. She is therefore one whole month out.

133. Also on 22.11.99 he noted that lifting, stirring and lifting with tongs were matters that he was told by the worker aggravated her pain (T100).

134. On 29 November 1999 the worker was spoken to be Mark Goode on behalf of the employer. Mr Goode was at the time an insurance loss adjuster and claims investigator. He asked her for a history of how the injury to the right arm occurred and in his statement (ExD3) he stated as follows:

> "13. I asked Ms Spellman whether there had been any specific event or time which she recalled had contributed to the injury. Ms Spellman said that there had been nothing specific and no specific day or time when the arm problem had occurred. She indicated that she first saw Dr Pevie in about September however she said that the problem had started towards the end of July or early August 1999."

135. This was put to the worker at T76 and her answers were "I can't remember".

136. This is completely different to her sworn evidence before me, and more consistent with what she initially reported to Mr Mercorella, as noted above. Events should have been fresh in the worker's mind when she spoke to Mr Goode. There is no good explanation as to why she did not tell him about the alleged roast incident if it occurred as she said that it did.

137. I am unable to accept the worker's sworn evidence that her problem with her right upper limb came on suddenly whilst lifting a baking dish as she alleged. I find on the balance of probabilities that no sudden onset of symptoms occurred at work as a result of such an incident. Further, I find on the balance of probabilities that there was no sudden onset of symptoms in her right upper limb at work due to any specific incident at work (she gave no evidence of any other possible incident). The employer has admitted an "injury" to the right upper limb and I find that it was an injury of gradual onset which was not caused by any one particular incident or activity.

138. According to Mr Mercorella's notes (Exhibit P7) the worker was treated by himself (or his associate on two occasions on 26/11/99 and 1/12/99) on approximately ten occasions up to and including the 22nd day of December 1999. All such treatments and complaints were related to the right side only.

139. On 1.12.99 he noted "better with ultrasound" and "much better than last week". He agreed (T100) that this referred to an improvement in her right elbow over the time. On 3.12.99 he noted "feeling improved" which he agreed possibly meant an improvement even after feeling better on 1.12.99. In the same consult he noted that she told him (T101) doorknobs were not giving her pain.

140. According to Mr Mercorella the worker continued to improve up until 10.12.99 and then on 13.12.99 she reported (ExP7 and T101) "that she had been sore over the weekend, ached plus plus, tried icing, no decrease in pain". He did not record any reason for this soreness and the worker gave no evidence in relation to this. Accordingly, no explanation is available. However, by 15.12.99 it appears that that had improved, using voltaren.

141. In December 1999 the worker said that Mr Schmidt had raised the subject of her returning to light duties. Her evidence on this topic was as follows (T27-28):

> Did any of your medical practitioners discuss with you a return to work program while you were still in Alice Springs?---Yes, Mr Schmidt did, in December from memory. He asked me did I think I would be able to cope with lighter duties and I was prepared to give it a go. So I took the doctor's certificate in which, from memory, read "light duties" and I was informed by my employer that the kitchen had been closed and I asked whether I would be able to do bar work. I think on Dr Schmidt's certificate it said, "light bar duties" because I was aware at the time that the kitchen

had closed, that was what the story was, and when I spoke to Michael, the manager at the RSL, that was earlier in the week and he said to me to come in at a set time, whatever morning it was, a couple of days later at 10 o'clock if I didn't hear from him in the interim. Well, I did receive a phone call from Michael Barrett and he told me that he had been in contact with a lady by the name of Beth Mildred from the Chamber of Commerce and that there could be some conflict if he was to slot me into the roster behind the bar and take away hours from another employee. So that would not be able to take place, this return to light duties, so that was the finish of that.

Did your employer arrange for any other place for you to have any light duties?---No.

Were you willing to attempt light duties?---Yes.

Were there things that you felt that you could have done?---Mm mm.

What were they at that stage?---I felt I would have been able to manage the Keno and/or the TAB.

142. This evidence was unchallenged. In particular Barrett gave no evidence on this topic at all when he was called to give evidence. I therefore accept the evidence of her discussions with Barrett. It is also in part consistent with the medical certificate (part of ExP5) from Mr Schmidt dated 20.12.99 referred to supra. However, Mr Schmidt certified her fit for "light duties, bar work, no lifting, 2-3 h/day". He did not restrict it to the Keno and/or TAB.

143. I formed the impression from the worker's evidence as a whole that she had no real desire to ever return to work in a kitchen or do bar work. Further, I formed the impression that this did not relate to any injury, but rather her personal preference to do Keno and/or TAB type work.

144. I find that the worker's right upper limb injury had improved by 20.12.99 to the extent that she was now able to return to some light bar work for 2 to 3 hours a day.

145. The worker drove to Queensland with a friend and her two children for about two weeks over this Xmas period (T58-9). She said that her friend did most of the driving. On the evidence she was problem free in the left arm before she went. The worker did not tell me anything about what she did during this two week period.

146. After the worker returned to Alice Springs she attended upon Mr Mercorella on 5 January 2000 and for the first time complained of symptoms starting in the left upper limb. In his evidence in relation to this (T95) he said – "that's when she first sort of reported to me that she was starting to get pain on her left elbow". Accordingly, it would appear most likely that problems in the left elbow started sometime between 22.12.99 and 5.1.00. The evidence does not enable me to be more precise than that. His actual note for this attendance was:

> "S: still fairly ISQ, possibly slightly worse on the right, and the left starting.
>
> O: tender ++ CEO * Right and left + lat. epi
>
> + sl post elb jt"

147. He read this onto the transcript at T98, and said that the "S" stood for subjective. Later he explained that "ISQ" meant "in status quo" or no change from previous. "O" stood for objective; "CEO" stood for common extensor origin; "lat. epi" stood for lateral epicondyle. The last few words stood for "slightly posterior elbow joint".

148. The worker agreed (T27) that the symptoms in her left arm first became apparent in "December '99, January 2000". She gave no evidence as to what

she was doing in the lead up to producing symptoms in the left arm beyond her very vague answers at T26-27 (set out above). The only activities that she identified were "tucking the children into bed" (which would only be a brief activity once a night for one or maybe both children) and "lifting washing baskets" (which could have been overcome by doing more than one trip to the dryer or clothes-line). She agreed in cross-examination (T108) that she didn't change the way that she ate as she "couldn't use a knife in my left hand". She did not tell me what, if anything, she was doing when she first noticed any symptoms in her left arm, nor what these symptoms were, nor where in her left arm she first noticed them. Nor did she tell me how long she had noticed the symptoms before seeing Mr Mercorella on 5.1.00.

149. Clearly on the evidence the period between 20/12/99 and 5/1/00 is critical when it comes to understanding why symptoms in the left arm commenced, as they commenced sometime during that period. I would have expected the worker to go into a lot of detail as to what was happening in this period and what she was, or was not doing, or doing differently in this period. I would have expected the worker to tell me what she was doing when she first noticed any (and what) symptoms in her left arm. These were all matters that were peculiarly within her personal knowledge alone. She has told me nothing. I would not expect Mr Barr to have asked any questions on this matter given that the worker chose to remain silent on it in her evidence in chief. At the end of the day I am left completely in the dark as to what led to the onset of symptoms in her left arm during this period. I am left with only her vague general responses about tucking in her children, carrying the washing et cetera.

150. It is to be remembered that she has embarked on this holiday with a friend (who was not identified in evidence), but I'm not told whether this friend was male or female, whether the friend was with the worker for the whole holiday, or whether this friend was required to (or did in fact) help the worker with any (and if so, what) tasks. The holiday was to Queensland,

where I know the worker has family. I don't know where she stayed or who with. I don't know whether she stayed with any (or which) family. I don't know whether any family helped her with any (and if so, which) tasks while she was away.

151. All I am told is that she goes away on holidays with symptoms in her right arm, and returns about two weeks later with symptoms in both arms. There may be a connection between the two, but there may not be. In the absence of any (or sufficient, if I assume that she still tucked her children into bed or did some washing etc. whilst on holidays) evidence I am unable to be satisfied on the balance of probabilities that the worker has established any such connection.

152. On the evidence I am unable to find on the balance of probabilities that:

- The problems in the left arm were either of sudden or gradual onset;
- The problems in the left arm were or were not caused by any particular incident or not;
- The worker was doing anything at all involving her left arm in the period between 20/12/99 and 5/1/00;
- During the period between 20/12/99 and 5/1/00 the worker was using her left arm in preference to her right whilst performing any (or what) activities; or
- There was any causal connection between the right arm injury and the onset of the left arm symptoms.

153. The worker was asked how the problems in the right arm compared with the left, once the left side became problematical. At T43-4 the following evidence was given:

"And when my left arm, I had trouble with that, I had similar – same symptoms, not similar, same symptoms as with my left in November of '99 to what I did in the onset of my problems with my right arm.

After the onset of symptoms in your left arm, did your symptoms then continue in both arms?---Yes.

Were they the same in the left or the right or did they differ?---At times they differed.

Can you tell us about that?---In what way? What the pain levels were like, when they differed.

First of all, how did they differ?---How did they differ – well, some days the right wasn't as bad as the left and then other days the left would be worse than the right."

I note that this is the same thing. I return to the transcript:

"Okay?---Different levels of pain, you know, like I couldn't say that my right arm was in dire agony. The orthopaedics – not the orthopaedics, the physiotherapists used to ask us to do it in a scale like 1 to 10, what level of pain, so some days my right arm may be an 8 and the left would be a 6.

Right?---Then other days my right would be a 9 and the left could be the same.

Did you suffer from weakness in both arms?---Yes.

Was that the same or different in the right and left arm in relation to weakness?---Same sort of weakness, yes.

In relation to your forearms?---Mm mm.

> What symptoms did you suffer in your forearms? You told us about the pain in your elbows?---Mm mm."

I digress to say that I disagree with this. The initial questions were related to "arm and elbow" and continued asking for symptoms in the left and right arm. At no stage did the questions or answers aforementioned specifically purport to deal with pain in the elbows. I return to the transcript:

> You told us about the weakness?---And also, I have had pain in the forearms up here, where the muscles and tendons are, in this top part, the top part of the forearm.
>
> Okay. What about your wrists?---There was like a weakness in my right wrist, that was around the time I nearly dropped that roast meat that we mentioned earlier, yeah, just like a weakness."

I digress to note that this is different to what she told me at T21 as set out above. There she mentioned "weakness in my forearm and pain in my elbow…..it was like I had lost feeling in my hands, not that I had lost feeling but the strength had gone that I normally had." The "wrist" was not mentioned at all previously. I return to the transcript:

> "Have you had that in both wrists since then?---No. I've had pain in the wrist.
>
> Right?---But that was associated with something that was like – occurred further down the track."

154. The worker went on to say (T44) that the symptoms in her right arm did not change from the time she first went to see Dr Pevie (from the notes of Mr Mercorella, as referred to herein, I am unable to accept this as true) until when she saw Dr Parkington in April 2001. In relation to the left arm she said the symptoms did not change from the time of their onset until when

she saw Dr Parkington. Further at T45 she added that the symptoms in both arms did not change up to when her payments were cut off in October 2001.

155. On 4.2.00 Mr Mercorella wrote to Mr Schmidt (ExP6). In part he said:

> "Thanks for reviewing Sharon, who is progressing slowly. Her right arm/elbow has improved slightly but whenever she tried heavier weights with exercise, it flares up again. So gone a little lighter, but she still can't lift/grip, et cetera. She is also getting pain in her left medial elbow, medial epicondylitis? ? from over-using left arm."

156. In Mr Mercorella's notes (ExP7) for 21.3.00 he recorded under "subjective":

> Good. Washed car today – no problems.

In relation to that entry Mr Barr had him clarify this (T102) as follows:

> So she gave you a history that she had washed the car and hadn't experienced difficulty?---Correct.
>
> Underneath that, you've got the words, something "almost gone in right"?---Tenderness almost gone in right common extensor origin.
>
> Does that mean that you actually palpated there to elicit tenderness and found only very minor tenderness?---That's correct.
>
> You judge that by the patient's response to your feeling the tender area; is that correct?---That is correct.
>
> You also did a strength test and found, on 21 March, that she could lift in excess of a kilogram for wrist extensions?---That's correct.
>
> That's an indication – in fact, all those matters, the car washing, the near absence of tenderness and the strength test, were indications that

the problem was getting much better, were they not?---With the right elbow, that's correct.

Did you make any notation as to the left on 21 March?---No, I didn't.

157. The worker was asked about this at T113:

> "Or that you washed the car?---I can't remember ever washing the car.
>
> But that would also indicate that you were on the improve, wouldn't it?---Yes, on a slight improvement, if that's what he said that I reported."

158. I find that the worker did tell Mr Mercorella that she had washed the car, and that she had had no problem or pain doing so. Her reluctance to admit ever washing her car does not assist her credit.

159. Mr Barr continued to take Mr Mercorella through his notes as follows (T102-104:

> But then on 23 March, your notes say, "still going well", and underneath that, it looks like the word "vacuum"?---That's correct.
>
> Did Ms Spellman give you some history that she was able to do the vacuuming?---That's correct.
>
> Do I understand the word "good" there to be your notation that she hadn't had any difficulty with doing the vacuuming?---That's correct.

160. On the worker's evidence pain and disability has continued in both upper limbs up to and including the time that she gave evidence before me in July and August 2004. When this part of Mr Mercorella's notes was put to the worker she gave the following response at T112:

> "You don't remember what you told Mr Mercorella, so you?---Bits and pieces I do. If I told him I vacuumed, I assume I would've vacuumed, but not without difficulty at that stage. I may have reported that I felt better, but I still suffered from pain."

161. I reject this evidence. I find that in fact she did the vacuuming and told Mr Mercorella that she had had no difficulty doing so. I therefore find that she was able to vacuum without pain on at least one occasion. The worker was giving evidence about events and bodily feelings from over four years before. It is not surprising that she might roll her memories together.

162. Prior to leaving Alice Springs the worker spoke to the Commonwealth Rehabilitation Service on two occasions (T28). I know nothing more about this.

163. In cross-examination Mr Barr asked the worker what restrictions she had in the time up to when she left Alice Springs. Her evidence at T70-1 was as follows:

> "In the early days, washing the dishes on occasions, pegging out washing, carrying the dirty clothes basket, carrying the wet clothes in the linen basket, cooking, making beds.
>
> .....
>
> …Did you find that you were restricted doing housework?---Yes.
>
> What restrictions did you have?---Vacuuming, mopping, the things that I previously just mentioned before you asked me this question again.
>
> What difficulty did you have vacuuming and mopping?---I experienced elbow pain, forearm pain.

And could you continue with doing those tasks or did you have to cease them altogether?---I would have to give my elbows a rest and either get someone else to finish it or do it another day, depending on what level of pain I had. My pain levels differ, like I mentioned before.

From day to day?---From day to day and it depends on what I do as to what my degree – my pain level degrees are.

But presumably if you are using your elbows, they are always painful or not necessarily?---Yes, they are.

Is it possible that some days the elbows don't cause you any problems at all – talking about this early time?---No, not then and not now.

So certainly going back to the early day period, that's the period until you left Alice Springs, every use you made of your elbows---?---Is painful.

Would cause you distress?---Yes.

Was that pain always at the same level or was it variable?---It was pretty bad early days, yeah.

So that prevented you doing your ordinary housework?---It didn't prevent me from doing it altogether, I was limited as to what I could do, depending on my level of pain. So I didn't stop doing housework altogether, I did have assistance at times.

Did you get people in to help you to do housework?---Yes.

Friends or ---?---My mother and friends, yes.

> And that was because you actually needed some assistance to be able to do the ordinary amount of housework that you had to do for your own household, is that right?---Yes.
>
> What about dressing and showering and so on, were they problems for you?---At times they were, not all the time but at times."

164. Yet by T248 she was "paying somebody to do my ironing and getting help to clean my own home". There was no mentioning of ever having to pay anyone to do her ironing in this period in evidence in chief or earlier in cross-examination. In addition, at T103 Mr Mercorella was asked about the worker's consultation with him on 5 April 2000, and the following evidence was given:

> "Then on 5 April there is a reference there to "no pain – good" something "activity"?---With all activity.
>
> "Good with all activity", and is that---?---Yes, all that simply is daily living we see, sorry.
>
> There are no aspects of daily living that are causing the person a problem?---Sorry, can you repeat that, please.
>
> There were no activities of daily living that were at that stage, causing this person a problem?---That's correct at that stage.
>
> ……
>
> Underneath the words "no pain" you have written, "only slightly tender on", and then there appears to be a gap in your note?---Yes. CEO which is the common extensor origin of the left and right, so she still had some tenderness on these tendons, but wasn't getting any pain with functional use of what she was doing at the time.

165. I find that this was in fact the true position, rather than her evidence before me. Clearly the notes of Mr Mercorella are a contemporaneous note of the worker's complaints to him at the time. Her evidence before me is a reconstruction of events from over 4 years ago.

166. During the time that the worker was off work in Alice Springs she was friends with Robyn Sheasby (who gave evidence commencing at T279). Sheasby was at the time married to Kym Leleu (who gave evidence commencing at T357). They lived around the corner from the worker, a distance of about 50 metres. Ms Sheasby gave the following evidence at T279:

> "Can you tell the court what it was that you observed about her after the injury?---Sharon had become somewhat – more than somewhat, a lot limited in compared – in comparison to what she used to be. For example, if we were grocery shopping or down the street, I would carry the bags. Sharon didn't carry anything. I never saw her do anything really physical after she'd hurt herself."

167. It was put to the worker (T72) that after she went off work with the employer she cleaned Sheasby's house once per week. The worker denied this. She specifically denied that she washed the windows, cleaned the floors, did the bathroom, or did vacuuming. She also denied the following at T73-4:

> You had a key to the house?---That's incorrect.
>
> And you would let yourself in?---I would never let myself into Robin's house without her being there.

I digress to note that there was no evidence to suggest that the worker did have a key to Ms Sheasby's house at any stage. I return to the transcript:

> And on occasions you saw Kym Leleu at the house when you were doing your cleaning work?---The only time I saw Kym was when I visited Robin and he was home from bush.

I digress to say that I reject this evidence as untrue. I prefer the evidence of Sheasby and Leleu on this topic. Their evidence is set out briefly later in these reasons.

> I suggest, Ms Spellman, that on two occasions you told Kym Leleu that you had to leave the house in order to go and see the doctor about your workers compensation?---No, that's not correct.
>
> I suggest that you were paid to do this work by Robin and that it was – you got paid $50 a time?---I never cleaned Robin's house."

168. Robyn Sheasby gave the following evidence in that regard:

> I never asked Sharon to clean my home, nor did I pay her to clean my home (T280).
>
> Did you ever – did she ever do any cleaning work at you house after she was injured?---She washed a couple of coffee cups, wiped down a bench, that's about it. (T280)
>
> At no time did I employ Sharon Spellman as a cleaner at my home in Alice Springs. (T281)
>
> ….as far as I'm aware, the only cleaning that Sharon Spellman ever did at my home was wash a few coffee cups, and she cleaned two silver goblets for me one afternoon and left them sitting in the middle of the kitchen table. And that's it. (T283)
>
> No. Again, as I've already said to you, I can't say definitely that she didn't clean the top of my cupboards. I was not in the habit of coming home from work and climbing up onto a stool to look at

the top of my kitchen cupboards. But I'm sure, if she had, she would have taken great delight in telling me that she'd cleaned the tops of my cupboards…….so like I said, if I wasn't there when Sharon was at my home, then I can't tell you what happened while she was there and I wasn't. All I can tell you is that I didn't employ her as a cleaner. (T283)

Were there occasions, on which you were at work, that you were aware that Sharon came around to the house during the daytime?---Yes, yes. There were a number of occasions.

And you're fully aware that at times, for example, when you would be at work, Sharon would come and visit at home and maybe spend a bit of time with Kym?---Yes.

If he were there?---Yep.

And she was able to come and go as she pleased?---Certainly, certainly, she had free access to my home.

And if she saw something that needed doing, it's quite possible that she may have just decided to do it for you, is that possible?---As I said – again, as I said, anything's possible, yes. Can I recall any specific or particular instances? Again, the answer is still no. (T284)

Was it her nature that, if you'd left, say, unwashed things in the sink, or hadn't wiped off the bench or cleaned the kitchen bench before you went to work, that she would do those things for you?---Yes, yes, absolutely. (T285)(emphasis added)

169. I was impressed with Ms Sheasby as a witness. Her answers were appropriate and unshaken. I have no reason not to accept her evidence. I prefer her evidence to that of the worker. The worker would have me believe

that she only went to the Sheasby home to visit Ms Sheasby. This is not the true position. I find that there were times when the worker attended to see Mr Leleu, knowing that Ms Sheasby was at work.

170. Kym Leleu gave the following evidence in relation to the worker's attendances at his home:

> …I want to ask you whether you ever saw Sharon in the period after she had stopped working at the RSL at your house, and if so, in what circumstances?---Yeah, she used to come around there and clean.
>
> And when you say she used to come around clean, did you see her?---Yeah, a couple of times. (T359)
>
> All right and can you describe – do you recall any specific occasions?---Yeah, one time she asked me to get a ladder to pull the diffuser of the kitchen light, so she could climb up and pull that off and try and undo.
>
> All right just before we get to that occasion, what sort of cleaning work did Sharon do at home in terms of what you saw her do?---Yeah, well one time I saw her cleaning the top of the cupboard in the kitchen.
>
> Yes?---And that was the time I got the ladder because she was standing up on the cupboard and that was pretty dangerous, well not dangerous but walking around and not much room.
>
> Yes did she do other – apart from the time you saw her cleaning the cupboard – did she do any other and if so, what cleaning work around your house?---Yeah, she like I said cleaning up a silver tea set thing once, you know like when you get married, the coffee set and all that stuff.

> Yes?---And just like normal – cleaning the floors and all that sort of stuff. (T360)
>
> Now apart from that day did you see her doing cleaning work at your house on other occasions?---No, probably only ever saw her doing cleaning twice I reckon that I can really remember, because she used to probably come around of an afternoon.
>
> …….I remember she was in the bathroom one time – like the kids bathroom but that's all I can really remember. (T361)
>
> …..You see I suggest to you that the only thing that Mrs Spellman cleaned of a silver nature in your house was two silver goblets?---Yeah, she done them too. (T364)

171. At T360-1 Mr Leleu also told of a time when the worker had been at his house but left saying that she had to go to see the doctor but would be back later. He said that she had not been wearing any arm support whilst she was doing the cleaning, but put one on to go to the doctor. This evidence went unchallenged.

172. I did not find Mr Leleu as impressive a witness as Ms Sheasby, but I have no reason to reject his evidence out of hand. I find that on two occasions Mr Leleu observed the worker to be doing cleaning type work within his home. I find that she cleaned at least two items of silver; climbed on a ladder to clean a kitchen light; and did some basic cleaning up. I do not find that this was part of any financial arrangement. Whether the worker did it out of friendship, or boredom or some other reason I do not know. I am unable to find that the work she did was particularly physical or onerous. But, I find that her gratuitous labour was somewhat inconsistent with her alleged stated incapacity for work at that time.

173. In May of 2000 (T29) the worker said that she left Alice Springs and moved to Morayfield in Queensland with her two children. She sold her house and

paid removalists to come in and pack up and move whatever she hadn't sold. She continued to see Mr Mercorella up to the time that she left. According to his notes (ExP7) he last saw her on 12 April 2000 when he was informed that the worker was leaving on Easter Sunday, 23 April, to go to the Gold Coast. At the time of his last examination he noted (T98):

> She still had a slight ache in the left with working a lot, I've written "less in the right".

174. Accordingly, by 12 April 2000 the worker's symptoms appear to have been "slight ache" in the left arm. As regards the right arm Mr Mercorella said at T100:

> Is that a reference to, if you like, the relative seriousness of the two elbows, the left elbow was slightly aching and the right even less so?---No, I think it meant compared to her symptoms before, her pain was less right now.
>
> So it wasn't to do with the difference between the left and the right elbow, but to do with the previous condition of the right elbow?---That's correct.

175. Mr Mercorella in cross-examination was unable to elaborate on what he meant by "with working a lot". He did say (T100) "I think it's to do with her work, but I'm unsure."

176. Morayfield is apparently just south of Caboolture (not Kabulcha, as spelt in the transcript). She said that she went to see a physiotherapist at the Lida Boulevard clinic. She also said (T29) that she was referred to a sports medicine specialist in a northern suburb of Brisbane where she says she had one injection of cortisone which – "I think it was my left, but I can't be sure".

177. In addition, the worker also apparently had (T30) “quite a few visits” to see CRS in Caboolture. Through them she was able to re-apply for a gaming manager’s licence in Queensland. That application was successful (T30). It appears from the evidence as a whole that the worker has in fact never applied for any employment utilising this licence. For reasons later set out, I find that she should have, as I find that she was fit for this type of employment as and from 12 April 2001 at the latest.

178. After about two months she moved to her sisters in Yeppoon as she “needed help with the children” (T30). She was asked to elaborate on what type of help she needed, and the following evidence was given at T30-1:

> “Help just to manage doing normal day to day things.
>
> What sorts of things were you not able to do?---I had difficulty with washing.
>
> What sort of difficulty with washing?---At times, pegging out. Most times lifting the basket was an issue, cooking, doing the floors, vacuuming, mopping, lifting the mop bucket.”

179. After moving to Queensland the worker continued to seek medical assistance and physiotherapy treatment in relation to both upper limbs. She was prescribed painkillers and anti-inflammatory medication by general practitioners who were not named (T34). At some stage she was referred to a Dr Geoffrey and (T32-3):

> “… he administered cortisone in my left and right elbow and removed the lump that we spoke of before prior to injecting my right elbow because he thought he would have better access to getting cortisone injection in, so---
>
> Did that give you relief?---For a period of time it did, yes.

When you say a period of time, are we talking months, weeks, days?---The longest would have been about two months, I would say, from memory.

Were you able to do more in that period, in the two month period after the injections than you had been able to do before?---I don't know that I would be able to say that I did more but the pain wasn't as extreme as it had been.

Can you tell his worship about the pain levels. Did they fluctuate?---Yes.

Were some days better than others?---Back in those days, yes, and – still are now. It all depends on what I do as to what level of pain I experience, so I've had to sort of shuffle things around a bit whereby once I would be able to make three beds and whiz over the toilet and bathroom, vacuum and mop in one day, well that gets staggered. The washing is a big issue, the lifting of the washing basket, I get assistance with that downstairs but there have been times where I've been known to kick it down the stairs or kick it from the laundry door to the clothes line which is a bit frustrating, but anyway."

180. There were "numerous occasions" that Dr Geoffrey gave the worker cortisone injections. "I think from memory it was two that he gave me in one arm or three in one and three in the other, I can't recall exactly but it wasn't just the one lot." (T34). She has had no further cortisone injections since.

181. The worker stayed with her sister for about 3 weeks (T31) until she found a house in Gracemere (which is apparently about 15 kilometres west of Rockhampton). She resided there for about two years (T33).

182. In about September 2000 the worker was seeing Patricia Green at CRS in Rockhampton. Apparently arrangements were made for the worker to

undergo a four week trial at the Frenchville Sports Club. Her duties were "basically gaming, keno, poker machines, maybe the TAB but that was sort of a bit iffy at that stage. To start off I think there was two hours a day three days a week and then progress as I was able." (T31). Unfortunately this never proceeded as (T32):

> "…the insurance company would only cover me for further aggravation to my elbows, which upset me a bit. So I wasn't prepared, under those circumstances, to partake in this return to work program because of that reason, so it never went ahead.
>
> So what did you understand the problem to be, that the insurance company would not cover you for what?---They would only cover me for further aggravation to my elbows and that was it. So if I was to slip or hurt myself in any other way, shape or form, it would not be covered by CGU."

183. I have not been asked to make any findings in relation to this, and therefore I won't do so. However as highlighted by Mr Barr at T84-5 it appears odd that the worker was unwilling to proceed with this work trial, but (as I shortly turn to) did other work trials even though she wasn't covered by insurance. Her stated explanation therefore makes little sense.

184. The worker wanted to gain some experience with the TAB system that they used in Queensland, so she again spoke to Patricia at CRS and "they sent my application off and the reply was that they only did training in Brisbane, so I didn't have the opportunity to yeah, train like I would have liked to in the Rockhampton area." (T34). I was not told how long the "training" would have been for, what was involved, or why she couldn't have gone to Brisbane for the "training". On the topic of this "training" the following further evidence was given at T34-5:

"If you had done that training, would you have been able to work doing the TAB in Rockhampton or near where you lived?---I could have. At that stage I felt I needed to learn the system first and feel confident and that's what I would have liked to have done if I had been able to yes.

What were your physical symptoms at the time you were investigating the TAB?---Pain in my left and right elbows.

If you had been able to obtain that employment, what was required physically?---Cash handling, balancing of your terminals at the end of the day, balancing of cash moneys, servicing – like serving customers. The system over there, which is now here in the Territory, the customer puts their own bet slip into the machine, it comes out on the other side. The operator takes the ticket and collects the money and hands them their bet slip. The coupon that they fill in has the bet slip filled out on the back which was different to the system that we had here years ago in Alice Springs whereby the operator had to insert the coupon and it would go in and then would print a bet slip that we would have to take out and then give to the customer.

So would you have been able to perform those duties?---Not then I don't feel I would have been, no."

185. She was not asked, and therefore did not go on to explain why she could not have performed those duties then. I find that the worker was fit to work full-time in a TAB as and from 12 April 2001 at the latest.

186. The worker also arranged some work trials of her own. At T35-7 she gave the following evidence in this regard:

"Can you tell His Worship first of all, what was the first work trial that you arranged for yourself?---A friend of mine manages a hotel in the Rockhampton area. I was keen to learn the new system.

When you say the new system, this is the new TAB system, is it?---Or the Queensland TAB, yes.

The Queensland TAB system, yes?---And he spoke to the owner of the hotel who was fine with it and Denise was the lady, she managed the TAB in this hotel. It was separate from the bar and the gaming room and whatnot, so I went in one day, I think it was for a couple of hours and the following day I went in for an hour and served customers, took their tickets and their money, gave them their bet slips back, learned how to balance – at the end of a shift you've got like a balance sheet where – what's the word for it – at the end of it you've got to sign off on your terminal, balance not only your balance sheet but make sure that your cash balances to what it says you turned over or made for the day.

And were you physically able to do that work?---I was with the exception of handling the till drawer and the bags of money and change.

So you attended on that work trial?---Yes.

So you then – did you feel that you were capable of understanding the system?---Yes.

Does the TAB in Queensland require you to have actually done a course with them?---Not that I'm aware of but it could be possible."

I digress to note that this is contrary to her evidence the following day at T114 where she said: "Did at any stage you have some temporary, part-time

work at the Queensland TAB?---No. I filled in an application form as I mentioned yesterday, and it was sent off to Brisbane, and unless I could attend training, formal training in Brisbane, I wasn't a candidate." So on 12.7.04 when she was giving evidence she was aware that she had to do a course, yet the following day she wasn't. I return to a consideration of T35-7:

> "Right, okay. So did you receive any payment for this work that you did?---No.
>
> As a result of that work trial, did you apply for any work at that place?---No.
>
> Did you attempt any other work trials?---Yes, I did.
>
> Can you tell His Worship about those work trials?---A friend of mine worked at a hotel in Mt Morgan which is a little town out of Gracemere near Rockhampton and I just wanted to see what I could manage, and what I could and couldn't do, basically, so she spoke with the people that leased the hotel and they agreed for me to go up there on occasions and learn, or better familiarise myself with the TAB system and also do bar duties and see what I could manage with. There was no, like, job offer or anything like that further down the track, I simply wanted to see for myself what my capabilities were.
>
> What did you find they were?---That I was able to pour draught beer.
>
> Yes?---And some drinks. The lifting aspect with glasses, refilling fridges and the till drawer of the TAB which was all one part of the actual bar, I had difficulty with and as a result, paid for it with levels of pain that were greater than what I was experiencing prior to taking on this work experience.

How long a shift did you work for the work experience?---Sometimes it would be for a couple of hours, other times it would be for five or six. There were quiet periods and there were busier periods, so---

How long did you trial yourself for?---All told it would have – well, it wasn't like every day I was going up there. There may have been a couple of consecutive days here and there but I can't remember exactly, but it could have been over a four week period all told, but not for four consecutive weeks, do you understand?

Okay?---Thank you.

Did you believe as a result – what did you believe about your capacity to obtain employment after that work trial?---I would not have felt comfortable in applying for a bar position because there were certain things that I couldn't do to the best of my ability, and I didn't feel confident enough to apply for a job and then be saying to a prospective employer, well, I can't lift kegs, I can't lift cartons of beer, there's some things I can do, some things I can't, because they would have just laughed."

187. The TAB duties that she described in her evidence appear to be extremely "light" and basic. Even with her arm problems (assuming for the moment that the left arm also is a work injury) I am unable to see why she could not have performed those duties on a full-time basis from 12 April 2001 at the latest.

188. It appears from the above evidence that the worker is saying that she did two work trials. One at a hotel in the Rockhampton area which was managed by a friend of hers, and the other at a hotel in Mt Morgan where another friend of hers worked. In evidence in chief at T45 she gave the following evidence:

"I think you've given evidence about the circumstances when you had attempted some work trials?---Yes.

And you've told us about two of those work trials?---Yes.

Was there another work trial?---No.

No more?---No."

189. Yet in cross-examination at T82-3 she gave evidence that she did a work trial at three places (not two as she had asserted earlier in her evidence) namely, the Kalka hotel in Rockhampton; the Kabra hotel which was west of Gracemere; and the Railway hotel in Mt Morgan. The worker did not given any evidence in regards to the work trial at the Kabra hotel in evidence in chief. Later in cross-examination (at T114) she said that "the Kalka, that was a two day thing, two hours one day, one hour the next, and that was strictly TAB". I don't think the worker was deliberately withholding this information, rather I formed the view that she was a bit mentally lazy.

190. The worker first saw Dr Quinn (general practitioner) on 19 February 2001. She did not take any history from the worker. According to the worker (T51) she "prescribed pain relief….started a new anti-inflammatory….liaised with CRS occupational therapist and….made referrals to other specialists."

191. The worker asserted in her evidence that she has not paid for medical and physiotherapy attendances and understood that those that have been paid were paid by the employer. Ms Gearin asserts that because some of the medical certificates may have referred to both upper limbs, then by the employer continuing to pay weekly payments and/or some medical accounts then amounts to some form of admission or acceptance of liability for both upper limbs. I am unable to accept this. If the worker had ceased to have any symptoms in the right upper limb and her only ongoing symptoms were in the left upper limb, then this assertion might then have some force. But the worker's evidence is that she has never ceased to have problems with the

right upper limb. If she were totally incapacitated for work due to the right arm then it would not matter that she had some other unrelated injury as well.

192. About six weeks before seeing Dr Parkington for the first time the worker apparently saw another specialist, Dr Bullwinkle, who apparently recommended surgery (T37, and ExP4) to both arms. The worker was apparently excited about this prospect but the insurer herein refused to pay for it. This is not surprising in relation to the left arm which has never been admitted as a work injury by the employer. She also apparently saw a further specialist, Dr Cook, who also apparently recommended surgery (T37). Neither Dr Bullwinkle or Dr Cook were called to give evidence. It seems that the worker then looked to the public hospital system, and she was booked in for surgery on 6 June 2003 to operate on her right elbow (T69). This operation did not proceed as the worker had some reservations.

193. On 12 April 2001 the worker was examined by Dr Parkington at the request of the employer. The history that he recorded in his report dated 17.4.01 (which forms part of ExP4) was as follows:

> "Ms Spellman felt a discomfort in August 1999, when she first noticed a pain in the right elbow. **This came on gradually** and she noticed this when lifting things. It would cause a sense of weakness in her <u>left</u> arm. She developed similar symptoms in the left arm in about November 1999. She was treated with physiotherapy from November 1999, until July 2000. She then consulted a Sports Medicine doctor. She had both elbows injected in August 2000. This helped her and she said that she felt very good for about six or eight weeks afterwards. The injections were not repeated, but she has had no surgical treatment. She did try using non-steroidal anti-inflammatory tablets but these caused nausea." (emphasis added)

194. In his oral evidence Dr Parkington advised that the word underlined was an error and it should have read "right". However, even with this amendment the history is again at odds with her sworn evidence before me, and re-inforces my rejection of her evidence about the sudden onset of pain whilst

lifting a heavy roasting dish. It was put to the worker in cross-examination (T78) that she didn't tell Dr Parkington about the "baking dish episode" and she said "I can't remember". There is no mention of the roasting tray episode at all. There is no mention of any event that caused a sudden onset of symptoms. On the contrary the doctor has specifically recorded a gradual onset. Given this history it is not surprising that Dr Parkington noted on page 3 of his report that:

> "The diagnosis has been given. There was no stated cause. Her symptoms arose gradually."

195. At T38-40 Ms Gearin took the worker through this history as recorded by Mr Parkington and the following evidence was given at T39:

> "Did you tell him that you felt a discomfort in August of 1999 when you first noticed a pain in the right elbow?---Mm mm.
>
> Is that a yes, did you tell him that?---I don't know if I told him that or not, I can't remember.
>
> **Did you tell him that it came on gradually and you noticed it when lifting things?---Yes.**
>
> Did you tell him it would cause a sensation of weakness in your left arm?---I don't think I said left arm, it was – I think it was---
>
> Right arm?---Mm mm.
>
> Then did you tell him that you **developed similar symptoms in the left arm in or about November 1999**?---Yes.
>
> Did you tell him that you were treated with physiotherapy from November 1999 until July 2000?---Yes.
>
> Did you have physio therapy after July 2000?---I can't remember.

Did you tell him that you then consulted a sports medicine doctor?---Yes.

And that you had had both elbows injected in August 2000?---Yes did you tell him that?---Yes.

And that it helped you and you said you felt very good for about six or eight weeks afterwards?---Mm mm.

Is that right?---Yes." (emphasis added)

196. Each of the matters in bold in the preceding paragraph is contrary to her sworn evidence before me. I find that either what the worker told me was untrue, or what she told Dr Parkington was untrue, or both are untrue. No explanation has been given as to why the worker would tell these untruths. I deal with Dr Parkington's opinions as expressed in ExP4 later in these reasons.

197. In cross-examination the worker was asked (T85) how she filled in her days in "mid 2001". She said "I did a lot of drinking"; that she didn't look after the lawns and garden; "I did some housework with help" from her children and a friend, Julie Moore.

198. Matters continued with the worker continuing to receive weekly payments of compensation until late October 2001. On 25 October 2001 Hunt & Hunt (the employer's solicitors) wrote to the worker (part of ExP4) in the following terms:

"Re: Spellman e/b RSL (Alice Springs)

Work Health Claim

We refer to the above matter.

We enclose (*) herewith a Notice of Decision on behalf of the Employer to you dated 25 October 2001. We advise that the purpose of the notice is to advise that your payments of compensation will

cease after 14 days of the receipt of the said Notice. The reasons for the cancellation are set out in the Notice and enclosed (*) medical report and certificate.

We ask you to read the notice and accompanying documents carefully, and note your rights to seek a Mediation if you are unhappy with the Employer's decision. We also enclose (*) herewith the standard Work Health Authority Bulletin regarding the Mediation process for your attention".

199. The notice of decision which was also dated 25 October 2001 and which accompanied the said letter (and formed part of Exhibit P4) was in the following terms:

"Dear Mrs Sharon Spellman:

With regard to your claim for payment of benefits as prescribed under the Work Health Act, you are hereby advised that your employer RSL Alice Springs, acting on the advice of CGU Insurance, hereby:-

- Cancels payments of weekly benefits to you pursuant to section 69 of the Work Health Act. The cancellation will be effective in 14 days from your receipt of this notice.

The reasons for this decision are:-

1. You are no longer incapacitated for work as a result of the work related injury on or about 1 September 1999.

2. Annexed to this Notice are copies of a report from Dr R Parkington dated 17 April 2001 and a certificate from Dr R Parkington dated 22 October 2001".

200. In the medical report dated 17 April 2001 (ExP4) Dr Parkington expressed the opinion (amongst others) that:

Ms Spellman is suffering from a bilateral epicondylitis or tennis elbow in both elbows. This condition is not caused by any acute injury. It is a degenerative condition of the tendinous insertion of the extensor muscles on the lateral aspect of the elbow. It generally arises spontaneously, but can be aggravated by repetitive activities.

> I think that the worker has recovered from any effect that her employment may have had upon her condition. Her continuing complaints are due to the natural progression of a lateral epicondylitis and I think that they are no longer work related.

201. The medical certificate which accompanied the two afore-mentioned documents (and also forms part of Exhibit P4) was dated 22 October 2001 and stated as follows:

> "I, *Dr T R Parkington* Consultant Orthopaedic Surgeon. HEREBY state that I have examined the worker, *Sharon Spellman* on *12/4/01* in relation to her work injury. Being an injury to her right arm, namely hand, forearm and elbow on or about 1 September 1999.
>
> As a result of that examination I CERTIFY that the worker has ceased to be incapacitated for work as a result of the work injury".

202. This certification needs to be read together with what he has said in his report. He clearly agrees in his report that the worker has an ongoing incapacity for work, but certifies that any incapacity due to a work injury has ceased.

203. The Worker has received no payments of weekly compensation from the Employer since in or about early November 2001. The worker did not see Dr Parkington again between 12 April 2001 and the date that he signed the certificate.

204. In the case of *Rupe v Beta Frozen Products* [2000] NTSC 71 Riley J noted the problem with the certificate in that case as follows:

> It was submitted that in this case the employer had failed to comply with s 69 of the Act. By virtue of s 69(3) of the Act a medical certificate was required to accompany the Form 5 notice because the employer alleged a cessation of incapacity for work. It was said that the certificate that did accompany the notice was not "a certificate for the purposes of s 69, and that ground of Form 5 was vitiated by formal defect". As the remaining grounds identified by the Form 5 had been rejected by his Worship, therefore the whole of the Form 5 was ineffective.

[8] The attack upon the medical certificate, which had been issued by Mr Sen, an orthopaedic surgeon, arose from the unusual circumstances surrounding the issuing of that certificate. Mr Sen had been engaged to review the worker prior to the worker entering upon a return to work program in August 1998. Mr Sen then reviewed the worker in October 1998 after the program had been in place for some two months. He saw the worker on 9 October 1998. When he gave evidence before the learned Chief Magistrate, Mr Sen expressed the view that the worker was not ready to return to his pre-injury duties on a full time basis as at 9 October 1998 and he had recommended a gradual increase of work over time. In a medical report dated 26 October 1998 that followed and was based on the attendance on 9 October 1998, Mr Sen noted that "the injury is not stable yet". He observed that "Mr Rupe needs ongoing physiotherapy" and, further, "he needs to do his own exercises and have physiotherapy at least twice a week for the next 3-4 weeks".

[9] On 25 November 1998, at the request of the employer, Mr Sen issued the certificate which accompanied the Form 5 notice. In that document he certified that:

"(1) On 09/10/98 I examined Mr Clinton Rupe in respect of work related injury that he says arose on 27 February 1998, namely left Achilles tendon;

(2) In respect of that injury, Clinton Rupe has ceased to be incapacitated for work and is fit to resume pre-injury duties."

[10] Mr Sen provided that certificate from his address in South Australia without the benefit of again examining the worker. The certificate issued even though Mr Sen gave evidence that he did not obtain a history from the worker as to what his "work duties" involved. He only knew that the worker was a butcher. There was no evidence of Mr Sen having been provided with any additional information between 9 October 1998 and 25 November 1998 relevant to the condition of the worker. He did not speak with the physiotherapist. The learned Chief Magistrate described the matter in this way:

"Mr Sen saw Mr Rupe shortly after the injury and once more only on 9 October 1998 when he formed the view that Mr Rupe was not then ready to resume full time duties, opined that further physiotherapy was required ("twice a week for the next three to four weeks") and gave an expectation of being able to resume full time work in four weeks from the date of the report, namely 26 October 1998. He then issued the medical certificate dated 25 November 1998 (Exhibit E16) which was appended to the Form 5. This certificate was given without further examination or apparent enquiry as to whether his recommendations had been followed or there had been any substantive improvement in the condition of Mr Rupe. In his oral evidence he indicated that he still backs his judgment which was based on years of experience. He says his views are supported by the video evidence showing Mr Rupe participating in bow hunting and fishing."

[11] There was no satisfactory explanation as to how Mr Sen could express the view contained in the medical certificate dated 25 November 1998 when he had not seen the worker since 9 October 1998 at which time he had been of the view that further treatment was required in order to enable the worker to resume full time work. He said he made the date 25 November 1998 because that was when he "expected him to go back to work". The opinion expressed in the medical certificate can only have been speculation on the part of Mr Sen based upon an assumption that there had been intervening medical treatment in the form of

physiotherapy and exercise which had been successful. He assumed, without any identified basis for so doing, that the condition of the worker had responded to treatment and that nothing had occurred which aggravated the condition. His Worship was critical of the certificate issued by Mr Sen. He made the following observations:

"The Form 5 with the certificate of Mr Sen, complies with the legal requirements of s 69, however I would have had little regard to the certificate of Mr Sen dated 25 November 1998 unless supported by other evidence. The practice of giving medical certificates should be treated seriously by the medical profession, especially since the rights of employers and workers are thereby affected. In this case, and in almost all cases, I cannot imagine that it would be appropriate for a medical certificate to be given without having some current process of assessment."

[12] In his evidence to the Work Health Court the following exchange occurred between Mr Sen and cross-examining counsel:

Doctor Sen, for all you know Mr Rupe may not have been able to cope working full-time five days a week at the time you signed the certificate?---Well, it is my expectation. That - that's what it is. The certificate said that I expect him to go back to work on such and such a day."

In fact, as can be seen from the document, it said that at that date he "has ceased to be incapacitated for work and is fit to resume pre-injury duties". Mr Sen may have been confused as to the purpose of his certificate or the use to which it was to be put. It seems he regarded the certificate as a statement of expectation rather than a certification of fact.

205. Based on this factual background Riley J went on to make the following findings:

[17] The question that then arises is whether there has been compliance with s 69(3) of the *Work Health Act* in this matter given the evidence and the findings of his Worship in relation to the certificate of Mr Sen. In my opinion there has not. The document relied on to support the Form 5 was not what it purported to be. It complied with the requirement of form in s 69 of the Act but in truth what Mr Sen did not do was certify that the worker had ceased to be incapacitated for work as at 25 November 1998. At its highest Mr Sen speculated that such would be the case. That is not what s 69(3) required. The section requires certification that the worker "*has* ceased to be incapacitated for work" ie the certificate must speak effectively of the worker's recovery at the time the s 69 notice to discontinue weekly payments is issued. It cannot be known what opinion Mr Sen may have formed had he examined the worker on or near to the date of his certificate.

[18] If the evidence of Mr Sen is accepted he was not intending to certify that the worker had ceased to be incapacitated for work. Notwithstanding the wording of the document he signed, he was only setting out his future expectations. The fact that it was issued in the circumstances described means it was a speculative expression of opinion as to the future by the doctor rather than an expression of

> concluded fact. In all of the circumstances his Worship was correct in not accepting the certificate.
>
> [19] The question that it is then necessary to address in this matter is whether the employer has fulfilled the requirements of s 69 of the *Work Health Act* and is thereby permitted to cancel or reduce payments of compensation otherwise due and payable. Are the conditions present that give rise to the right created by the section to discontinue or limit payments? What is not of concern is any question of whether or not the opinion of the doctor should be accepted. That would necessarily open up questions of weight and merit relating to the opinion of the doctor. Such issues are to be addressed at a different stage in the proceedings if this be necessary. In an appeal of the kind being considered in this matter the issue is whether, in all of the circumstances, the certificate itself is of the kind contemplated by s 69(3) of the *Work Health Act.* In my opinion it was not.
>
> [20] It follows from what has been said above that, in this matter, there was a failure by the employer to comply with the requirements of s 69 of the *Work Health Act* and the employer could not rely upon the provisions contained in that section in order to cease payments. Having failed to comply with the requirements of s 69, the employer is obliged to continue to make weekly payments of compensation until lawfully permitted to cease or reduce those payments either by giving a fresh notice or by making a substantive application: *Ju Ju Nominees Pty Ltd v Carmichael* (1999) NTSC 20 at 9; *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73 at 76, 78-79. In this matter a substantive application was made in the counterclaim filed and delivered on behalf of the employer.

206. Accordingly, the certificate in that case was inadequate as it was based upon a future expectation, and Mr Sen had no way of knowing whether his expectation was right or not. I do not see the same problem in the instant case. Dr Parkington is not relying upon what he expects or hopes might happen, but rather upon what his opinion was at the time of his examination in April 2001. As to the correctness of that opinion I deal with this later in these reasons.

207. Another attack on the Form 5 is that the certificate of Dr Parkington and his accompanying report are inconsistent with each other. I find that they are not. Clearly they are predicated upon what he considers to be related to a work injury and what he attributes to an underlying degenerative condition. Upon that basis they make perfect sense. I therefore find that the Form 5 is not invalid. As to the ultimate correctness of the assertions therein contained, that is for me to decide, and I deal with this later in these reasons.

208. At the time payments ceased the worker said (T51) that she was unable to perform the duties of a bar attendant, kitchen hand or cook. She elaborated upon this as follows at T51-2:

> "How do you know that you were unable to perform those duties?---Well, through the work experience and work trial that I did at the hotel, I worked out for myself what I could handle and what I couldn't. As far as pain levels went, weights, the whole bit. As far as cooking go, I know I've had to change at home my style of cooking.
>
> In what way have you had to change that and why?---We don't do roasts in the oven any more and I have help from the children, we do it in a frypan because of the lifting factor involved. Big pots, like cast roles (*sic. casseroles*) and that, I cook in much smaller proportions now to what I once did and that again is due to the lifting factor and the pain that results from lifting things that are too heavy.
>
> Do you sometimes attempt to lift heavy things and have you?---Yes, I have.
>
> I'm talking about specific---?---Yes, I have and as a result I've paid for it.
>
> What sorts of things do you remember attempting to lift or indeed lifting?---Baskets of washing, cartons of beer, shopping bags and there have been times when I've lifted shopping bags and they have been too heavy for me and I've paid the ultimate price."
>
> And what is that?---Pain."

209. The worker said (T87) that her pain is worse now than it was back in 2001, as she says that she now has trouble with her shoulders as well. At T108 the following evidence was given by the worker:

> "Notwithstanding the fact that you have not participated in work, daily job of work and so on, there has been a slow progression in the nature of the deterioration in both arms since 1999?---I would say so, yes.
>
> You would say that the deterioration, looking at say, 1999 to 2004, is a slight deterioration?---I don't know how to answer that, a slight deterioration, it's just – it's ongoing and it's not getting any better.
>
> But deterioration indicates your view that it's actually getting worse, doesn't it?---Yes.
>
> Do you still say it's getting worse?---Yes."

210. At T88 the worker gave the following evidence:

> "What is the maximum lift that you would undertake at home?---At home?
>
> From the floor to bench height?---Maximum weight wise you are asking me?
>
> Yes?---A kilo, two kilos. I don't know, I haven't really thought about it.
>
> Two kilos is two cartons of milk, two litres of milk?---From the floor to the bench, between 500 grams and a kilo.
>
> No more than that?---No, I wouldn't otherwise I would be asking for trouble."

211. The worker gave the following evidence (at T31):

> "Were you able to drive a motor vehicle all of this time?---Yes.
>
> Have you changed your motor vehicle?---Yes, I have.
>
> What have you changed your motor vehicle from and to?---From a manual to an automatic."

This evidence was clear and unequivocal, and not something that a person was likely to be honestly mistaken about. Clearly, I find, this evidence was intended to create the impression that she had changed to an automatic because of her arm problems. Yet, giving evidence later on the same day in cross-examination at T86-7 the worker gave the following evidence:

> "Did you use to drive a motor vehicle back in mid 1991 – sorry, mid 2001?---Yes.
>
> What motor vehicle was that?---It was – I had a Hyundai Sonata 5 speed manual.
>
> And colour?---Silver.
>
> And that was a fairly recent model, was it?---Mm mm.
>
> Did you dispose of that car?---Yes, I have.
>
> When did you get rid of it or when did you sell it?---Early this year.
>
> So you kept the manual vehicle from – in fact before 2001 up to 2004?---Well, I wasn't in a position to change, either make the changeover financially…

I digress to note that, in my view, this answer was intended to create the impression that the only reason she kept her old manual car so long was

because she couldn't afford to change it, and not because she wasn't having any trouble driving it. The cross-examination continued:

> When did you purchase that vehicle?---Where?
>
> When?---When? It would have been '97, I suppose, '97, '98.
>
> In Alice Springs?---That's right……
>
> Your present motor vehicle, what kind of vehicle is that?---It's a Mitsubishi Sigma station wagon.
>
> Is that yellow in colour or goldy in colour?---Yeah.
>
> Is that also a manual?---That's a manual, and I have my sister's car on loan when need be.
>
> So you still own a manual car?---That's right."

Clearly, the worker became aware that Mr Barr was aware of her new car, and even knew the colour of it. Only then does the worker agree when it is put to her that the new car is also a manual and not an automatic as she said earlier in her evidence. I find the difference between these two bits of evidence to be not capable of innocent explanation. The worker did not appear to be under the influence of any drugs when she was giving evidence. She did not give the appearance of a person who was in a confused mental state. I found this evidence to reflect adversely upon her credit.

212. I find that the worker is less physically disabled than she would have me believe. I will go into more detail on this when considering the medical evidence herein. I watched a quantity of film in relation to the worker. It did not show her doing anything surprising (apart from lifting and carrying a bar stool), nor did it suggest a person with any pain or symptoms to either arm. She did not give the appearance of a person who was incapacitated to any noticeable extent. However, the film was not taken in any work setting, and

she wasn't doing a lot in the film. I found the film to be fairly neutral, and without assistance to either side.

213. Apparently (as this is admitted on the pleadings) the worker sought mediation in respect of the employer's decision to cancel payment of weekly benefits. Apparently the mediation took place on 22 November 2001 and the attempt was unsuccessful and a certificate of mediation apparently issued dated 22 November 2001.

214. On 30 November 2001 the worker filed a form 5A Application in this court seeking:

> "Order in respect of claim for compensation under Part V for determination of dispute between worker and employer following mediation under Part V1A: s 104".

215. On 6 December 2001 the employer filed an appearance in relation to that application.

EXPERT MEDICAL EVIDENCE

216. The history of how an injury occurred is a crucial matter. It is the starting point of any medical opinions. If the court should find that the facts are in any way materially different to those upon which a medical opinion is based, then such opinion may be given little or no weight. The importance of this has been stated in numerous academic articles and cases. Some examples are:

- The object in calling an expert is usually to have him express an opinion. In part, that opinion will be based on facts ascertained by him or put to him as a basis for his opinion. Normally, he will disclose those facts before being permitted to express his opinion. Those facts must be proved by the party who calls him by admissible evidence. Otherwise, the opinion must be excluded or rejected, unless the variance between the posited facts and the facts ultimately proved does not deprive the opinion

of it's basis, or does no more than weaken the force or weight of the opinion – *Admissibility of Opinion Evidence* JJ Doyle QC (1987) 61 ALJ 688 at 691-2

- The court must be satisfied that the grounds of the opinion are established. The witness should have stated the facts on which the opinion is based (*R v Turner* (1975) 1 QB 834 at 840).....If the expert opinion is expressed through the process of hypothetical questions by a witness who has no first hand knowledge of the facts, all facts essential to his opinion require proof. If the factual premise on which the opinion is based is not established, the opinion is for that reason undermined. – *Difficulties of Assessing Expert Evidence* Justice Von Doussa (1987) 61 ALJ 615 at618.

- I agree with the learned stipendiary magistrate's conclusion that if the essential facts on which the doctors based their opinion is not proved then the opinion may be for that reason undermined – *Bjorvig v Brambles Australia Limited* Thomas J delivered on 1.12.95.

- Unproven assumed fact upon which basis experts provide opinions cannot be allowed to attain the status of facts simply because the expert assumes them – *Expert Evidence* Freckelton and Selby Vol 1, pl-2822, par11.30. The party who propounds the expert opinion must prove the facts upon which the opinion is based – *Rennie v Territory Insurance Office Board* Martin CJ delivered on 5.2.97

- To be of value the opinion of an expert must be founded upon a sub-stratum of facts, which facts are proved by the evidence in the case, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. As is the danger when an expert witness interviews a lay witness, the ergonomist treats certain facts as proved rather than assumed and those facts were not ultimately proved by the evidence – *Forrester v Harris Farm Pty Ltd* (1996) 129 FLR 431

- Before an expert medical opinion can be of any value, the facts upon which it is founded must be proved by admissable evidence and the opinion must be founded upon those facts – *Pollock v Wellington* (1996) 15 WAR 1 per Anderson J who applied *Ramsay v Watson* (1961) 108 CLR 642; *Trade Practices Commission v Arnotts Ltd* (1990) 21 FCR 324; *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844.

- "The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are "sufficiently like" the matters established "to render the opinion of the expert of any value", even though they may not correspond "with complete precision", the opinion will be admissible and material: see generally Paric v John Holland Constructions Pty Ltd [1984] 2 NSWLR 505 at 509-510; Paric v John Holland Constructions Pty Ltd (1985) 59 ALJR 844 at 846. One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved." *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 731-2;

- The jury cannot weigh and determine the probabilities for themselves if the expert does not fully expose the reasoning relied on……..Underlying these observations is an assumption that the trier of fact must arrive at an independent assessment of the opinions and their value, and that this cannot be done unless their basis is explained." *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 733;

- In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field

in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R* (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise" (at [41]). *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743-4.

217. No explanation has been put forward as to why Dr Pevie was not called to give evidence. I do not know whether he was or was not reasonably available to give evidence. In the absence of any explanation I do not draw any adverse inference against either side for not calling him. I assume that

he was not reasonably available, or neither side considered that his evidence would have assisted their case.

218. Mr Schmidt likewise has not been called to give evidence, and no notes or medical report (if any exist) have been tendered in evidence. I do not know whether he was or was not reasonably available to give evidence. In the absence of any explanation I do not draw any adverse inference against either side for not calling him. I assume that he was not reasonably available, or neither side considered that his evidence would have assisted their case.

219. Dr Quinn gave evidence before me by way of video and telephone on 31.8.04. The telephone was necessary due to problems with the video link. She advised me that she had qualifications. Unfortunately she spoke so quickly that I was unable to note what they were. The transcriber of the transcript had no better luck and simply recorded it as "inaudible". I have listened again to the tape and the only thing I was able to make out was "MBChB". She went on to quickly say a number of other letters, none of which were meaningful to me. Whatever qualifications she may have she did not inform me as to where she obtained them from or when. I do not know when she commenced practice, and I know nothing of her experience. She did tell me that she had ceased general practice, but I was not told when or why. She first saw the worker on 19 February 2001, and last saw her in September 2003 (T264).

220. Accordingly, Dr Quinn was the worker's general practitioner for about two and a half years, but I do not know how often she saw the worker during that time. I also do not know what, if any, examinations she ever made of the worker. It appears from her evidence that when she took over the treatment of the worker:

> "At that stage she had been seen by Dr Bulwinkel. She'd been diagnosed with bilateral epicondylitis, and I continued the management that he had initiated."(T265)

221. It appears that Dr Quinn has never taken a history from the worker as to how the injury to either the right or left upper limbs developed. She said that this had been done by others. However, she was not asked and therefore did not elaborate as to who took a history, when this history was taken or even what the history was. At T264 she gave the following evidence:

> "During the time that you treated Ms Spellman, did she have symptoms relating to epicondylitis in both arms?---Yes, she did.
>
> Did those symptoms incapacitate her, in your opinion, from working at her occupation as a barmaid?---Yes, they did. Initially, when I saw her she was physically incapacitated due to pain. But as time progressed it became an obvious psychological (inaudible) the ability to work and the inability to cope with one, the pain and two, not being able to care for her children."

222. I note that any psychiatric claim was expressly abandoned by the worker when the hearing commenced.

223. As noted earlier, Dr Parkington first saw the worker on 12 April 2001. He has "been a practising orthopaedic surgeon for over 20 years. I'm a Fellow of the Royal College of Surgeons of Edinburgh. I hold a certificate of higher surgical training in orthopaedics. I'm a Fellow of the Australian Orthopaedic Association. I'm in private practice full time."(T314). He provided a report (part of ExP4) dated 17 April 2001. In that report he expressed the following opinions at page 3:

> "<u>Ms Spellman is suffering from a bilateral epicondylitis or tennis elbow in both elbows</u>. This condition is not caused by any acute injury. It is a degenerative condition of the tendinous insertion of the

extensor muscles on the lateral aspect of the elbow. It generally arises spontaneously, but can be aggravated by repetitive activities.

I think that Ms Spellman would have difficulty in returning to work as a chef in her present condition because of the repeated lifting of food trays that is required. She has worked in other lighter capacities in the hospitality industry, and I think she would still be able to do this……Ms Spellman said that she could have worked behind the bar. I would agree with her. I think she is capable of working behind the bar.

Ms Spellman is willing and also quite able, to work behind a bar, and do some of the lighter work she has done in the past.

The worker is partially incapacitated for work. She can work full-time provided she is able to lighter employment, as already suggested.

I think that the worker has recovered from any effect that her employment may have had upon her condition. Her continuing complaints are due to the natural progression of a lateral epicondylitis and I think that they are no longer work related.

Her condition has not stabilised and is capable of being improved, and indeed, cured. It is too soon to express any permanent impairment in percentage terms at this stage. With the appropriate management, she may eventually well have no impairment at all." (emphasis added)

224. Dr Parkington was the only medical expert called in the employer's case. His opinion does not totally differ from the other medical experts, in that they all appear to agree that the worker suffers from "bilateral epicondylitis". They differ as to the cause of the condition.

225. On 21 March 2003 the worker saw Dr Kevat. He has an "MMBS from the Monash University from 1975, and I'm a Fellow of the Royal Australaian College of Physicians from '98 onwards, and I'm a rheumatologist partly in private practice and partly in public hospital practice" (T134). He prepared a report dated 24 March 2003 (ExP8). In the said report Dr Kevat recorded the mechanism of alleged injury/sequence of events as follows:

> "An incident occurred in approximately August 1999 when she lifted out a tray of roast blade from the oven, experiencing pain with weakness in her forearms. At the time she reported only her more severely affected right side, but within a month or two she was experiencing increased left elbow pain, she thought through over compensating."

226. As noted above I find that no such sudden onset occurred at work, either while lifting a tray from the oven or otherwise. Accordingly, I find that the history as given to Dr Kevat was untrue. This appears to have been the first time that the worker gave such a history to anyone (as there is no evidence of any earlier reporting, and it doesn't appear in her pleadings at all) and this was over three years after the event. This history also suggests (contrary to the worker's sworn evidence, and to what she has reported to others) that in the non-existent lifting incident her symptoms were bilateral. Dr Kevat was asked about this at T148 noted:

> "…I've looked at my handwritten notes on which I base my report, and that I've actually clearly written that the symptoms, the original symptoms, were bilateral. She experienced pain in the forearm and weakness on both sides, but reported only the right side."

227. On the evidence I find that what the worker told Dr Kevat in this regard is also untrue. These variations in the history are not minor. On the contrary I consider them to be very important, if not crucial. I am unable to accept or place any weight upon the opinions of Dr Kevat as to the cause of the onset of symptoms in either the right or left arm expressed in ExP8, as they are based upon a materially incorrect history. As regards the right arm this is of no real consequence as on the pleadings it is admitted that that injury arose out of or in the course of her employment with the employer. But as regards the left arm it is of significance.

228. In his report of 24 March 2003 (ExP8), Dr Kevat expressed the following opinions:

> "The diagnosis in my opinion is indeed lateral humeral epicondylitis or tendinopathy of the common forearm extensor tendon bilaterally. I suspect however, from the extension of symptoms in a somewhat diffuse distribution, that she has also developed a superimposed chronic pain syndrome which could account for her symptoms being rather more disabling than is commonly encountered in the non-work related setting.
>
> Ms Spellman experiences disability mainly in relation to the use of her upper limbs, so that she can only perform light, non-repetitive manual tasks.
>
> With regard to the type of work Ms Spellman may be able to perform, her disability, as noted previously, is confined to the use of her upper limbs, where moderate to heavy lifting tasks cannot be sustained. She has no intellectual impairment or other musculoskeletal difficulties and therefore <u>should be quite capable of light physical work within her industry, if such is available, and clerical duties</u>." (emphasis added)

229. Dr Kevat expressed the following views in relation to epicondylitis:

> "**The accepted or the usual explanation is there are micro tears** of the tendon, and that leads to attempts at healing, and that's inflammatory reaction.
>
> So the pathology is that the inflammation is a reaction to microscopic tears; is that right?---That is believed to be the causation of it, yes.

Does surgery identify if in fact such tears have occurred?---Surgery may. (T136)

It's not just inflammation that causes the problem, you believe, it's an actual physical tearing?---It's – there are certain conditions where inflammation may be primarily involved, but that really relates to primary diseases such as (inaudible) arthritis, where you may have primarily an inflammation pathology at the insertion of the tendon, but there are a vast majority of cases of epicondylitis that involve some form of physical strain. So **I <u>assume</u> that it is micro tears**, that is what the literature says about them, **but <u>to be sure</u> of that of course one conducts a study where there are serial specimens taken from tendons, and I don't think anyone has ever done that**.

It is possible to do biopsies of tendons to see whether there's products of inflammation cells, is it not?---It is possible to obtain (inaudible) at operation, which may show these pathological changes.

For example, when your views were put to Dr Parkington about tears or micro tears, he said that in many years of experience at relieving the problems of epicondylitis, he'd never observed such tearing. Is that because it's so microscopic that you'd never see it as a surgeon?---**I'm not a surgeon, so I've not directly observed pathology at these places.**" (T142) (emphasis added)

230. Dr Kevat did not identify what "literature" he relied upon. Whilst he asserted that it was the "accepted" (which he immediately corrected to "usual") explanation, this explanation is not one that Dr Parkington accepts. At T318 Dr Parkington gave the following evidence on this topic:

"Do you have anything to say to the court about the notion of micro tears?---Well, if there was a tear occurring in that person then there would have been a single episode of sudden pain when the tear occurred. **I don't subscribe to the opinion that it was caused by a tear or micro tears. That is a supposition, a theory that's been put forward for the causation. When you explore these, as we sometimes do, we don't find tears in the tendons.**

Are you speaking there from your experience as an orthopaedic surgeon?---Absolutely.

And what about the notion of **micro tears**? Is that an accepted causative factor in the case of epicondylitis?---Well, **it is one theory. I don't think it is a proven factor. I don't think it is a generally accepted factor.** There are other theories such as a branch of the radial nerve being entrapped or, for example, a fold of synovium within the elbow joint being trapped. That is not, in my experience, the cause of this condition." (emphasis added)

231. I therefore find that the explanation of micro tears as put forward by Dr Kevat is no more than one of a number of possible theories that have been put forward in an attempt to explain the onset of epicondylitis. On the evidence before me I am unable to accept it as an explanation on the balance of probabilities. Dr Parkington has observed the tendons numerous times on operation, and Dr Kevat never has. The other explanation that has been put forward is by Dr Parkington who states in his supplementary oral report (part of ExD2) that:

> …epicondylitis is a degenerative condition affecting the tendinous insertion of the extensor muscles on the lateral aspect of the elbow.

> It is not an acute injury. It generally arises spontaneously. Some individuals have a pre-disposition to developing the condition. Some work occupations can be causative, for example, cutting textile material with hand scissors all day long.

232. Clearly, this opinion is not universally accepted within the medical profession either. The state of the evidence does not enable me to decide on the balance of probabilities that Dr Parkington is correct in his view. He may be, but I would need far more evidence than I was given in this case before I could come to a concluded view on such a complicated medical issue. I am therefore unable to find on the balance of probabilities that epicondylitis is a "degenerative condition" and "not an acute injury" which "generally arises spontaneously".

233. Dr Parkington continued in his supplementary oral report to say:

> However, because of the nature of the condition, and my understanding of the varied work duties carried out by Ms Spellman, I can say it was not caused by work activities of food preparation, cooking and cleaning the kitchen.
>
> The history I obtained on 12th April 2001 was of gradual onset of symptoms in the right arm starting in August 1999. She noticed pain when lifting things – both at home as well as at work.
>
> As to whether the condition was aggravated by the activities performed at work, I agree that this is possible. However, any aggravation caused by her performance of her work duties should have ceased when Ms Spellman ceased work, I would say within 2 weeks of cessation of the "aggravating" activities.
>
> In the present case, there has been more than ample time for any work produced aggravation to have long since ceased. I do not

accept it as reasonable that the work activities could have produced a permanent aggravation of Ms Spellman's epicondylitis.

234. This opinion is all predicated upon a medical view (which is understandable) but, for reasons that I will set out later, does not necessarily accord with the law.

235. As to the onset of problems in the left arm it is clear from the history that he was given that the worker told Dr Kevat that she injured both arms in the same incident at work, but only reported the more painful right side. This therefore colours his views as to the left sided epicondylitis. In that regard he went on to say at T144:

> "Well, there's very little – very little alternative explanation that I know primarily she had a problem with her right arm, and then she was obliged to over-use her left arm, and thereby developed a problem with the left arm, rather than having a constitutional (inaudible) position epicondylitis.
>
> The problem is though, with respect, doctor, you did not get from her a history as to any use or additional use or arguably destructive use of the left arm, did you, you're guessing, with respect?---I agree that I did not obtain details of physical actions with the left arm. I based that on common sense, the understanding that she will be obliged to use her left arm for the whole variety of possible tasks that she will be required to perform, having young children and having no partner to assist."

236. Again, this is coloured by the (as I have found) erroneous history that he was given. The worker did not suffer any injury to her left arm at any time during her employment with the employer. If she had then it would make sense that it wouldn't take much to aggravate it. I understand that Dr Kevat was not required to make the decisions that I have to in this case. I therefore

understand why he would simply accept that the injury to the right may have been caused by over-use of that limb because of injury to the right limb. It is a simple and plausible explanation. However, I must decide matters on the balance of probabilities, and although common sense should never be ignored, I have to have facts upon which to base my conclusions. Whilst Dr Kevat didn't need to know what the worker actually did to allegedly compensate for the injured right arm, I need to have those facts established on the evidence.

237. Dr Kevat expressed the view that it was a reasonable explanation for the development of left-sided symptoms that she was protecting the right arm. He was asked about the basis for this in cross-examination at T143-4 where the following evidence was given:

> "But isn't it the case that you have to look carefully at this proposition, that is, the proposition that the injury to the left was caused as a result, in attempting to protect the right, to determine exactly what motions or movements Ms Spellman had abandoned, using her right hand, and those which she had taken up, using her left hand. It would be important to obtain a history on those matters, would it not, before you could pronounce a view, a considered view, one way or the other?---It seems to me to be self-evident that if you're required to perform certain tasks and you then are only obliged, or only able to use one arm instead of two, then you would be over-using the arm that you're able to use, and I don't see that I would have to obtain a detailed account of exactly what tasks a person has to perform."

238. I have some problems with this response. Firstly, not only didn't it appear that Dr Kevat obtained a "detailed account" of the tasks the worker was performing, but he didn't in fact obtain any account. His opinion is therefore based upon no facts at all. It is based purely on supposition. He did not

obtain any history from the worker as to what, if anything, she was doing. Nor did he obtain any history as to whether she was using one hand (and if so which) or both hands. Having obtained no history at all, it was not appropriate to assume anything. I can understand that he did not want to seek a detailed history of tasks, and changes in tasks, but, in my view, it was incumbent upon him to obtain some history if he were going to express an opinion. He did not, and his opinion is therefore undermined.

239. Secondly, Dr Kevat was incorrectly told by the worker that in the lifting incident (which I find did not occur) in about August 1999 she experienced "pain with weakness in her forearms. At the time she reported only her more seriously affected right side, but within a month or two she was experiencing increased left elbow pain, she thought through over-compensating." (ExP8). In his oral evidence he checked his notes and confirmed (T148) that the original symptoms were bi-lateral. I find that this is also not the true situation. He therefore has proceeded on the mistaken understanding that the worker continued working with an injured left arm before eventually stopping on 12 October 1999.

240. This may help to explain why Dr Kevat did not take any additional history as to the likely cause of the left arm symptoms, as he was wrongly led by the worker to believe that it had arisen at the same time as the right upper limb problem. I find that this history was not the true position, and the variations were important and material. I am unable to accept or place any weight upon the opinion of Dr Kevat as to the likely cause of the left arm symptoms, as they are based upon a history which I find to have been

241. Dr Quinn gave the following evidence in cross-examination at T271:

> "Did you assume that the pain and disability in both elbows had come on at the same time?---No. From memory there is – there is a letter from a clinic in Alice Springs that says the pain in the left elbow, medial condylitis, from overuse of the left arm, so I

assumed that the left – sorry, the right arm elbow had improved initially and then she was getting pain in the left medial elbow from medial epicondylitis from overusing the left arm. So that dated back to February 2000.

Exactly, so you've offered the view, have you not, that the symptoms in the left arm started because she had ceased using the right arm and started doing things with the left arm that she had previously done with her right arm, haven't you?---Yes, I have.

And so, my question to you is this, did you take a history from her as to the extent to which, in 1999, she had altered the use of her right arm to take account of symptoms in the right elbow?---I didn't take a history as to what was happening in 1999 but as to what was happening in 2002-2003, yes. I mean, that was what I made my assumption on, not on what was happening back in 1999."

242. Accordingly, Dr Quinn also had no history before her which could have provided any basis for the opinion which she expressed. She has based her opinion on assumptions. It is therefore flawed in the same way as the opinion of Dr Kevat.

243. However, that is not necessarily the end of the matter. It would have been open to the worker to introduce evidence as to the tasks that she was doing leading up to the onset of symptoms in the left arm. She could have told me if she was avoiding using her right arm for certain tasks, and generally what changes she had made in the way she used both her right and left arms. This would have enabled me to make factual findings, and having done so, these findings might have then provided a foundation to support the opinions of Dr Kevat and/or Dr Quinn. Unfortunately the worker has not given me sufficient evidence on this topic to enable me to make other than the most superficial of findings, as referred to above.

244. At T137 Ms Gearin put to Dr Kevat that "chopping in the kitchen, was her description of what she was doing and what had caused her symptoms" and he expressed the view that "that would fall within the range of relative activities for epicondylitis." But as earlier found on the facts I do not accept or find that the worker did a lot of chopping whilst Jason worked with her.

245. Dr Parkington saw the worker again on 23.1.04 and prepared a written report dated 26.1.04. This report became part of ExD2. In that report he noted:

> "The history stated in that report (referring to his earlier report) was read to Ms Spellman. She added that the has had three injections into each elbow."

246. Although Dr Parkington refers to his latest report being "supplementary to the one prepared by me at your request on 12.10.01" when that report is looked at it contains no history. The only report that does contain a history is the report of 17.4.01, and the history is as set out earlier in these reasons. I find that it was that history that was read out to the worker. She had an opportunity to correct any errors in that history, but the only correction that she sought to make was to alter the number of injections that she had received. The worker was not asked and did not offer any explanation as to why she did not correct the history to inform Dr Parkington of the alleged baking dish incident. This is a further basis to reject the worker as an honest or reliable historian.

247. In ExD2 Dr Parkington expressed the view that:

> "Ms Spellman is suffering from a bilateral epicondylitis or tennis elbow in both elbows. This condition is not caused by any acute injury. It is a degenerative condition of the tendinous insertion of the extensor muscles on the lateral aspect of the elbow. It generally arises spontaneously, but can be aggravated by repetitive activities.

I think that Ms Spellman would have difficulty in returning to work as a chef in her present condition because of the repeated lifting of food trays that is required. She has worked in other lighter capacities in the hospitality industry, and I think she would still be able to do this. She told me that her employer told her that if she wanted to stay at work, she has to lease the kitchen where she was working. If she did not do this, she was required to leave. Her employer refused to give her lighter work, such as behind the bar, which she had been doing previously. She told me that she had therefore taken her employer to the anti-discrimination tribunal and had won this case. Ms Spellman said that she could have worked behind the bar. I would agree with her. I think she is still capable of working behind the bar.

……

Ms Spellman is willing and also quite able, to work behind a bar, and do some of the lighter work she has done in the past.

…….

The diagnosis has been given. There was no stated cause. Her symptoms arose gradually.

The worker is partially incapacitated for work. She can work full-time provided she is able to lighter employment, as already suggested.

I think that the worker has recovered from any effect that her employment may have had upon her condition. Her continuing complaints are due to the natural progression of a lateral epicondylitis and I think that they are no longer work-related." (emphasis added)

TIME FOR PROCEEDINGS

248. Proceedings herein were commenced by the worker on 30.11.01 when she filed an application in this court. That application made no reference to any particular injury. Rather it sought an:

> "Order in respect of claim for compensation under Part V for determination of dispute between worker and employer following mediation under Part V1A: s 104".

249. The worker filed her original Statement of Claim on 23.4.02. In paragraph 3 thereof she pleaded:

> "In or about August/September 1999, the worker developed an injury first in her right hand, forearm and elbow, and then in her left hand, forearm and elbow. ("the injury")
>
> PARTICULARS OF INJURY
>
> Bilateral Epicondylitis"

250. Although this is not a claim in accordance with s82 of the Act in my view, it may suffice for the purposes of s182(1) of the Act.

251. In paragraph 15 of the employer's Further Amended Notice of Defence it pleads as follows:

> "To the extent that the worker claims compensation and other relief for the alleged injury to her left hand, forearm and elbow:
>
> 15.1 The worker is not entitled to compensation because she failed to give notice of the injuries as soon as practicable as required by s80(1) *Work Health Act*;

15.2 Proceedings for the recovery of compensation are not maintainable under s182(1) *Work Health Act* because the worker did not make a claim for compensation within 6 months after the occurrence of the injury."

252. Nowhere in the worker's pleadings does she address this pleading. In particular, the worker's pleadings do not seek any finding from this court in accordance with either s182(2) or (3) of the Act. Even if the worker were seeking such a finding, the evidence is silent as to why she didn't comply with s182(1) of the Act.

253. With respect to notice, clearly it is the worker's evidence that any symptoms in her left upper limb only arose at least 2 months after she had commenced to receive weekly payments of compensation in respect to the injury to her right upper limb. The following medical certificates were tendered into evidence as ExP5:

- 12.10.99- Dr Pevie stated that the worker was suffering from "right lateral epicondylitis, unresponsive to conservative treatment" which the worker states was caused by "meal preparation and cooking/cleaning etc";
- 18.10.99- Dr Pevie stated that the worker was suffering from "right lateral epicondylitis" which the worker states was caused by "meal preparation, cooking & cleaning at work";
- 25.10.99- Dr Schmidt stated that the worker was suffering from "right elbow/hand pain" which the worker states was caused by "lifting at work";
- 9.11.99- Dr Schmidt stated that the worker was suffering from "right elbow/hand pain" with no stated cause;

- 19.11.99- Dr Schmidt stated that the worker was suffering from “right tennis elbow” no stated cause;

- 20.12.99- Dr Schmidt stated that the worker was suffering from “right tennis elbow” with no stated cause. He went on to certify that the worker was fit for “light duties, bar work, no lifting, 2-3 h/day, progress as (illegible)” from 21.12.99 to 31.1.00;

- 4.2.00- Dr Schmidt stated that the worker was suffering from “right tennis elbow” with no stated cause. He went on to certify that the worker was totally unfit for work from 1.2.00 to 1.3.00;

- 28.2.00- Unknown medical practitioner stated that the worker was suffering from “improving tennis elbow” with no stated cause. This medical practitioner went on to certify that the worker was fit to return to work for restricted hours/days (without specifying how many hours per day or days per week) from 1.3.00 to 16.4.00. In addition it was certified that the worker was fit to return to work for the same period but she should avoid repetitive use of affected body part;

- 13.4.00- Dr Pevie stated that the worker was suffering from “right lateral epicondylitis” which the worker states was caused by “heavy kitchen duties”. He went on to certify her fit for modified work/alternate duties from 13.4.00 to 31.5.00 but did not state any instructions/limitations;

- 26.3.01- Dr Quinn stated that the worker was suffering from “bilateral tennis elbow” which the worker states was caused by “repetitive work injury”. She went on to certify her totally incapacitated for work from 26.3.01 to 26.5.01;

- 22.5.01- Dr Quinn stated that the worker was suffering from “bilateral tennis elbow” which the worker states was caused by “repetitive work injury”. She went on to certify her totally incapacitated for work from 27.5.01 to 27.8.01; and

- 28.8.01- Dr Quinn stated that the worker was suffering from “bilateral tennis elbow” which the worker states was caused by “repetitive work injury”. She went on to certify her totally incapacitated for work from 28.8.01 to 27.11.01.

254. The gap in medical certificates between April 2000 and March 2001 was not explained. Nor was the lack of any certificate since August 2001. However, based upon these certificates the earliest notice of any possible problem with the left upper limb occurred in the medical certificate dated 26.3.01, which was at least fourteen months after symptoms in that limb allegedly first developed.

255. In addition, a letter from Mr Mercorella to Dr Schmidt dated 4.2.00 was tendered in evidence before me and became ExP6. This letter does note “she is also getting pain in her left medial elbow. Medial epicondylitis? ?from overusing left arm.” However, there is no evidence to suggest other than that this document came to light during the discovery process in the court. In particular, there is no evidence to suggest that this letter was sent to the employer at any time prior to proceedings being commenced on 30.11.01.

256. The only medical reports tendered in evidence were:

Dr Tardent to Dr Bulwinkel 1.12.00 (ExD4)

Dr Bulwinkel 28.2.01 (ExD4)

Dr Parkington 17.4.01 (ExD2)

Dr Parkington 12.10.01 (ExD2)

Dr Quinn 27.10.01 (ExP10)

Dr Quinn 22.5.02 (ExP10)

Dr Quinn 7.8.02 (ExP10)

Dr Quinn 15.9.02 (ExP10)

Dr Kevat 24.3.03 (ExP8)

Dr Quinn 12.9.03 (ExP10)

Dr Parkington 26.1.04 (ExD2)

Dr Parkington 5.2.04 (ExD2)

Dr Parkington 14.4.04 (ExD2)

Dr Parkington 13.5.04 (ExD2)

257. The earliest reference to any injury to the left upper limb comes from her physiotherapist (Mr Mercorella) who first noted complaints concerning the left limb when he saw her on 5.1.00. His notes were tendered and became ExP7. Accordingly, any "injury" to the left upper arm appears to have occurred sometime between 22.12.99 and 5.1.00. Accordingly the earliest report (even assuming that the employer had any knowledge of it before the discovery process started, and there is no evidence to suggest that it did) is almost 11 months after the symptoms in the left upper limb arose.

258. As part of ExD2 the various letters to Dr Parkington from Hunt and Hunt were also tendered. The first of these is dated 29.3.01. In that letter Ms Cheong states:

> "The worker was diagnosed as having tennis elbow, namely right epicondylitis. This condition then apparently developed into bilateral epicondylitis."

259. Accordingly, the employer was aware of a problem in the left upper limb sometime prior to 29.3.01. However, I do not know when it first became aware, what it became aware of and how. These are matters within the knowledge of the employer, and matters which it should have introduced into evidence if it sought to rely upon Paragraph 15.1 of it's Further Amended Defence. I therefore find that the employer has not laid the factual foundation for the ruling that it seeks in paragraph 15.1.

260. That is not the end of the matter. Further, any claim for compensation should have been made within 6 months of the occurrence of that injury

(s182(1)(a) of the Act). As noted above it appears that the injury to the left upper limb occurred sometime between 22.12.99 and 5.1.00 at a time when the worker was off work and in receipt of weekly payments in respect to the injury to her right upper limb. Accordingly, whatever may have been the cause of the symptoms in the left upper limb it is clear (and I find) that no symptoms arose or existed at any time that the worker was at work with the employer. No claim in accordance with section 82 of the Act has apparently ever been made or served in accordance with section 83 of the Act relating to the left upper limb.

261. I find that any claim in relation to the left upper limb should have been made by 5 July 2000 at the very latest. Accordingly, I find that no claim for compensation was made within 6 months after the occurrence of the injury as was required by section 182(1)(a) of the Act. It follows that the worker's claim in respect to the left upper limb is not maintainable (s182(1)) unless the worker can satisfy me on the balance of probabilities that the failure was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause (s182(3)).

262. In the case of *Murray v Baxter* (1914) 18 CLR 622 the High Court considered this question in the context of s 12 of the NSW *Workman's Compensation Act,* 1910. That section is in similar terms to s182 of the Act. In the joint judgment of Isaacs and Gavan Duffy JJ (Griffiths CJ dissenting) Their Honours said at Page 632 – 633:

> "Dr Brissenden, raised a further point of considerable importance. He contended that the whole period from the termination of the five months – that is, from about the beginning of October 1912 – to the date when the action commenced –viz, September 1913 – must be covered by the plaintiffs excuse. To sustain that, it was necessary to contend, and learned counsel did contend, that "the failure" secondly mentioned in paragraph (b) of sec 12 meant "the failure to commence proceedings before their actual commencement". But that is an impossible construction of the words of the paragraph, unless we proceed to virtually legislate. "The failure" secondly mentioned refers to "the failure" just previously mentioned, and that

> is "the failure to commence proceedings with the period above specified" You cannot imply a period where one is expressly "specified." The "period above specified" for the commencement of an action is expressly stated to be "within six months from the time of death"; and "within" does not include a period "beyond". The Act distinctly states and limits within fixed termini a condition precedent; it permits that condition to be excused; if it is excused its effect ceases, and if we were to extend the limits specified we should be creating a different condition." (emphasis added)

263. I note that the word "within" appears in s182. Applying the reasoning in this decision to s182 it would follow that it is only the stipulated period of 6 months that needs to be enquired into and anything beyond that period is irrelevant. In *Tracy Village Sports and Social Club v Walker* (a decision of Mildren J delivered on 10 July 1992) His Honour when considering s 25 of the *Workers Compensation Act* expressly followed the decision in *Murray v Baxter* (supra) in finding that "no other period of time is relevant for the purposes of the proviso" (at paragraph 32 of that decision).

264. I therefore proceed on the basis that the only period during which the Worker must show that her failure to make a claim "was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause" is the period from about 5 January 2000 until 5 July 2000.

265. In relation to this period the worker has remained silent as to what her reasons were. I know that she did leave the Northern Territory in about May 2000 to move to Queensland. However the worker did not offer this as a reason for not making a claim in respect to her left upper limb. She was not asked any questions in this regard at all and therefore gave no evidence as to why she did not make a claim within the six months that she was obliged to do so. In the absence of any evidence I cannot speculate. The issue was squarely raised in the employer's Defence. Despite this the worker simply gave no evidence from which I could find that she had discharged her onus in respect to s182(3) of the Act.

266. This may appear to lead to the inevitable conclusion that the worker's claim in respect to the left upper arm is not maintainable and therefore must be dismissed. In the instant case the left upper limb "injury" is squarely raised in the worker's original Statement of Claim, and has remained a part of all Amended Statements of Claim thereafter. Accordingly, if the worker had satisfied me (on the balance of probabilities) that the injury to the left upper limb was a sequelae to the injury to the right upper limb then her claim may still have been maintainable. For the reasons herein contained she has failed to do this.

267. It follows that the worker's claim in respect to the left arm is not maintainable and must be dismissed.

OTHER FINDINGS

268. On the evidence I find that the worker had some problem tucking in her children and carrying washing prior to the onset of left sided symptoms. I am unable to find that she somehow used her left arm differently (how, or how often) leading up to the onset of symptoms in her left arm.

269. It follows that the worker has failed to satisfy me on the balance of probabilities that the right arm injury was the real, proximate or effective cause of the onset of left arm symptoms. She has failed to satisfy me on the balance of probabilities that the left arm symptoms were a sequelae of the injury to the right arm.

270. Further, I am not satisfied that the left sided epicondylitis is an "injury" under the Act. The worker has failed to prove on the balance of probabilities that this arose out of or in the course of her employment.

271. If I am wrong on this, and if the left arm symptoms were an "injury" under the Act, then not being a sequelae it should have been the subject of a separate claim, which it was not.

272. That injury did not occur on a working day that she attended at her workplace or was present at the workplace. Accordingly, if the worker alleges that the injury occurred by way of a gradual process (s4(5)) then she must establish that her employment "materially contributed to the injury". To do that the worker must bring herself within s4(8) of the Act. She has, in my view, failed to do so.

273. I return to a consideration of the right arm injury which is deemed to be admitted, and which the employer has attempted in it's Defence to limit to "an exacerbation and/or aggravation of the worker's right sided epicondylitis". Dr Parkington expresses the opinion that the aggravation has ceased and therefore whatever remains (and he accepts that she does have on ongoing partial incapacity for work) is due to the underlying degenerative condition. Ms Gearin submits that this approach is not correct in law. In that regard she relies upon the case of *Darling Island Stevedoring v Hankinson* (1967) 117 CLR 19. The facts of that case were that unknown to himself a worker had for some considerable time been suffering from an infection which had partially destroyed some of his spinal structures. Whilst lifting a heavy package at work, he felt an acute pain in his back. During the following fortnight his condition deteriorated until he became paralysed. Medical evidence accepted by the Commission was that the pain was caused by the collapse of one or two of the infected vertebral bodies and the consensus of medical opinion was that the infection, unless discovered and treated successfully, would in the ordinary course of events have progressed ultimately to produce a collapse of the vertebrae and incapacity.

274. In that case Barwick CJ (at page 25) referred to Sir Frederick Jordan's "illuminating judgment in *Salisbury v Australian Iron and Steel Ltd* (1943) 44 SR (NSW) 157, a judgment the legal reasoning and conclusions of which I respectfully agree." Hence, I will start there. At pages 160-165 Jordan CJ said:

"It is useful, therefore, in the first instance to refer to the relevant provisions of the Act and to some of the leading authorities by which their effect has been expounded. The Act provides that a worker who has received a personal injury arising out of or in the course of his employment shall receive compensation from his employer in accordance with the Act: ss.6(1) and 7. The Act, however, makes no provision for the payment of compensation except in cases where death (s. 8), or total or partial incapacity for work (s.9), results from the injury. Hence, the burden of proof lies upon the worker to establish (1) that he has received a personal injury arising out of or in the course of his employment, and (2) that as a result he has sustained some incapacity for work, i.e., incapacity for obtaining or performing work of the kind in which he was employed at the time of the accident, or of earning full wages, to the same extent as he could before the injury, assuming such work to be available. If the worker establishes both these matters he is (in general) entitled to receive at least some workers' compensation from his employer. Prima facie he is entitled to the compensation provided for by s. 9; and the burden of proof is on the employer to prove that he is entitled to something less or that his right has terminated: *Bryer v Metropolitan Water Sewerage and Drainage Board* (1939) 39 S.R. 321 at 328 . 331-2; *Parr v Richard Hawarth and Co. Ltd.* [1940] 3 All E.R. 43 at 45. He is not, however, necessarily entitled to go on receiving compensation indefinitely. He is entitled to it only so long as the injury continues to be in its nature a wholly or partly incapacitating injury, so that in this sense it produces resultant incapacity.

Although the general rules are well established, it is often difficult to apply them in border-line cases, and the authorities run into fine distinctions. This is largely due to the fact that there is a fundamental antinomy between the important social service which the Act is intended to provide and the means adopted for providing it. The object of the Act is to benefit the community by preventing workers and their dependants, who constitute the great majority of the community from suffering destitution through the bread-winner becoming incapacitated for work. The means adopted to achieve this object are to throw the whole burden of the relief upon the employers. This has made it necessary for the Legislature to restrict the benefits of the Act to workers whose incapacity can be to some extent causally connected with their employment. Since, however, when a worker is incapacitated, his needs and those of his dependants are just as imperative whether the incapacity arises from his employment or not, it is natural that there should be a constant struggle on the part of workers to obtain and retain sorely needed relief in cases in which incapacity is not, or is no longer, associated with an employment injury, and equally natural that there should be a

struggle on the part of employers to dissociate incapacity from employment where ever possible. The tendency of recent authorities has been to uphold the claims of workers to the furthest limits that the language of the Acts will permit.

Difficulties arise in particular when a worker who has been disabled by an employment injury subsequently receives another disabling injury from a cause unconnected with his employment. There are various possible cases; the employment injury may have been one of a kind causing partial or total disablement of a temporary or permanent nature; and the supervening injury may be caused by a non-employment accident or may be the disabling culmination of a progressive non-employment disease of long standing. In the present state of the authorities I think that, at any rate as a general rule (for this is a field of law in which it is unsafe to dogmatise), the compensation rights of the worker who has been incapacitated by an employment injury are neither reduced nor increased by incapacity caused by a supervening non-employment injury, however arising. Thus, if a worker who is still incapacitated by an employment injury sustains a non-employment injury which totally disables him, this does not affect his right to receive workers' compensation: If his employment injury was permanent and total, he is still entitled to full workers compensation: *Ward v Corrimal-Balgownie Collieries Limited* (1938) 61 C.L.R. 120 at 140. If permanent and partial, he is still entitled to the compensation appropriate to partial incapacity: *Cory Bros. Co. Ltd. v Hughes* [1911] 2 K.B. 738; *Harwood v Wyken Colliery Co.* [1913] 2 K.B. 158; *McCann v Scottish Co-operative Laundry Association* [1936] 1 All E.R. 475*; Ward v Corrimal-Balgownie Collieries Ltd* (1938) 61 C.L.R.120 at 130-1; *Parr v Richard Hawarth and Co. Ltd* [1940] 3 All E.R. 43. On the other hand, if his employment injury was one the disabling effects of which would, sooner or later, cease, so that it produced only temporary incapacity which would in time disappear, the fact that the worker whilst still temporarily incapacitated sustained a non-employment injury which totally and permanently incapacitated him, would not increase his right to workers' compensation. His right to this would cease when, in the ordinary course of events, his employment injury would have ceased to be incapacitating; *Stowell v Ellerman Lines Ltd* (1923) 16 B.W.C.C. 46. **It is only in respect of his employment injury as a source of incapacity that he is entitled to workers' compensation**.

It is necessary now to consider the case of a worker who is suffering from a progressive non-employment disease which, although it has not yet incapacitated him, will in its ordinary course eventually do

so, at first partially and then totally. Such a worker may incur an employment injury which incapacitates him for one or other of a number of different reasons. (1) It may cause an incapacity which is not associated with his non-employment disease, for example where a worker suffering from a not yet incapacitating non-employment heart disease cuts his hand while working and is unable to resume work only because the cut has not yet healed. (2) It may cause incapacity which is associated with the unemployment disease, as where it is not or itself incapacitating, but its effects, in combination with those of the not otherwise incapacitating disease, are incapacitating. (a) In this type of case, the employment injury may be purely temporary in its effects. For a time it produces effects and then it ceases to produce any. So long as it produces effects, these, added to those of the disease, cause incapacity which would not otherwise exist. But when it ceases to produce effects, the stage of the disease is found to be what it would have been, and its course to continue as it would have done, if the injury had never occurred. (b) Or it may be permanent in its effects. When these are added to the effects of the disease, they cause partial incapacity which did not previously exist and would not otherwise have then come into existence, or it prematurely increases the extent of a previously existing disease incapacity. The effects of the injury do not disappear. They continue, in combination with the effects of the disease, to contribute to the premature occurrence of disability which would not then have been produced by the disease alone, and to continuance of the incapacity so occurring. In the long run the disease alone, would have caused the disability, but the injury anticipates it. In the case which I have numbered 2 (a), the worker is entitled to compensation so long as the employment injury produces effects and these effects, added to the effects of the disease as it existed when the injury occurred, are sufficient to produce disability. **It is not necessary that the employment injury should be the sole cause of disability. It is sufficient if it is a contributing cause**: *Harwood v Wyken Colliery Co.* [1913] 2 K.B.158 at 166-169. It may be the catalyst which precipitates disability in a medium of disease. **But when the stage is reached at which the employment injury ceases to produce effects and could therefore no longer be a contributing cause to any incapacity which may then exist, the right to compensation ceases.** In case 2 (b), for a time at least, it is the addition of the effects of the employment injury which produces incapacity, or an increased incapacity, which would not otherwise have existed. **So long as these effects continue, the fact that a non-employment injury supervenes (in the form of an accentuation of the non-employment disease), sufficient of itself to produce the incapacity or increased incapacity, does not deprive the worker of his right to continue to receive**

compensation. To hold that it does would be inconsistent with the authorities cited above. An analogy is provided by the Scottish case of *Jamieson v Fife Coal Co. Ltd* (1903) 5 F. (Ct. of Sess.) 958, cited with approval by the House of Lords in *McCann v Scottish Co-operative Laundry Association Ltd.* [1936] 1 All E.R. 475 at 480. There, a workman had sustained an employment injury which totally incapacitated him. Like everyone else, he was growing older; and everyone who is not prematurely incapacitated by injury or disease, and who lives long enough, inevitably arrives at stages when he is, first partly and then totally, incapacitated for manual labour by the effects of normal physical degeneration. This is the common fate of humanity. It was held that the fact that the workman had arrived at the first of these stages did not justify a reduction in his compensation, and by parity of reasoning the fact of his arriving at the second would not justify his being deprived of compensation altogether. And yet, at each stage, incapacity due to a physical condition not connected with employment overtakes and renders immaterial from a merely physical point of view the incapacity resulting from the employment injury. The case of *Stowell v Ellerman Lines Ltd.* (1923) 16 B.W.C.C. 46 shows that the position is the same when the effects of a partially incapacitating employment injury are overtaken by a totally incapacitating non-employment disease.

Reliance has, however, been placed for the respondent on the decision of the Court of Appeal in *Old v Furness Withy & Co. Ltd.* (1934) 27 B.W.C.C. 266. In that case, a workman who was suffering from a non-employment aneurism was on the 28th June, 1933, struck on the breast by a case which fell while he was at work. He worked intermittently until 5th September, when he became wholly unfit for work. In proceedings for workmen's compensation an award was made in his favour on 7th May, 1934, on the basis of total incapacity, but limited to a period of fourteen weeks. This was the period between 5th September and 12th December, 1933. The Judge found that the blow accelerated the degenerative process of the aneurism which might otherwise have been expected to be gradual and fairly regular. It caused the workman to become totally incapacitated before he would otherwise have been. He would, however, in the ordinary progress of the disease, have been incapacitated long before the date of the hearing (7th May, 1934). It was for this reason that compensation was awarded for only fourteen weeks, at the end of which time the Judge presumably found that he would have become incapacitated by the disease in any event. In one place in his reasons he said that he rejected evidence that the effect of the blow was trivial and only temporary; but since he said later that the blow did

not permanently incapacitate him, Hanworth M.R. in the Court of Appeal took him to mean that the blow did not cause a permanent injury. It caused the heart condition to get worse at an earlier date, but did not increase permanently the rapidity or nature of the disease. The results of the injury would not always affect him. It did not permanently add to his incapacity. By the date of the hearing its effect had passed away. On this footing, his Lordship held that the Judge was right in discontinuing the compensation at the date when he found that its effects had ceased, so that it played not part in any of the then existing incapacity. Slesser and Romer L. JJ. appear to have decided the case on the same basis. For example, Romer L.J. (1934) 27 B.W.C.C. at 280.says: "Where, however, at the date of the award it is made plain to the County Court Judge that the incapacity resulting from the accident has in fact ceased, then, of course, his award must be for compensation up to the date at which he finds incapacity has come to an end." Assuming that the members of the Court of Appeal were right in their interpretation of the Judge's findings of fact, it is impossible to quarrel with their decision. According to that interpretation, the case was an example of the type 2 (a) mentioned above, in which the right to compensation ceases when the employment injury ceased to produce any effects capable of causing or contributing to disablement. There are, however, certain observations by Romer L.J. (1934) 27 B.W.C.C at 280-1. which have been taken to mean that even if the employment injury produces permanently incapacitating results, nevertheless when the disease reaches the stage at which it would have of itself caused incapacity independently of the employment injury he loses his right to compensation. If they do mean this, they are, in my opinion, only dicta, unnecessary for the decision of the case and inconsistent with the authorities. Indeed, they would seem to be somewhat inconsistent with the observations of the same learned Judge in the later case of *Ormond v C. D. Holmes & Co. Ltd.* [1937] 2 All E.R. 795 at 801 where he said "In some cases, however, incapacity is caused by a disease in conjunction with a contributory cause. A man, for instance, may be suffering from a disease of the heart that sooner or later is bound to cause his death. His death, however, from the disease may be accelerated by some particular, though not necessarily an unusual, act of exertion. In those cases, the death or incapacity can properly be said to be caused by an accident, and, where the contributing cause is furnished by and in the course of the injured workman's employment, he is entitled to compensation under the Act." In *Hutton v Nidd*rie *and Benhar Coal Co. Ltd.* [1938] S.C. 30 at 40 the Lord President, referring to the remarks made by Romer L.J. in *Old's case* about the case where the worker would have become incapacitated at a certain date even if there had been no accident, said that he himself expressed no opinion on the legal result

of such a case. The observations of Lord Macmillan in *McCann v Scottish Co-operative Laundry Association Ltd.* [1936] 1 All E.R. 475 at 482 are, however, quite explicit. "My Lords," he said "it is now well settled that a workman who by reason of incapacity due to an accident is entitled to compensation does not lose that right merely because through some extraneous supervening cause, such as illness or old age, a natural incapacity is added to the incapacity due to the accident. The employer cannot plead that as the workman would, by reason of his condition apart from the accident, be incapacitated in any event, he has lost his right to compensation. There is no merger of the accidental incapacity in the natural incapacity. The circumstance accordingly that the appellant's partial incapacity due to her accident was during the period in question combined with total incapacity due to her illness, affords the respondents no answer to her claim to be compensated for her partial incapacity during that period". The principle is here stated by his Lordship in perfectly general terms. There is no reason for supposing that it makes any difference whether the extraneous supervening cause is the occurrence of a disabling post-injury illness or the accentuation to disability point of a pre-injury illness. **The question in every case is, would the injured worker, had there been no supervening non-employment event, still be incapacitated by the effects of his employment injury operating solely or as a contributing factor. So long as the question should be answered in the affirmative, he is entitled to workers' compensation, and it is nothing to the point that the supervening event would itself have incapacitated him even if he had not been still disabled by his employment injury.** When the employment injury is one producing effects which, coupled with those of an existing non-employment disease, are incapacitating, and the supervening event consist in a subsequent accentuation of the disease, the question is whether the employment injury still produces effects which, coupled with the disease, would still disable him assuming that the accentuation of the disease had not occurred. If the answer should be, yes, the worker is still entitled to compensation. To say that the employment injury merely accelerated the occurrence of a disability which the disease alone would inevitably have produced later on, is to say that it caused disability to occur at a time when it would not otherwise have existed but that subsequently the disease reached a stage which made it alone sufficient to produce the disability. But assuming that the worker would have been entitled to go on getting compensation if the disease had grown no worse, I cannot see how, consistently with the authorities, it can be held that the fact that the disease did get worse disentitles him to compensation. **The question is, not whether the disease has caught up with the effects of the**

employment injury, but whether the employment injury has ceased to produce disabling effects.

In the present case, the learned Commissioner found that the rate of progress of the applicant's non-employment disease was accelerated by the conditions of his employment, and he fixed 1st July, 1943 (the date of the hearing), as the termination of the period of acceleration. He evidently did not accept the opinion of Dr. S.A.Smith, which would have established that the facts that the applicant had been doing hard manual work and had incurred a certain amount of pulmonary fibrosis had no effect on his disease or on the occurrence of his incapacity. He must have accepted to some extent the medical evidence called for the applicant. This was to the effect that the laborious nature of the work coupled with the pulmonary fibrosis and combined with the disease caused a breakdown at an earlier period than it would have been caused by the disease alone had it run its course unaffected by these two factors. But no definite opinion was expressed as to whether the inevitable breakdown would or would not have occurred as early as the date of the hearing. Putting aside Dr. Smith's evidence which was not accepted, there was no evidence that the laboriousness of the work coupled with the fibrosis produced effects of a merely temporary nature which would have disappeared by 1st July, 1943, and no evidence that if the disease had grown no worse than it was when the applicant first became incapacitated, the effects of the work and the fibrosis would not still have been operative and coupled with the disease, would not still have continued to incapacitate him. In these circumstances, I think that the questions should be answered as follow:

(1) Yes,

(2) No,

(3) No,

(4) Yes, unless it is proved that a stage has been reached at which employment injury has ceased to produce effects causing or capable of contributing to cause incapacity.

I may add that it is not surprising that the learned Commissioner came to a contrary conclusion. The medical evidence was conflicting. He had to do the best he could with it. It was, in my opinion, quite open to him to find as a fact upon that evidence that,

although the employment injury had combined with a non-employment disease to produce disability at an earlier date than it would have been produced by the disease alone, the disease of itself, apart from the employment injury, would have produced disability by the date of the hearing. This being so, it was natural for him to be misled by the dicta in *Old v. Furness Withy & Co Ltd* (1943) 27 B.W.C.C. 266. into thinking that he was bound to restrict the compensation to that date, and for this reason to make his award in the form in which he did". (emphasis added)

275. Barwick CJ after respectfully agreeing with the legal reasoning and conclusions of Jordan CJ went on to say at pages 25-28:

> "At the outset, I would wish to say that I do not think that the facts of the matter were rightly analysed as establishing an injury by aggravation, acceleration, exacerbation or deterioration of a pre-existing disease rather than an injury in the unextended sense of the statutory definition which itself led to incapacity. Regarded as the latter, the case presents no problem. **Quite clearly, the circumstance that the injury would not have occurred but for the diseased state of the vertebrae or that its results were more extensive because of that condition would be irrelevant once incapacity was causally related to the injury.** For my part, I am of opinion that the facts did establish such an injury and did not establish an injury by aggravation, acceleration, exacerbation or deterioration of an existing disease.
>
> **The relevant question in the case of an injury is whether incapacity resulted from it.** It is not, as in the case of an action at law based on negligence, what damage has the injured party sustained. Thus cases such as *Watts v Rake* (1960) 108 CLR 158 and *Purkess v Crittenden* (1965) 114 CLR 164, in so far as they deal with the possible effect of a pre-existing condition upon the amount of an award of damages in such an action, are not in point in connexion with a claim under the Workers' Compensation Act.

If the resulting incapacity is temporary, and has ceased by the time the award is made, the award will be limited to that period of incapacity. If the incapacity is temporary but continuing at the date of the award, as a rule, the award will be expressed to continue during the incapacity, leaving the parties, if need be, to litigate subsequently the time at which incapacity ceased: or the award may simply be made without limitation as to time, the respondent to it being able to bring its operation to an end by establishing the loss of the incapacity. But the question in either case is whether the injury had ceased to cause incapacity.

The Commission in the present case took the course of finding all these descriptions as the consequence of the work. If the injury to the respondent were to be regarded as an injury within the extension of the statutory definition, it would seem to me that the right description of it would be an acceleration or perhaps aggravation of the pre-existing infection. An acceleration by work in an employment of a pre-existing disease not itself arising out of or received in the course of the employment becomes in itself an injury within s 9 of the Act. The question is whether because of the nature of such an injury, the basic principles to which I have referred in connexion with other injuries must be in some fashion modified or qualified. If incapacity in fact results from the acceleration, is this not enough to entitle the worker to an award in the same way or to the same extent as would be the case with any other injury? I have no doubt that it would. **If the incapacity it causes ceases, the award will be for that reason terminable. But that incapacity does not cease because it is demonstrable that, without the injury, the worker would have arrived from another cause at the same state of incapacity.** It seems to me

nothing to the point that that other cause would have been the pre-existing disease in its own unaided progression. **Where the incapacity which results from the acceleration is permanent, in my opinion, the award is not terminable because that incapacity would in any case have been the end result of the pre-existing disease.**

I appreciate that the injury is described in the section as the acceleration of the disease and not as the accelerated disease. But to cover the cases the legislature evidently desired to embrace, in my opinion, the only proper description of the relevant injury would be "the acceleration of the disease". When seeking to ascertain the result of the injury — the acceleration of the disease — I am unable myself to abstract the acceleration as if it were a causative entity apart from the disease in its accelerated state. Here, analysing the facts as did the Commissioner, the work accelerated the progress of the spinal infection. Incapacity resulted. It resulted from the then — accelerated — condition of the infection. That incapacity was permanent — it was not temporary. In my respectful opinion, it is not permissible so to isolate the acceleration of the disease as to attribute a part only of that permanent incapacity to the acceleration.

In my opinion, where the acceleration is the injury if incapacity results, the entitlement to compensation is identical with that which would flow from the like incapacity resulting from any other kind of injury. In my respectful opinion, the conclusions which Sir Frederick Jordan expresses in *Salisbury's Case* (1943) 44 SR (NSW) 157 are as applicable to the case where the injury is merely the aggravation, acceleration, exacerbation or deterioration of a pre-existing non-employment disease as they are to the case of any other injury. I would respectfully agree with Sir Frederick

Jordan when, as I read his judgment in *Salisbury's Case*, above, he supports the decision of the Court of Appeal in *Old v Furness Withy & Co* (1934) 27 BWCC 266 only on the footing that the incapacity caused by the accident had ceased and come to an end before the date on which an award of compensation had been made. On any other view, in my opinion, that case ought not to be followed in connexion with the Workers' Compensation Act. Whilst in agreement will other parts thereof, I am unable, with very great respect, to agree with the statement in the judgment in *McLaughlin & Co Pty Ltd v Brinnand*, unreported (High Court 28 May 1965) — noted, 39 ALJR 77, which I have quoted, that: "If, however, the employment by aggravating his disease or accelerating its progress merely causes an incapacity of the same degree that the disease would in time have caused but causes it earlier, then it seems to me that the resulting compensable incapacity is only that which can be said to be attributable to the aggravation or acceleration: that is to say, it is the incapacity from its actual occurrence to the time when, ex hypothesi, the disease, if not accelerated or aggravated, would have produced it." Therefore, though the facts of this case are said to bear the interpretation which the Commissioner has placed upon them, I am of opinion that his award would have been rightly made.

However, in my opinion, the evidence in the case does not support the view that the injury to the respondent was an aggravation, acceleration, exacerbation or deterioration of a disease. As I have already indicated that acceleration, in my opinion, on the facts was a consequence of the injury but not the injury itself." (emphasis added)

276. I respectfully adopt the above reasoning in the instant case. Accordingly, I do not find that the epicondylitis in the right arm was an injury under the

extended definition (as an exacerbation and/or aggravation, as pleaded by the employer), but was in fact an "injury" in it's own right.

277. I find that the worker was a person who had a medical pre-disposition to developing epicondylitis, and in or about August 1999 she started to develop symptoms in her right arm due to the work that she was doing in the kitchen with the employer. She had not previously suffered from epicondylitis in either arm. She continued working in the expectation that her problem would go away. It did not, and gradually became worse over a period of time. On 12 October 1999 the pain in her right arm had reached a level whereby she needed to cease work in order to try and resolve the pain and incapacity that was associated there-with.

278. Whilst in the ordinary course of events it would be hoped that the pain would resolve and eventually disappear this was not the case with the worker. All people are different, and the worker was one of that small group of people who continue having problems.

279. On the evidence the worker has never been pain free in the right arm, although there have been times when I find that her problems have been relatively minor, but other times when the pain has increased as well. Having injured her right arm at work (which is admitted on the pleadings) it is for the employer to prove, on the evidence, on the balance of probabilities that any incapacity from that injury ceased at a particular time. The medical opinions are in agreement that she has an ongoing incapacity for work due to her right arm epicondylitis.

280. The employer has approached it's evidential and legal onus apparently reliant upon the idea that she already had a degenerative condition (albeit one that was asymptomatic) and that therefore whatever happened at work was only a temporary exacerbation and/or acceleration of it. However, having found (as I have) that the epicondylitis in the right arm was itself an "injury" rather than an exacerbation and/or acceleration of a pre-existing

injury, then this approach is less valid. In the instant case, the employer would need to satisfy me on the balance of probabilities that any incapacity from the injury had ceased at a particular point in time. In my view, they have failed to do so. At best it is speculation, even if based upon what one would normally expect.

281. The fact that (as both Dr Kevat and Dr Parkington agree) in the normal course you would expect epicondylitis to resolve over several months does not assist the employer. Dr Parkington himself has been involved in numerous cases where this has not occurred and he has performed surgery. Dr Kevat and Dr Quinn appear to seek to explain the worker's ongoing symptoms at least in part upon some non-physical component. The worker has abandoned any psychiatric claim, and accordingly I do not have to concern myself with anything other than the physical. On the medical evidence as a whole therefore, in the ordinary course one would have expected the worker's problems in her right arm to resolve over time once she was away from the aggravating work setting. However, it is clear (and I find) that she didn't.

282. It is possible that the worker may well have developed the right sided epicondylitis whether she was working with the employer or not. She may well have developed it at home at a later time even if she were not in any employment. However, for the reasoning in *Salisbury's case* and *Hankinson's case* this is not the relevant issue, because **"that incapacity does not cease because it is demonstrable that, without the injury, the worker would have arrived from another cause at the same state of incapacity."**

283. The right side epicondylitis was (and was admitted to be) a work injury. It arose out of or in the course of her employment with the employer. As a result of the right arm epicondylitis the worker was incapacitated for work in the kitchen of the employer from 12 October 1999. The worker still

remains incapacitated for work in the kitchen of the employer at the time the evidence concluded before me. I am therefore not satisfied on the balance of probabilities that the work injury (right arm epicondylitis) has ceased to cause incapacity for work. On the contrary the worker continues to be incapacitated for the work that she was doing at the time the injury arose.

284. The worker served a claim form (ExP1) stating that her "right hand, forearm and elbow" were the parts of her body affected by the work injury that she alleged. This needed to be read together with the medical certificate (ExP5) which was served two days before which asserted that the worker was suffering from "right lateral epicondylitis, unresponsive to conservative treatment". That was the injury that the employer deferred a (and ultimately made no) decision on. Therefore it was that claim that was deemed to be admitted. If the evidence established that the worker was pain free in the right arm for a reasonable period of time then the opinion of Dr Parkington would have real weight. He has approached the problem from a medical view point based upon what his usual expectation would be. However, his own evidence clearly establishes that not all cases follow the same path. If they did then it would not have been necessary for him to perform surgery in cases of epicondylitis. The employer has not established, to my satisfaction, that the injury to the right arm arising out of or in the course of her employment has ceased to cause incapacity for work.

285. It therefore follows that the employer has failed to prove what it has asserted in it's Form 5 and in it's counterclaim.

286. In addition the worker has pleaded that when she was being paid weekly payments she was not paid the correct amount as superannuation contributions were not included. Although the employer did not admit this in it's Defence Mr Barr has not addressed any argument to this issue at any stage.

287. In the case of *Hastings Deering (Australia) Ltd v Smith* [2004] NTSC 2 Thomas J decided in paragraph 27: "I agree with the conclusion of the learned stipendiary magistrate that the respondent is entitled to compensation for the employer funded contribution component to be included in normal weekly earnings." In the case of *NT Drilling Pty Ltd v McFarland* [2004] NTSC 23, Riley J decided in paragraph 10: "In my opinion the superannuation contributions are to be regarded as remuneration simpliciter for the purposes of the definition of "normal weekly earnings" in the Work Health Act. The amount payable as a superannuation contribution is therefore to be included in the calculation of normal weekly earnings."

288. Both of these decision are binding upon me, and I respectfully follow them. It follows that the worker should have been paid the superannuation contributions as part of her normal weekly earnings. Ms Gearin provided a set of calculations which I assume must be correct as Mr Barr did not address them. However, now that I have finalised this matter I will give the parties the chance to agree this calculation along with others that may be necessary.

CONCLUSIONS

289. As found earlier the worker's claim in respect to the left arm is not maintainable and must be dismissed.

290. I find that the right lateral epicondylitis was an injury under the Act that arose out of or in the course of the worker's employment (without need to have recourse to the extended definition of "injury" under the Act).

291. I am not satisfied that the left lateral epicondylitis was an injury under the Act that arose out of or in the course of the worker's employment.

292. The employer has satisfied me on the balance of probabilities that the worker is no longer totally incapacitated for work as a result of the work injury, and that this has been the case since at least 12 April 2001.

293. The employer has failed to satisfy me that the worker has ceased to be incapacitated for work as a result of her work injury, the right lateral epicondylitis (as pleaded in paragraph 13 of it's Defence).

294. The employer has not pleaded in the alternative that the worker is partially incapacitated for work, and has therefore sought no ruling or finding in this regard. This is apparent from the way that paragraph 13 of the Defence and paragraphs 23 and 24 and (c) of the prayer for relief of the counterclaim are pleaded.

295. The worker has pleaded (in paragraph 13 of her Statement of Claim) that "as a consequence of the injury the worker had been totally, or in the alternative partially, incapacitated for her work with the employer and for any employment reasonably available to her, from September 1999 to date and continuing". As it is raised by the pleadings I will make some findings in this regard. I find that as and from at least 12 April 2001 the worker was partially incapacitated by the work injury, and continues to be partially incapacitated for work.

296. I find that the worker was able to perform the following work as and from 12 April 2001:

- Bar work, provided that she did not have any heavy lifting (such as cartons of beer, trays of glasses etc);
- Keno operator, without restrictions;
- TAB operator without restrictions;
- Poker machine attendant, without restrictions;

- Receptionist/office worker such as the duties that she performed whilst working for NT Freight-Ascot Haulage.

297. I find that the worker was not able to return to the type of work that she performed in the kitchen with the employer, and this was the case continuing up until the time that evidence concluded before me. She is unlikely to be able to ever return to this type of employment in the future.

298. It is the employer who has sought to cancel the worker's weekly payments, but only on the basis that the worker has ceased to be incapacitated for work. In this regard the employer has not been successful. The employer has not sought to reduce the payments in the alternative on the basis of any partial incapacity.

299. No evidence has therefore been introduced by which I could find that any of the work (which I have found above the worker could do) is reasonably available to the worker. Nor has any evidence been introduced that would enable me to find (if any such work were reasonably available to the worker) what, if anything, the worker would be able to earn in any such employment.

300. This is a court of pleadings, and the pleadings do not require me to decide further.

301. It is an unusual result to arrive at after being unimpressed with the worker as a witness, but the employer has failed to prove what it set out to do in it's pleadings. Accordingly, it should follow that the employer's counterclaim should be dismissed, the worker's weekly payments should be restored (at the correct amount) from the time that they ceased until the date hereof, and continuing until reduced or cancelled in accordance with the Act.

302. The only issue remaining is as to what formal orders I should make to give effect to this decision. I will hear the parties on the form of the final orders. I trust that the parties will be able to do whatever mathematics are required. I will hear any necessary argument on costs or incidental matters.

Dated this 7th day of December 2004.

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D TRIGG SM
STIPENDIARY MAGISTRATE