CITATION: *Ruby Anne Sayson v Northern Territory of Australia* [2005] NTMC 076

PARTIES: RUBY ANNE SAYSON

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 20408292

DELIVERED ON: 19 December 2005

DELIVERED AT: DARWIN

HEARING DATE(s): 14, 15, 16 & 18 November 2005

DECISION OF: D LOADMAN, SM

CATCHWORDS:

Work Health Act – whether worker (Applicant) had "returned to work" – if not has the employer (Respondent) discharged the burden of proving that the worker was not "incapacitated" within the meaning of the Work Health Act – status of claims by worker for benefits made on two separate occasions.

REPRESENTATION:

Counsel:

Applicant: Mr J Waters QC

Respondent: Mr M Grant

Solicitors:

Applicant: Caroline Scicluna & Associates

Respondent: Collier & Deane

Judgment category classification: B

Judgment ID number: [2005] NTMC 076

Number of paragraphs: 108

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

No. 20408292

BETWEEN:

RUBY ANNE SAYSON
Applicant

AND:

NORTHERN TERRIORY OF
AUSTRALIA
Respondent

DECISION

(Delivered 19 December 2005)

David LOADMAN SM:

CONCESSIONS

1. The employer concedes that intermittently return to work programs were devised by The Commonwealth Rehabilitation Service ("CRS") on its behalf commencing with a program on 9 September 2002 and culminating with a program on 22 April 2003.

2. The employer concedes that when the applicant was off work she was absent from work pursuant to a medical certificate on diverse dates reflected in Exhibit A8 up to and including 8 April 2004, BUT

   The respondent does not concede that at any time prior or subsequent to 8 April 2004, when the applicant was off work, she was off work due to being "incapacitated in terms of the Work Health Act".

PRELIMINARY

1. Mr Waters QC prepared and filed by way of submissions a document styled "Amalgamated Pleadings" which was accepted as correctly compiled by Mr Grant and which was in the following terms:-

   "1. The Worker was born on 22 August 1972 and commenced employment with the Employer at the Employer's premises at Alice Springs Hospital on a casual basis from on / or about January 1998. On 13 May 1999 the Worker obtained a full time permanent position in the capacity of a patient services assistant. The applicant was a "Worker", within the definition contained in the *Work Health Act* ('the Act') at the relevant time.

   D1. The Employer admits paragraph 1". (The reference "D1" and similarly sequential references to capital D followed by a number are references to the relevant paragraphs of the employers defence filed in the proceeding)

2. Insofar as it's necessary in the light of the admission, the Court finds the facts set out in the above paragraph, to have been proven. Patient Services Assistant is the subject of the acronym "PSA" in this Court's decision.

3. "2. On 20 May 1999 the Worker suffered injuries to her left shoulder and neck during the course of her employment, when a patient who was transferring from a wheelchair to a bed commenced to fall, grabbing the worker's left shoulder as she did so and jerking same downwards, which caused the Worker to take the patient's full weight in her left arm and both of them to fall to the floor ("the accident").

   D2. The Employer admits paragraph 2".

   Save for the alleged "injuries", the Court finds these facts proven.

4. "3. The Worker sustained injuries to her left shoulder and left side of her neck and subsequent anxiety state. The Worker has been diagnosed with having suffered a left brachial plexus traction injury leading to ongoing neuropathic pain in her left shoulder and neck ("the injuries").

   D3. In relation to paragraph 3, the Employer admits that the Worker sustained an injury to her left shoulder and admits that the claim was

accepted by the Employer. The Employer admits that the Worker has been diagnosed as having suffered an injury as described in paragraph 3, however the Employer does not admit that this diagnosis is correct".

These facts are found proven save for the alleged diagnosis.

5. "4. The Worker notified the Employer of the injury on the date it occurred and subsequently lodged a worker's compensation claim form as prescribed on or about 30 May 1999. The Employer subsequently accepted liability for the claim.

   D4. The Employer admits paragraph 4".

   These facts are found proven.

6. "5. The injuries sustained by the Worker resulted in her total incapacity for her pre injury employment and initially, in her total incapacity for work from the date of accident to 16/6/99.

   D5. The Employer admits paragraph 5".

   These facts are found proven.

7. "6. The Worker resumed her employment in a restricted capacity and as a supernumerary employee from 17/6/99. She commenced working for 2 hours daily 5 days per week, pursuant to a graded return to work program devised by the Worker's appointed rehabilitation consultant as CRS Australia. By 5/7/99, the Worker's daily hours were further increased until she was working full time hours on restricted duties, from 24/1/00.

   D6. The Employer admits paragraph 6".

   The Court finds proven, the absence by the applicant from her employment, on the dates set out in paragraph seven above.

8. "7. The Worker complied with her rehabilitation plan as much as was possible however, her condition worsened at various times and she was

required to cease her employment due to increasing pain and / or for the purposes of seeking treatment for the injuries sustained on the following dates: 21 & 25/6/1999, 9-31/7/1999, 15/9/1999, 21/9-7/10/1999, 12, 13 & 21-27/10/1999, 3-5, 27 & 28/4/2000, 2/5-3/8/2000, 15-30/8/00, 4-6/9/00, 11-27/9/00 and 8/11/2001.

D7. Paragraph 7 is denied save and except that the Employer admits the Worker was absent from her employment on the dates as set out therein". The Court finds the worker was absent from work on the dates alleged.

9. "8. From 4/8/00, the Worker was provided with restricted supernumerary ward clerk duties for full time hours. The Worker was unable to continue in her trial of the ward clerk's position from in or about February 2001 due to then commencing maternity leave at that time. The Worker returned to work from maternity leave, on restricted supernumerary patient services assistant' duties, pursuant to a further graded return to work program, on 25/10/2001 for 4 hours 5 days a week, building up to full time hours by 22/11/2001, notwithstanding that the Worker continued to experience pain from her injuries.

D8. Paragraph 8 is admitted save and except the assertion that the Worker continued to experience pain from the injuries which assertion is not admitted".

The Court finds proven, in accordance with the respondent's admissions, that the worker was absent from work on the dates set out in paragraph nine, above, the remaining facts being in issue.

10. "9. Throughout the course of undertaking her various rehabilitation plans and particularly on or about 14 March 2002 and 9 May 2003, the Worker suffered recurrences and or an exacerbation or aggravation of her injuries in the course of her employment and was consequently totally incapacitated for

work again on the following dates: 28/3-27/5/2002, 26/9/2002-24/3/2003, 13 & 14/5/2003, 3, 5 & 6/6/2003 and continuously since 21 August 2003.

D9. Paragraph 9 is denied save and except that the Employer admits the Worker was absent from work on the dates as set out therein. The Employer specifically denies that on or about 14/3/02 & 9/5/03, the Worker suffered recurrences, exacerbation or aggravation of her injuries or suffered any injury as defined by the Work Health Act. The Employer further denies that the Worker was totally or partially incapacitated for work on the dates as pleaded at paragraph 9. The Employer asserts that since 9/5/03 the Worker has been and remains fit to return to her pre injury employment with the Employer".

Consistent with the pleadings, the Court finds proven, only that the worker was absent from work on the dates as alleged.

11. "10. The Worker lodged a further worker's compensation claim form with respect to the recurrence of injury on 9 May 2003, pursuant to a direction received from her nursing support service manager Rose Moody, who advised the Worker that she was required to lodge a fresh claim form for that recurrence given her claim for the injuries sustained on 20 May 1999 had been closed. The Employer purported to subsequently dispute liability for the claim in or about June 2003, for reason alleged that the Worker's ongoing injuries were not work related. A Mediation Conference was held on 20 February 2004 with respect to the Employer's refusal to reinstate the Worker's entitlements to compensation.

D10. In relation to paragraph 10 the Employer pleads as follows:

(a) The Employer admits that the Worker lodged a further claim but does not admit the balance of the first sentence of paragraph 10.

(b) The second sentence in paragraph 10 is admitted.

(c) The third sentence in paragraph 10 is admitted"

The Court makes findings in accordance with the above admissions.

12. "11. The Employer suspended the Worker's entitlements to weekly payments of compensation, which were due to the Worker pursuant to sections 64 and 65 of the *Work Health Act,* on various dates from 9 July 1999, particulars of which will be provided prior to trial. No notification pursuant to s.69 of the Act has ever been received by the Worker nor has the Employer made any application to this Court pursuant to s 104 of the Act.

D11. Paragraph 11 is denied. On various occasions prior to 9/5/03 when the Employer did not pay the Worker weekly benefits pursuant to ss 64 & 65, such payments were not made, or payments were reduced, because the Worker had returned to work or was not entitled to benefits pursuant to the Work Health Act. The Employer denies any notification was required to be made to the Worker for these periods. For the period after 9/5/03, the Employer denies liability for the Worker's claim for compensation".

13. To summarise then, what is before the Court for purposes of the Court's decision, is resolution of the issues which arise from the following allegations:-

(a) "The worker complied with her rehabilitation plan as much as was possible, however, her condition worsened at various times and she was required to cease her employment due to increasing pain and/or for the purposes of seeking treatment for the injuries sustained on the following dates: 21 & 25/6/1999, 9-31/7/1999, 15/9/1999, 21/9-7/10/1999, 12, 13 & 21-27/10/1999, 3-5, 27 & 28/4/2000, 2/5 – 3/8/2000, 15-30/8/00, 4-6/9/00, 11-27/9/00 and 8/11/2001"

(b) On and after 22 November 2001 did the worker continue to experience pain from the injuries?

(c) What is the decision of the Court in relation to the allegations contained in paragraph nine above, repeated for convenience, namely:-

"Throughout the course of undertaking her various rehabilitation plans and particularly on or about 14 March 2002 and 9 May 2003,

the worker suffered recurrences and / or an exacerbation or aggravation of her injuries in the course of her employment and was consequently totally incapacitated for work again on the following dates: 28/3-27/5/2002, 26/9/2002- 24/3/2003, 13 & 14/5/2003, 3, 5 & 6/6/2003 and continuously since 21 August 2003".

(d) The worker's compensation claim, lodged on 29 May 2003, ascribed claim number 14062 and Exhibit A3, in the proceedings refers. Was that lodged

"…. with respect to the recurrence of injury on 9 May 2003, pursuant to a direction received from her nursing support service manager, Rose Moody, who advised the worker that she was required to lodge a fresh claim form for that recurrence, given her claim for the injuries sustained on 20 May 1999 had been closed".

14. Distilling what is put in issue on the pleadings and / or what emerged as being in issue during the course of the trial, the Court perceives and finds that it must decide the following:-

a. Since no notice of cancellation, cessation, suspension or any like termination was ever provided by the employer to the worker, the onus of establishing the change of circumstances warranting such termination is accepted in paragraph 71 of the employer's submissions, to require the employer to discharge the onus of proof on the balance of probabilities that it was justified in so terminating the benefit. As is stated in the said submissions, authority for the proposition is the decision in *Morrissey v Conaust* (1991) 77 NTR 19 at 25 and the cases there cited. As is further correctly stated, the proposition set out in the preceding sentence is supported by the said other authorities cited. The employer, as is apparent from the pleadings, summarised elsewhere, must prove on a balance of probabilities that the worker "returned to work on or about January 2002". In order to overcome being defeated by the absence of any notice. The employer must prove, on the balance of probabilities, that that occurred. ("The return to work")

b. Whatever the answer to the above proposition is, and assuming that there are primary applications made for compensation to be attributed or referrable to the injury in May 1999, does the worker, as a consequence, have an entitlement under the Act in respect of such claims. It is alleged on behalf of the employer, that in relation to that aspect of the matter, the worker bears the onus of establishing that, since March 2002 she has suffered incapacity and consequent economic loss referrable to an injury arising out of or in the course of her employment. (paragraph 77 of the employer's submissions) ("The primary applications")

c. If the Court finds the worker did not "return to work" within the meaning of the Act, has the employer discharged the accepted onus of proving beyond reasonable doubt "that the worker was not entitled to benefits" under the Act from 28 March 2002. That is to say, that the worker did not suffer from any "injury" within the meaning of the Act after 28 March 2002, or, in the alternative, "that any injury from which he (sic) did suffer", did not incapacitate her within the meaning of the Act" (paragraph 83 of the employer's submissions) ("The incapacity after 28 March 2002")

THE RETURN TO WORK

15. The worker's evidence in chief, mostly comprised, although, without any objection, counsel leading her through the evidence in general terms in accordance with the pleading filed, namely the statement of claim, of 21 September 2004.

16. Little purpose in the Court's perception, is to be served, from going through all of that evidence for the reason that it accords with the allegations in the statement of claim, and in large compass, has already been the subject of facts found, pursuant to agreement, to have proved as outlined above.

17. It is important, in the Court's perception though, to record that on the 13 May 1999, the appointment to a full time position as a PSA, involved in particular, lifting and assisting with lifting and obviously placing into the appropriate bed or position adult patients. The admitted injury on 20 May 1999 indeed entailed taking a patient from the x-ray facility in a wheelchair, the incident in question occurring when the patient stood, preparatory to getting onto the bed, grabbing the worker's left arm and pulling her to the ground. The worker described the patient as a "big lady".

18. From 17 June 1999, when the worker returned to the Alice Springs Hospital, and thereafter pursuant to a return to work program, commenced working two hours on restricted duties five days a week, she did everything, she said, that she was told to do, culminating in returning to work full time, but on restricted duties. In February 2001, she gave birth to a male child, Gabriel, this pregnancy being a troublesome one, precluding her from any form of resumption of duties until on 25 October 2001, when she returned to full time hours. This is not quite borne out by the provisions of the relevant return to work program, the specifics of which are contained in a CRS Report being part of Exhibit A5, containing in the top right hand corner "R53", which would indicate that although she returned to work on 25 October 2001, that document contains something significant in the Court's perception, namely as an "Assistant in <u>paediatric ward</u>. This has reduced manual handling demands than the other wards. Perform hygiene tasks, carbolising beds and pushing of wheelchairs \ beds, but avoiding assisting with transfers of <u>older children</u>. Duties include dishing out food". (the Court's underlining) Distilled to what the worker was doing and fit to do, it in entailed that she was required to and did involve herself in lifting and transferring younger and smaller children but was not fit to or required to move older children.

19. There is also a reference in the entry relating to 8 November 2001, to "buffing". This is an activity which ultimately was no longer to be

performed by a PSA and for that reason seems academic to this Court. The draft return to work program concludes with an entry, "29 November – ongoing", in the following terms "Resume normal duties, including normal roster" and under the heading Hours, "Full time hours on roster".

20. Part of the same Exhibit is a Territory Health Services return to work program progress report of 28 November 2001, which document extensively deals with complaints and difficulties but, relevantly, on page two, recites "On 28 November 2001, when reviewed for the second time, Ms Sayson had upgraded to full time work and was managing the full range of duties, excluding buffing, which had not been required during her return to work program".

21. There is a further progress report of 5 December 2001, alleging upgrading to her full normal roster, but significantly the report of 2 January 2002, recites on page two of that report "… the conclusion of the program was performing the full range of duties of a PSA in the Paediatric Unit (this Court's underlining) at Alice Springs Hospital …".

22. It is irresistible to conclude that all the other reports referred to, related to her performance in the Paediatric Unit, the relevance of which will become clear, or at least hopefully so, shortly.

23. Whilst there are other issues in relation to the worker's oral evidence, which will be addressed in the decision, in cross examination, the worker, in this Court's observation, was often non responsive and largely unable to remember many important facts, particularly any matter which may have been destructive of her case. Strangely, she said "I don't recall going back to full time work". "I can't say never but, I can't remember". (transcript 41) When faced with the return to work program's contents, she agreed that she did return to work but, not to her full duties. Belatedly, and unconvincingly, being faced with the comments in the second review of the

return to work program on 28 November 2001 set out above, she said "yes I think so". (transcript 54)

24. In this Court's finding the highest the respondent can assert the full time work comprised entailed duties performed by the worker only in the Paediatric ward which involved the lifting and transfer of younger children and the avoidance of similar activities relating to older children. Whilst it is probably a matter dictated by logic, in any event, the Court refers back to the quotation from the draft return to work program, and particularly the sentence "this has reduced manual handling demands than the other wards" and "…but avoiding with assisting with transfers of older children".

25. "Return to work" has been the subject of judicial decision, firstly, in a decision of the Full Court of the Northern Territory, *Morrissey v Conaust Ltd* (1991) 77 NTR page 19 at page 25. That was a decision in relation to an interpretation of section 69(2) Work Health Act when it was worded differently from the relevant wording applying to the decision needing to be made in the matter before the Court. In an internet sourced judgement as opposed to the authorised decision, if there is one, the Court has been provided with the decision in *Terence Carmichael v Ju Ju Nominees Pty Ltd*, a decision of Angel, ACJ, as he then was. His Honour, firstly, propounds "(on page 3 of 5) the phrase "return to work" ought to be given, its ordinary meaning in accordance with the English language, in the context in which it appears".

26. It was further submitted that the expression should not be given a narrow meaning in accordance with the principle that, rights created under beneficial legislation, will only be read down by a virtue of a subsequent amendment where that amendment adopts clear language to that effect. His Honour rejected the construction urged upon him by appellant's counsel "….. that the worker must return to the work that he was previously doing or at least at a level of remuneration which he was previously receiving or

which does not leave him any entitlements under the Act", His Honour , however, pointed out that construction failed to recognise that the rights conferred by section 69 of the Act, permitted in appropriate circumstances, firstly, discontinuance of the payment of compensation, but secondly, the reduction in the amount of compensation payments. As a consequence of this, to accede to the construction, the subject of appellant's counsel's submission, it was held by His Honour "Such an interpretation can not be right".

27. In that case however, instead of merely reducing the payments so as to be concomitant with the duties capable of being performed by the worker, the employer had cancelled the benefit.

28. In the case before this Court the construction urged upon His Honour is not trammelled with that difficult. In these circumstances, that construction must dictate that, in the case before this Court, "return to work" as at the 2 January 2002, was not a full return to work, for reason of, duties being performed only in the paediatric unit, such duties being the subject of commentary set out above.

29. It follows then, that in those circumstances, the suspension, cessation or termination of benefits was necessarily subject to the provisions of section 69(1) of the Act. Since the requisite notice was not given, the cessation of payments was not lawful.

PRIMARY APPLICATIONS CONCERNING CLAIMS MADE 14 MARCH 2002 AND 9 MAY 2003

30. Although, vexed with issues of onus when contrasted with the succeeding and last issue for determination by the Court, the Court finds it is correctly submitted on behalf of the employer, that in respect of claims arising out of the alleged injuries on 14 March 2002 and 9 May 2003, the worker bears the onus of establishing that, since the 14 March 2002 she has suffered

incapacity and consequent economical loss referrable to an injury arising out of, or, in the course of her employment.

31. The submissions of counsel for the worker at paragraph 23 of such submissions, seek to make some capital of the final assertion contained in paragraph nine of the particulars of defence, dated 13 October 2004. That is not an appropriate construction of the pleading, which this Court finds, in essence, denies that on 14 March 2002 and 9 May 2003, there were occurrences, exacerbation or aggravation of injuries or, that any injury was suffered on those dates, as defined by the Work Health Act. The concluding sentence does not detract from the thrust of the submission. The determination of the question depends exclusively and entirely on the evidence of medical practitioners and / or the worker, as to whether or not there was "incapacity" or "injury".

32. Despite different parties bearing the onus, in relation to these matters, and the succeeding and final matter, the Court proposes, in essence, to deal with this aspect of the matter and the final aspect of the matter conjointly under the heading that follows.

THE INCAPACITY ARGUMENT

33. As framed in paragraph 83 of the employers counsel's submissions, the employer, if it wished to benefit from the assertion, would have to prove on a balance of probabilities "that the worker did not suffer from any "injury" within the meaning of the Act after 28 March 2002 or, in the alternative, that any injury from which he (sic) did suffer did not incapacitate her within the meaning of the Act".

34. The Court first of all refers to those matters set out in paragraph 18, above, concerning the Commonwealth Rehabilitation Service Reports, as contained in Exhibit A5, where insofar as the issue of incapacity is concerned, the report of 2 January 2002 is highlighted and for reason of convenience is

repeated, namely "…. the conclusion of the program was performing the full range of duties of a PSA in the paediatric unit at Alice Springs Hospital. She reported that she had some pain in her shoulder, but "didn't think about it often. Pain is not preventing her performing any task".

35. At all material times, as testified in evidence in chief, the worker allegedly suffered from, and continues to suffer from pain in the shoulder and neck and numbness in the left arm. The swelling on her neck and shoulder, on the left side, which the Court observed caused her to be stressed and the symptomology was painful and the "swelling has never gone down". Sometimes apparently the swelling is not as evident as it was in Court on 14 November 2005. Any stress to the left arm, lifting something heavy, as an example, allegedly causes the swelling to increase and this symptomology has been the same for the last two or three years. The worker testified she was prescribed panadine forte for pain and sleeping tablets to assist her to sleep, although she had abstained from taking the latter because of the need to take the children to school. For relief, she used a heat pack and in addition she uses an electrical machine and strapping as advocated by "the physio".

36. Her head is "not in the middle" although she was unable to say when that particular fact was pointed out to her.

37. Upon accompanying her husband to Darwin, as the Court understands it was in late 2004, she tried to work at a photo shop. She is willing to be retrained. When she had approached the supervisor at Big W for employment, she had been compelled to say that she could not participate in any activity involving heavy lifting. She said that her husband did the house work and the laundry. Further, her husband did the ironing and the garden while she attended to meals. She said that she folded clothes, tidied around the house, helped with the kids but, her husband did all the heavy work and so far as exercise was concerned, she performed the exercises advocated by

the physiotherapist. Home based stretching, pursuant to the report, had been carried out "I do it everyday as I can, the only thing that's not done lately is walking".

38. She said that she did lift patients in the paediatric ward during that part of the return to work program when she was assigned PSA duties there. There is some contradictory statement made by her saying "her shoulder was pain free but occasionally stiff" to be juxtaposed with "my shoulder is never pain free". Her lack of recall was quite astonishing in relation to the entire history following upon the first return to work program, although she conceded that most of the time that she had taken off work in early 2002 had been because of her pregnancy and the difficulties that she had with that event. She had no knowledge or recollection of the term "deconditioned", apparently a medical term ascribed to the state, as the Court understands it, of the muscles due to their lack of use.

39. She specifically was unable to recall ever, on or after 28 November 2001, "returning to full time work with the exception of buffing", but later on recalled, after having the second review document read to her in part, that she returned to all her duties at full time work, (bearing in mind it was in the paediatric ward), she denied this and then followed that with saying she didn't recall telling anyone that her symptomology was "getting better".

40. She described how on the morning of 14 March 2002 she awoke with pain in the shoulder and neck, although she couldn't attribute its manifestation to any incident at work, she could not recall that aspect of history given to Dr Jackson which will be referred to later.

41. In May 2003, with some prompting, she recalled suffering an onset of pain due to pushing a trolley and it was after that incident she submitted the claim form, given claim number 14062, the form as previously indicated being marked Exhibit A3.

42. On a visit to Alice Springs after she had moved to Darwin, as it transpired, although the primary motive was to visit her brother in law, she went to see Dr Winterflood. He was the only doctor who she had consulted, in relation to her condition, since leaving Alice Springs. She thought it was in June or July 2005 that this visit occurred.

43. She recalled that she told Dr Millons that she would load the washing machine and the dishwasher and do no more activities relating to either of those duties. She recalled saying to him that she did no reaching with her left arm. She said when reaching with her left arm it causes pain in the shoulder. She said that when she'd seen Dr Elder she advised him she did no chore which involved reaching with her left arm. In July 2005 she had said to Dr Burns that her husband had to hang out the clothes because she couldn't reach out with her left arm.

44. She conceded that when she had been assigned duties as a ward clerk during one of the return to work programs, the training that she received, comprised familiarity with the filing system, answering the phone and learning the basic knowledge of computers. Those were the skills required for a base grade clerk's position in the public service, she conceded.

45. She said that in her father's business where she once worked her only duty was collecting money and concluded this part of her evidence by saying she was not trained to do any office job.

46. She said that she did not recall saying to anybody that she couldn't pick up her son Gabriel because of her shoulder injury and specifically could not recall telling one Margot Webster that was the case. When it is done, it causes her pain in the shoulder so she avoids doing it whenever she can. She did say that she had told all the doctors that she couldn't lift her son because of her shoulder injury. She said that she was right hand dominant and that she ironed with her right hand, which, to the Court makes it rather inexplicable that she is unable to attend to ironing with the right hand.

47. The videos ExhibitsR3 and R4, comprising surveillance of the worker, were then viewed in Court. In respect of the surveillance on 15 November 2005, with some seeming prevarication, she conceded that she was shown, at 16.36 lifting Gabriel into the vehicle. When questioned about how many times she did that on a daily basis, she was non responsive until the Court intervened by suggesting it was not a difficult question and she was required to answer it. She then offered evidence that two or three times a day she went out and in doing so, as the Court understood it, put Gabriel into and removed him from the car.

48. When shown at 16.5, 4.45 and thereafter, hanging washing out with both hands extended and moving with no apparent limitation and certainly no visible hesitancy, she obviously had to concede, it was she hanging out the clothes. At this point she denied that she had ever told anyone that she couldn't hang clothes on the line.

49. The next video footage viewed, was April 2004, again she was shown hanging out the washing, reaching above her head, bringing the washing in, shaking articles of clothing out, with all these activities exhibiting full extension of her arm and no evidence of discomfort or difficulty.

50. On 11 April she conceded at point 15.06.02 that she was changing Gabriel's nappy and to do that had to pick him up and put him in the car and that she had not asked her brother in law and sister in law, who were at hand, to assist her or do the job for her.

51. She conceded that she was demonstrated as carrying out, apparently unrestricted movements, in connection with shopping at "Mad Harrys" in Alice Springs, that in the car she was twisting her head from left to right to reverse the vehicle, without any apparent difficulty, because, in response to a question, "I have to". There was no difficulty in her spinning the wheel to perform required manoeuvres in the motor vehicle. To this Court's observation, she closed the boot of the car after loading purchases into it

with her left hand, she reached up with her left hand and took a frying pan and a Christmas tree from the shelving, she lifted Gabriel out of the car.

52. On 21 October 2005, she admitted that the video footage showed it was she shopping in Palmerston, lifting a large object, namely a Christmas tree in a box, from the shelving, picking it up and holding it in her left hand and that she continued to hold the article with no apparent discomfort, in her left hand alone. A shopping basket with some goods in it was also carried in her left hand. She conceded she had picked up and put Gabriel into the shopping trolley and pushed it around the supermarket, that she put goods in the boot on 22 October 2005 and shut the boot with her left hand and that she had lifted Gabriel from the trolley and put him on the ground. She did interject to say that she did this particular activity with her right hand.

53. She was then re-examined by Mr Waters QC, she explained some of the answers in cross examination, for instance, that the Christmas tree at Palmerston was a light object. That it wasn't that she couldn't turn her head but, that she didn't turn it fully unless she had to. That she usually moved her bum to see behind her because of her injury, and that she was not able to lift heavy items with her left hand, because if she did so she would be stiff and sore at the end of the day. She said she didn't want to use the services of her brother and sister in law in relation to changing a nappy, it was her duty. She said that the clothes being hung out on the line were damp rather than wet, and on the occasions when she was hanging out the washing, she had to hang it out because her husband was away and no one else could have helped her. As a consequence of that sort of activity she suffered pain in her neck and shoulder and couldn't sleep at night. Towards the end of re-examination, she asserted, "I never got back to full time work".

54. Her husband, Lewis Sayson, then gave evidence, and in summary he said there had never been any problems that he'd observed prior to May 1989 in the left shoulder area and that her left shoulder was now, and had been since

May 1999, bigger than her right shoulder. The centre line of her body was not in the centre. The swelling is variable. He had to do heavy laundry, mopping the house, and anything that could possibly involve lifting. When she was forced to perform any activity involving use of her left arm that resulted in her complaining of having a sore shoulder. That she used her prescribed medication when she felt the pain and often had little sleep.

55. With the Court's permission, Mr Grant asked further questions because some of the material canvassed by Mr Waters QC was not strictly speaking proper for re-examination. She said to Mr Grant that she had used no medication lately. She completed her evidence by saying that nobody had ever told her she was not allowed to perform the tasks about which she had been questioned but, rather had said that she should avoid performing such activities because they would not be good for her shoulder.

THE MEDICAL EVIDENCE

56. Dr David Millons prepared a medico legal report, dated 10 Mach 2005, and on page 4 of that report, records that the worker had said to Dr Millons, on the occasion of the examination on 8 March 2005:-

> "she might wash up a few dishes. She will use a short Philippino (sic) broom to sweep. Her husband does the mopping, sweeping, washing and cooking. She might feed the washing machine and the dish washer but she does not do more than that. She does not do any ironing.
>
> She drives short distances. She goes shopping with her husband".

Self evidently, or if not self evidently, in the Court's perception, she intended to tell the doctor that she had nothing to do with the laundering of clothing. Asserting her husband did the cooking is contrary to her evidence in Court. She does not do any ironing, but as already remarked, one wonders why. Saying that she went shopping with her husband would

seem to be have been for the purposes of conveying to Dr Millons that she didn’t go shopping without him.

57. The Doctor, on examination, detected a soft tissue swelling in the left root of the neck, which was somewhat tender. Further there was tenderness over the left trapezius, although there was no wasting of that muscle. Then, although these are extracts, he made the following relevant observations:- “Flexion and extension of the neck are full and pain-free. Rotation and lateral flexion are of good range with a complaint of pain at the extreme of rotating and laterally flexing to the left. … Her left shoulder exhibits a full range of movements with a complaint at the extremes of elevation and internal rotation. No painful arc is crossed as the arm is raised and lowered. There is a full range of movements at all other joints of the left upper limb. …. Extension and lateral flexion are full and pain-free”.

58. Dr Millons then recites in his report, after a review of the workers file and x-rays, amongst other things, observing a “localised syrinx formation”, which other medical practitioners, as will become apparent, also observed, but the significance of which is nil so far as her work capacity is concerned.

59. He then expresses his opinion, and again there are only pertinent extracts set out in this decision, with that qualification he said the following; “investigations excluded frank shoulder problems and, indeed, her left shoulder exhibits a full range of movements with no evidence of any sub-acromial impingement”. He acknowledges a suggestion that there may have been some traction damage to the brachial plexus. The symptoms he describes “as fairly broad and non specific”. He excluded the existence of any “frank neurological deficit in the left upper limb”. This was conceded as an irrelevancy for the purposes of this Court’s decision by both counsel, in any event, and “what one is left with is a lady whose head seems to be tilted to and taken out to the right with a soft tissue swelling in the left side of her neck, <u>the nature of which is not clear</u> (this Court’s underlining), I just

wonder whether the swelling might relate to the tilting of the head and the neck". Next he opines, "there maybe an underlying scoliosis of long standing". He recommends this for investigation, x-ray and the like. It was never done. At perhaps the high point of his clinical diagnoses is a suspicion "I suspect that her problems are really more musculo-skeletal than anything else and attention to a regular exercise program might help minimise symptoms". In relation to "a possible diagnoses", he says "all I can come up with is that there appears to have been some muscular-ligamentous injury to the left side of her neck in the incident on 20/05/99. That does not appear to involve the shoulder joint but seems to rest more in the left root of the neck. There is no convincing evidence of any brachial plexus injury".

60. In relation to pre-injury employment, any other employment, he says "as noted above, I believe that she ought to be capable of working four hours' (sic) work a day in a light duty clerical capacity".

61. Then finally, "You ask whether her incapacity for work that she has had since 21/08/03 is as a result of her continuing to suffer from the effects of the injury she sustained in May 1999.

- That would certainly appear to be so, she having complained of systems since that time. The incident with the trolley, whenever it was, appears to have just demonstrated that a problem was in train and does not of itself appear to have been a new injury".

62. He was called to give oral evidence and in relation to some of the activities observed on the video and the subject of evidence otherwise, his observations, he said, would allow the worker to lift Gabriel in and out of the child seat in the car because she had full range of movements in her neck and shoulders. Further that his observations would enable her to have full rotation of her neck so as to reverse when parking. Hanging small items on a clothes line would be consistent with his findings, as would changing a

child's nappy, even when help was available. Activity would cause an increase in pain. There is no identification of a separate cause other than the incident on 20 May 1999 for the existence of the worker's problems.

63. When cross examined by Mr Grant, he refused to acknowledge positively there was no organic cause for the symptomology and said that there maybe some underlying basis for her systems. (transcript 104) The appearance of her neck was certainly not normal although the swelling could be attributed to the way she held her head. He also acknowledged that if the history given to him is not correct then his diagnosis fell away and said of the residual problems "they might be musculo-skeletal, that is soft tissue injuries, although it was very unusual for subsisting soft tissue injury of this kind to continue for this length of time. The "swelling", he accepted, "was not consistent with a soft tissue injury" (transcript 106) and the pain in the shoulder could manifest itself because of a lack of use. That the existence of this pain was not related to the injury in May 1999 (this is from the Court's notes, the transcript at this point has no record of the utterance, the word in the transcript being, inaudible). Further the worker did not currently seem to be suffering from any injury at all". He agreed that the thrust of what the worker had said to him in relation to the laundering, was that, he understood she was at pains to say that she couldn't hang the washing and that if he was provided with evidence that she repeatedly indulged in full extension of her left arm for a period of over half an hour, he would question her veracity (transcript 106)

64. The objective appraisal of Dr Millons' most favourable conclusion for the worker is, in this Court's finding, at best equivocal. There is also the issue that the symptomology maybe due to an underlying scoliosis. Whether that is so has not been established and clearly, if it was so, it would not have been an injury that she sustained at work.

65. In respect of the claims she makes relating to the incidents on 14 March 2002 and 9 May 2003, it is the worker who bears the onus of establishing:-

a. that she sustained an injury within the meaning of the Act on 20 May 1999, but further,

b. that the injury she sustained incapacitated her within the meaning of the Act.

66. There is nothing surprising about Dr Millons agreeing on re-examination, that all of the physical activity portrayed on the videos referred to, was in accordance with his findings, because as has previously stated, his investigations excluded frank shoulder problems and "indeed, her left shoulder exhibits a full range of movement with no evidence of any sub-acromial impingement".

67. What this Court finds more sinister, however, is the deliberate attempt by the worker to engender an opinion by Dr Millons based on specific inactivity, her total inability to hang out the washing, which this Court finds palpably false. As Dr Millons said, had he been made aware as part of the history that such activities, as are portrayed on Exhibits R3 and R4, were indulged in by the worker contrary to her history given to him, he would question her veracity. So does this Court.

68. In the event, that concluded the evidence for the worker. The employer then called Dr Robin Jackson, who appeared by video link. Dr Jackson examined and reported on the worker, on 26 October 1999 and again on 21 September 2001. The reports generated, relating respectively to those two examinations, were dated 3 November 1999 and 1 October 2001. The reports are respectively R5 and R6 in the proceeding.

69. In 3 November 1999 report, the worker told Dr Jackson that she did some meal preparation, although unfortunately perhaps, the issue of the laundering of clothing is not mentioned. She told Dr Jackson that

vacuuming, sweeping and mopping were done by her husband, who assisted with the shopping (in this Courts' view this was clearly to engender a conclusion being made by Dr Jackson, that she could not even attend to shopping without her husbands' assistance). Ironing is not mentioned. On examination he found that she had a full range of apparent pain-free cervical spine movement, and whilst it wasn't his full commentary, he did find that she had "a full range of movement in the left shoulder without any obvious increase in discomfort. Muscle power and sensation appeared normal and deep tendon reflexes were symmetrical". He excluded more serious sequelae and his diagnosis was that of a soft tissue injury, musculo-ligamentous, in type. He concluded there was no aggravation of any underlying condition and concluded that she was capable of returning to normal full time duties "in due course, but this may take some time to achieve". He excluded the existence of a permanent disability that would affect her work capacity in the future and forecast an excellent prognosis, leading to a full recovery without the injury impacting on her future capacity for work. He did, however, accept that "some genuine symptomology does exist".

70. In the report, Exhibit R6 dated 1 October 2001, relating to her reassessment on 21 September 2001, he questioned her afresh in relation to the history given in Exhibit R5 and she reaffirmed that history as being correct. He notes in this report that the worker failed to mention a referral to Dr Geoff Thompson.

71. In relation to her left shoulder, he noted some minimal tenderness, without any swelling, muscle wasting or deformity around the shoulder and that she demonstrated a "full range of shoulder movement", not complaining of any pain but complaining of "tiredness". He reaffirmed his diagnosis and reasserted that there was a "simple soft tissue injury". If there was a brachial plexus lesion, which he thought was uncertain, then, in any event,

as at the time of examination, she had made a full recovery from such an injury.

72. He noted that whilst the situation, which was then current, was related to 20 May 1999 injury, he said “Please note that Ms Sayson has a full range of what appears to be pain-free shoulder at this stage”. He certified her as fit for work, although, she “is badly deconditioned”. Apparently that is a medical description to be applied to a situation where there has been little or no use of musculature relating, in this case, to her left arm and shoulder. He concluded that a return to a PSA position was debatable and assessed her as more suitable for duties of a ward clerk. He concluded that “there is little evidence to substantiate (…incapacities reported by Ms Sayson), his guarded conclusion in relation to prognosis was that “her protracted symptomology is somewhat difficult to explain in the circumstances. There is no evidence to suggest that she has sustained anything other than a relatively minor injury and, therefore protracted disability is difficult to explain”.

73. When called to give evidence, he said that he would expect the injury, if it occurred, to have resulted in complete recovery in a matter of weeks, or in the event of a serious injury (which this of course is not so diagnosed by him as being such) within two months (transcript 123), and that whilst there were always to be exceptions to the rule, normally six months was enough for a full return to the pre-injury work duties (transcript 123 and 124). He reiterated she was vague in answers to questions (transcript 124), the Court felt this was critical of her and her tiredness would be what one would expect as a consequence of her deconditioning, although there was no muscle wasting (transcript 125). He said the full range of pain free shoulder movement was indicative of resolution of the injury (transcript 125). He said that the injury itself had recovered, and that what he had advocated was a ward clerk’s duties at that time (transcript 126), because they were less physically demanding, with a gradual introduction into, and ultimately, a progression to doing, the full duties of a PSA. He suggested that factors

which may be influencing the symptoms could be social or financial, and if so they were totally unrelated to any injury as such and one could not exclude taking into account (transcript 126) "secondary gain".

74. Mr Waters QC, cross examined Dr Jackson. He concealed that if there was an exaggeration of symptoms, he was not of that conclusion otherwise he would have made such a comment. He reiterated, in his opinion, the injury had resolved and current alleged symptoms are related to the deconditioning, although he conceded, that as a possibility, he would concede, he couldn't guarantee there would be a complete return to full duties, and that her inability to do so may relate to a work injury but, qualified that by saying, there may be other factors and work injury was only one of them. He had not been able, he conceded, to identify positively a motive of secondary gain nor could he say that the existence of non-compensable philosophies existed. This was speculation indulged in by him, because of the fact that this minor injury had not resolved, in terms of symptomology, despite the lapse of four years after its incidence. In any event, he stated that those factors were not related to medical matters. He was reluctant to comment on the contents of Dr Millons' report without having had an examination at or about the same time that, he, Millons in fact had but, he did say that he could not see any reason why the symptoms described by Dr Millons should be present.

75. The respondent then called, also by video link, acting Professor Richard J Burns, a consultant neurologist. He had prepared in advance of his being called, two reports, the first, Exhibit R7 in the proceedings dated, 27 July 2004 following upon an assessment carried out on 19 July 2004, the second, Exhibit R8, dated 29 July 2005, after an examination on 25 July 2005.

76. He said in his oral evidence as to her given history in Exhibit R7 that "she said she is never really free of pain and in the period over the last five years it has not changed to any significant degree" (transcript 136). That is not in accordance with the evidence she gave in Court.

77. In terms of her activities, she said to him in July 2005 "she is able to undertake activities around the home but, her husband does most things when he is there and she avoids heavy lifting and anything that requires reaching". Those last two activities are not predicated on the husbands' presence or absence and the clear meaning of that verbiage is indicative of her avoiding heavy lifting and anything that requires reaching. Her activities on the videos Exhibits R3 and R4, previously referred to, contradict that being the case. For example, in relation to the extension of her arm when hanging up or removing laundry from the line, on the two occasions reflected in the video tapes. He excluded any neurologic injury or existing neurologic condition.

78. He opined that in the event that there had been a brachial plexus dysfunction "... I would have expected recovery of function by now and it would be most surprising to have pain without any other signs on the basis of brachial plexus damage". He was unable to provide a diagnosis in relation to the existence of any casue for the alleged injury that might have occurred on 9 May 2003.

79. The report then contains the following:-

> "Ms Sayson complains of ongoing pain and disability such as to incapacitate her for any employment. Is the pain and disability she complains of genuine symptoms of her injury if you believe she has sustained an injury?"
>
> I understand that Ms Sayson has ongoing pain which she said incapacitates her for any employment, but I am unable to explain her pain either from the nature of the symptoms she described or from my neurologic examination".

80. In response to a question as to her return to work, he qualified his answer by saying there was no neurologic abnormality which precluded her from returning to work.

81. In his report of 29 July 2005, Exhibit R8, he recited first, the workers' current symptoms in the following terms "Ms Sayson stated she experiences persistent pain in the left neck and supra clavicular fossa region, present all the time but worse with stress or if the weather is cold" (the underlining is by the Court). In relation to present activities she said "She undertakes some cooking and washes the dishes and looks after the children. She drives the car. She is able to do washing, but her husband hangs out the clothes (this Court's underlining). Her husband does most of the ironing. Her time is spent with the children watching television and reading and going for walks in the afternoon for approximately three or four kilometres". It is to be noted again, that there is no qualification of only hanging out clothes when her husband is not there. It is a simple and unequivocal statement.

82. On examination there was no swelling or tenderness in the neck region and no head tilt, further she demonstrated a full range of neck movements.

83. He indicated again, that she was without neurological impairment but, added that there was no evidence to suggest impaired function of her spinal cord or with nerve roots of the brachial plexus.

84. In his evidence in chief, he said he could find no physical diagnosis for the symptomatology and was unable to come up with any explanation in relation to the ongoing symptoms. In relation to the injury alleged to have occurred on 9 May 2003, he said that he did not know what to make of it but, he did not think that she had injured herself on that day. He said he was unable to identify anything that could cause the pain of which she complained and her symptoms were not consistent with any condition which he could recognise. He could not identify any organic cause for the symptoms. He reiterated that there was no basis on which she was unfit to return to work, in his view. His memory was not clear in relation to the actual statement made concerning the hanging out of clothes (transcript 139) but, of course one has to look at that facet of the evidence in conjunction with its manifestation in

other areas to come to a conclusion, which seems almost irresistible, that with him as well, the worker was at pains to exclude from activity indulged in by her, any hanging out of clothes at any time.

85. Acting Professor Burns was then cross examined by Mr Waters QC, who was at pains to try and disqualify him from expressing an opinion in relation to any aspect of medicine, apart from, his speciality as a consultant neurologist. He could not get the professor there. His evidence was that even where he excludes a neuropathic cause for pain symptomology, when he sees someone with pain in real life, it is necessary to consider alternative causes, even if they do not discretely fall within the area of his speciality. He conceded that soft tissue injuries per se, were outside of his speciality area, and conceded as he had to, without memory of the specific words, that the worker may have qualified hanging out the clothes by referring to that activity occurring when her husband is absent. Bear in mind the Court's remarks above. He said that he no established reason to suggest that the worker had not been honest in providing him with a history. That of course does not exclude this Court finding she had been dishonest.

86. He was then re-examined by Mr Grant and he reiterated that as a neurologist excluding neurological cause, he nevertheless looked for a cause of pain generally and attempted to make a diagnosis from the nature of the symptoms described, not discretely or exclusively from a neurological perspective. He said that as a diagnostician he dealt with pain of all sorts, and that it included a consideration of a soft tissue injury existing. The Court then permitted further cross examination arising out of Mr Grants' re-examination by Mr Waters QC. He said that he had looked for a physical cause not confined to neurology. That he could professionally asses the joint or any other part of the body for the existence causing of pain but, "I cannot explain her pain on the basis of any physical disorder" (transcript 151).

FINDING IN RELATION TO ALLEGED INJURY AND / OR INCAPACITY FOR WORK

87. Purely for the purposes of ease of comprehension, the Court restates as paragraph 9 of the workers statement of claim, asserts that:-

    a. throughout the course of undertaking her various rehabilitation plans;

    b. particularly on 14 March 2002 and 9 May 2003, the worker suffered "recurrences and / or an exacerbation or aggravation of her injuries" in the course of her employment and alleges total incapacity on dates specified but continuously since 21 August 2003.

88. In relation to those allegations in its defence, the employer denies them save for admitting the worker was absent from work on the specified dates. Paragraph 9 of the defence specifically denies that on or about 14 March 2002 and 9 May 2003, the worker suffered the recurrences, exacerbation or aggravation as alleged and denies that the worker was totally or partially incapacitated on the dates, as alleged. Although, it was pointed out by Mr Waters QC, the concluding sentence refers to the worker being fit to return to pre-injury employment since 9 May 2003, it is clear, on a proper construction of the way the case was run, that the employer is asserting such a state of affairs, existed continuously from 14 March 2002.

89. The Court finds that the onus of establishing the advent of the alleged recurrences, exacerbation or aggravation rests upon the worker as does the task of proving that the worker was totally incapacitated on the date specified and continuously since 21 August 2003. It is trite that the onus to be discharged by the worker is to establish these matters on a balance of probabilities.

90. Conversely, in respect of the issue of establishing that the worker did not suffer from any injury within the meaning of the Act after 14 March 2002, or alternatively that any injury from which she did suffer, did not incapacitate her within the meaning of the Act, the onus to be discharged by the employer is on a balance of probabilities.

91. Examining the medical evidence, which has already been traversed, the Court finds firstly, that if any injury at all was suffered on 20 May 1999, which is certainly not without some doubt, she suffered a soft tissue injury, either musculo-skeletol or musculo ligamentous, in any event, a minor injury. Secondly, that as at 26 October 1999, but certainly by 14 March 2002, the worker had a full range of movement in the left shoulder, muscle power and sensation having returned to normal. Insofar as that injury may have been an injury as defined in the Act, it is this Court's observation, that because payments were made, a graduated return to work program engaged, and a claim accepted under the Act, they do not prove, either, that there was a compensable injury under the Act, which occurred on 20 May 1999, as alleged, or that if there was, the worker was thereby incapacitated.

92. Had the worker pleaded by way of reply or in her original statement of claim, an estoppel by conduct and successfully established same, in relation to those matters, the position may have been otherwise. That, however, did not occur. In the event, the employer, by its defence, does not put those matters in issue and bearing in mind the Court's qualification of what is specifically pleaded in paragraph 9 of its defence, the Court construes the case of the employer to be, that it denies the existence of a compensable injury existing on or after 14 March 2002, which includes the claim of 9 May 2003, and, includes the denial of the continuation of an injury totally incapacitating the worker for work since 21 August 2003 and currently. So, also, is it construed, that further and in any event, if there was such an injury, the denial then extends discretely to a denial of concomitant incapacity under the Act.

93. As an overview, specific statements already having been made in respect of discrete aspects of the worker's evidence, the worker was a wholly unimpressive witness, her constant lack of recall, being, in this Court's finding, tailored and convenient but, incredible having regard to the lengthy history of the matter and the prosecution of her claim, coupled with the numerous medical examinations to which she subjected herself or was compelled to attend.

94. In relation to her activities, revealed in the video tapes, Exhibits R3 and R4, video R3 is in relation to activities observed on 7 April 2004, 9 April 2004 and 11 April 2004.

95. Exhibit R4, the second video, is activity of 21 October 2005 and 22 October 2005, as already pointed out, what is significant is the engaging in activities such as hanging out washing, which together with the other activities, the subject of earlier comment, was in this Court's finding, the subject of falsehoods when giving her history to all of the medical specialists referred to.

96. As also already recorded, Dr David Millons indicated that if he had been given information of the type outlined to him by Mr Grant and depicted on the video entailing shopping without assistance of her husband, two or three times a day picking up and putting down of Gabriel, hanging out the washing, and subsequently removing it, these activities being engaged in for over half an hour at a time, without any form of limitation or favouring of the left arm, he would have doubted the worker's veracity. That doubt is a doubt which this Court entertains most cogently.

97. It is this Court's conclusion, that the worker, deliberately and carefully tailored her history to each of the doctors and explicitly informed them or lead them to believe amongst other activities:-

a. that her husband had to assist her with <u>all</u> her shopping;

b. that she had nothing at all to do with the laundering and hanging out of clothes, those matters being dealt with exclusively by her husband.

98. Of course, when confronted with the video evidence, she then, by way of necessary invention, changed her position to contend that she either had said, or always had meant, that she refrained from the activities in question unless her husband was unavailable, in which instance, she was compelled to perform the activities. There is no evidence, either from her or from her husband, as to the precise periods of his absence, if, indeed he was absent at all. Such a history is absent from all the admitted medical evidence.

99. Her husband's evidence is both partisan and vague and assists her case not at all.

100. No medical specialist is able to find any organic cause for her alleged continuing pain symptomology, which symptomology is not consistently described by her, either to the medical specialist or the Court, and varies from constant and unceasing, unremitting pain to intermittent and decreasing pain, depending upon the question put to her and the whim of the worker.

101. There is no identified medical organic cause found to exist, either for the existence or continuation of such symptoms on and after 14 March 2002, or at all, assuming that indeed they ever existed.

102. All of the medical evidence is to the effect that at worst there is deconditioning of muscles relating to full arm extension and rotation. There is no apparent reason for the continuation or continued existence of any symptoms.

103. It is the unanimous conclusion of all the medical experts that the swelling, which the Court observed existed, was not attributable to any soft tissue injury which may have been sustained on 20 May 1999 but, rather to some posture adopted by the worker, or perhaps to other causes not identified,

such as scoliosis. In any event, not to the alleged injury on 20 May 1999 at all.

104. It is this Court's conclusion that the only residual problems that the worker maybe suffering from, is what the doctors have described as deconditioning, a situation which arises as a consequence of muscles not being used. The only way the incidence of stiffness and pain, which use of the left arm and shoulder may generate, can be overcome is by continued movement, exercise and physiotherapy but, the point is the deconditioning is not an injury within the meaning of the Act, or if it is, it is not an injury which amounts to incapacity, in terms of the Act.

105. The worker has not established the existence of those claims which may have amounted to primary applications arising out of the alleged exacerbation etc on 14 March 2002 and / or 9 May 2003 and having failed to prove on a balance of probabilities any entitlement, both claims are dismissed.

106. Insofar as the negation of any compensable injury on or after 14 March 2002 is concerned and /or alternatively the negation of any such incapacity during such period is concerned, this Court finds that the onus of proving such negation, reposing as it does on the employer, has been discharged and consequently the application by the worker made on 26 March 2004 to the Work Health Court fails.

107. There will be judgement in favour of the employer, the judgement being that the worker's claim is dismissed with costs.

108. Insofar as costs are concerned, it has been agreed between the parties that the unsuccessful party will pay to the successful party in the absence of agreement, costs to be taxed at 100 per cent of the Supreme Court scale and that order is consequently made.

Dated: 19 December 2005

DAVID LOADMAN
STIPENDIARY MAGISTRATE