

CITATION: *Hamilton v Northern Territory of Australia* [2006] NTMC 027

PARTIES: CRAIG HAMILTON

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20505395

DELIVERED ON: 31 March 2006

DELIVERED AT: Darwin

HEARING DATE(s): 8 March 2006

JUDGMENT OF: Mr H B Bradley CM

CATCHWORDS:

WORKERS COMPENSATION--WORK HEALTH--INJURY—EARNING
CAPACITY

Normal Weekly Earnings – relevant date when there is a series of injuries

Work Health Act 1886 (NT) s 53, s 65

Northern Cement Pty Ltd v Uni Ioaser NTSC unreported 17 June 1994

REPRESENTATION:

Counsel:

Worker:	Ms S Gearin
Employer:	Mr B Macmanamey

Solicitors:

Worker:	Ward Keller
Employer:	Cridlands

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 027
Number of paragraphs:	28

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

No. 20505395

BETWEEN:

CRAIG HAMILTON
Worker

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Employer

REASONS FOR DECISION

(Delivered 31 March 2006)

Mr H B BRADLEY CM:

1. In this matter the worker Mr Craig Hamilton was at all material times and still is employed by the Northern Territory as a Police Officer. His substantive rank at least from 1994 until the present time is that of Senior Constable. He was, at least until March 2001, mostly engaged in the operational duties of a Police Officer namely those duties which could involve physical confrontations with members of the public.
2. On the pleadings and the evidence before me there were four events relevant for the purposes of this claim each of which has resulted in at least temporary incapacity. On or about 30 June 1990 the worker sustained a dislocation to his left shoulder in the course of arresting a person as a result of which he made a claim for compensation which was accepted by the Northern Territory. Again on or about 15 February 1991 the worker sustained a further dislocation to his left shoulder and again made a claim for compensation which was accepted by the Northern Territory. On 17

October 1994 the worker sustained a third dislocation of his left shoulder during the course of carrying out his duties. Once again the claim was made for compensation and this claim was accepted. After each of these incidents the worker received treatment, sometimes surgical treatment, and returned to his employment as an operational Police Officer.

3. On or about 7 June 2000 the worker again suffered an injury but on this occasion the injury or incident which caused pain was due to the otherwise innocuous motion of pulling a notebook from his left breast pocket with his left hand. When he carried out this action he experienced sudden and severe pain in the shoulder as asserted in paragraph 10(a) of the defence filed on behalf of the employer. A short time after sustaining this injury and after seeking medical treatment the worker returned to his duties at the Katherine Police Station and worked as an Acting Sergeant carrying out operational duties. There is some doubt about the precise period he was so acting and no evidence was given of the actual duties carried out. Subsequently, after ongoing medical visits and treatment in March of 2001 it was recommended that the worker cease carrying out operational duties and since that time alternative employment has been found for him within the Police Force.

The Issues

4. Whilst the worker has been paid compensation in respect of each of the periods off work and, no doubt for his medical treatment a number of issues arose between the parties. Initially the issue that arose was the question of whether or not the value of the free accommodation provided to the worker should be taken into account for the purpose of calculation of “normal weekly earnings”. Following the instigation of proceedings and as the pleadings were finally agreed the issues have been reduced and both Counsel have agreed that at least for the time being the Court is asked to determine the following matters;-

- 4.1 whether the relevant event/injury to be used for the calculation of benefits post 2000 is the event of 17 October 1994 or the event of 7 June 2000,
- 4.2 given that the employer now concedes that the value of free accommodation to the worker, is to be included in the calculations of “normal weekly earnings”, what was the value of that accommodation in either 1994 or 2000, and
- 4.3 whether the agreed fact that the worker was engaged by the Police Force in the capacity of a Brevet Sergeant for some months after the final injury but transferred after complaint should be treated as an indication of his present “capacity to earn” for the purposes of calculating his entitlements to weekly compensation.

Date of Entitlement

- 5. In respect of the first issue it needs to be recognised that s 53 provides the mechanism for application to be made for injuries at work. The section reads:

“53. Compensation in respect of injuries

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”.

- 6. Given that “injury” is defined to include “The aggravation, acceleration, exacerbation, reoccurrence or deterioration of a pre-existing injury” the effect of the section is that whenever all the requirements for the payment of benefits are met a new claim arises. This includes the situation of a series

of injuries during employment with one or more employers. In this claim there is only one employer and the question is which injury is the worker entitled to use as the basis of his undoubted entitlement. To be relevant on an ongoing basis a second or subsequent injury must have more than a transitory effect otherwise a workers rights would refer back to the pre-injury position. See *The Darling Island Stevedoring and Lighterage Co Ltd v Hankinson* (1967) 117 CLR 19 at 23 – 25 for discussion on this topic. In this case the date of the injury giving rise to entitlement is important to the parties because it affects the calculation of Normal Weekly Earnings and thereby the quantum of payments.

The Evidence

7. Most of the evidence in this case related to the issue of whether or not the worker was incapacitated as a result of the combined effect of the first three injuries and ongoing and progressive arthritis or whether there was a fresh injury in 2000 which precipitated an entitlement to a fresh claim for ongoing compensation. In the pleadings the employer seeks a ruling that the worker's entitlement to compensation arises in relation to the time of the injury sustained either in 1990 or alternatively 1994. There was no emphasis placed on the state of the shoulder after the 1990 injury and no submissions were made that I should make a finding that the 1990 injury should be used as the basis for calculating current entitlement. The employer's submissions were directed towards finding that the real and underlying cause of disability for Mr Hamilton is the combined effect of the first three injuries and the resultant arthritis which was very graphically described following the investigative procedures carried out by Dr Goldberg in 2001. The employer says that the incident on 7 June 2000 resulted in temporary incapacity only and that when Dr Goldberg finally recommended against continuing operational duties in March of 2003 the real reason for that recommendation was the changes to the geometry of the shoulder as a result of the first three injuries, surgical intervention and progressive

arthritis. The employer says that the temporary exacerbation of June 2000 ceased after a time to be of any effect in relation to the worker's capacity to undertake employment on a fully operational basis. The worker argues that the injury in June 2000 had permanent consequences sufficient to sustain an entitlement to make a fresh claim under the Act and that that therefore should be the date upon which normal weekly earnings are calculated for the purposes of ongoing benefits. Not surprisingly given the respective positions of the parties I am informed that the calculation of normal weekly earnings at June 2000 will result in a higher figure than if those same calculations were made in respect of the conditions of employment as at 17 October 1994.

8. The evidence on this issue consists on the evidence of the worker and the various Doctors whose reports were presented and who gave evidence during the course of the proceedings.
9. The history in so far as it relates to medical issues can be shortly if not completely summarised as it was by Dr Olsen and Mr Shailand in their reports dated 14 November 2005 and 28 December 2005.
10. Mr Hamilton sustained a dislocation of his left shoulder on 30th June 1990 when he was apprehending a suspect. He made a good recovery after treatment and returned to employment. After the second dislocation on the 14th February 1991 he noticed that there was a tendency for the shoulder to spontaneously dislocate while carrying out home duties etc. As a result he was referred to Dr Schmidt an Orthopaedic Surgeon in Alice Springs who performed surgery on the shoulder. After return to work there were some ongoing problems which persuaded Dr Schmidt to remove a staple which was considered to be causing an impingement. Following this removal there was significant improvement in his shoulder and he returned once again to full time duties. He continued at work until the third incident on 17th October 1994 when the shoulder was again dislocated. On this occasion he

was referred to Dr Baddeley and surgery was conducted by him on 9 February 1995 and 21 September 1995. Following this surgery and physiotherapy he was once again returned to operational duties. The date of such return is not clear from the evidence before me but it would seem that it is likely that this occurred towards the end of 1995 or early 1996. He had no further medical treatment until the incident of June 2000 when he felt pain as a result of removing his notebook from his left breast pocket. The nature of that injury and its aftermath is what is principally in dispute. Apparently Dr Baddeley advised that there was little further that could be done and that the problem was likely to continue. Mr Hamilton, not satisfied with that advice, continued to see his GP Dr Brummitt who arranged for him to be seen by a Sydney Orthopaedic Surgeon Dr Goldberg. Dr Goldberg saw Mr Hamilton in October 2000 and again on 13 February and 20 March 2001 when an arthroscopy was carried out. The arthroscopy revealed some instability and significant arthritis resulting in a recommendation that the worker should only be doing light clerical work and he should never return to heavy work again. Following that recommendation there were some difficulties for the worker arising out of the type of work he was assigned. These difficulties were associated with depression but this was overcome and he subsequently returned to work and still is employed by the Northern Territory Police. He continues to take anti-inflammatory drugs and painkillers. He is restricted in the type of duties he can undertake and will never return to full operational duties. The evidence is that the shoulder will continue to deteriorate ultimately probably requiring a total joint replacement.

11. In the worker's evidence he was not sure of the precise dates which he carried out certain duties at the Katherine Police Station and whilst the evidence is still unclear in any precise way it seems that at the time of the incident in June 2000 he was carrying out duties as an Acting Sergeant on a higher duties allowance. In cross-examination he accepted that it was

possible that he returned to the duties of Acting Sergeant on an operational basis until March 2001 when Dr Goldberg's recommendation took effect. At that time, namely March 2001, he ceased work as Acting Sergeant and was put in charge of the cells of the Courthouse in Katherine and has never carried out any further operational duties which were likely to involve him in physical altercations. The employer argues that this return to operational duties between June 2000 and March 2001 is an indication of the fact that he was not incapacitated for the purposes of s 65 of the *Work Health Act*. The employer argues that it is the underlying arthritic problem diagnosed by Dr Goldberg in March 2001 that is the real cause for the ongoing claim for compensation.

12. Dr Baddeley, the treating Surgeon both before and after the incident in June 2000 opines in his report dated 19 September 2002 that:

“When seen on 4/9/00 he felt he was managing better and whilst he was reluctant to live with any discomfort he did feel that he was able to live with it... and I advised him against further surgery at this stage. I advised him that further physiotherapy was indicated...I believe that this gentleman has ongoing low-grade rotator cuff problems following further injury on 7/6/00...I believe that this condition is consistent with the history given...I believe that Mr Hamilton's injury is an aggravation of a pre-existing rotator cuff problem and that without these he would not have his present problems...it is unlikely that there will be any permanent restrictions although final opinion concerning this cannot be made for at least one year. Temporary restrictions on his capacity to perform normal full police duties are present currently and are likely to continue for a period of six weeks. During this time he is only fit to perform light sedentary work. These restrictions are a direct result of the injury of 7/6/00...it is not possible to be certain when Mr Hamilton will be symptom free but I would anticipate that he would be significantly improved in six weeks time. In the early stages following injury it is not possible to fully outline long term prognosis...I would anticipate that he would be fit to perform the majority of his work at that time but further assessment would be necessary should he not be able to do so”.

13. Regrettably it seems that Mr Baddeley's optimism was not justified and he was never again consulted by the worker or those who advised him. After

the 2000 incident the worker also consulted Dr Brummit the General Practitioner at Katherine and his records disclose ongoing concerns with regard to his left shoulder injury. References are made to this injury in his notes dated 8 June 2000, 21 June 2000, 11 July 2000, 1 August 2000, 7 September 2000, 16 October 2000, 27 November 2000, 15 January 2001 and 5 April 2001. This seems to represent a significant escalation of his condition when compared to the 4 years prior to 8 June 2000. It was during the course of these ongoing visits to Dr Brummit that arrangements were made for him to be seen by Dr Goldberg in Sydney. In the various reports from Dr Goldberg he commented in October 2000:

“He was doing reasonably well with intermittent symptoms until a few weeks ago when he pulled a book out of his pocket and developed **impingement syndromes** and some **bruising down his shoulder**. He denies any instability symptoms he has had a cortisone injection but no other treatment. His present symptoms are those of impingement rather than instability...shoulder movements are slightly restricted and power was normal. The impingement sign was positive. The anterior relocation and anterior apprehension signs were positive...I believe that Mr Hamilton has an unstable left shoulder but his symptoms are due to impingement.

(In February 2001 he said)...he is still getting impingement and now instability symptoms despite a lot of further physiotherapy...apart from putting up with the patients condition his only other option is to consider an arthroscopy of the shoulder and possible subacromial decompression. The arthroscopy is the only way to determine whether anything more can be done to relieve his shoulder.

(On 26 March 2001)...gleno-humeral arthroscopy revealed severe grade IV changes about the humeral head which were extensive. There were grade II changes to the glenoid. The labrum was frayed and there was a Buford complex but no discrete labral tear. There were grade II changes on the deep surface of the supraspinatus...though the patient still has an element of instability there is no doubt in my mind that the patient's pain is coming from arthritis from the gleno-humeral joint....There is little doubt in the future he will require a joint replacement.

(and on 25 July 2001)...he advised me that he has had intermittent problems since his last surgery and on 7 June 2000 when he pulled a

book out of his pocket in the course of duties at work he abducted his arm and began experiencing increased shoulder pain. He had been treated with an injection. When I reviewed him he complained of pain about the shoulder which was worse with overhead movements and woke him at night. There was associated weakness and loss of motion. The patient also advised me that he had a significant catching sensation about the shoulder. On examination his left shoulder was wasted and there was a delto-pectoral and superior scar, he was tender about the joint line. Shoulder movements were restricted...I felt the patient had instability within the left shoulder with impingement and also suspected that he had some underlying arthritis...I advised the patient that he had arthritis of his left shoulder and a mild instability and advised him to accept his shoulder as it was and exercise. I did not feel there was any potential to improve him with further surgery at this point in time.... This condition can be related to all the injuries in question and his two operations. I cannot distinguish which of the injuries and which of the operations has caused most of the problem....The patient's prognosis is guarded".

14. The findings described in the report of 25 July 2001 are on the evidence significantly more severe than what would appear to have been the situation in the years leading up to the 2000 event.
15. Dr Johnn Olsen saw Mr Hamilton for medico-legal purposes and provided reports dated 14 November 2005 and 13 February 2006. He further gave evidence at the hearing via videoconferencing facilities. In his reports Dr Olsen opines:

"The work related dislocations of 30 June 1990 and 14 February 1991 were instrumental in setting up what became a pattern of further dislocations that required further surgical intervention...In my opinion Mr Hamilton is not fit for operational work as a Police Officer. He is however fit for work that does not involve apprehending suspects and offenders and work that does not involve wrenching or forceful movements of his shoulder, he also in my opinion should avoid heavy lifting and in particular should not lift more than five kilos using the left shoulder and should not perform any lifting or exertion where the shoulder is in a forward, flexed or lateral abducted position...Mr Hamilton did not display any tendency to exaggeration or embellishment, the prognosis is as stated by Dr Goldberg...where however an event has been recorded as significant as the event of 7 June 2000, then in my opinion that becomes one of

the relevant causative events which have all contributed in a permanent sense to the degenerative condition moving from its initial status when the first dislocation occurred to where the condition is at the present time. In my opinion it would not be proper to dismiss the incident of 7 June 2000 as merely a transient or temporary aggravation. In my opinion it should be viewed as one of a significant number of events which have all contributed to the progressive nature of the left shoulder injury...(on 13 February 2006)...finally it is not possible to be adamant on this matter, I can only reaffirm that based on the above discussion it is my opinion that the incident of 7 June 2000 was significant and did materially contribute to the eventual outcome of pain, impairment and disability in the left shoulder”.

16. In his Evidence in Chief before the Court Dr Olsen confirmed that it was the injury in 2000 that was the one that finally incapacitated him from being able to work as an operational Police Officer. During cross-examination he further confirmed that Dr Goldberg’s finding that the incapacity was the result of the total of all of the inputs; that is of the accidents and operations that had occurred since 1990. He was asked about the tearing sensation reported by the worker and indicated that could indicate damage to some of the surgical repairs or some other aspect of the shoulder. I note in passing that Dr Goldberg had noted bruising being reported at the time when he first saw Mr Hamilton. The Doctor agreed that to decide whether or not an injury is permanent or temporary you should look at the symptoms to see whether they were genuinely increased as a result of the incident that occurred. If the increased symptoms remain then there was permanent incapacity, if not then that incident might not have led to permanent incapacity. The Doctor was then advised of what I understand to be the agreed fact that Mr Hamilton had returned to operational duties between June 2000 and March 2001. The Doctor then agreed that the aggravation might be temporary if he had returned to work. He said the real test was whether he was able to return to similar work. The Doctor was asked to presume that in October 2000 Mr Hamilton returned to full operational duties for five months. If such a presumption was accepted the Doctor agreed that it could be that the aggravation was only a temporary aggravation. Later in re-examination the

Doctor noted that his history of tearing was consistent with that of Dr Baddeley and he reiterated a view that I think is consistent through most of the medical evidence that each insult has had a cumulative effect on the overall condition. He agreed that the injection and anti-inflammatory administered by Dr Baddeley could explain the feelings of improvement and his ability to return to employment.

17. For the employer, Dr Matthew Sharland an Orthopaedic Surgeon from Darwin Private Hospital was called. He was called solely for medico-legal purposes and saw Constable Hamilton for an hour on 21 December 2005. He obtained a similar history of the incidents occurring in 1990, 1991, 1994 and 2000. In his report dated 28 December 2005 (Exhibit 15) he opines:

“ that his current disability is a consequence of all of the dislocation and subluxation events that he has had, and in addition secondary to the multiple operative procedures...(In respect of 7 June 2000)...He does actually describe being in an abducted position and moving into external rotation, which is consistent with a further instability event. Because the pain was felt in an unusual position for him, being in the postero-superior aspect of his shoulder, one would suggest that this pain was most likely because of the specific gleno-humeral joint pathology relating to his arthritis, which perhaps had not been as symptomatic previously....He did not dislocate his shoulder at this time as he had done previously but rather had the onset of severe posterior pain which he had not had before. As described above, this suggests to me that a dislocation did not occur, but that the pain was from subluxation which led to a specific aggravation of the underlying osteoarthritis...Given that the problem is cumulative damage leading to degenerative arthritis, I do not believe that the incident of 7 June 2000 specifically added to the current condition. I believe his shoulder would essentially be in the same condition now regardless of the incident of 7 June 2000”.

18. It is clear that Dr Sharland who saw the worker in December 2005 reported that the principal perhaps only cause of his current incapacity is the arthritis to the shoulder. This opinion would appear at least in part to be due to his report of the history to the effect that the worker did not return to operational duties after the operation of 21 September 1995. This does not seem to be the fact. He did however accept in evidence and indeed in chief

that the incident of 2000 would be one of a number of events causing small incremental changes in the total history. Further in cross-examination he agreed that while the incident of June 2000 increased the symptoms of arthritis at that time it was not necessarily the final insult to a vulnerable shoulder. He said that each of the insults were incremental. He said that his tests showed a very unstable shoulder and that the limitations of movement measured by him were all consistent with the present degree of arthritis as described by Dr Goldberg.

19. Whilst no-one can absolutely be sure about some of these things it appears to me that it is more likely than not that the incident of June 2000 did add to the incapacity in a material and permanent way. The reasons for this are that:

- 19.1 Following the June 2000 injury the worker maintained contact with the medical profession in a way which was quite different to the four years immediately preceding it. He continued to complain of difficulties, was not prepared to accept Dr Baddeley's advice that there was nothing that could be done to improve the shoulder and thereafter sought the further opinion of Dr Goldberg and submitted himself to operative treatment to see whether anything could be done. All this indicates a significant increase in symptoms subsequent to June 2000 and such an increase it seems was evident notwithstanding his desire to return to operational duties (something which I can understand any reasonably young policeman would prefer).

- 19.2 The opinions reached by Dr Baddeley are firm and he was the treating Surgeon both before and after the injury of June 2000.

- 19.3 Dr Olsen's views substantially supports the workers case and the concession reamed out of him in cross-examination was premised on the bald assertion that he return to full time operational duties during

the period between June 2000 and March 2001. Such questioning did not put the full situation including the ongoing problems with Dr Brummitt and Dr Goldberg into perspective.

19.4 That while Dr Goldberg never stated (perhaps was never asked) that the June 2000 incident was the final insult leading to an incapacity to undertake operational duties his opinion and the way which he expressed it is not inconsistent with the views of Dr Baddeley and Dr Olsen.

19.5 Dr Sharland's views were premised on the fact that there was a return to a state similar to that which had been prior to June 2000. Whatever the history was that he obtained it was not really consistent with the ongoing visits to Dr Brummitt and to some extent must be put in question for that reason. He also seems to be saying that whatever was the case in respect of the June 2000 events his condition would now be similar or at least he would be unable to carry out operational duties simply because of the progressive arthritis. That is not necessarily the determining point in this case. The fact is that subsequent to that injury and while he was still complaining of incapacity as a result of the June 2000 incident he ceased work as an operational Police Officer and has never returned to it. Dr Sharland also has accepted and has said that the incident of June 2000 was one of all of the progressive insults to the shoulder which has resulted in his current condition.

19.6 The temporal connection of the 2000 injury, the increased complaints and medical attention leading to the recommendation to cease work is hard to reconcile with the view that this increased incapacity was due only to the onset of osteoarthritis.

20. For the above reasons therefore I find on the balances of probabilities that for the purposes of the *Work Health Act* the worker does have, as a result of

the incident in June 2000, an impairment or partial incapacity for work. Such a finding does not preclude the finding that his present past incapacity is also a result of the injuries sustained in 1990, 1991 and 1994. What it means is that his present entitlement under the *Work Health Act* is an entitlement which arises under the June 2000 injury and it is the date of that injury that ought to be used for the purpose of calculating his ongoing entitlement.

21. Subject to the value of his accommodation the question of his actual entitlement is, I am told by the parties, a matter which is capable of being calculated by them having regard to his particular facts and his earnings as at 7 June 2000. Of course it will be necessary to establish that his current earnings or earning capacity is less than that figure before any entitlement under the Act will arise and further orders will have to be made in respect of that at a later date.

Accommodation

22. It is agreed between the parties that the value of the accommodation provided to the worker is part of the normal weekly earnings for the purpose of the Act. I have been asked to determine, on the evidence before me, what that value is. Given my findings above the relevant date for the purpose of such a finding is 7 June 2000. The evidence touching upon that question consists of the evidence of Mr Copeland the valuer now living in Alice Springs whose report was tendered and who reached the view that the appropriate valuation, namely the value of the unfurnished housing commission accommodation provided to Senior Constable Hamilton in Katherine was \$210 per week. That valuation is criticised by the employer on the basis that there were no proper figures for actual commercial rentals available to the valuer for the year 2000 and that he extrapolated from subsequent rentals in respect of properties that were of a dissimilar nature. The valuer's response was that he took those differences into account and

used a valuer general comparison of rents in 2000 and 2001 to show that there was no real change during the relevant period.

23. The employer tendered a billing statement (Exhibit 13) to show that the actual rent paid by the police force for the housing commission premises was \$144 and that that, if not prescriptive of the actual value of the accommodation, was at least indicative that something less than \$210 was an appropriate figure.
24. In my view a rental paid by one arm of Government to another for the purposes of provision of housing accommodation for a public servant is not indicative in any way of the commercial value of such premises or of the value to the worker. It is simply an accounting entry by one arm of Government to another. In the event whilst the opinion of Mr Copeland might be criticised by the employer it is the only evidence available to the Court and the employer has not chosen to tender any alternative valuation evidence. In the circumstances I find that the appropriate value of the premises provided to the worker as at 7 June 2000 was \$210 per week.
25. In case the views reached by me as to the appropriate date for which benefits should be calculated are changed in another jurisdiction I indicate that in relation to the accommodation provided in 1994 that the only evidence once again available to me is the evidence of the expert provided by the plaintiff namely Mr Mark Harris who reached the view that the appropriate evaluation be given to the property as \$190 per week. His valuation process was much less criticised by the employer and the employer relied only on the fact that the Valuer General is documentation indicated a base range of \$190 per week. It was argued that if this was an average (and that was not proved) and there must be something lower available in respect of housing commission premises. The employer's submissions are based on conjecture in this regard and in the circumstances I once again rely on the evidence of the worker's expert and find that if the date for the valuation of

accommodation is to be 1994 then the appropriate valuation is \$190 per week.

Employment as Brevet Sergeant

26. The final point which the parties have asked me to decide is the issue of whether or not the worker's employment as a Brevet Sergeant at the training centre is an appropriate basis for estimation of the workers capacity to earn. The facts are that the worker applied for a position at the Police training centre post 2000 and was successful. He said that this was a Brevet Sergeant position where he gets to wear the rank insignia of Sergeant and was paid as a Sergeant. He said a Sergeant is usually attached to that position and he performed that work with no significant difficulties arising because of his shoulder condition. It seems that a complaint was made about his conduct which was then investigated. Following the investigation and partial substantiation he was transferred out of the Brevet Sergeant position and subsequently worked as a Senior Constable again for the Police Force and is presently in the forensic branch as a Crime Scene Examiner. The worker accepts that but for the transfer out of the position he would have been able to continue in that position so far as his shoulder was concerned. The evidence as to what the position of Brevet Sergeant precisely is is rather scarce and there is no evidence available to me whether or not the position was permanently available or not. Further although the worker has conceded that there were complaints about his conduct I have no idea whether or not those complaints as to his conduct related to misconduct or his ability to carry out the duties for reasons other than the disability to his shoulder.
27. It is now established as law that where disability is proved with loss of earning capacity then the onus shifts to the employer to establish any higher capacity to earn than that admitted to by a worker – see *Northern Cement P/L v Uni Ioasa* (NTSC 17 June 1994, unreported [15]-[17]). In this case

whilst it was clear that for a period of time the worker was paid as a Brevet Sergeant, I do not have evidence satisfactory to me to show that he was guilty of misconduct of a type or nature that might militate against the worker so far as the obligation to minimise loss is concerned. I do not know whether the substantive position of Sergeant of Brevet Sergeant is still in existence or whether he would still be acting in those duties on a permanent basis. In such circumstances it is my view that the employer has not satisfied that the onus that it bears in this regard and whilst the pay which the worker received during the period he acted as a Sergeant will be taken into account for the purpose of calculating his entitlement that pay rate should not be used to establish current earning capacity.

28. In summary I find:

28.1 The relevant date for current calculations of Work Health payments is 7 June 2000.

28.2 The relevant value of accommodation is \$210. per week.

28.3 The workers temporary employment as a Brevet Sergeant is not the amount which he is reasonably capable of earning for the purposes of s 65 of the Act.

I will allow the parties time to consider these reasons prior to making final orders.

Dated this 31st day of March 2006.

H B Bradley
CHIEF MAGISTRATE