CITATION: *Gutte v Austral Contracting [2006] NTMC 50*

PARTIES:	DAVID GUTTE (Worker) v AUSTRAL CONTRACTING (Employer)
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health Act
FILE NO(s):	20425759
DELIVERED ON:	31 May 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	9, 10, 11 and 12 May 2006
JUDGMENT OF:	Mr V M Luppino

CATCHWORDS:

Work Health – Appeal against decision to cancel weekly payments – Onus of proof -

Interest for late payment - Penalty interest

Work Health Act (NT) ss 69, 89, 109.

Ju Ju Nominees v Carmichael (1999) 9 NTLR 1; Alexander v Gorey (2002) 171 FLR 31; Wormald International (Aust) Pty Ltd v Aherne, Supreme Court, Mildren J, 23 June 1995; Passmore v Plewright (1997) 118 NTR 28; Pengilly v Northern Territory of Australia (No3) (2004) 14 NTLR 1.

REPRESENTATION:

Counsel:

Worker:	Mr Priestly
Employer:	Mr Christrup

Solicitors:

Worker:	Priestleys
Employer:	Hunt & Hunt

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 50
Number of paragraphs:	112

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

No. 20425759

BETWEEN:

DAVID GUTTE
Worker

AND:

AUSTRAL CONTRACTING
Employer

REASONS FOR DECISION

(Delivered 31 May 2006)

Mr V LUPPINO SM:

BACKGROUND

1. Following termination of the Worker's weekly payments by the Employer pursuant to section 69 of the Work Health Act ("the Act"), the Worker commenced proceedings in this Court exercising the right apparently conferred by section 69(1)(b)(iv) of the Act, to appeal that decision.

2. The Statement of Claim alleges that the Worker sustained an injury in the course of his employment on 12 August 2003. That an injury was suffered is admitted by the Employer. The Worker's Statement of Claim pleads injuries comprising:

   a. an annular tear of the L4/5 disc;

   b. meralgia paresthetica;

   c. psychiatric sequelae.

The Worker claims ongoing incapacity for work. The Employer admits only that the Worker sustained a back injury, but not the claimed incapacity for work.

3. The Employer initially accepted the Worker's claim and commenced payment of weekly benefits. Following receipt of certificates for the purposes of section 69(3) of the Act, one from Professor Burns, Neurologist, and the other from Mr Lewis, Orthopaedic Surgeon, the Employer served a notice on the Worker purporting to cancel his weekly payments pursuant to section 69(1) of the Act. Relevantly that notice provided:

> "As a result of their understanding of medical opinions the Employer and Insurer are of the view that you were incapacitated for work as a result of the injury but you are no longer incapacitated at all as a result of the work injury that occurred on 12th August 2003.
>
> Medical opinion by Mr Graham Lewis and Professor Richard Burns states that the work injury of lower back injury, that you suffered from the incident at work dated 12th August 2003, has now ceased to be a contributing factor to any ongoing incapacity that you now suffer.
>
> Attached to this notice is a copy of the medical certificate issued by Mr Graham Lewis – Consultant Orthopaedic Surgeon and Professor Richard Burns – Consultant Neurologist both dated 23rd September 2004, stating you have ceased to be incapacitated for work as a result of the work related injury.
>
> As a result of these medical certificates dated 23rd September 2004 issued by Mr Graham Lewis and Professor Richard Burns, we consider that you are able to earn equal to or greater than you're pre-injury earning of $1204.11."

4. Absent any claim for substantive relief by the Employer, the law is well settled in terms of where the burden of proof lies. The authorities, culminating in *Ju Ju Nominees Pty Ltd v Carmichael (1999) 9 NTLR 1*, establish that:

1. Where weekly compensation is to be cancelled by an Employer for the reason that the Worker has ceased to be incapacitated for work, a notice

given under section 69(1) must sufficiently state the reason and be accompanied by the medical certificate required by section 69(3).

2. The Employer carries the onus of establishing the change of circumstances warranting the cancellation or reduction of the amount of weekly compensation pursuant to section 69.

3. If the Employer asserts that the Worker has ceased to be incapacitated for work then it assumes the burden of proof.

4. If the Employer succeeds in proving an assertion that total incapacity for work has ceased, demonstrating a change in loss of earning capacity, the onus of proving any partial incapacity for work passes generally to the Worker.

5. If the Employer fails to establish the grounds stated in the notice, the effect of allowing the Workers appeal would be that the Employer would be required, by force of section 69, to continue to make weekly payments of compensation until lawfully permitted to cease or reduce those payments, either by giving a fresh notice or by making a substantive application under section 104 of the Act.

6. If the Worker has widened the scope of the issues for trial beyond an appeal under section 69, then the Employer is not confined to the grounds stated in the section 69 notice but can raise by way of answer any other ground to resist the claim if it wishes, including as to whether there was any injury in the first place.

The section 69 notice in this case makes it clear that the Employer asserts that there is no ongoing incapacity on the part of the Worker. The Worker has not widened the scope of the proceedings on the pleadings beyond an appeal against the decision made under section 69 of the Act. Additionally the Employer no longer seeks any substantive relief under section 104 of the Act. The onus is therefore on the Employer to prove all assertions in the

section 69 notice and the operative time is the date of service of the section 69 notice.

5. The Worker claims total incapacity from the time of the cancellation until approximately June 2005. At that time the Worker commenced employment with the Power and Water Corporation ("PowerWater"). The Worker was still in that employment at the time of the hearing. The Worker claims a partial loss from the date of commencement of that employment. The Worker's weekly income from employment at PowerWater varies according to overtime and sometimes exceeds, and sometimes is less than, his indexed normal weekly earnings.

6. The central dispute in the matter is whether the Worker is suffering a continuing incapacity for work as a result of the injury occurring on 12 August 2003. Matters which I was told are not in dispute and which I therefore find proven are:

    1. That at the relevant time the Worker was employed by the Employer as a mechanical services plumber.

    2. On 12 August 2003 and while lifting a piece of machinery known as a whacker-packer on to the back of a vehicle, the Worker suffered a back injury.

    3. The present value of indexed normal weekly earnings is $1,204.11.

    4. The section 69 notice was served upon the Worker on 1 October 2004.

7. Section 69 of the Act is central to the issues in this case. The relevant parts of that section are:-

> 69. Cancellation or reduction of compensation
>
> (1) Subject to this Subdivision, an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom it is payable has been given –

(a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and

(b) a statement in the approved form –

(i) setting out the reasons for the proposed cancellation or reduction;

(ii) to the effect that, if the worker wishes to dispute the decision to cancel or reduce compensation, the worker may, within 90 days after receiving the statement, apply to the Authority to have the dispute referred to mediation;

(iii) to the effect that, if mediation is unsuccessful in resolving the dispute, the worker may appeal to the Court against the decision to cancel or reduce compensation;

(iv) to the effect that, if the worker wishes to appeal, the worker must lodge the appeal with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2);

(v) to the effect that the worker may only appeal against the decision if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful; and

(vi) to the effect that, despite subparagraphs (iv) and (v), the claimant may commence a proceeding for an interim determination under section 107 at any time after the claimant has applied to the Authority to have the dispute referred to mediation.

(2) Omitted.

(3) Where compensation is to be cancelled for the reason that the worker to whom it is paid has ceased to be incapacitated for work, the statement under subsection (1) shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work.

(4) For the purposes of subsection (1)(b), the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced.

THE EVIDENCE

8. The Worker gave evidence and he gave a brief history of his employment with the Employer and of the nature of his duties and his responsibilities. Essentially he was engaged to undertake the Employer's Government contract for the maintenance of Government infrastructure in the Katherine Region. That work involved plumbing and maintenance predominantly working in remote communities. I would describe the nature of the Worker's duties as he described them in his evidence as heavy physical work.

9. The Worker described the events resulting in the relevant injury. He said that on 12 August 2003, in the course of the installation of an underground fire hydrant for PowerWater it was necessary for an excavation to be backfilled and compacted. He went to the PowerWater depot to obtain a unit known as a whacker-packer. He was alone at the time. Photos of the actual unit were put in evidence (Exhibit W1). It is approximately 1.5 metres high. The lower portion comprises a large metal base plate connected by a shaft to the motor fitted to the upper portion. The Worker estimated its weight as at least one hundred kilograms. On all the estimates given in evidence, the least it weighed was eighty kilograms.

10. The Worker described how he attempted to load the unit onto the vehicle. As he was alone, he said that he bent down, wrapped his arms around the shaft of the unit, lifted it up to his knees then turned towards the vehicle and attempted to raise the unit onto the vehicle. He says that he heard a loud noise in his back and contemporaneously felt the onset of severe pain. He said he dropped the unit and he fell to his knees. He said that he rested for fifteen minutes and then devised an alternative method to load the unit onto the vehicle. He said that he then took the unit to the site where other workers unloaded it, used the unit to compact the backfill and then reloaded it onto the vehicle. The Worker said that he then took it back to the

PowerWater depot where he unloaded it, again alone, by dragging it off the back of the vehicle.

11. He said that he then went home, laid down and took some pain relief. Things however did not improve and next day he consulted his general practitioner, Dr King who prescribed rest and ongoing pain relief. He said that more or less for the next three months he did little more than rest.

12. The Worker said he had discussions with Mr Duggan, the principal of his Employer, regarding possible light duties. There were no light duties available. That was not challenged. He described becoming frustrated, angry and sullen. He said that until then he had never had any significant period of unemployment and had never received any unemployment type benefits.

13. He described how he sourced some unpaid work at the Katherine Country Club. The work was of a light nature and for restricted hours. He also gave evidence as to how, through his association with a rugby club in Katherine he did volunteer work at the Katherine Show over a three day period in July 2004. The work was at a bar established by one of the local hotels at the Show. He said that this has been an annual event for a number of years and it was a major fund raising activity for his rugby club. He described the hours he worked, the type of duties he performed, how he accommodated his incapacity and how it impacted on his condition. The Worker continued the unpaid work at the Katherine Country Club until he received the section 69 notice. He said that concerns of the Katherine Country Club regarding legal liability lead to a contemporaneous cessation of his voluntary work.

14. He then applied for two government positions. Copies of both applications were put in evidence as Exhibit W3. He was ultimately successful in securing employment at PowerWater, albeit with some complications. Apparently he was offered a position by PowerWater but that offer was later withdrawn, ostensibly because of his ongoing condition. There is a certain

irony in that given that his weekly benefits were terminated on the basis that he had no ongoing disability. Leaving that aside, the Worker protested to various Government Departments and Ministers and officers at PowerWater. He finally succeeded in convincing the CEO of PowerWater to reverse the decision and was re-offered employment. He commenced employment in May 2005. He continues in that employment. His work is largely of a supervising nature, specifically the supervision of contractors engaged by PowerWater. The physical work he does is limited to light work. The vehicles that PowerWater uses all have necessary lifting equipment and all heavy work is done by contractors.

15. The Worker gave evidence of the discussions he had with Mr Lewis and Professor Burns. It is apparent that whether he has provided full and frank information to those doctors, specifically regarding his activities at the Katherine Show in July 2004, is a contentious issue. As became clear in subsequent cross examination, the Employer disputes that the Worker told those doctors of that and suggests that that was done specifically to influence their opinion as to his then state of his incapacity. The Worker said that he had disclosed his involvement at the Katherine Show to his case manager at the Employer's insurers, and to his rehabilitation provider. He says that this occurred prior to the examination by Mr Lewis and Professor Burns. No evidence to contradict this was called. Indeed it would appear that the arrangements for surveillance at the Show were made as a result of that disclosure.

16. Cross examination of the Worker for the most part centred on his activities at the Katherine Show in July 2004. There was extensive video surveillance during the three days of the Show on 16, 17 and 18 July 2004. The video surveillance also revealed that the Worker withdrew money from an automatic teller machine at approximately 8am on the morning of Saturday 17 July 2004. The relevance of that was in connection with an assertion which the Worker made in an affidavit sworn for the purposes of

an application for interim benefits. He there asserted that at the relevant time his condition prevented him from rising any earlier than 11am and the recorded observations are inconsistent with that.

17. A condensed version of the video was played and the video surveillance in its entirety was put in evidence (Exhibit E10). The condensed version was tendered as Exhibit E11. The condensed version shown at the hearing was over selected periods over the three days starting from approximately 1pm on the 16 July 2004 until approximately 6pm on 18 July 2004. The Worker is depicted in various situations and performing a variety of activities. Generally the movements of the Worker as depicted on the recording, when first viewed, do not indicate any restriction or discomfort. Those movements include walking, turning, twisting, bending, squatting and carrying a variety of items of varying weights. The last three motions assume a particular relevance given contemporaneous restrictions specified by the Worker's treating doctor.

18. Were it for these general motions alone, I would consider the video surveillance material to be inconclusive. Although no discomfort or restriction of movement was apparent, nonetheless I did not consider that the movements were generally inconsistent with a person with the level of disability described in the evidence.

19. I reviewed the video surveillance material at the conclusion of the hearing. The noteworthy events depicted on the video, having regard to the evidence which was to follow, were:

    1. He appears to walk briskly, at least on the first day and the early stages of the second day, and without restriction or discomfort. The briskness does drop off noticeably thereafter.

    2. On a number of occasions the Worker is seen carrying cartons of beer, (the evidence put the weight of each at approximately ten kilograms)

mostly carrying two cartons at a time, one in each hand. On one occasion he is seen to stack one carton on top of the other and to carry them in front of his body.

3. He is seen carrying bags of ice of two distinct sizes, breaking up the ice and then emptying the ice into eskies. Generally he carried two bags but on one occasion he is seen carrying two in one hand and one in the other hand.

4. He is seen to bend down under a perimeter rope which was strung at just below the chest level of the Worker. This occurred three times. Mr Lewis would later place much reliance upon this in particular to support his views as he said that this movement was clearly in excess of the Worker's claimed forward flexion restriction on examination. However on my view of the bend, it was not inconsistent with the history that the Worker gave to Mr Lewis. He does not bend fully as Mr Lewis claimed, certainly no more than would be required to reach mid shin level. Contrary also to the evidence of Mr Lewis the rope is not slung "low". Moreover, the Worker is clearly being careful as he bends as he is seen to support his back by placing a hand on each knee, consistent with guarding a back condition.

5. He is seen bending over to empty cartons of beer into the eskies. However, in each case there is nothing dramatic about the extent that he bends. Despite the number of times, the bends are mostly moderate and I think they are quite consistent with the history he gave the doctors.

6. Mostly when he is seen bending to pick something up he seems to do so often in a motion where he leans forward and reaches down with his arm almost vertical at that point. It would only be possible to properly compare this to reaching to mid shin level which Mr Lewis reports on if he were to reach back towards his legs, else it appears to me to be a sufficiently different action to the test that Mr Lewis relies on. He often

reaches forward with one hand only and supports himself with the other on any available item including the eskies, the trestle table and on one occasion on a nearby step ladder. This also appears to be a guarding strategy and shores up the Worker's evidence.

7. The eskies are all raised by being placed on top of red milk type crates which the Worker said was done deliberately to accommodate his back condition.

8. He is seen forcibly pulling on the door of the cool room to open the door. This occurs on at least three occasions and despite an apparent significant level of force being used there is no apparent restriction or discomfort.

9. Overall the pace he apparently works at is very moderate. He is not seen to be under pressure or unable to cope and he appears to have ample opportunity to rest, all of which is consistent with his evidence.

10. Although he is seen to be on his feet for the vast majority of the time, he is not seen just standing very often. He is either moving or leaning on things.

11. He is seen placing items in the tray of a utility which has drop down sides. The sides are in the upright position and he has to lift items over the sides to place them in the tray.

12. He is seen, with the assistance of another person on each occasion, lifting a large esky. The motion is effected with apparent ease, which suggests that the esky is then empty. On one occasion it is apparent that the esky has some contents as the lift appears more strenuous (contrary to the Worker's evidence that it was empty each time) although precisely what the contents were is not clear. Likely it contained bags of ice given that was the contents of the other esky at that time. Mr Lewis said that he saw the esky being filled with ice before it was lifted

but no such occasion was seen on the video. There was an occasion where an esky was emptied of ice before it was lifted off a vehicle and perhaps Mr Lewis confused the two occasions.

13. He is seen squatting twice to adjust a trestle table and then bending to move the trestle table. The squats are within a short period of each other and are of the order of five or so seconds each.

14. At one time, apparently when returning the cool room at the end of the Show, he is seen squatting and undoing something. This squat is for a period of approximately ten seconds and he keeps his back almost perfectly straight throughout.

15. He is seen at approximately 8.15am on the Saturday morning using an ATM machine. As is discussed elsewhere in these reasons, that is relevant for another reason, however for now it is of note that despite having worked a full and long day the day before, and despite evidence from him and his partner about the effect of that long days work, he apparently moves without any sign of restriction or discomfort.

16. He is seen to be moving an obviously empty esky by a combination of lifting it by its side, using its handle, pulling it along and kneeing it to manoeuvre it. Again this is quite consistent with guarding a back condition in my view.

17. On one occasion only he is seen to reach down to the ground to pick up empty carton packages by squatting as opposed to bending his back.

18. He is seen to climb on to the tray of the utility, and also to alight from that vehicle but it is clear that he is taking care as he alights.

19. He is seen dragging a forty four gallon drum backwards for a short distance. It appears to take some effort but it is not apparent what, if any, the contents of that drum were. The Worker said it was empty.

20. In cross examination the Worker was shown a number of progress certificates issued by Dr King dated 8 June 2004, 23 August 2004, and 1 October 2004. In each case Dr King certified that he was fit to work with restrictions as to time, four hours per day, and as to activities namely avoiding squatting and kneeling, lifting weights greater than ten kilograms, repetitive bending and lifting. The certificates were tendered as Exhibit E5.

21. He agreed that he made no reference to his ongoing disability in the two job applications comprised in Exhibit W3. He agreed that in an affidavit sworn 13 January 2005 for the purposes of his application for interim benefits, he deposed to not being able to get up in the morning before 11am. It was in this context that the video recording of him attending at the ATM at approximately 8am on Saturday 17 July 2004 became relevant. He conceded that the affidavit made no reference to his work at the Katherine Show. He was less than forthcoming as to whether he had told Professor Burns and Mr Lewis about his activities at the Katherine Show.

22. In re-examination regarding the lifting of the eskies, the Worker said that the esky was empty in each case. My impression from observing the video is that on one occasion the esky appeared to have some contents although the precise nature of those contents was not apparent. Mr Lewis said that he noted an occasion when the esky was filled with ice before the Worker assisted in lifting it. When I reviewed the condensed video material there was an occasion when the Worker appeared to lift an esky which was not empty. The contents were never seen hence I cannot accept that it was full of ice as Mt Lewis claims. Although that lift was more strenuous than the lifts of the obviously empty eskies, it was not so strenuous as to render obviously untrue the Worker's evidence at this point. The Worker estimated that the weight of the empty esky was of the order of fifteen kilograms.

23. In relation to the ice bags that he was observed carrying, he said that the weight of the small one was three kilograms and the weight of the large one

was nine kilograms. In relation to the trestle table that he was seen adjusting and moving, he said that it was made of plywood and estimated the total weight at ten kilograms. He confirmed that he was squatting when adjusting it and he said that he did this as it more accommodated his condition than bending. Although he moves with no apparent restriction on these occasions, it is interesting to note that although he squats (and keeps his back straight for that matter) his helper performing the same task at the other end did so by bending rather than squatting. He said that the forty four gallon drum that he was seen dragging was empty and weighed of the order of ten to fifteen kilograms.

24. He said that arrangements were made to accommodate his condition when preparations were made for his participation at the Katherine Show. Apparently in previous years the cool room was mounted on a truck. This time it was mounted on a trailer to facilitate his access to it. Similarly, in the past the eskies were kept at ground level and he said that this time they were put up on crates to minimise the amount of bending he had to do.

25. He confirmed that he made no mention of his back condition or disabilities in the two job applications which comprised exhibit W3. He said that the reason for this was to ensure that he was granted an interview at which time his plan was to give details of his disability and take the opportunity to explain the disability in detail.

26. He said that the work at the Katherine Show was nothing like the work at Austral Contracting as there was no heavy handling nor time limits and he could rest as required. He said the intensity of the work at the Katherine Show was more or less the same as that in his current employment.

27. In relation to the video showing him pulling at the cool room door with some force on a number of occasions, he said that he was the only one who apparently had a problem with the magnetic catch on the door. That however misses the point. The point is that there were no objective signs

showing any restriction of movement or pain or discomfort consequent upon that motion. That was not explained.

28. He confirmed that he continued to take his pain relief during the period he worked at the Katherine Show. He said that he took it both in the morning before leaving home and at the end of each days work. He said he took four in the morning and had top ups as required. Top ups consisted of two tablets at a time and he said that there were maybe two top ups during the day.

29. The Worker's partner, Kerry Watkins, gave evidence after the Worker. She said that she has been a relationship with the Worker since February 2001 and shared accommodation with the Worker on and off, between July 2004 and September 2004 at which time they started living permanently together. Other than that, and depending on her work commitments, she said that she saw the Worker most weekends. She described the nature and type of activities which the two shared. She said that on occasion the Worker assisted her in her own employment in doing small maintenance type jobs. She says that the Worker has not provided that sort of assistance since the date of the injury.

30. She described the Worker as being a very sociable person before the injury and that he had no complaints of back pain before the injury. She said that his outlook and mental attitude changed after the injury. She said he became withdrawn, sullen, moody, frustrated and aggressive and he was not pleasant company. This was entirely different to his outlook and mental attitude before the injury. He said that they have rarely socialised since the injury.

31. She said that she also worked at the Katherine Show in July 2004 although she mainly worked in the member's bar area. This was the area that the Worker said he went to when he took his rest breaks. She confirmed that she saw the Worker take pain killers before they left home in the morning.

However she said that the Worker took them regularly during the day. She said that she saw him top up his medication two or three times throughout the day. This is curious as she was not with him the whole time as they were working at different bars and as the Worker himself only described top ups as occurring "maybe twice". However she confirmed the Worker's discomfort at the end of each day that he worked at the Show. She described how he would take a very hot shower then go straight to bed. She said that he was sorest on the Friday night and the Saturday night and that she massaged his back on those nights.

32. She said that in the period between July and September 2004 the Worker was constantly in pain. She said that he would often be lying on the floor or just sitting in the chair complaining of pain and claiming that he could not move because of the pain. She said that on occasions he was teary. However, the events recorded on the video over the three days of the Katherine Show included this period. That showed that over the three consecutive days of continuous activity, the Worker apparently showed little restriction of movement or pain and discomfort.

33. She said that she has not seen the Worker do any substantial lifting since the injury. She said that when they moved house they obtained alternative assistance for moving heavy items. She said the Worker was confined to small light boxes containing clothes or household implements.

34. She says that on occasion she has had to assist the Worker to undress from the waist and to remove his shoes and socks. Most recently this was in the Christmas-New Year period at the end of 2004. She said she helped him because he could not bend over. She says that even now he occasionally asks for help removing his socks and shoes. The period referred to here is some five months after his apparent ability to perform the body motions without any apparent discomfort on three consecutive days that he worked at the Katherine Show in July 2004.

35. Ms Watkins said that the Worker's mental attitude has improved considerably since he secured his current employment. She said that he still had occasional bouts of depression but is generally a lot happier and looks forward to going to work. She said that he has become chattier and laughs more frequently.

36. The Worker's supervisor in his current employment, Mr Jason Bird gave brief evidence. He has known the Worker for approximately five years but has been his supervisor at PowerWater since the Worker commenced working there. He confirmed that the Worker's current employment requires heavy lifting but that there is equipment to assist with this and if necessary, other staff is available to undertake that task.

37. Mr Frank Dalton, the current licensee of the Katherine Country Club was next called on behalf of the Worker. He held that position at the time that the Worker was employed there on a voluntary basis. He has known the Worker for in excess of twenty years. He said that the Worker was a very hard worker and had approached him with a view to working part time at the club. He said that the club could not have afforded to have had the Worker on the payroll particularly given that there were restrictions in the duties that the Worker could perform. Mr Dalton confirmed that the Worker had restricted duties. He was not to unload brewery trucks nor was he permitted to move kegs around. As far as Mr Dalton knew, the Worker complied with those restrictions.

38. The document evidencing the return to work program that the Katherine Country Club entered into in respect of the Worker was put in evidence as Exhibit W8. Mr Dalton said that the Worker commenced working in late 2003 or early 2004 and the employment ceased at the same time that the Worker's weekly payments were cancelled. The cessation was consequent upon concerns of legal liability for the Club. Mr Dalton had earlier said in evidence that when the Worker originally approached him for work he

indicated that he could not consider it because of legal liability issues. That led to the return to work agreement that contained provision for the club to be indemnified by the insurer.

39. Associate Professor Richard Burns was the first of the medical experts to give evidence. He was called on behalf of the Employer. He is impressively qualified in the neurology field. He provided two reports dated 22 July 2004 and 2 May 2006. In addition he provided a medical certificate dated 23 September 2004 which was one of the two certificates relied upon by the Employer for the purposes of section 69(3) of the Act.

40. His report of 22 July 2004 was based on an examination and interview occurring on 19 July 2004. This is the day after the conclusion of the Katherine Show. Professor Burns had not seen the video surveillance material at that time. That report notes the history of the incident and the subsequent progress and treatment. Both are consistent with the evidence before me and with other medical reports. He noted that the Worker reported being able to drive and undertake all activities around the home without major impairment. That report and the letter requesting same were tendered as a bundle (Exhibit E13).

41. In terms of the physical examination he noted that the Worker presented in no obvious distress. His gait was normal. Lateral flexion and rotation of the spine were undertaken without impairment but there was some restriction of forward flexion of his spine.

42. He said that he thought that the Worker presented in a straightforward manner but said nothing about engaging in work at the Katherine Show even though this was in the three days immediately preceding the date of the examination. He did confirm that the Worker advised of his work at the Katherine Country Club.

43. He diagnosed low back pain of uncertain cause as well as meralgia paresthetica. He said that the Worker may have had an underlying degenerative process present and he did not consider that the changes indicated on the CT scan (it is not clear which scan he refers to), were entirely the result of the relevant incident. He opined that the relevant incident may well have aggravated a pre-existing condition.

44. He explained that meralgia paraesthetica is a not uncommon condition symptomised by tingling or numbness on the outside of the thigh. It is due to the trapment of a small sensory nerve running from the groin. It is not a serious condition nor is it related to the Worker's back injury. No harm comes from it, nor is any treatment required and it has no effect on the Worker's capacity for work.

45. He said that there was no neurological deficit warranting any surgical intervention. He said that although he believed the Worker to be genuine, he was puzzled as to the persistence of the symptoms and the failure of those symptoms to respond to normal treatment.

46. Professor Burns saw the video surveillance material subsequent to that report and after reviewing that, he completed the certificate dated 23 September 2004.

47. Professor Burns provided a supplementary report dated 2 May 2006. In that he confirmed that he had then been provided with and viewed the report of Professor Marshall and various video surveillance including video taken 17 and 18 July 2004.

48. In that report he said that he found the following movements of the Worker on the video to be inconsistent with the account the Worker had given him at the time of his initial examination namely:

- He appeared to be walking freely.

- At times he walked briskly.
- He is seen to lift cartons without difficulty, to push on doors and lift bags of ice, to crush them on a bench or table.
- At no stage did he seem restricted or hold his back or seen to be in any pain or have any restriction of movement or slowness of activity.
- Despite reporting to him on 19 July 2004 that prolonged standing made his symptoms worse, Professor Burns noted that the video showed him standing for long periods.
- He noted that he assisted in lifting a large crate (presumably he means the esky) without apparent difficulty, although Professor Burns concedes that he was not aware of the contents or the weight.
- He is seen to jerk open the doors of the cool room without apparent limitation or discomfort.
- Overall the video did not indicate that the Worker was incapacitated but he qualified that by saying that he does not know what, if any, pain the Worker experienced throughout.

49. In his evidence he was questioned further about the surveillance videos. He said that he was surprised by this as it was inconsistent with the history he obtained and the presentation, particularly in that the Worker said that he had pain if he stood for prolonged periods. Professor Burns said that the Worker did not appear in discomfort on the video. Similarly he said that on examination the Worker gave the impression that lifting would be difficult, yet he did not appear troubled by the lifting motion shown of the video.

50. He confirmed that after viewing the surveillance material he signed the certificated dated 23 September 2004 and that together with covering correspondence was tendered as a bundle as Exhibit E14.

51. Cross examination of Professor Burns was brief. He confirmed that his certificate dated 23 September 2004, despite that it certified *"... that the Worker has ceased to be incapacitated for work as a result of the work injury..."* did not mean that the Worker was fit to return to his pre-injury work which involved heavy lifting. He confirmed that the Worker would not be able to do heavy plumbing work and accordingly agreed that he still had some limitation for work.

52. Professor Vernon Marshall next gave evidence and was called on behalf of the Worker. His curriculum vitae was put in evidence as Exhibit W16. His qualifications are also impressive. His report dated 16 December 2005 together with the letter requesting the report was put in evidence as Exhibit W17. His further report dated 7 April 2006 and the letter requesting same was put in evidence as Exhibit W18. There was one qualification to the admission of the report of 7 April 2006 in that the parties agreed that two paragraphs thereof were not relied upon. It was admitted subject to that.

53. In his report of 15 September 2005 he says:

- He examined the Worker on 15 September 2005.
- Available material included several hours of video tapes (including the video shown in evidence).
- He had x-rays and imaging, the x-rays (taken 13 August 2003) showed narrowing of the L5/S1 disc with osteophytes. An MRI of 26 September 2003 showed multilevel disc change, an L4/5 disc bulge and annular tear and L5/S1 disc degeneration and lower lumbar facet joint degenerative changes.
- He noted that the video surveillance material showed the Worker moving without any apparent restriction.

- He observed no overt behavioural signs on examination and thought that the Worker was frank and open with him.
- On examination there was no limitation of gait and no limp, the Worker had full range of movement of the cervical spine through extension, flexion, lateral bending and rotation.
- The Worker had some limitation at the extremes of the thoracolumbar spinal movement with pain at the extremes.
- He had full range of movement of his shoulders and upper limb joints and full range of movements at hips, knees, ankles and feet.
- He diagnosed

    1. persisting mechanical low back pain after soft tissue strain;
    2. meralgia paraesthetica;
    3. post traumatic symptoms.

- In his opinion the Worker's persisting symptoms are consistent with the continuing effects of the original injury. In his opinion the video surveillance is also consistent with him coping with activities similar to his part time bar work and his ability to cope with continuing pain without restrictions of activities of daily living.
- He is of the view that the Worker could not return to the full building construction activities which were part of his pre-injury duties.
- He considers that the surveillance material does not indicate that the Worker had completely recovered from the effects of the relevant injury and specifically that the surveillance material is consistent with the persisting partial impairment that he reports.

54. The salient points of his report dated 7 April 2006 are:-

- He agreed that the changes shown on X-rays and the MRI, as well as a CT Scan dated 30 January 2004, show evidence of degenerative change which would have pre-dated the relevant injury.

- He says that the work injury caused an aggravation of that pre-existing condition.

- He remains of the view that the Worker is not able to return to his full pre-injury duties.

55. He said that the meralgia paraesthetica was indirectly related to the back injury. His explanation of the nature of the condition was consistent with that of Professor Burns. Professor Marshall however said that the irritation of the nerve resulted from the weight gain of the Worker consequent upon his decreased level of activity that followed from the injury. This scenario was not put to Professor Burns. He also agreed however that the condition did not require treatment and it did not result in any incapacity for work. The difference of opinion is therefore largely of academic interest only.

56. With the aid of a model of the appropriate section of the spine, Professor Marshall explained his finding and elaborated on his opinion. His diagnosis was one of mechanical back pain. In his opinion the pain came from the annular tear of the disc. He said there were some pre-existing degenerative changes but that was not a factor because of that had previously been asymptomatic.

57. He said that he examined the video surveillance material before preparation of his report of 15 September 2005. He said he reviewed that material on 9 May 2006. He was asked to identify which aspects of the video surveillance might be indicative of the Worker protecting a back injury. He indicated a section where the Worker was squatting and rose with a straight back. He said that action was consistent with that. In another section he said the Worker bent with his hips and knees rather than with his spine. He said

both of these movements were good preventative back pain strategies. He said that the video surveillance material in its entirety showed the Worker doing the variety of activities which he was doing any way at the Katherine Golf Club. He says the video showed the Worker bending to approximately forty degrees. Although he said that the video showed the Worker walking unimpeded, this was not inconsistent with the presentation and the history. Noting the examples of lift, he indicated that he was not aware of the weights lifted but generally considered that the presentation on the video was consistent. He said that notwithstanding the video, his opinion was still firmly that the Worker was not fit to return to his pre-injury work.

58. When cross examined as to whether there was any objective testing of pain or simple reliance upon the history given by the patient, Professor Marshall made a telling comment. He said that he made observations of the Worker's gait and his demeanour. He said that during the examination he looked for signs which are both consistent and inconsistent with the history. He said that these are the "behavioural" factors referred to in the report and he considers that to be an integral part of his examination. He said that there were no adverse behavioural signs apparent and that he considered the Worker to be genuine. He said that he was alert to the possibility that the Worker may have exaggerated his symptoms. He said that an exaggeration in any event would not necessarily change his diagnosis as the mechanical low back pain was a settled fact in his view. Although he agreed that an exaggeration of symptoms could effect his assessment of capacity, he was very convincing and persuasive when explaining that he was alert to the need to detect exaggeration. He was certain that had there been exaggeration, that he would have detected it.

59. Mr Graham Lewis was then called by the Employer. He is a well qualified and experienced orthopaedic surgeon currently working as a medico-legal consultant. He examined the Worker at the request of the Employer. He has provided reports dated 3 August 2004, (following his examination of the

Worker on 28 July 2004) and 28 January 2005 and 21 April 2006. Mr Lewis also provided a certificate dated 23 September 2004 which, as with the certificate of Professor Burns, formed the basis of the section 69 notice. His initial report dated 3 August 2004 and the letter requesting same were tendered in evidence as Exhibit E19. In that report his findings and opinions were largely consistent with those of Professor Marshall.

60. The examination of the Worker on 28 July 2004 was ten days after the Katherine Show. Mr Lewis does not record any history being given to him by the Worker as to his participation in the activities at the Katherine Show.

61. Mr Lewis's report of 3 August 2004 records the mechanism of the injury and sequence of events together with the subsequent process and management. This all appears uncontroversial. He records that the Worker reported persistent back pain aggravated by sitting for longer than thirty minutes. He reports that the Worker avoids bending and lifting where possible and is careful how he lifts objects. He has recorded the Worker reporting that standing in one position will aggravate the discomfort and that the back pain often keeps him awake.

62. On examination, he noted that the Worker walked with a slight limp but there were no apparent problems with dressing, undressing or climbing up onto or down from the examination couch. He reported noting full range of movement of the cervical spine and that the shoulders were normal.

63. In relation to the spine he noted a loss of normal lumbar lordosis. Testing of forward flexion showed the Worker was able to reach to mid shins and that he claimed pain with forward movement. Similarly lateral flexion to both sides was a little restricted and associated with claimed pain. He also noted claimed pain at the extreme of extension but he considered this to be in the normal range. He noted evidence of lower lumbar spine changes of long standing.

64. He considered that the Worker probably sustained an annular tear of the L4/5 disc. He considered it likely that there was some element of aggravation of degenerative changes. On the balance of probabilities, he considered the Worker was still incapacitated as a result of the relevant injury. He was doubtful of the Worker's capacity to return to his normal employment.

65. Mr Lewis's report of 28 January 2005 was subsequent to his viewing of the video surveillance material. It is not clear from the report which video surveillance material he viewed for this purpose. He was later cross examined about that. However, Mr Lewis is quite clear that he considers the level of activity, particularly lifting and carrying cartons of beer, bending further than he demonstrated during the course of the examination and the assistance with carrying eskies and the trestle table, to be inconsistent with the Worker's earlier presentation. This lead to a change in his opinion as to the Worker's level of incapacity. He said that the physical activity demonstrated on the video was markedly more than was demonstrated during the examination on 28 July 2004. As a result he was of the view that the Worker was fit to return to his pre injury work as a mechanical plumber.

66. He said that the video material showed a markedly greater degree of activity than the Worker led him to believe was possible. Specifically he noted the Worker lifting and carrying cartons, bending further than he demonstrated at the examination, carrying bags of ice and carrying trestles. Overall he said he was very surprised by the level of activity demonstrated. As a result he completed the certificate dated 23 September 2004. That was submitted in evidence together with his covering letter to the Employer's insurer and became Exhibit E20.

67. Mr Lewis's evidence was, not surprisingly, seriously challenged in cross examination. Some questioning centred on suggestions of an apparent bias

by him in favour of insurers or defendants. That achieved nothing in my view and I draw no conclusions adverse to Mr Lewis based on that alone.

68. He was questioned as to whether he watched the entirety of the videos. He claimed that he did although he said that he fast forwarded the video on occasions. He confirmed that together with the videos he received a summary of specific observations of activities by the Worker at various times. He refuted the suggestions that he only observed the parts of the video referred to in that summary. He was challenged on this. He estimated that he spent a "few hours" watching the video, albeit with some fast forwarding. The invoice of his employer covering his work in watching the videos, reviewing his material and providing the further report was put to him. That was in the amount of $473.00. He claimed to be unaware of the amount charged for that service but did not dispute the amount put. Bearing in mind that the video surveillance material comprised some ten hours of video, that amount cannot possibly reflect the number of hours he claimed to have spent watching the video then reviewing his notes then preparing a further report.

69. He had said in examination in chief that the most striking example of inconsistency apparent from the video compared to the history he took and the Worker's presentation on examination were the occasions where the Worker was seen ducking under the perimeter rope. From my own observations of the video that rope was set at just below the chest level of the Worker. Mr Lewis said that on presentation the Worker's forward flexion was very limited, however the video at that point indicated what he thought was greater than reaching mid shin level it was almost unrestricted forward flexion in his view. I do not consider that his description of the Worker's actions and movements at that point is correct according to my viewing of the video. Mr Lewis claimed an inability to recall certain actions of the Worker associated with that particular bending motion when they were put to him. These were obviously inconsistent with the

uncompromising view that he took. I refer here to the action of the Worker bracing and supporting his back by placing a hand on each knee. If, as Mr Lewis said, this was the most striking example of inconsistency that he cannot recall a movement which is central to that view is of some concern. At the very least this seriously questions the validity and weight of his opinion.

70. He refuted all suggestions and all specific instances put that the video surveillance material was entirely consistent with the actions of a man protecting a back injury. Mr Lewis could not recall the specific instances which were put. He agreed that the instances where the Worker assisted in carrying an esky would have lesser relevance if the esky was empty but he maintained that on one occasion he noted that the esky was first filled with ice. As I have said, that is not apparent on the condensed video. He said that although his usual practice is to make ongoing notes as he watches surveillance video he could not locate those notes on his file but believed that he had noted the particular instance in those notes.

71. Although he could not specifically recall the instance put, he agreed that a person without a back condition would be unlikely to pick up empty cartons by bending the knees as opposed to bending the back. He accepted that such an action could be an indication that the person is protecting a back injury. Furthermore, and accepting that one carton of beer weighs ten kilograms, Mr Lewis was prepared to concede that nothing he saw on the video demonstrated a capacity which went anywhere near what would be described as heavy lifting.

72. He confirmed that he looked for Waddell signs during his examination. He said these are a guide to assisting in the detection of possible exaggeration of symptoms. He said that the signs were all negative on examination. He would not accept that necessarily meant the Worker was truthful because he said the signs are a guide only. In principle that would have to be correct.

He went on to agree however that he did not make any note of any other signs or indicators on examination that might be suggestive of exaggeration by the Worker. He agreed that the movement required to lift the whacker-packer which resulted in the injury is entirely different to any of the movements evident on the video.

73. He said that another aspect of the video which was in stark contrast with the presentation on examination was that the Worker, on the Friday, after having worked a long day, looked just as active at the end of the day as he did at the start. This was quite apparent from the video. As I have said elsewhere in these reasons, the Worker appeared untroubled at 8.15am on the Saturday when he was seen at the ATM machine. My impression from the video material is that the intensity of the Worker's activities seemed to drop off from about mid way through the activities on the Saturday.

74. The specific instance which Mr Lewis relied upon greatly, namely the Worker ducking apparently unrestricted under the perimeter rope, was regrettably not a matter which was specifically put to Professor Marshall. That may have proven very useful to me in resolving the difference of opinion between Mr Lewis and Professor Marshall given the significance of that to Mr Lewis and the reliance he placed upon that in changing his views concerning the Worker's level of incapacity.

75. The last witness called by the Worker was his general practitioner at the relevant time, Dr Russell King. He was the Worker's general practitioner from the time of the injury until the end of 2004. Through him three reports and one letter were tendered as Exhibit W22. His report is summarised as follows:

- He says that the Worker complained of low back pain, occurring daily, of varying severity usually requiring simple analgesics but when the pain is very bad (once or twice a week) he is only able to obtain pain relief by lying down.

- The Worker reported that, on good days, he can carry out light manual tasks such as driving or light yard work.
- The Worker also had symptoms of depressed mood and bouts of anger and intense frustration for which he had been described anti-depressants.
- At the time of examination (the date of which is unclear) he reports the Worker having minimal movement of the lumbar spine with limited forward flexion by reason of pain.
- He diagnosed low back pain due to degenerative disc disease of the lumbar spine and facet joint osteoarthritis with the pain likely to be due to an aggravation of the pre-existing degenerative disease and damage to the L4/S5 and L5/S1 discs.
- He also diagnosed depression due to an adjustment disorder.
- The prognosis for return to full time work as a plumber was poor but there were some prospects of return to some form of alternative work.
- He suggested ongoing treatment in the form of an exercise regime, psychological support, a weight control program and occupational retraining.
- He considered then that the Worker was able to work part time with light duties. He recommended no squatting, no working at heights, no lifting anything heavier than ten kilograms, no repetitive bending or lifting and working for four hours per day, five days per week.

76. Although he had seen some, he had not seen the entirety of the video surveillance material by the time he gave evidence. He was asked to compare Mr Lewis's findings in his report of 3 August 2004 with the video. He was asked whether the restrictions described in Mr Lewis's report were hugely discrepant with what was depicted on the video. Placing much reliance on Mr Lewis's description of back and spine movements on page 4

of the report, Dr King said that he found no movements on the video which were greater than those referred to in that part of Mr Lewis's report. He said that most of the motions seen on the video were less than those described in the report. He said that he had not seen anything on the video which changed his view. In particular he disputed that the Worker had no incapacity for work as at 1 October 2004.

77. The Employer also arranged for the Worker to be assessed by a psychiatrist, Dr Les Ding. He examined the Worker on the one occasion on 28 July 2004. Dr Ding then provided a medical report dated 3 August 2004. That was admitted by consent and without Dr Ding being required to attend for cross examination. Clearly therefore there is no contention with the findings of Dr Ding.

78. Dr Ding detailed the history given to him in particular the deterioration in the Worker's psychological state. Dr Ding noted a history of feelings of despondency, hopelessness about the future and uncertainty about securing alternative employment. He also noted that the Worker had suicidal thoughts and was abnormally tearful. He noted no past history of any significant stress factors.

79. Dr Ding expressed the opinion that the Worker suffered a diagnosable psychiatric disorder, specifically an adjustment disorder with mood symptoms. He said that this is indicated by the intensification of the Worker's emotional distress to a level where there were significant distressing and disruptive depressive symptoms.

80. However, he was of the view that at the time of the examination at least, the Worker's symptoms were in remission and that his psychological distress did not then amount to a diagnosable condition.

81. He concluded that the Worker did not require any specific specialist psychiatric or psychological treatment and that there was no psychiatric impediment to his ability to work.

82. The last witness called by the Employer was Mr Duggan who is the Managing Director of the Employer. He said that he employed the Worker as a "trades assistant" with duties to work with plumbing tradesmen and assist them as required. In cross examination he specifically refuted that the Worker was a properly qualified plumber, something which contradicts not only the evidence of the Worker himself but is inconsistent with the evidence of the Worker's current working status at PowerWater and the formal admissions which have been made.

83. He said that the Employer was generally engaged in performance of maintenance on housing including installation of septic tanks, installation and replacement of hot water services, repairs to water mains and drains and the like. He described the types of physical activities which the Worker would be required to perform as part of his job.

84. He described the types of items which the Worker would be required to lift including PVC pipe, roof sheeting, solar hot water systems, hot water tanks, toilet pans and the like. He said that the Employer had lifting equipment available comprising a back hoe and a forklift. He said that when work was being performed at remote communities, equipment would be hired as required.

85. He said that he was present on the Sunday of the Katherine Show in 2004 and observed the Worker working at one of the bars. He said he saw him removing cartons of beer from the cool room and load them into the eskies. He said that it appeared to him that his task was mainly involved in keeping the eskies stocked with beer and that he did not do too much serving. He did not say for what period of time he observed the Worker at the Katherine Show but he did say that the duties that he saw the Worker performing at the

show were similar to the duties that the Worker had to perform in the course of his employment with the Employer.

86. He also described how he had seen the Worker washing vehicles during the period that the Worker was off work and in receipt of weekly benefits. He described specifically how he saw the Worker washing a van which required him to use a step ladder to wash the roof of that vehicle.

87. In cross examination he would not concede the Worker's qualifications. As to his claim that the work he saw the Worker performing at the Katherine Show was similar to that at Austral Contracting, he refused to concede that there was no comparison between the two, something which I think is glaringly obvious on the evidence. He was then shown an assessment by a rehabilitation provider of the Worker's employment at Austral Contracting. This was subsequently admitted into evidence as Exhibit W23. He conceded that he contributed to the information it contained. He conceded that, amongst other things, it recorded the Worker's duties with the Employer included and required:

1. Driving for up to seven hours to reach job sites.
2. Installation of solar hot water systems weighing up to eighty kilograms.
3. Removal of solar hot water systems requiring replacement that were heavier than eighty kilograms.
4. Working on unstable or steep roofs.
5. Working in confined spaces.
6. Climbing ladders while lifting items in excess of twenty kilograms.
7. Unloading plumbing material and equipment, with assistance of fellow Workers where required, up to and exceeding one hundred kilograms in weight.

88. Despite the last item in the preceding paragraph, Mr Duggan would not concede that the Worker would be required to lift items in excess of one hundred kilograms. He says that in the event that that sort of material or equipment was present then it would be likely that the back hoe would also be present and that would be used for such lifts. This seems to contradict the information he provided for the purposes of the workplace assessment.

89. In any event, when the specific items referred to in the workplace assessment document were again put to him, he maintained his view that the work he saw the Worker performing at the show was similar to his work at Austral Contracting. That is obviously untenable. His reluctance to concede the obvious is not to his credit.

90. In relation to the Worker washing cars during his period of incapacity, he conceded however that the Worker did nothing to attempt to conceal that activity. Likewise he agreed that the activity was nothing like his normal duties when working.

ASSESSMENT OF THE EVIDENCE AND FINDINGS

91. I will deal briefly with findings in relation to the meralgia paresthetica and psychiatric sequelae. In relation to the former I accept the evidence of Professor Burns in preference to that of Professor Marshall. Professor Burns has the greater expertise as the condition is more related to his specialty. I find that the condition does not result from the relevant incident. Little turns on that however as both doctors agreed in any event that the condition does not result in any incapacity for work. In relation to the psychiatric sequelae, I accept the unchallenged evidence of Dr Ding and find firstly that the Worker suffered an adjustment disorder directly resulting from the relevant incident, secondly, that as at 3 August 2004 and continuing, the

condition was in remission and thirdly, that since 3 August 2004 and continuing, that condition had no contribution to any capacity for work.

92. I place little credence on the evidence of Mr Duggan. His insistence that his observations of the relatively minor activities undertaken by the Worker at the Katherine Show showed activity similar to what was required of him in his normal work discredits him in my view. Clearly that assertion is untenable in light of the video surveillance evidence and my assessment of that evidence. The extent of this became more apparent when examples of the required work activities were put to him, such as the need to load and unload cement mixers, the need to load and unload bags of cement, the need to mix concrete and to then push a wheel barrow load of concrete, which he conceded to weigh in excess of a hundred kilograms. If anything turns on his evidence, to the extent that his evidence contradicts that of the Worker, I prefer the latter.

93. Mr Christrup submitted in closing that the Court should find for the Employer and reject the Worker's evidence. I have some concerns with the evidence of the Worker. The Worker's omission of details of work at the Katherine Show was questionable especially in view of the contemporaneity of that work with three medical examinations, one on the day immediately after, where I would have thought it appropriate that he mentioned that activity. That omission however is of reduced significance given his prior disclosure of the intended activity to his case manager and rehabilitation provider. It is clear that the Worker was not attempting to be deceptive. I come to this conclusion because I think it is clear that the Employer or its insurer knew of those activities. No challenge was made by the Employer to the Worker's evidence of disclosure to his case manager and rehabilitation provider and I find that he did so inform both persons. In light of that and noting that the activities were one off, the Worker's omission is not critical.

94. I also have concerns regarding his claim in his affidavit sworn 13 January 2005 that he did not rise earlier than 11am due to pain. Clearly that was untrue at least on the occasion of the Katherine Show when he was seen at an ATM at approximately 8am. It was submitted that the Worker's claimed inability to recall the contents of the affidavits was particularly difficult to accept given the reasons published by the Judicial Registrar for refusing that application. The Judicial Registrar clearly relied on this very matter to a significant extent in refusing that application. Although there is substance to that submission and I do not dismiss it lightly, I accept the Worker's evidence that he did not recall that given that the decision of the Judicial Registrar was in February 2005 which was 15 months before the hearing before me. More obviously I believe it is conceivable because the Worker had nothing to gain from feigning an inability to recall those details as the decision of the Judicial Registrar and the contents of the Worker's affidavits is a matter of record.

95. Mr Christrup also submitted that the Monday 19 July 2004 was another obvious instance when the Worker's assertion in that affidavit about not getting out of bed until 11am due to pain must have been untrue. That was the occasion of the Worker's attendance in Darwin for a medico-legal examination. The thrust of the submission is that as that appointment was at 11:30am then the claim could not be true on that day either presumably because the Worker then resided in Katherine. However I am not entirely convinced that the foundation for this submission was established. I do not recall evidence as to the time of the appointment on that day. Even assuming there was, I do not recall any evidence that the Worker travelled from Katherine to Darwin that morning. Either way I do not consider it appropriate to place the emphasis which Mr Christrup urges on such a general statement in an affidavit sworn for a specific purpose some six months after the event. Inaccurate as the Worker's claim may be in these

two specific instances I am not prepared to say, as Mr Christrup submitted, that the relevant part of that affidavit should be viewed as a lie on oath.

96. Mr Christrup also relied on a number of other matters to support his submission that the Court should find for the Employer. Firstly, he submitted that the Worker did not give a truthful account of his pain from and including the time of his examinations in July 2004. Essentially that centred on the submission that I should prefer the evidence of Mr Lewis to that of Professor Marshall. He relied on the evidence of Mr Lewis and Professor Burns referring to the stark contrast between the Worker's claimed restrictions during examination and the abilities he exhibited at the Katherine Show. However Professor Marshall and Dr King did not consider the movements of the Worker at the Katherine Show to be inconsistent with the history the Worker gave. On my assessment of the video surveillance evidence as discussed earlier in these reasons, I would have to agree.

97. Mr Christrup also relied on the absence of evidence of neurological impairment. That is so from the evidence of Professor Burns. Professor Marshall conceded this and he also conceded that an annular tear or disc bulge would not necessarily give rise to symptoms of pain. However it is clear the absence of neurological signs or radiological evidence is not conclusive. An important aspect of Professor Marshall's evidence, which I am prepared to accept, is that there is a mechanical basis for the claim, namely the existence of the annular tear. His evidence is that such a condition can result in pain. Mr Lewis also conceded the existence of the annular tear although he was of the view that the tear had resolved and had healed itself. That view seems to accept that pain could result from the annular tear.

98. Mr Christrup also submitted that there were significant signs of the Worker exaggerating his symptoms. Overall I thought that the Worker presented well and credibly. His background clearly shows that he is a hard Worker

with a strong work ethic. I was very impressed by his evidence as to the lengths he went to secure his current employment at PowerWater. That confirms that he is a person with a strong desire to work and that is inconsistent with someone attempting to extract compensation that he is not entitled to. Dr Ding expressed the opinion that the Worker suffered a diagnosable psychiatric disorder, specifically an adjustment disorder with mood symptoms. He said that this was indicated by the intensification of the Worker's emotional distress to a level where there were significant distressing and disruptive depressive symptoms. It is difficult to see how this opinion could be correctly formed unless the Worker was genuine and I remind myself that the Dr Ding's opinion was unchallenged.

99. Reliance was also placed on the apparent omission of incapacity from the Worker's job applications. That was explained by the Worker. He said he did not disclose the incapacity so that he might at least achieve an interview where he could at least explain the extent of his incapacity in detail. Reluctance by employers to engage persons with an incapacity is not unusual and is quite understandable. The Worker's strategy appeared to work in his application for employment at PowerWater where he was ultimately successful. Given the subsequent dramas related to that employment, it would appear that without that strategy, he would not have been considered for the position. Frankly I consider that to be something in favour of the Worker's credit in those circumstances.

100. Lastly, Mr Christrup submitted that the Worker's activities at the Katherine Show exceeded the restrictions in the certificates issued by Dr King. This is clearly true in relation to the duration of Dr King's involvement as the Worker's treating doctor. Dr King limited work to four hours per day. He also recommended avoiding squatting and repetitive bending and lifting. In any event I think this submission looks at that part of Dr King's evidence in isolation. Dr King was not very concerned about the restrictions being

exceeded on that occasion. I think Dr King said enough in his evidence to convince me that this was not significant.

101. At the end of the day however I was convinced that the Worker was genuine and I am prepared to accept his evidence for a number of reasons. Firstly, his impressive work ethic and work history. Secondly, that he was prepared to work for such a long period on an unpaid basis at the Katherine Country Club and that he took the initiative to source and arrange the work at the Katherine Country Club. Thirdly, by his subsequent attempts to secure alternative employment. Fourthly, by reason of the lengths he was prepared to go secure his current employment when the offer of employment appeared to be in jeopardy. Fifthly, by reason that Dr Ding assessed him as genuine given his diagnosis. Sixthly, the apparent care shown on the video surveillance that the Worker took to accommodate his back condition, which I think is most telling given that it is clear that the Worker was not surveillance aware at that time. Seventhly, that both Dr King to a lesser extent, but mainly Professor Marshall, give credible evidence which I am prepared to accept, to the effect that they saw nothing on the video inconsistent with the history given and the Worker's presentation on examination. Nothing I have seen or heard is consistent with a person exaggerating symptoms for personal gain. For these reasons I am prepared to accept the Worker as a witness of truth.

102. In terms of the medical evidence, the dispute centres largely on the differing views of Professor Marshall and Mr Lewis. Although Professor Burns shares the same view as Mr Lewis in terms of the relevance of the video surveillance material, he was prepared to concede that the Worker had not totally recovered from the effects of the injury or that he had a totally unrestricted capacity for work. Clearly therefore he agrees that the Worker remained incapacitated to some unspecified degree. Moreover Professor Burns's specialty is in a different field to those of Professor Marshall and

Mr Lewis which are in more closely allied fields and more relevant to the nature of the injury and the symptoms causing incapacity.

103. At the end of the day I have conflicting opinions from two well qualified medical experts. Overall, I thought Professor Marshall was the more impressive witness. His evidence was positive and certain and his opinions were well expressed and well explained. He was unshaken in cross examination. On the other hand, I have concerns with the evidence of Mr Lewis. Although Mr Christrup submitted that I should prefer the evidence of Mr Lewis for a number of reasons I thought that Mr Lewis was too rigid in his views. I also thought it was very telling that Mr Lewis's assessment of the motion of the Worker on the video and upon which he placed such reliance in forming his view did not support his claims. At the end of the day he is the only medical witness who maintains that the Worker has no restriction at all. Coupled to the concerns I have already referred to in connection with the evidence and opinions of Mr Lewis, and my favourable impression of the Worker's evidence, I prefer the evidence of Professor Marshall.

104. For the foregoing reasons, I accept the evidence lead in support of the Worker's case, in particular the evidence of the Worker himself and that of Professor Marshall. On that basis the Employer has not met the onus that it bears to justify the termination of the weekly payments in the circumstances of this case.

INTEREST

105. The Worker also claims interest under both sections 89 and 109 of the Act. Those sections are set out hereunder:-

> 89. Late payment of weekly payments
>
> Where a person liable under this Part to make a weekly payment of compensation to a Worker fails to make the weekly payment on or before the day on which he or she is required to do so, the Worker

shall, in respect of that weekly payment, be paid, in addition to any other payment required to be made under this Part, an amount represented by the formula –

$$A \times \text{the prescribed rate of interest} \times \frac{B}{52}$$

where –

A is the amount of that weekly payment payable to the Worker; and

B is the number of weeks (with a part of a week being counted as a whole week) occurring within the period commencing immediately after the day on which payment of that weekly payment was due and concluding at the end of the day on which payment of that weekly payment is made.

109. Unreasonable delay in settlement of compensation

(1) If, in a proceeding before it, the Court is satisfied that the Employer has caused unreasonable delay in accepting a claim for or paying compensation, it must –

(a) where it awards an amount of compensation against the Employer – order that interest on that amount at a rate specified by it be paid by the Employer to the person to whom compensation is awarded; and

(b) if, in its opinion, the Employer would otherwise be entitled to have costs awarded to him or her – order that costs be not awarded to him or her.

(2) Where a weekly or other payment due under this Act to a person by an Employer has not been made in a regular manner or in accordance with the normal manner of payment, the Court must, on an application in the prescribed form made to it by the person, order that interest at a rate specified by it be paid by the Employer to the person in respect of the amount and period for which the weekly or other payment was or is delayed.

(3) Where the Court orders that interest be paid under subsection (1) or (2), it may, in addition, order that punitive damages of an amount not exceeding 100% of such interest be paid by the Employer to the person to whom compensation is awarded or to whom the weekly or other payment due under this Act is payable.

106. The application was made on the basis that the Worker's weekly payments were unreasonably terminated. Mr Priestley submitted that due to the

ambiguity in the section 69(3) certificate given by Professor Burns, (which was apparent from his evidence), given also the severe consequences for any worker where weekly payments are terminated, the Employer must have some obligation to ensure that such action is only taken where the appropriate basis exists. Mr Priestley went on to submit that the Employer did not do so and could easily have done so if proper enquiry of Professor Burns had occurred. He therefore submitted the termination occurred unreasonably. I note that Professor Burns said that he was simply sent the video material and a pro forma section 69(3) certificate. He was not given any explanation of the purpose or effect of the certificate or of the available alternative, i.e., to certify reduced incapacity in lieu of total incapacity. Therefore I think there is some basis for submitting that the Employer's actions were unreasonable. However that is not the test to be applied.

107. Leaving aside whether the necessary factual matrix to support the application exists, I am of the view that sections 89 and 109 cannot apply at this stage of the proceedings. The relevant authorities on those sections which I have considered, namely *Ju Ju Nominees v Carmichael* (1999) 9 NTLR 1, *Alexander v Gorey (2002) 171 FLR 31*, *Wormald International (Aust) Pty Ltd v Aherne,* Supreme Court, Mildren J, 23 June 1995, *Passmore v Plewright* (1997) 118 NTR 28 and *Pengilly v NTA (No 3) (2004) 14 NTLR 1*, identify the following propositions:-

1. Section 89 only applies to weekly payments of compensation whereas section 109 applies to all types of compensation payments.

2. It is possible for an award to be made under both sections.

3. Interest on interest cannot be awarded.

4. An award of interest under the Act is not the same as an award of interest on judgment in civil cases. An award of interest under the Act requires more than just a successful outcome of proceedings.

5. Section 89 does not require a court order as a pre-requisite to a worker's entitlement to interest as the section mandates it whenever a weekly payment is not paid when due.

6. Where an employer disputes liability, a successful outcome for the worker is a pre-requisite to an order for interest as compensation or weekly payments are not due until the Court pronounces a result in favour of the worker.

7. Section 109(2) requires more than mere lateness of payment and if non payment is due to a genuine dispute about liability or quantum, an order under section 109(2) should not be made.

8. Where weekly payments are not properly terminated, for example without giving the notice required by section 69, then an order under either section can be made.

9. An order under section 109(2) is appropriate for a contumelious default in payment of a court ordered payment.

108. In my view section 89 cannot apply to provide for interest on back payments following a successful appeal by a worker against a section 69 cancellation. Proposition 6 in the preceding paragraph rules that out. That is clearly correct on the wording of section 89. As the Employer here had validly cancelled weekly payments utilising the procedure in section 69 of the Act, it is not until I order resumption of weekly benefits and the Employer thereafter defaults that there can be said to be a failure by the Employer *"…to make the weekly payment on or before the day on which he or she is required to do so…"*.

109. I am also of the view that section 109 does not apply. Mr Priestley's argument might have more force if the Employer had only relied on the section 69(3) certificate of Professor Burns. There would then be some scope for arguing that there was no genuine dispute given what Professor

Burns' actual view was at the time. That would in any event have required a finding that it was inappropriate for the Employer to rely on Professor Burns' certificate to cancel weekly payments. In my view, even leaving aside the additional certificate of Mr Lewis, there was nothing to directly or indirectly indicate that the Employer knew that Professor Burns' opinion was equivocal. Relevant also is that the Employer had video surveillance material from which it was possible to form the view that at worst, the Worker was not genuine and that at best, he had an apparent ability to exceed the restrictions specified by his own doctor at the time. That I have accepted that the Worker is genuine does not change that. These factors would clearly not support a finding that the Employer's actions were unreasonable or that the dispute was not genuine.

110. In any event, the Employer also relied on the certificate of Mr Lewis. Although Professor Burns conceded in evidence that there was some residual effect on the Worker's working capacity and his certificate was equivocal, Mr Lewis was of the view that the Worker was left with no incapacity for work and he maintained that view in his evidence. Although I have rejected Mr Lewis's view and have preferred the contrary evidence of Professor Marshall, there was nothing unreasonable in the Employer relying on Mr Lewis's certificate, again particularly in light of the video surveillance material which both apparently reinforced Mr Lewis's view and prima facie indicated an apparent ability by the Worker to exceed the limitations then current and placed upon him by his own general practitioner.

ORDERS

111. In summary, I find for the Worker and order the Employer to resume payments of compensation from 14 October 2004, being the date from which the cancellation of weekly payments took effect. I give liberty to the parties to apply as to quantum. I decline the application for interest under sections 89 and 109 of the Act.

112. I will here the parties as to any ancillary orders.

Dated this 31st day of May 2006.

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V M LUPPINO
STIPENDIARY MAGISTRATE