CITATION: *[2006] NTMC 063*

PARTIES:	DAMIAN YOUNG **WORKER** v HENRY WALKER ELTIN CONTRACTING PTY LTD (IN ADMINISTRATION) **EMPLOYER**
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20428221
DELIVERED ON:	3 August 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	5.6.06 – 9.6.06
JUDGMENT OF:	D. TRIGG SM

CATCHWORDS:

Work Health – normal weekly earnings.

- *out of or in the course of employment.*
- *Value of accommodation and meals etc.*

Expert evidence.

REPRESENTATION:

Counsel:

Worker:	Ms Gearin
Employer:	Ms Mangan

Solicitors:

Worker:	Withnalls
Employer:	Lavan Legal

Judgment category classification:	A
Judgment ID number:	[2006] NTMC 063
Number of paragraphs:	203

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

No. 20428221

[2006] NTMC 063

BETWEEN:

DAMIAN YOUNG
Worker

AND:

HENRY WALKER ELTIN CONTRACTING PTY LTD (IN ADMINISTRATION)
Employer

REASONS FOR DECISION

(Delivered 3 August 2006)

Mr DAYNOR TRIGG SM:

1. This action commenced on 1 December 204 when the worker filed an Application for compensation under Part V of the Work Health Act (hereinafter referred to as "the Act"). The worker's original Statement of Claim was filed on 29 March 2005, and the employer's original Notice of Defence was filed on 19 April 2005.

2. On these original pleadings the following matters were admitted by the employer:

- At all material times the worker was employed by the employer (sic. as a) Diesel Mechanic;
- The worker's normal weekly earnings (hereinafter referred to as "NWE") are $1,360.40 (and the employer does not admit that the NWE are unknown);
- At all material times in the employment the worker was a worker within the meaning of the Act;

- On or about 20 August 2004 the worker made a claim pursuant to section 80 of the Act;
- On 31 August 2004 the employer deferred liability for the injury and on 29 October 2004 the employer disputed liability for the claim pursuant to section 85 of the Act; and
- On or about 26 November 2004 a mediation certificate was issued to section 103C of the Act.

3. On the original pleading the worker alleged that he suffered an injury arising out of or in the course of his employment on or about 16 August 2004. He particularised this injury as “left shoulder dropped out and ripped”. He went on to claim that he was “as a consequence of the injury” totally incapacitated for work from 16.8.04 until 19.8.04, and partially incapacitated for work from “20 August 2004 to date and continuing – restricted duties”.

4. Thus the pleadings remained until 17 May 2006 (20 days before the hearing was due to commence) when the worker was given leave to file and serve an Amended Statement of Claim. The employer filed a Substituted Defence on 23 May 2006. During the course of the hearing the worker made some further amendments to his Statement of Claim, but none of these required any further amendment to the employer’s Defence.

5. Accordingly, by the end of the evidence the following matters were admitted on the pleadings:

- The worker was employed by the employer as a diesel mechanic at the Tanami Granites Mine in the Tanami desert Northern Territory of Australia;
- At all material times it was a term of his employment with the employer that he work 2 weeks on (14 days) being 12 hour shifts and then have one week off (7 days);

- At all material times in the employment the worker was a worker within the meaning of the Act;
- On the 16th August 2004 the worker was present at his accommodation at the Tanami Granites Mine site;
- The worker was subsequently diagnosed as having a dislocation of the left shoulder;
- The worker handed a notice of injury to the employer on 16 August 204;
- On or about 20 August 2004 the worker made a claim pursuant to section 80 of the Act;
- On 31 August 2004 the employer deferred liability for the injury and on 29 October 2004 the employer disputed liability for the claim pursuant to section 85 of the Act;
- The remuneration received from the employer for the period 16 August 2003 to 15 August 2004 was $71,161;
- The employer did on behalf of the worker make contributions in accordance with the Superannuation Guarantee Levy requirements, at 9% calculated on the composite base hourly rate of pay;
- The worker's NWE is $1,100 (and not the $1,360.40 initially claimed, or the $1,754.14 later claimed, or the $1,848.48 finally claimed); and
- On or about 26 November 2004 a mediation certificate was issued pursuant to section 103C of the Act.

6. On the final pleading the worker still alleges that he suffered an injury arising out of or in the course of his employment on or about 16 August 2004. The employer continues to deny the "injury" or that it arose "out of or in the course of his employment". The worker now particularises the

"accident" as "the worker was present at his accommodation at the work site when he stretched his left arm above his head and suffered an injury to his left shoulder". The injury is now particularised as "the worker suffered an injury to his left shoulder which was subsequently diagnosed as a dislocation of the left shoulder".

7. He now claims that he was "as a consequence of the injury" totally incapacitated for work from 16.8.04 to 20.8.04 (in lieu of 19.8.04), and partially incapacitated for work from "21.8.04 to date and continuing" in lieu of from 20.8.04 as previously pleaded.

8. In addition to the financial amounts pleaded previously, the worker added a claim for "non cash benefits". After some initial reluctance from Ms Gearin paragraph 8(a)(iii) of the Statement of Claim was amended to read:

> "Weekly Non cash benefits of $535 being the provision by the employee of:
>
> (a) Accommodation including laundry and cleaning - $280 per week;
>
> (b) Food - $245 per week;
>
> (c) Sporting, recreational facilities, including gymnasium, theatre, pool, tennis court and wet mess - $10 per week.

9. The worker now "claims" the following relief:

> A. A declaration that at the date of the accident the worker was a worker employed by the worker within the meaning of the Act.
>
> B. A declaration that the worker suffered an injury arising out of or in the course of his employment with the employer at the date of the accident namely on 16 August 2004.
>
> C. A ruling as to the value of the worker's NWE at the time of the accident.

D. A ruling as to the most profitable employment that can be undertaken by the worker in accordance with section 65(2)(b) of the Act.

E. Payments pursuant to sections 64 and 65 of the Act for loss of income entitlements from 16 August 2004 to date and continuing.

F. Payment of all entitlements pursuant to section 73 of the Act.

G. Interest pursuant to sections 89 and 109 of the Act; and

H. Costs at 100% of the Supreme Court scale.

10. Clearly, the third appearance of the word “worker” in “claim A” is in error, and this should read “employer”. As already noted above, the employer does admit that “at all material times in the employment the worker was a worker within the meaning of the Act” (see paragraph 3 of substituted Defence). Accordingly, it is unnecessary for me to determine this aspect. All other “claims” (B to H) are alive. The worker bears the legal and evidentiary onus on each of the “claims” that he makes.

11. On the issue of superannuation both counsel advised that this issue was currently before the Northern Territory Court of Appeal and a decision was pending. Both counsel accepted that I would be bound by whatever decision that Honourable Court made, and accordingly, it was agreed that they would not re-argue that issue before me. I take it from this that (subject to any possible appeal to the High Court) I was to await and then adopt (assuming that it is on point) the decision of the Court of Appeal. However, that decision has not (as far as I am aware) been published as at the date of delivering my decision herein.

12. At the commencement of the hearing Ms Gearin (counsel for the worker) advised that the parties were hopeful of agreeing what the worker’s wages were, and therefore no evidence relating to this was adduced. At the conclusion of evidence on 8.6.06 both counsel closed their respective

cases subject only to the issue of the worker's wages and payments. Both counsel were confident that this could be resolved overnight. On 9.6.06 I was advised that agreement had yet to be reached on this issue, but counsel proposed to make closing submissions. I declined to allow this to occur. I advised both counsel that I would not hear closing submissions until all the evidence was closed. I further advised that if agreement was not reached they should go into evidence and I would decide the issue. I was unwilling to leave this issue alive due to the obvious difficulties that this could create. I stood the matter down for half an hour to enable this issue to be resolved one way or the other. Counsel then requested further time, which I granted.

13. Finally a schedule of past income received by the worker was tendered and became ExW18. As part of that exhibit there was also a "schedule of outstanding entitlements" which was effectively the worker's submissions based upon the agreed amounts received. Ms Farmer (solicitor for the worker) initially addressed on this document, but it quickly became apparent that there were blatant errors in the submission part of the exhibit. However, as this was only the submission, rather than the evidence portion of the exhibit, the matter proceeded while Ms Farmer went away to correct her submissions. The amended exhibit was later tendered, and I will refer to this document in more detail later in these reasons.

14. I now turn to consider the facts.

15. The worker was born on the 25th day of January 1979. He is currently 27 years of age. He "grew up" in Emerald, Queensland.

16. The worker is right hand dominant.

17. The worker did his senior schooling at St Brendan's Christian Brothers College in Yeppoon Queensland, where he attended as a border. He completed Year 12 in 1996.

18. After leaving school he undertook some general jobs in his area including farm work and fruit picking. He then undertook a twelve month pre-vocational course with the Central Queensland Institute of TAFE.

19. It was put to the worker in cross-examination that he had previously dislocated his left shoulder when he fell off a push-bike on 25 February 1997. Although he could not recall the date, he agreed with the event. The medical records held by the Emerald hospital were tendered and became ExE4. These notes disclosed the following:

- 26.2.97 1945hrs. Pt presented with obvious deformity of (L) shoulder. Pt fell off bike while riding. Dr Smith notified. Verbal order given for 1ml pethidine 100mg with maxolon 10mg – same given. X-ray technician notified – Eden RN;

- 26.2.97 2000hrs 18 y.o. (sic male) c/o painful (L) shoulder after fall from pushbike.

  OE / obvious deformity (L) shoulder joint

  Minor abrasions

  x-ray : ant. Dislocation no # seen

  reduction : 5mg midazolam IV Kocher's method

  reduced on post- x-ray

  sling

  r/v tomorrow – Sean Rothwell

- 27.2.97 r/v after (L) shoulder dislocation.

  (L) arm bandaged to body (sic with) 6 inch bandage

  - leave on for 4/52

  return before for shower / bandage (sic triangle) as needed.

- 27.2.97 1520hrs collar & cuff sling and tube grip

- 11.4.97 r/v 6/52 post left shoulder dislocation

  Had C & C (sic) strapping x 2/12,

Then C & C only

Now – good ROM

- non tender
- no sensory defect

P/ Exercises to strengthen shoulder muscles given.

Avoid forced extend rotation + abduction for another 1/12

R/v pn

Warned of risk of recurrence

20. I therefore find that the worker suffered a significant anterior dislocation of his left shoulder on 26 February 1997, when he fell off his bicycle. The shoulder did not re-locate independently and remained dislocated for some considerable time until it was reduced at the Emerald Hospital.

21. Subsequent examination by Dr Saies (orthopaedic surgeon from Adelaide) during an operation that he performed on 15.3.01 disclosed a large Hill Sachs lesion (like a divot or dent) in the ball of the joint. I find that this damage was primarily the result of this first dislocation.

22. It was further put to the worker that this was the beginning of his problems with his left shoulder but he “wouldn’t say it was the beginning”. I do not understand his reluctance in that regard. Unless there was some earlier incident which we weren’t told about, it is clear, and I find that the worker’s problems with his left shoulder commenced on 26.2.97 when he fell off his bike.

23. Whilst attending his TAFE course he also worked at Hastings Deering between June 1997 and August 1997 by way of work experience, working three weeks per month. Hastings Deering were Caterpillar dealers. In that work experience the worker said that he did overhead work, either on hoists, over pits, or laying flat and working up. There was no evidence to

suggest that the worker had any particular difficulty with these tasks at that time.

24. He received a Certificate 1 in Engineering (Pre-vocational) Mechanical/Automotive from the TAFE on 15 October 1997.

25. Ms Mangan (counsel for the employer) suggested to the worker that he had a number of other dislocations after the bike incident, and the worker said that he was unsure how many. As the evidence progressed it became apparent that the worker had had a number of incidents involving his left shoulder. In some of these the ball of the joint moved within the joint without actually fully dislocating. These episodes were described by the various medical experts who gave evidence as subluxations. It appears that the worker was not aware of the different terms until relatively recently. Accordingly, when the worker described previous “dislocations” to various persons, it is unclear now whether in fact he was describing a “dislocation” or a “subluxation”. It is however clear that he was describing a feeling of instability within the left shoulder.

26. In about February of 1998 the worker obtained a position as an Apprentice Diesel Fitter with GEMCO on Groote Eylandt in the Northern Territory of Australia.

27. Ms Mangan suggested to the worker that some time prior to June 2001 he dislocated his shoulder playing football. The worker said that he was unable to recall the football incident. The reference to football comes from the notes of a “fellow” (ExE7) who was working with Dr Saies at the time that he first examined the worker on 14.3.01. It appears that this “fellow” took a history from the worker and examined him, and then Dr Saies came in and repeated so much of the two procedures as he considered relevant. The reference also makes it’s way into Dr Saies report dated 26 October 2004 (ExE9).

28. Whilst working at GEMCO he undertook a course at the Northern Territory University, presumably as part of his apprenticeship. This course ran from Semester 1 in 1998 until Semester 2 in the year 2000. On the 11th of July

2001 the worker was awarded a Certificate 3 in Automotive Heavy Vehicle (Earthmoving/Industrial Mechanic).

29. In addition, during his time at GEMCO the worker undertook and obtained the following (as appears in ExW8):

- Completed the requirements of the welding and thermal cutting (NBB009) on 6 March 1998;
- Completed the requirements of the Machining (NBB06) on 13 March 1998;
- Completed the requirements of the Hand & Power Tools (NBB007) on 20 March 1998;
- Completed the requirements of the Engineering Drawing Interpretation (NBB012) on 3 April 1998;
- Completed the requirements of the Fabrication Techniques 1 (NBB10) on 16 April 1998;
- Completed the requirements of the Manual Metal Arc Welding 1 (NFO1) on 29 April 1998;
- Satisfactorily completed a training course with all requirements of O&K RH120 Hydraulic Excavator Maintenance training on 26 September 2000;
- Successfully completed the requirements for Signature Engine Familiarization on 22 May 2001; and
- Passed the tests under the Ozone Protection Act 1990 on 29 October 2001 at the Northern Territory University.

30. When the worker was employed at GEMCO he lived in the community in the accommodation supplied by the employer. The employment required him to work above his head and there was a lot of climbing of ladders onto large machines. He had to do component change overs, including

changing sumps, which required him to work from under the machines. He also checked ball studs for steering and movement in drive lines. He had to work over his head with spanners.

31. Although the worker is right hand dominant his work required him to use both hands.

32. In cross-examination Ms Mangan put to the worker that prior to 26.6.00 he had attended the Alyangula health clinic to report problems with his shoulder. The worker did not agree that he was having ongoing problems with the left shoulder, but rather pain every now and again. Ms Mangan further suggested that he had some apprehension it was going to come out again, but the worker would not agree to any "apprehension".

33. The Territory Health Services (hereinafter referred to as "THS") records (ExE5) indicate that on 14.1.99 the worker attended solely in relation to his left shoulder and gave a history of "dislocated left shoulder 1 year ago. Grumbling left shoulder pain since". I note that the bike incident had in fact occurred two years before and not one. He had a full range of movement with mild pain.

34. Ms Mangan put to the worker that on 29.4.99 he had a dislocation, but it popped back in again, but there was pain. The worker couldn't recall.

35. The THS notes (ExE5) confirm that on 29.4.99 the worker attended and gave the following history:

> came off bike 2/7 ago.
>
> Dislocation but popped back in again…
>
> Pain around shoulder since
>
> Mod ROM…
>
> No specific tenderness except anteriorly
>
> Off work 30/4 – 3/5

36. His explanation for not recalling appears to be that he considered it insignificant, with not the same pain. He said “now I don’t recall any prominent injuries that stood out as painful as these”. Whilst I would not expect the worker to remember specific dates, he should be able to recall generally whether he had other dislocations, and approximately how many. He should also remember that he dislocated it twice falling off a bike. This would therefore appear to be at least the second dislocation of the left shoulder.

37. Ms Mangan further put to the worker that the THS records indicate that in October 1999 he had a recurrent dislocation of the left shoulder. The worker again could not recall. It is clear from ExE5 that on 8.10.99 the worker again attended in relation to his left shoulder and gave a history of “recurrent dislocation left shoulder”.

38. Ms Mangan further asked the worker whether he could recall seeing Dr Butler in Alyangula on 17 March complaining of recurring dislocations. The worker could not. The THS notes (ExE5) disclose that the worker did attend on 17.3.00 and was to be referred to “orth” at Gove hospital. The reason noted was “recurrent dislocation (L) shoulder”.

39. If the worker had left shoulder dislocations that were significant enough to attend a doctor then I would expect him to recall the general fact, if not the particular. I find that the worker did have an unstable left shoulder leading up to June 2000. I further find that the left shoulder was causing the worker ongoing problems due to the fact that it was dislocating or subluxating on a recurrent basis. Dr Butler noted the following in his report of 26.7.00 (part of ExE5):

> He has a history of recurrent dislocations to his left shoulder following a pushbike accident two years ago. Mr Young has dislocated his shoulder on approximately five occasions, usually involving mild to moderate trauma.

40. I find this history to more closely reflect the true position than the worker’s evidence before me now. When this was put to the worker in cross-examination he said “I would not say recurrent dislocations”. When asked

about the history of approximately 5 dislocations the worker said “they’re not something I recall….I possibly could have recalled it then”.

41. The worker could not remember having had any time off prior to the 26th day of June 2000 as a result of his left shoulder. The THS records (ExE5) would suggest that he may have had 30.4.99 until 3.5.99 off work.

42. On the 26th day of June 2000 whilst employed with GEMCO the worker suffered a further injury to his left shoulder. He said that he was moving a drum pulley off a conveyer. To do this he was standing on a truck disconnecting the drum off the crane. He slipped and his body weight pulled his left arm back and his left arm was dislocated at the shoulder.

43. In relation to this incident the worker completed a claim form which became ExE1. In this document the worker described the incident as follows:

> I was unhooking a cradle from a pulley & as I knelt down in fell forward cause my body weight to act awkwardly on my shoulder & my shoulder dislocated.

44. In that claim form the worker did disclose that he had suffered from a dislocated shoulder before.

45. On 26.6.00 the worker saw Dr Butler after the incident at work. Dr Butler took the following history from the worker:

> He stated that he was holding a chain with his left hand with his shoulder above his head. He leaned forward and his shoulder dislocated. It the relocated itself spontaneously.

46. On 29.6.00 Dr Butler issued a medical certificate in which he stated “pre-existing condition (recurrent dislocation)”. The worker agreed in cross-examination that he (meaning Dr Butler) “obviously” got that from him.

47. The worker thought that he was off work at GEMCO for 3 months or so. In cross-examination he was asked if he remembered going back to work with his arm in a sling. He didn’t. Again I would expect this to be something he should remember. In the end, the best the worker could suggest was that you do generally go back to work on light duties, then back to work with

restrictions to get rehabilitated. He assumes that is what happened in this case. He appears to have no real idea. In the end, to summarise his evidence he has no real idea of when or how he went back to work, or on what restrictions, if any.

48. It is clear from the report of Dr Butler of 26.7.00 (part of ExE5) that the worker was initially treated with a sling for two weeks and referred to physiotherapy. He was also placed on light duties and instructed not to raise his left arm above his head. Further, “an x-ray of his left shoulder reveals a Hills sack osteochondral abnormality of the superio-lateral left humeral head”.

49. On 13.7.00 the worker again attended at THS and reported (ExE5) that “(L) shoulder feels good no pain.” Despite this, Dr Butler issued a medical certificate certifying the worker fit for work but with “no work with arms above head”. Dr Butler continued to place this limitation on his subsequent medical certificates. The reason for this appears in the last paragraph of his report of 26.7.00 where he states “I believe Mr Young would not be able to resume his tasks as an apprentice fitter and turner unless his left shoulder can be stabilised.”

50. The THS records (ExE5) note a further attendance by the worker on 23.10.00. Here it is recorded that:

> Workers Comp rejected his claim.
>
> Plan to go to grievance
>
> Has returned to normal duties.
>
> No further episode of dislocation.

51. Following the dislocation in June 2000 the worker was eventually referred to Dr Saies, an orthopaedic surgeon in Adelaide. He first saw the worker on 14.3.01 and recorded the following history in his report dated 26.10.04 (Ex E9):

> He described problems of recurrent instability affecting the left shoulder. His initial dislocation happened three years prior to this event when he fell off a pushbike in 1998. The shoulder required reduction at that time and this was undertaken in a hospital. At that particular time in 1998 he was not working. However he started work three months after his initial dislocation injury and at the time that he was originally employed no pre-employment screening examination was undertaken. He sustained a number of further dislocations to this shoulder during a wide variety of activities including football and at times when rolling onto that shoulder. He sustained a dislocation to the left shoulder while at work in June 2000. He was able to spontaneously reduce and enlocate the shoulder at that point in time.
>
> When seen by me on that occasion he described a history of multiple dislocations on the shoulder and ongoing pain and discomfort in the shoulder. He was able to continue on at work in a restricted capacity only.

52. Again, this history is different to the worker's evidence before me. Dr Saies commented on this later in his report of 26.10.04 where he says:

> I also do not concur with the information that he has given in relation to the initial presentation. My records differ in that the patient remained substantially symptomatic following his pushbike accident in 1998 and was having considerable problems with the shoulder leading up to what was his third or fourth dislocation that had occurred in the workplace and was the final event precipitating his knee (sic need) for treatment in June of 2000.

53. On examination on 14.3.01 Dr Saies noted:

> An unstable shoulder with positive apprehension signs. A diagnosis of recurrent post-traumatic instability of the shoulder was made.

54. The worker underwent an "arthroscopy and open inferior capsular shift" to his left shoulder on 15.3.01. This operation was performed by Dr Saies, and he noted the main findings (ExE9) "were of a significant antero-inferior Bankart ligament tear along with damage to the posterior humeral head, articular cartilage or a Hill Sasch lesion". The operative record (ExE8) noted "there was a large Hill-Sachs lesion and an extensive Bankart lesion". He drew these as part of a diagram that formed a part of the operative record. He later said in evidence that the drawing was roughly to scale.

55. The worker said in evidence in chief that GEMCO paid for this operation, but it transpired in cross-examination that this was paid on a without prejudice basis as the then employer was apparently denying liability for the injury. There apparently was a process of mediation involved. The worker was not legally represented in relation to that matter.

56. After the operation the worker believed that he went on light duties and then returned to full duties. Whilst he had no idea when he returned to full duties both counsel seemed to agree that it was on 22 June 2001. There is a note in the THS records (ExE5) of an attendance by the worker on 21.6.01. On that occasion he attended for two reasons, but one of them was for a review following surgery. On examination there was “FROM”, which I take to mean a full range of movement. “Nil distress” was also noted. Accordingly he was to return to “full duties from 22/6”. Accordingly, I find that the worker did return to full duties with GEMCO from 22.6.01.

57. Dr Saies prognosis following the operation is noted in his report of 26.10.04 (ExE9) as follows:

> The results of this surgery are that 85%-90% of patients will achieve a stable shoulder without ongoing dislocation episodes. Some patients will find that they have minor apprehension in the above shoulder height lifting position, and some patients, of course, will sustain further specific injuries that damage the repair and lead to further episodes of recurrent instability despite the reconstruction.

58. The worker completed his apprenticeship with GEMCO in July 2001 and ceased employment with GEMCO on the 28 July 2001. It is apparent from the worker’s evidence that the worker had some issues between himself and GEMCO. I was not informed as to what these may have been.

59. In November 2001 the worker commenced work at Coalfields Construction at Emerald in Queensland as a Diesel Fitter. That employer was a Civil Construction Company and they had earth moving machinery and the worker did the maintenance and repairs on those machines.

60. The worker said that his jobs always involved heavy lifting as components for these vehicles were made out of steel. He said the amount of lifting

depended on the job you were doing. Sometimes he was on the ground and would have to lift a heavy component up and put bolts in. Sometimes he was working above his head such as when holding a hose out of the way to remove nuts. He estimated that thirty to forty percent of his work involved working above his head with this employment. The worker was asked in evidence in chief whether he had any problems with his shoulder doing work at Coalfields Construction and he said certainly not that he could recall.

61. In February 2002 the worker commenced work at McMahon Contractors at the Merlin Diamond Mine as a Diesel Fitter. This mine was situated near Borroloola. In this employment he was working with quite large earth moving machinery such as dump trucks and loaders. He had to change components, fix hydraulic pumps, change transmissions etc. This job also required him to work above his head and had similar lifting requirements. In this employment his accommodation was provided and he worked two weeks on and one week off working twelve hour shifts of day and night.

62. In evidence in chief the worker was asked whether he had any problems with his shoulder doing work at Merlin Diamond Mine and he replied no, nothing that required him to have a day off. He went on to explain that he might have a niggling little pain every now and then that would be there but he didn't believe it stopped him working.

63. In November 2002 the worker moved to Ranger Uranium Mine as an Industrial Mechanic. His reason for the move was that the word was that the Merlin Mine was closing down and it was just a matter of time so he thought he would get out before it did.

64. Prior to starting work at Ranger Mine the worker had done the medical to work for the employer herein and he was waiting for a position to come up. In the interim he worked at Ranger. At Ranger he did an 8,000 hour service on a large genset. He had an overhead travelling crane to do the lifting and generally the work wasn't overhead work. He said they were sitting on the engine and there was very minimal overhead work there.

65. In evidence in chief the worker said that he started working with the employer in December 2002 as an Industrial Mechanic. However, in cross-examination it became clear that in December 2002 the worker was employed by Skilled Engineering, and it was through them that he started working with the employer.

66. On the 10th day of December 2002 the worker signed a site entry application under the heading “Newmont Tanami Operations”. This document was tendered and became ExW1. The worker said he didn’t complete the form himself, rather the questions were asked and the answers written in by somebody else, and he signed it. The form is hard to read and the handwriting at times is illegible. On this form in question 5 the worker was asked “Have you ever had to claim workers compensation?” The “Y” is circled (meaning yes) and in the right hand column is written “Dislocated L shoulder 2001 reconst. Mar01.”

67. In question 8 of ExW1 he was asked “Have you had any serious injuries, illness, mental or physical which required medical treatment for a period of one week or more?” Again the “Y” is circled and the explanation “shoulder” is given.

68. In question 40 of ExW1 he was asked “Have you ever or do you suffer from other joint injuries or conditions?” Again, the “Y” is circled and the explanation is “shoulder aches every now and then like (illegible)”. When this answer was put to the worker he agreed that the illegible word was probably “numbness”, as he said this is how he had described it in the past.

69. When the worker was first working at the mine through Skilled Engineering he stayed in a single room (“donga”) which did not have an en-suite.

70. After the worker commenced working through Skilled Engineering at the mine in December 2002 he expressed interest in working directly for the employer. He filled out an application form (which was not placed into evidence). He said that he undertook a drug test and a medical and passed both of those. This evidence was not challenged, and no evidence relating to this “medical” was introduced. The worker signed a “Condition of

Employment for Callie Project" document on the 2nd of April 2003. This document stated that his start date was the 27th of March 2003 and he was employed as a Heavy Duty Fitter on a fulltime basis. This document became ExW3. The worker said that initially this was his employment contract but he then went on to an AWA and thereafter was paid a flat hourly rate. I was not informed as to the terms of any AWA.

71. The following relevant matters appear in ExW3:

> You will be employed by Henry Walker Eltin Contracting Pty Ltd, a wholly owned subsidiary of Henry Walker Eltin Group Ltd on the Callie Project.
>
> Accommodation and messing will be provided for by the Company whilst on site.
>
> All employees shall abide by any camp rules and regulations that apply on site. The Company reserves the right to search it's premises (including employees accommodation) to determine whether any person has engaged in conduct that interferes with or adversely affects it's business.
>
> Travel to and from the Project site to your point of hire, Alice Springs, at the conclusion and commencement of each roster cycle will be provided by the Company. Travel to site will be on Company time; travel back to your point of hire will be on personal time.
>
> Travel to and from the Project site accommodation and your place of work each shift will be provided by the Company. All travel will be in your own time.
>
> You will be required to join the relevant Henry Walker Eltin Superannuation fund.
>
> Continuous shift employees are entitled to twenty five (25) days accrued leave for each year of continuous service.
>
> All employees are to observe the "7 hour" rule, that is no employee is to consume alcohol within t hours of commencing a shift. Employees may be required to undergo screening tests for alcohol and illegal drugs as required by the Company. You agree to assist the Company where required, to submit to random and incident specific alcohol and drug testing. You acknowledge that refusal to submit to, or fully participate in such testing, or if the result of the test shows you were under the influence of illegal drugs or alcohol whilst on

> duty, will result in disciplinary action which may include dismissal in accordance with the Company's policy.

72. James Turner gave evidence before me. He is a contracts manager employed by Newmont Australia. He was involved in the contracts for the Callie mine (which was the mine the subject of this claim). He stated that Newmont provided messing and accommodation for all the employer's employees, and Newmont did not charge the employer for this. He said this was justified on the basis that all costs to the employer were costs associated with extracting the ore, so there was no point in charging for this and then having it back-charged. It would just be an administrative waste.

73. As noted earlier (in EXW3) it was the employer's responsibility to provide accommodation and messing to the worker whilst he was on site. How the employer did this was a matter for them.

74. Mr Turner went on to say that Newmont had a contract with Eurest to provide all messing, food and cleaning at the village. He said that this contract cost Newmont around $30 per person per day, but there was a sliding scale depending upon the number of people in camp at any one time.

75. The workers employment required him to fly in to the Tanami mine site from Darwin and stay on site for a two week period. During this period he would work 12 hour shifts. Day shift would run from 6am until 6pm, and the night shift would run from 6pm to 6am. At the end of his two week shift he would be flown back to Darwin for one week off before repeating the cycle.

76. At the start of his two week cycle he would go to the airport early in the morning in order to catch a Pearl Aviation flight. This would take him to the airstrip in the Tanami. From there he would be bussed directly to the mine to start his first day shift at 0600. He would then work 7 consecutive day shifts. After the 7th day shift he would not work then until 1800 the following day, when he would then commence 7 consecutive night shifts. At the completion of the last night shift he would then be bussed (after showering

and changing at the mine site) to the airstrip to be flown out for his 7 days off. The cycle would then commence again.

77. It was the unchallenged evidence of Mr Turner that Newmont owned the mining lease, and controlled the operation of the mine site (hereinafter referred to as “the mine”) and the accommodation village (hereinafter referred to as “the village”). He went on to say that there was an agreement between Newmont and the employer whereby the employer was to mine the ore from the mine, bring it to the surface and stockpile it.

78. There was a mill and processing plant (with a power station close by) about 2 kilometres from the village, but this does not appear to have been any part of the employer’s business or operations. The mine was 45 kilometres away from the village.

79. A plan of the village was tendered and became ExW13. Fifty eight colour photographs of the village and it’s surrounds were also tendered into evidence and became ExW2.

80. In the village the worker had his own single room which he did not share with any other worker. He would not have to clean out the room for other occupancy during the period that he was away and this room was his for the duration of his time. This is not surprising. If he were working 2 weeks on and 2 weeks off then a change over in respect to the same room would be possible. It would not have been practical on his roster.

81. In his room (after he became an employee of the employer) there was a single bed, a bar fridge, a desk and chair, an air-conditioner, and en-suite. In addition, the worker had brought his own television from Darwin which he used in the room. Photographs 9, 19, 20, 21 and 22 of ExW2 showed the inside of a room similar to what the worker stayed in. It was a pretty basic but clean standard of accommodation. The furniture and bed also were basic.

82. The worker did not have a motor vehicle at the village, and he was not aware of anyone else having access to a vehicle other than contractors

who may have brought their own vehicles to deliver their tools to site. He did not have access to any transport (other than to go to and from the mine or airstrip) and had no way of getting away from the village or mine site. The evidence clearly showed that the mine site and the village were very remote. Mr Gore (a valuer who gave evidence in this case) prepared a report which became ExE3. In paragraph 2.0 of that report he set out the location of the "work site" as follows:

> The work site, subject to this assessment, is the Granites Gold Mine, which is located in the Tanami Desert. It is located approximately 550km north west of Alice Springs. It is adjacent to the Tanami Road and located approximately 60km from Rabbit Flat Roadhouse.
>
> Access to the area is via the Tanami Road which is a gravel un-sealed road and there is a contractor air flight to the mine site.
>
> This is considered a remote location.

83. The worker was required to stay at the village site during the whole two weeks that he was working. At the village there was a wet mess which sold alcohol. Photographs 1, 29, 43, 44, 48, 49 and 50 of ExW2 show the various areas of the wet mess. It appears to be of a reasonable standard. Alcohol was subsidised and it initially cost about $2.20 for a beer but this went up to about $2.50 by the time he left. Initially alcohol was not allowed to be taken back to rooms, but towards the end of his stay workers were allowed to take up to a six pack back to their dongas. In the wet mess there were pool tables (photos 43 and 44 of ExW2) and dart boards as well (photos 51 and 52 of ExW2).

84. On occasions the mine operators provided entertainment by means of a band or comedians. There was a stage (photo 50 of ExW2). The worker described the wet mess as the heart of the village.

85. There was a room also in the village where they showed movies from time to time and also had cultural awareness courses (photos 6, 7 and 8 of ExW2). The movies were on once or twice a week but the worker only went

to see movies about once or twice during the period that he stayed in the village.

86. The village also had a gym (photos 10 and 11 of ExW2). The worker said that employees were encouraged to be active and there were signs and posters up around the place encouraging activity. There was also a person put on at the gym to assist people with programs. The worker said that he used the gym from time to time but did not undergo any particular program. It was suggested by Mr Gore in his evidence that a person had to join the social club in order to access the gym. The worker was not asked whether he was a member of the social club at any time.

87. The village also had a library (photo 24 of ExW2) but the worker never availed himself of it.

88. Outside of the wet mess there were various areas to sit and on Saturday nights they would hold a barbeque (photos 51 and 52 of ExW2).

89. The village also had a pool that the worker said he didn't need encouragement to use as sometimes it got very hot. (photos 40, 41 and 42 of ExW2).

90. The village also had a tennis and basketball court (photo 55 of ExW2), but the worker did not suggest that he ever utilised this.

91. When the Saturday barbeque was served there was steak and sliced tomato, cooked onion, cheese, sauces and bread and butter. Whilst the mess was also open the worker chose to eat at the barbeque on Saturday nights.

92. When the worker was on day shift he would get up at about 4am shower and get dressed and go to the mess (photos 26, 27 and 46 of ExW2) at about 4:30am. For breakfast there would be a full buffet with bacon, eggs, cereal, bread, everything. For breakfast the worker wouldn't have the same thing each day. Some days he would have cereal and toast. Other days he would have bacon and eggs and sausages. Other days he would

just have crumpets. He estimated that he had pretty well everything on the buffet over the period he was there.

93. In addition in the mess there was a salad bar (photo 45 of ExW2) with cold meats and fruit. Lunch boxes were provided by the employer, and the worker would have to prepare his own lunch to take with him. Some days he would make meat and salad sandwiches. Other days he would take a meat pie or sausage rolls out with him. There was also fruit. The employer provided cordial containers and had juices, water, milk etc. After fixing his lunch he would then go and sit in the bus and wait for it to leave for the mine site. The worker said that the journey would take 30 to 40 minutes and he would use this time to get some extra sleep.

94. Upon arrival at the actual mine site the worker's work clothes from the previous shift had already been washed, dried and hung up. He'd then change out of his normal clothes into his work clothes and then attend a pre-start meeting. This meeting was to delegate jobs for the day, discuss safety or other issues.

95. The worker was working underground and his jobs would be written up on a white board.

96. If a bogger (a machine that dug ore underground) blew a hydraulic hose then he'd get all his tools that he needed and take it underground with him. Working underground could be cramped as the machines would have to be fixed where they stopped. The worker said it was quite a regular problem replacing lift hoses. To do that he was working overhead in cramped conditions looking up and working blind a lot of the time. He had a light on his helmet.

97. The worker estimated that fifty to sixty percent of his work involved work over his head, whether standing or laying down under a machine.

98. Lunch would normally be for half an hour, and in addition there was a smoko. At the mine site there was a room (the crib hut) for the workers to eat their lunches. In this room they had access to a pie oven, a microwave,

a toaster and other such items so they could heat up their food or prepare it. They also had peanut butter, vegemite, jam etc plus bread and a sandwich maker and other items to prepare lunches.

99. The worker said that because of his position he didn't have any set times to stop for lunch or smoko as if he had to fix a machine he had to keep working on it until it was finished so that work could continue.

100. Towards the end of the day shift at about 1730 they were up cleaning the utility and writing jobs on the white board for the next shift. He'd pack his tools up and then go and have a shower at the mine site, leave his clothes there to be cleaned for the next shift and get back into his normal clothes. He would then get back on the bus and travel back the thirty to forty minutes to the accommodation area.

101. Upon returning to the camp site he'd either go back to his room, or go to the mess and have dinner, or go to the wet mess.

102. Dinner time was again a buffet and there was always a choice of at least two or three items. It could be pasta or roast or something else. Friday nights was fish and chip night. In addition there were soups and laksa. If he didn't feel like what was being served at the buffet he could always ask for a steak or some fish to be cooked up and this would always be done. The steak was rump or t-bone or whatever it was they ordered in at that particular time.

103. For dinner the worker would have steak or pasta, fish and chips on a Friday night on occasions or on other times he'd have a roast.

104. There were also deserts provided in the form of cakes, tarts, custards, meringues, four different type of ice-cream etc. There was also tea and coffee available.

105. There was a laundry at the village which the workers could use to have their laundry done if they wished as well.

106. The worker's room was cleaned by mine staff and his bedding was changed twice a week he believed.

107. When he worked nightshift he would get up about 1530 to shower get changed and get ready. He would then go to the mess to have his meal. Even though it was the afternoon meal he could still have cereal or breakfast if he wanted to.

108. The worker was asked whether he'd had any incapacity during the time that he worked for the employer and he said that he'd been able to do everything up until then and he couldn't recall a restriction.

109. Prior to August 2004 the worker had been "courting" a woman named Fiona for about two years. It appears that he had originally met her in Emerald. She had two children (now aged 10 and 8) from a previous relationship. The worker purchased a house at 5 Scanlan Court Farrar in about late 2003. He rented this out to Fiona at $250 per week. The worker was renting a room from a friend in the same area and paying $100 a week. Sometime around the time of the injury the subject of this claim (the worker did not say whether it was before or after) the worker moved into his house with Fiona and they commenced a de facto relationship, which still continues.

110. As a consequence of the worker's relationship with Fiona, the worker had applied for a transfer from the mine to Darwin, and had spoken to Bill and Sam about that. It was his decision to move as he wanted to remain in Darwin rather than fly in/fly out. The worker was aware that the rates of pay would be less. He said that he was on $27.50 an hour at the mine, and the rate in Darwin would be $17.80 or something. He said that he had organised a transfer and the employer signed it. Although this evidence was unchallenged, no such signed document was tendered into evidence.

111. On the 16th day of August 2004 the worker said he was getting ready for nightshift. It was about three thirty to four o'clock in the afternoon. He got up and put his arms above his head and leant into it to stretch and he heard a tear. He said that it felt like his left shoulder was out and he fell back onto the bed and rolled around in pain and it then felt like the

shoulder went back in. He then held his left arm in to his side and he went to the wet mess. At the wet mess he saw the Manager and told him that he had dislocated his shoulder. The Manager called paramedics who arrived in a troop carrier. The worker was driven by the paramedics to the Newmont site where apparently the clinic was situated.

112. The worker believed that the paramedics either were nurses or had first aid training. He spoke to a female paramedic and she asked what had happened and he told her. She gave him anti-inflammatories and put his left shoulder in a sling. She did not examine the shoulder as the worker didn't want to move it as it was too sore. The worker said he could get his shirt off by slipping it off. He was in a lot of pain but couldn't remember whether he was given any pain killers.

113. A flight was organised for the defendant back to Darwin the following day.

114. The worker went back to his room and rang Fiona.

115. Upon arriving in Darwin the worker couldn't get to see the doctor the employer wanted him to see for a week so he arranged to see his general practitioner Doctor Forrest.

116. On 16 August 2004 the worker signed a declaration as part of his Work Health Act claim form claiming that he handed the claim form to the employer on the 16th of August 2004, however, in the same document (ExW4) he signed the authorisation for medical information on the 17th of August 2004 and the employers declaration stated that the employer received the claim form on the 17th of August 2004.

117. In this claim form (ExW4) the worker said the injury happened at "5.30pm" which is different to his evidence before me. He described the incident as follows:

> I was in my camp room and had one of those big stretches as I was getting into the shower and half way through it I heard like a tearing noise and my left shoulder dislocated which dropped me in pain and I layed on my bed to try and put it back in, which was successful and rang the parramedic.

118. In his evidence before me he did not suggest that he rang the paramedic. If he truly was getting in to the shower at 1730 then it would appear (on his earlier evidence) that he would have been too late to get the bus to the mine, as this was likely to have left at least half an hour before. This was not explored in evidence.

119. Further on in the claim form the worker said that he reported the injury to Lew Franklyn, the site manager, also at "5.30pm". He went on to assert that he stopped work because of the injury at "6.00pm", but clearly he had not yet commenced work. I note that Mr Franklyn gave evidence before me but was not asked any questions about this day or the reporting of the incident.

120. The worker first saw Dr Forrest on 20.8.04. The worker told Dr Forrest (medical certificate dated 20.8.04, part of ExW9) that he "was stretching his trunk and shoulders whilst in his accommodation". Dr Forrest made a diagnosis of "recurrent dislocation of the shoulder spontaneously relocated". The worker believed he was given a medical certificate which he believed he gave to the employer. This first medical certificate stated that the worker was fit to return to work on restricted duties from 20.8.04 to 2.9.04 inclusive but "left arm to be in a sling no active use of the left arm".

121. By letter dated 31 August 2004 (ExW5) the employer's insurer (Alliance Australia Insurance Limited) purported to defer liability for a period up to 56 days.

122. By letter dated 3 September 2004 (ExW6) Alliance again wrote to the worker stating as follows:

> "I refer to our letter dated 31 August 2004 regarding the above mentioned claim.
>
> I have now received wage details from your employer and this letter is to advise you that your normal weekly earnings have been determined as $1,360.40 gross.
>
> Your employer will pay you the above rate as prescribed in the letter dated 31 August 2004. Please ensure you provide ongoing and current work compensation medical certificates to support your incapacity for work."

123. By letter dated 29 October 2004 (ExW7) Alliance again wrote to the worker as follows:

> "I refer you to our conversation today and unfortunately pursuant to section 85 of the Work Health Act (copy enclosed) your employer disputes liability for compensation."

124. Attached to ExW7 was a Notice of Decision confirming that the employer (acting on advice of Alliance Australia Insurance Limited) disputes liabilities for your claim. The reasons for this decision were stated as:

> 1. You have not sustained an injury pursuant to the Work Health Act
>
> 2. If you have sustained an injury pursuant to the Work Health Act, which is denied, your injury was not sustained out of or in the course of your employment
>
> 3. If you have sustained an injury pursuant to the Work Health Act, which was sustained out of in the course of your employment, which is denied, your current employment did not materially contribute to your current injury.

125. Since the incident on 16.8.04 the worker told Dr Saies on 27.3.06 (ExE10):

> He described ongoing apprehension and a sense of lack of confidence in the shoulder, particularly with the arm in abduction and external rotation. He described regular pain in the shoulder. He had described no further dislocation since that particular event.

126. The worker said that on 15 November 2004 he returned to work in Darwin for the employer on light duties. His job was to move the workshop into the new premises at Hook Road. He used two hands to do this. He said he was able to use the left arm within his restrictions which included no rotating the shoulder up and no heavy overhead work. As a result of the employer's decision to dispute liability the worker was told that he had to be stood down as he was not able to work unless he had a full clearance to do so.

127. The worker said that his supervisor wasn't happy about this but said he'd been told what to do. The worker told the supervisor that he couldn't get such a certificate so he would make his job easier and he would finish up.

128. Apparently, some further discussions occurred with higher management and it was decided that if the worker got a certificate stating what his restrictions were he could continue working. He did that and after about a week away from work he then returned to work again on restricted duties. He did anything that he could that didn't require him to get into that position with his left shoulder. He said it was up to him what he could or couldn't do. Changing tyres and that sought of thing he was able to do. Some jobs he couldn't do so he'd get assistance from a work mate and they'd help him out.

129. The worker said that he was paid less money per week as the rates were lower but you could work extra hours as well to make it up. He continued working in the same workshop.

130. In January 2005 the employer apparently went into administration. Presumably the administrator sold off portions of the business as the worker continued working at the Hook Road premises throughout and on the 1st of April 2005 became an employee of McMahon but doing the same work and working from the same premises. The worker was still employed by McMahon's when he gave evidence before me, although he plans to leave that employment on 13 June 2006.

131. The worker has not returned to unrestricted duties to date.

132. The worker said that he has been advised by the various doctors that he has seen to undergo a further operation on his left shoulder. I accept this evidence. In the report of Dr Sharland of 2.3.05 (ExW15) he states:

> Given that it is more than six months from the time of injury and physiotherapy has been undertaken, it is likely that Mr Young will continue to have symptomatic instability with an inability to work over head with the left arm. The treatment for this is surgical intervention.

133. When Dr Sharland gave evidence before me on 8.6.06 he stated that he was not performing this surgery himself (although he could) because the worker was keen to have it done by the best. He considered that Dr Bokor

was the best in Australia for re-do surgery, and hence he had arranged for him to perform the surgery on the worker.

134. In addition, Dr Saies in his report of 4.5.06 (ExE10) states:

> This patient is likely to continue to experience low grade instability symptoms, particularly with the arm at or above shoulder height unless he undergoes a redo reconstruction. It is possible that he would be able to tolerate bench height work activities without ongoing instability but I suspect that there would be other aspects of his domestic and recreational pursuits that would lead to instability symptoms or further dislocations of the shoulder. I would therefore recommend that he undergoes redo surgery.

135. I therefore find that a further reconstruction of the left shoulder is both reasonable and necessary.

136. The worker and his partner (Fiona) now have a child together who is aged 16 months (in addition to Fiona's two other children who are aged 10 and 8) and Fiona is expecting her fourth child on 29 September 2006.

137. The worker is booked in to have an operation in Sydney on his left shoulder on the 6th day of July 2006. The worker believes that he will take three to six months after the operation to recover. He will have his arm in a sling for six weeks after the operation so "he will be a one armed bandit for that time".

138. As a result of this the worker has decided to leave the Northern Territory with his family and return to Emerald and he will be leaving on about the 13th of June 2006.

139. The worker has sold his house in Darwin and will be taking annual leave. After his annual leave has run out he will then be having to survive on the money from the house until he can find employment.

140. The worker has his parents in Emerald as well as his brother and sister. In addition Fiona's mother and father and a sister live there as well. Hence they are moving to Emerald for family support and assistance. This is a reasonable course of action in the circumstances.

141. In addition, the worker believes that they are “crying out” for diesel mechanics in Emerald, so he is hopeful of obtaining employment once he is fit to do so.

142. The worker struck me as a decent “bloke”. He had a particularly poor memory for events and dates. I did not form the impression that he was deliberately trying to be evasive however, but rather, he would be a person who would benefit from using a diary. His general presentation suggested that he would not easily move into more clerical or senior roles.

143. I make the following factual findings:

- On 26 February 1997 the worker suffered a serious dislocation of his left shoulder when he fell off a bicycle;
- His left shoulder remained dislocated and had to be reduced in the Emerald Hospital;
- As a result of this incident permanent damage was caused to the left shoulder and it remained clinically unstable thereafter;
- The worker had ongoing instability in the left shoulder and he suffered a number of dislocations or subluxations thereafter (particularly in 1999 and 2000);
- On 26 June 2000 whilst working for GEMCO he suffered a further dislocation of his left shoulder which further exacerbated his ongoing left shoulder disability;
- The worker’s left shoulder would not heal itself and if he were to continue with his trade he required an operation;
- On 15 March 2001 Dr Saies performed an open inferior capsular shift of the left shoulder. He found a large Hill-Sachs lesion (which was not repaired) and an extensive Bankart lesion. A single bone anchor was used to stabilise the labral deficiency present, capsular flaps were shifted and sutures were tensioned;

- The worker remained in a sling for 6 weeks;
- On 22 June 2001 the worker returned to full duties with GEMCO;
- Thereafter the worker continued to work as a diesel mechanic with various employers. He had no further episodes of dislocation or subluxation for the next 3 years, and therefore the operation had proved successful;
- The worker commenced working for the employer initially through Skilled Engineering in December 2002;
- The worker became an employee of the employer from 27 March 2003 as a heavy duty fitter;
- As part of the employment the worker was obliged to work at the mine in the Tanami Desert (which was a remote location) for 2 weeks before having 1 week off;
- Whilst on site the worker was obliged to live in accommodation (that was provided at no charge to him) which was provided for his use, as there was no alternate accommodation nearby;
- Whilst on site the worker's accommodation was cleaned for him at no expense to him;
- Whilst on site the worker had his meals provided at no expense to himself;
- It was the employer's obligation to provide the worker's accommodation and messing whilst he was on site;
- Whilst on site the worker's laundry was done at no expense to him;
- Whilst on site the worker had access to other amenities (such as a wet mess, swimming pool, gymnasium, movies, entertainment);

- Whilst on site the worker had no access to any transport (apart for travel to and from the mine, or to and from the airstrip) to enable him to leave the village if he were to wish to do so;
- The whole reason for the worker being at the mine was to work (12 hours per day plus travelling time, plus preparation time);
- Time off between shifts was to enable the worker to be refreshed and able to work his next 12 hours;
- During the 3 years leading up to August 2004 the worker experienced some ongoing pain every two to four weeks in his left shoulder and he continued to be somewhat guarded with his use of this shoulder;
- On 16 August 2004 the worker was a “worker” as defined in the Act (as admitted by the employer);
- On 16 August 2004 the worker was present in his accommodation in the village. He got up to begin preparing to go to work. He stretched his arms and dislocated his left shoulder again causing a sudden onset of pain. He was able to get the shoulder back into place by rolling onto it;
- The worker suffered an “injury” (being a physical injury, dislocation of the left shoulder) which resulted in further damage to the left shoulder and rendered it unstable;
- The worker was totally “incapacitated” as defined in the Act, for work as a diesel mechanic as a result of the left shoulder injury on 16.8.04 from 16.8.04 until 10.9.04 (during which period the worker was to have his arm in a sling and not use his left arm at all);
- The worker was partially incapacitated for work as a diesel mechanic from 10.9.04 until the present time and continuing;
- In the event that the worker’s re-do surgery on his left shoulder is not successful, or if he didn’t undergo such surgery the worker would

remain permanently partially incapacitated for work as a diesel mechanic (or any physical work generally);

- Since 10.9.04 the worker's incapacity has been that he has been unable to abduct his left arm or extend his left arm above 90 degrees, and as such he has been limited in his ability to work above his head or to lift any weight above shoulder height;

- Without a successful re-do operation on the left shoulder this incapacity is likely to be permanent;

- It is a part of the worker's normal employment that he lift weights above his shoulders and work above his head or above his body if lying prone;

- Accordingly the worker has remained unfit to perform his pre-injury employment since 16.8.04, and remains fit only for restricted duties;

- Restricted duties were available to the worker with McMahon in Darwin, where the worker was working at the time of the hearing herein;

- It is reasonable and advisable that the worker undergo a re-do operation on his left shoulder as this may return him to a full working capacity;

- Without such an operation he would never be fit for unrestricted duties;

- Accordingly, the worker's decision to cease work and undergo this re-do operation is reasonable in the circumstances of this case.

144. I turn now to consider the law as it applies to the facts herein.

145. The starting point to an entitlement to compensation under the Act is *section 53* which states:

> 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. (emphasis added)

146. I find that the “injury” to the worker’s left shoulder on 16.8.04 resulted in the incapacity for work above referred to. As such, it is not necessary to consider the additional consideration as to whether the injury also “materially contributed” to incapacity (as referred to in *section 4(8)*, which is set out hereafter).

147. “Injury” is defined in *section 3(1) of the Act* as follows:

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

148. The question for determination is whether the “injury” to the “worker” arose out of or in the course of his employment with the employer. If it did it is compensable. If it did not, it is not. *Section 4 of the Act* deals with this concept as follows:

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

(i) is present at the workplace; or

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

(b) is travelling by the shortest convenient route between his or her place of residence and his or her workplace;

(c) is travelling by the shortest convenient route between –

(i) his or her place of residence or his or her workplace; and

(ii) a trade, technical or other training school which he or she is required to attend by the terms of his or her employment or as an apprentice or which he or she is expected to attend by his or her employer;

(d) is in attendance at a school referred to in paragraph (c)(ii) whilst so required to attend;

(e) is travelling by the shortest convenient route between –

(i) his or her place of residence or his or her workplace; and

(ii) any other place for the purpose of obtaining a medical certificate, receiving medical, surgical or hospital advice, attention or treatment, or receiving a payment of compensation in connection with an injury for which he or she is entitled to receive compensation or for the purpose of submitting to a medical examination required by or under this Act;

(f) is in attendance at a place referred to in paragraph (e)(ii) for a purpose so referred to; or

(g) being a worker who is employed by more than one employer and has attended on a working day at a workplace for one employer, is travelling by the shortest convenient route between that place and his or her place of employment for another employer.

(2) Subsection (1) does not apply if an injury sustained while travelling is sustained during or after a substantial interruption of or substantial deviation from the worker's journey made for a reason unconnected with his or her employment or attendance at a school or place referred to in subsection (1)(c)(ii) or (1)(e)(ii), which, having regard to all the circumstances, would ordinarily have materially added to the risk of injury.

(2A) Notwithstanding subsection (1), an injury to a worker shall be taken not to arise "out of or in the course of his or her employment" if the injury is sustained in an accident, as defined in the Motor Accidents (Compensation) Act, while he or she –

(a) having been at his or her workplace, is temporarily absent during an ordinary recess;

(b) except as provided in subsection (2B), is travelling in circumstances referred to in subsection (1)(b) or (g); or

(c) is travelling between his or her place of residence and a place referred to in subsection (1)(c)(ii) or (e)(ii).

(2B) Subsection (2A)(b) does not apply where a worker –

(a) is travelling between his or her place of residence and a workplace, which is not his or her normal or usual workplace, at the request of his or her employer; or

(b) is required by his or her employer to work outside his or her normal hours of work while he or she is travelling between his or her place of residence and a workplace and, in accordance with the terms of his or her employment, he or she is paid, in whole or in part, for the time taken to travel to that workplace.

(3) In a case referred to in paragraph (g) of subsection (1), the injury shall be deemed to have occurred while the worker was being employed by the employer last mentioned in that paragraph.

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

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

(b) without instructions from his or her employer,

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

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

(6) Unless the contrary is established, a disease shall be taken to have been contracted by a worker in the course of his or her employment if –

(a) it is a disease, or a disease of a kind, specified in Column 1 of Schedule 1 as related to employment of a kind specified in Column 2 of that Schedule opposite to that disease in Column 1; and

(b) the worker –

(i) was, at any time before he or she became aware of his or her contraction of that disease, engaged as a worker in employment of that kind; or

(ii) died without having become so aware but was, at any time before he or she died, engaged as a worker in employment of that kind.

(6A) Subject to this section, a disease shall be taken not to have been contracted by a worker or to have not been aggravated, accelerated or exacerbated in the course of the worker's employment unless the employment in which the worker is or was employed materially contributed to the worker's contraction of the disease or to its aggravation, acceleration or exacerbation.

(7) In this section –

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

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

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

(a) an injury or disease; or

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

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

149. It is clear that in choosing to use the words “without limiting the generality of the meaning of the expression” the Legislature was not intending to limit the meaning of the words “out of or in the course of his employment” to

only those matters as appearing in the definition. The words still retain their natural and ordinary meaning.

150. There have been a number of cases that have addressed this issue over the years, and the concept has developed over time. However, in my view, the leading authority on this area is the High Court decision of *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473. The facts in that case were that the worker successfully applied for a job with the employer at Mt Newman in Western Australia. The contract was for three months. The worker was required to work about ten hours a day for six days a week, and they might have to work some Sundays. The employer would have two vehicles to provide transport for them, and if they got the chance they could visit the surrounding areas. During the worker's third week the supervisor said that as they would not be working the next Sunday he was organizing a trip to Wittenoom Gorge on that day for anyone who cared to come along. The group travelled in the employer's vehicles, and the worker was injured in the course of the trip when one of the vehicles crashed.

151. In a joint judgment of Their Honours Mason CJ, Deane, Dawson and McHugh JJ at pages 482-485 they said as follows:

> Beneficial as the *Henderson-Speechley* test has proved to be in the law of workers' compensation, its formulation no longer accurately covers all cases of injury which occur between intervals of work and which are held to be within the course of employment. A finding that a worker was doing something "in order to carry out his duties" at the time he sustained injury is in many cases simply fictitious. Consequently, the rational development of this area of law requires a reformulation of the principles which determine whether an injury occurring between periods of actual work is within the course of the employment so that their application will accord with the current conception of the course of employment as demonstrated by the recent cases, particularly the decisions of this Court in *Oliver* and *Danvers*.
>
> A striking feature of the recent cases which have held that an injury occurring in an interval between periods of actual work was within the course of employment is that in almost all of them the employer has authorised, encouraged or permitted the employee to spend his time during that interval at a particular place or in a particular way. However, it would be an unacceptable extension of the course of

employment to hold that an employee was within the course of employment whenever the employer had authorised, encouraged or permitted the employee to spend the time during an interval between periods of actual work at a particular place or in a particular way. That formulation would cover not only the case of the "lunchtime" injury, as in *Oliver*, and the case of the railway worker, as in *Danvers*, but also many cases involving injuries occurring during intervals between daily periods of work which could not fairly be regarded as within the course of employment. Thus, an employee who is encouraged by his or her employer to see a doctor after working hours is not ordinarily within the course of employment if injured while visiting the doctor, although the case would come within such a formulation. The course of employment is ordinarily perceived as commencing when the employee starts work in accordance with his or her ordinary or overtime hours of work and as ending when the employee completes his or her ordinary or overtime hours of work.

The distinction between an injury sustained by a railway worker as in *Danvers* and a non-compensable injury sustained by an ordinary employee after the day's work has ceased lies not so much in the employer's attitude to the way the interval between the periods of actual work was spent but in the characterisation of the period or periods of work of those employees. For the purposes of workers' compensation law, an injury is more readily seen as occurring in the course of employment when it has been sustained in an interval or interlude occurring within an overall period or episode of work than when it has been sustained in the interval between two discrete periods of work. Where an employee performs his or her work at a permanent location or in a permanent locality, there is usually little difficulty in identifying the period between the daily starting and finishing points as a discrete working period. A tea break or lunch break within such a period occurs as an interlude or interval within an overall work period. Something done during such a break is more readily seen as done in the course of employment than something that is done after a daily period of work has been completed and the employee has returned to his or her home. **On the other hand, there are cases where an employee is required to embark upon some undertaking for the purpose of his or her work in circumstances where, notwithstanding that it extends over a number of daily periods of actual work, the whole period of the undertaking constitutes an overall period or episode of work. Where, for example, as in *Danvers*, an employee is required to go to a remote place and live in accommodation provided by his or her employer for the limited time until a particular undertaking is completed, the correct conclusion is likely to be that the time spent in the new locality constitutes one overall period or episode of work rather than a series of discrete periods or episodes of work. An injury occurring during the interval between periods of actual work in such a case is more**

readily perceived as being within the current conception of the course of employment than an injury occurring after ordinary working hours to an employee who performs his or her work at a permanent location or in a permanent locality.

Moreover, Oliver and the cases which follow it show that an interval or interlude in an overall period or episode of work will ordinarily be seen as being part of the course of employment if the employer, expressly or impliedly, has induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way. Indeed, the modern cases show that, absent gross misconduct on the part of the employee, an injury occurring during such an interval or interlude will invariably result in a finding that the injury occurred in the course of employment. Accordingly, it should now be accepted that an interval or interlude within an overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment "and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen"(20) *Danvers* (1969) 122 CLR, at p 537.

The occurrence of the injury

In the present case, the appellant was already a casual employee of the respondent at Wollongong in New South Wales when he was engaged to work as an employee of the respondent on a project at the remote location of the mine at Mt Newman in Western Australia. The project was expected to last for some three months. The appellant was briefed in Wollongong and travelled to Mt Newman in his capacity as an employee of the respondent. His air fares to and from Mt Newman were the responsibility of the respondent. The basis upon which he was engaged for the project was that he would be working extended working hours (approximately sixty hours per week) spread over six days per week with the possibility of also being required to work on the seventh day (i.e. Sunday). While on location at Mt Newman, the respondent provided him with free accommodation and full board in a "camp" which included some recreational facilities. In these circumstances, the whole period during which the appellant was engaged in working at Mt Newman constituted an overall period or episode of work. The outing in the course of which the appellant sustained his injuries took place in an

interlude or interval in that overall period or episode of work. (emphasis added)

152. The decision of *Hatzimanolis* has been followed in the Northern Territory. On 22 October 1992 the Court of Appeal (Gallop, Martin and Mildren JJ) considered the case in *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239. At pages 246-7 of the joint judgement of Their Honours Martin and Mildren JJ said:

> The nub of Mr Riley's submission was that, given that the respondent was in the course of his employment up to the time he stopped at the hotel, the only reasonable conclusion open was that he then went into "recreation mode" and abandoned his employment as a consequence of his gross misconduct in his drinking at the hotel until he was intoxicated (he had a blood alcohol reading of .208%). If gross misconduct took him outside his employment, so the argument went, there could be no resumption of his employment when he later left the hotel in order to return to the camp.
>
> There are, in our opinion, several answers to this contention. The first is, that the injury did not occur during an interval between episodes of work. The respondent was not merely returning to the camp for his own purposes; his journey was for his employer's purposes, namely, to carry the parts he had purchased to the work place, to return the vehicle to the workplace, and to return himself to the camp site where he was required or reasonably expected to be. As his Honour observed in the Supreme Court:
>
> "... the respondent's situation was no different to that of a person whose primary job was to drive, for example, a truck driver or of a person whose employment has as one of its incidents activities taking one away from one's primary place of employment, for example a mechanic who travels to buy spare parts or an office girl who goes to the post office to collect mail. Subject to the question of serious and wilful misconduct and s7(3) of the Act, the respondent was entitled to compensation."
>
> The second answer to the respondent's contention is that we do not consider that the High Court intended, by its references to "gross misconduct taking him or her outside the course of employment," to be laying down a universal proposition of law that whenever gross misconduct occurs during an interval between episodes of work, the employee must be outside the course of the employment. No doubt that will often be the case, but s7(3) of the Act makes it clear that an employee is not taken outside the course of his employment by his own serious and wilful misconduct if he suffers permanent and serious injury.

153. Kearney J also considered the decision of *Hatzimanolis* in the case of *Wilson v Lowery* (1992) 108 FLR 301 on 8 July 1992. At page 313 he said:

> The conclusion by his Worship, open to him on the evidence and on his findings, that the respondent was on 10 September 1984 engaged in activities on the appellant's behalf, and was in the course of his employment, precludes any need to consider the law applicable to injuries sustained during intervals in work. Accordingly, in view of the findings of fact, I do not consider that *Hatzimanolis* has any direct bearing on the outcome of this appeal, as earlier expressed.

154. That decision went on appeal and in *Wilson v Lowery* (1993) 4 NTLR 79 the Court of Appeal, comprising Gallop, Martin and Angel JJ wrote a joint judgement. At page 86 they noted that Kearney J (in the decision under appeal) referred to the case of *Hatzimanolis* and then proceeded to set out the passage from that case above cited. At page 87 Their Honours then went on to say as follows:

> Kearney J held that it would be open from the findings of fact of the Worker's Compensation Court to infer that the worker was engaged in an overall period or episode of work involving the shooting of wild horses for pet meat on Mt Bundy, Mt Ringwood and Ban Ban Springs Stations from May 1994 onwards. Furthermore, if contrary to the actual findings of the Worker's Compensation Court, the findings had been that the worker intended to shoot buffalo on 10 September 1984 not on his employer's behalf but on his own behalf on a work free day, nevertheless in driving to Marrakai to do so it would be open to have found that the worker would have been in the course of his employment because on the facts as found the employer had expressly encouraged him to engage in that activity on that day and had made available his vehicle and some equipment for that purpose. Accordingly, it would follow that on the basis of such findings, although the worker's injuries were sustained during an interval between his ordinary duties, they were nevertheless sustained in the course of his employment.
>
> In our view Kearney J correctly applied the authorities to the decided facts and no error has been demonstrated.

155. On the facts in this case it is clear, and I find, that the worker was required to travel to a remote location in the Tanami Desert in order to carry out his employment. He was required to work in that remote location for 2 weeks continually before being allowed to have a week off. In addition, he was

obliged to reside in the village in accommodation (and with other amenities) provided for him during the two weeks that he was obliged to work. I therefore find that the whole two week period that the worker spent working at the mine or living in the village constituted one overall period or episode of work. I therefore find that when the worker stretched in his accommodation and injured his left shoulder he was in the course of his employment.

156. I therefore find that the worker's injury on 16 August 2004 arose in the course of his employment with the employer. Accordingly, the worker was (and remains) entitled to be paid compensation in accordance with the Act. He has not been.

157. I now turn to consider what was the worker's normal weekly earnings at the date of his injury. As noted earlier it is admitted on the pleadings that the remuneration received from the employer for the period 16 August 2003 to 15 August 2004 was $71,161. If this were the correct starting point then this would average out to $1,368.48 per week. However, in my view, this method of calculation is only applicable if *paragraph (d)* of the definition of "normal weekly earnings" in *section 49 (1) of the Act* is applied. But this only applies:

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

158. I note that the worker has purported to calculate his normal weekly earnings based upon paragraph (d)(ii) of the definition. In the instant case

the worker had not been employed for a short time and accordingly the difficulties envisaged by *subparagraph (i*) don't arise. In addition, there is no evidence to suggest that the worker was remunerated other than by reference to the hours that he worked. Hence, in my view, it is not appropriate to calculate the worker's normal weekly earnings by reference to paragraph (d) of the definition at all.

159. In my view, paragraph (a) of the definition applies and accordingly the worker's remuneration for his normal weekly number of hours of work calculated at his ordinary time rate of pay needs to be calculated.

160. In paragraph 8.4.3 of the employer's substituted Defence they plead that the worker's base rate of pay was $27.50 per hour from 14.5.04 until 15.8.04. This accorded with the worker's evidence in cross-examination. The worker (over a three week period) worked 7 x 12 hours of day-shift, followed by 7 x 12 hours of night-shift, followed by 7 days off. Accordingly he worked 14 x 12 hour shifts every 21 days. This equates to 168 hours of work over 21 days, or an average of 56 hours per week. 56 hours per week multiplied by $27.50 per hour totals $1,540.

161. The same result is apparent from an analysis of the "schedule of past income received by the worker" which was ExW18. That exhibit shows clearly that from early May 2004 the worker's daily pay went from $312 to $330. Accordingly, for the 14 consecutive work days from 3.6.04 until 16.6.04 (inclusive) he was paid $330 per day, which totals $4620 for this 14 day period. He then had from 17.6.04 until 23.6.04 (inclusive) off work and was not paid for any of these 7 days. The exact same payment pattern continued up to and including 15.8.04 (being the day before he was injured). Therefore the cash component of his normal weekly earnings at the date of his injury was ($330 x 14 days, divided by 3 weeks) $1,540.

162. I therefore find that the wages component of his normal weekly earnings was $1,540 per week as at the date of injury on 16 August 2004, and not the $1,368.48 that the worker has sought in his pleading and on which he has based his calculations in ExW18. Accordingly, the calculations in

ExW18 (which were not part of the evidence, but were by way of submissions) are not correct. Whilst the Work Health Court is a court of pleading, I do not consider that the effect of paragraph 8(a)(i) of the Amended Statement of Claim is to abandon any claim for any amount in excess of $1,368.48. It is to be remembered that the Act creates a statutory entitlement to a worker to receive compensation in accordance with the Act, provided that he meets the statutory pre-conditions (which the worker has in this case). The amount which the worker has asserted as his entitlement is, in my view, not in accordance with the Act as applied to the evidence in the case, and should therefore be ignored. In the same way, in my view, the amount that the employer has asserted as the worker's entitlement in paragraph 9.1 of it's Substituted Defence is not in accordance with the Act as applied to the evidence in the case, and should therefore also be ignored.

163. In addition to the cash amount, the worker has also asserted that weekly non-cash benefits of $535 formed part of his normal weekly earnings. He breaks this down (in paragraph 8(a)(iii) of the Amended Statement of Claim) as:

(a) Accommodation including laundry and cleaning - $280 per week;

(b) Food - $245 per week;

(c) Sporting recreational facilities, including gymnasium, theatre, pool, tennis court and wet mess - $10 per week.

164. The employer has denied any entitlement to the worker to include any of these items in his normal weekly earnings. Firstly, Ms Mangan says in paragraph 83 of her closing submissions that "accommodation and messing were provided to all workers at the mine site by Newmont". As noted earlier this appears to have been the case, but it was part of the worker's employment contract that the employer was obliged to provide it. How it did so, and at what cost was a matter for them. The evidence also indicates that Newmont could have charged the employer for this service but apparently chose not to as the employer could have turned around and

claimed it back off Newmont as part of the cost of extracting the ore from the ground. Accordingly, the decision by Newmont not to charge the employer was one apparently based upon commercial expediency. Newmont could have charged for all services provided in the village. On the evidence it appears that drinks in the wet mess were at a cost, and some facilities were only available to members of the social club. Whether there was a fee attached to joining the social club was not made clear.

165. The fact remains that the employer, in it's original contract with the worker (ExW3), contracted that "accommodation and messing will be provided for by the company whilst on site". How the employer chose to do that was a matter for them, but it was a condition of the worker's contract of employment. It was an entitlement that the worker had the benefit of during the whole period that he worked for the employer at the mine. I therefore reject the submission that the arrangement between Newmont and the employer somehow negates this contractual employment obligation.

166. Secondly, Ms Mangan submits that the items claimed simply do not form part of the worker's normal weekly earnings. In making this submission she goes through various decisions of this court and the Supreme Court on appeal and either seeks to distinguish them or suggest that the decisions do not support the worker's contention. It is therefore necessary to look at the various cases in the Northern Territory that have dealt with this topic to date.

167. I first had cause to consider the matter in *Fox v Palumpa Station Pty Ltd* [1999] NTMC 024. In paragraphs 60 to 84 of that decision I dealt with the issue as follows:

> 60. NWE is defined in section 49(1) as follows:
>
> ""normal weekly earnings", in relation to a worker, means -
> (a) subject to paragraphs (b), (c) and (d), remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay;
> (b) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he or she worked full-time at one time for one employer and part-time at

another time for one or more other employers - the gross remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay in respect of his or her full- time employment;
(c) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he or she worked part-time at one time for one employer and part-time at another time for one or more other employers -
(i) the gross remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay in respect of both or all of his or her part-time employments; or
(ii) the gross remuneration that would have been payable to the worker if he or she had been engaged full-time in the part- time employment in which he or she usually was engaged for the more or most hours of employment per week at the date of the relevant injury, whichever is the lesser; or
(d) where -
(i) by reason of the shortness of time during which the worker has been in the employment of his or her employer, it is impracticable at the date of the relevant injury to calculate the rate of relevant remuneration in accord-ance with paragraph (a), (b) or (c); or
(ii) subject to paragraph (b) or (c), the worker is remunerated in whole or in part other than by reference to the number of hours worked,
the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he or she was engaged in paid employment."

In my view, paragraphs (a), (b) and (c) of this definition are not applicable to the Worker as he was not paid at an hourly rate based on the number of hours that he worked. He had no fixed hours per day or per week that he was required to do. He had various duties to perform and in return received a "remuneration package". There was no minimum or maximum number of hours that he was required to work on any day. There was no provision for over-time to be paid. Likewise, paragraph (d)(i) is not applicable as there is no problem with the Worker only being with the Employer for a short period in the instant case. Accordingly, the question to be answered in this case is what was the "average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker"?

61. Exhibit P1 sets out the terms of his appointment. This document was dated 4.8.89 and was (as far as is relevant to the current issue) in the following terms:

"The remuneration package is as follows:-

Salary: $30,000 per annum, gross before tax.

Housing: An unfurnished residence will be provided and the station will pay the rent to the community.

Meat: Meat for your personal consumption and that of your guests on Palumpa will be provided.

Electricity: These items will be met by the station.

and Gas

Telephone: The residence has a telephone which is funded by the station. This will be free of charge for personal calls while these are at an acceptable level. If Maureen takes over the store, then calls made from the store will have to be recorded and charged back to the community."

62. Over time the "salary" component was increased. The Worker's group certificate (Ex.P4) discloses that his "gross salary, wages, bonus etc." for the financial year from 1.7.91 to 30.6.92 was $33,666.88. When this is divided by 52 weeks the figure of $647.44 (which is the amount paid by the Employer after the said injury) per week is arrived at.

63. The Worker has sought to quantify the various other aspects of his "remuneration package" and have this added to the sum of $647.44 in order to arrive at his NWE. This would appear to depend upon what is included in the word "remuneration" as it appears in the definition of NWE. Does it mean only money paid by an employer to a worker, or does it include all of the benefits whether in money or kind?

64. From an analysis of the Act: the word "wage" appears in section 65(4)(a)(i); the word "wages" appears in sections 3(2), 14(3), 53(1)(d), 56(1), 130(5)(a) &(c), 187(1)(n), and in paragraphs 9, 10, 11 & 13 of schedule 2; the word "income" appears in section 164(3)(a); the word "salary" appears in sections 53(1)(d), & 56(1); the word "earnings" appears (other than in the combination of "normal weekly earnings" or "average weekly earnings") in sections 49(1) - in the definition of "dependant", 85A(1), 90A(1), 127(2)(b), & paragraph 10 of schedule 2; and, the word "remuneration" appears (other than in the definition of NWE in section 49(1)) in sections 3(3), 3(7), 3(8), 3(8A), 3(9), 3(10), 24(2)(b), 49(2), 144(2)(b), 156(2)(b) & paragraphs 9 &11 of schedule 2.

65. In paragraph 9 of schedule 2 the words "the amount of wages, salaries and all other forms of remuneration paid or allowed to workers" appear. This would tend to suggest that remuneration is something different to wages and salaries.

66. Section 49(2) states:

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

67. Therefore, it is necessary to consider whether the provision of accommodation etc (as provided for in ExP1) forms part of the Worker's "remuneration" and is not an "allowance" and thereby excluded by section 49(2).

68. Remuneration is defined in the *Concise Oxford Dictionary of Current English (eighth edition)* to mean: "1. reward; pay for services rendered. 2. serve as or provide recompense for (toil etc) or to (a person)."

69. In *Chalmers v. the Commonwealth of Australia* (1946)73CLR 19 @ 37 Williams J confirmed that:

"The ordinary meaning of remuneration is pay for services rendered."

70. The English Court of Appeal considered the meaning of remuneration in the context of their worker's compensation legislation in the case of *Dothie and others v. Robert Macandrew & Co* (1908)1 KB 803. The definition there under consideration was "workman does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250l. a year." At page 806 Cozens-Hardy MR said:

"His pay was 216l. a year in cash.....he lived on board his ship. He got his food on board there, whether he was actually at sea or not; and it is not disputed, and it could not be disputed, on behalf of the respondent's that, in considering whether he is a "workman", you must have regard to the fact that his remuneration was not merely 216l. in cash, but also board and lodging on board ship."

And at page 808:

"The true test is not, therefore, what Captain Dothie actually saved by his allowance, but what was the actual value to the workman of the reasonable board which was provided for him by the shipowners."

In the same case Fletcher Moulton LJ said at page 809:

"Now let us suppose that the workman is within the Act and claims compensation. He is in receipt of certain monetary payments, but he is also in receipt of his food. Now it is incontestable that you must reckon the value of the food as part of the remuneration he gets. It is remuneration in the sense that it is something which he receives for his labour; it is remuneration in the sense that it is something the expense of which has to be borne by his master in order to procure that labour. But of course we cannot give compensation in food; we must turn it into money."

And Buckley LJ added at page 810:

"Here the workman was the master of a ship, and the remuneration payable in kind was his board on board the vessel. What we have to ascertain, I think, is the value of the board as in fact supplied to him, being, as it appears it was, reasonable according to the nature of his employment. The next question is how are we to ascertain that value, because the value to one person and the value to another person is often a different thing. I think that the value that we ought to arrive at is the value to the workman reasonably ascertained. It is not necessarily the cost to the employer, it is the value to the workman."

The Court of Appeal again considered the matter in Skailes v. Blue Anchor Line, Limited (1911) 1 KB 360. At pages 363-4 the Master of the Rolls Cozens-Hardy said:

"Now "remuneration" is not the same thing as salary or cash payment by the employer. The word "remuneration" is only found in s.13 of the Act and in Sched. I., par.2(a), and this latter paragraph satisfies me that remuneration involves precisely the same considerations as earnings. I do not think it is open to this court, after our decision in *Dothie v. Robert Macandrew & Co* to take any other view. We there held that the value of board and lodging must be brought into account in considering whether the remuneration of a deceased man exceeded 250l, and that the mere cash salary was not to be solely regarded."

In the same case Lord Justice Fletcher Moulton said at page 367:

"This "remuneration" is the remuneration under the contract, and therefore is not identical with the "earnings" or "average weekly earnings" of Sched. I., Pars. 1 and 2."

He went on to add at page 369:

"If in addition to wages there is remuneration in kind, such as gratuitous board and lodging, it must take a fair estimate of the annual value of such remuneration to the workman. And even where

part of the remuneration is in the form of gratuities so customary and so capable of being estimated as to justify their inclusion in "earnings" (as in the case of waiter's tips), I think it probable that they also must be taken into consideration in deciding whether the contract of service comes within the exception."

The majority of the Court of Appeal in that case held that "earnings" was synonymous with "remuneration". Fletcher Moulton LJ was in dissent on this point.

71. The Full Court of the Supreme Court of Victoria also had cause to consider the word "remuneration" in *Connally v The Victorian Railways Commissioners* (1957) VR 466. In a joint judgment by Herring CJ and Gavan Duffy J their honours said at page 467:

"The question we have to answer appears to us therefore to depend on the meaning to be given to the word "remuneration" in the definition of "worker" in s.3(1). Does it mean the sum the worker actually receives from his employer under their contract, or that sum less sums which because of the contract between employer and workman are to be deducted in calculating the worker's remuneration, or does it mean the sum by which the worker is richer after deducting from what he receives from his employer what he has had to expend, or has lost, in performing his obligations under the contract, or if it has none of these meanings what other meaning has it?

For ourselves, apart from authority, we would see no reason for giving to the word "remuneration" other than what we take to be its ordinary meaning "pay for services rendered or work done".

Their Honours concluded at page 472:

"We may conclude by saying that in our opinion "remuneration" in s.3 is not to be construed by considering the meaning to be given "average weekly earnings", "earnings", or any other word or phrase. It should be given its natural meaning unless there is reason to do otherwise. In our judgment that natural meaning is the full sum for which the worker is engaged to do the work in question and does not mean the sum found by balancing his gains and losses or by deducting from the moneys received by him for his services the expenses he had to incur for the purpose of putting himself in a condition to earn his remuneration."

Following upon this decision Sholl J considered the matter in *Dawson v. Bankers and Traders Insurance Co Ltd* (1957) VR 491. At page 497 he held:

"Board and lodging are properly included in remuneration, - at any rate where they are not provided solely for the benefit of the employer, *Dothie v. Robert Macandrew and Co*, supra; *Skailes v. Blue Anchor Line Ltd*, supra. And they are to be included, not at a figure representing the actual saving to the employee which they represent, but at their value to him, *Dothie's case*. In calculating that value, the test is not necessarily the cost to the employer."

In the end result Sholl J in that case calculated the worker's remuneration by adding up his cash salary, plus the value of his board and lodging, plus the value of the transport provided by the employer.

72. In the case of *Rofin Australia Pty Ltd v. Newton* (1997) 78 IR 78 the Australian Industrial Relations Commission considered the meaning of remuneration. In a joint decision the Commission (comprising Williams SDP, Acton DP, Eames C) said at page 81:

"The term now used is "remuneration", a term which denotes a broader concept than salary or wages. "Remuneration", in our view, is properly defined as the reward payable by an employer to an employee for the work done by that employee in the course of his or her employment with that employer. It is a term that is confined neither to cash payments nor, necessarily, to payments actually made to the employee. It would include non-pecuniary benefits and payments made on behalf of and at the direction of the employee to another person out of monies otherwise due to that employee as salary and wages."

73. Hence, in the case of *Bell v. McArthur River Mining Pty Ltd* (1998) 81 IR 436 the Commission accepted (at page 449) "that the provision of board and meals while on site at McArthur River Mining may be a component in the assessed rate of remuneration applicable to Mr Bell."

74. I also note the following passage in the work by *Hill and Bingeman: "Principles of Worker's Compensation*" at page 122:

"In all cases the calculation of average weekly earnings is concerned not only with money wages but also with what the worker receives in kind from the employer (*Simmonds v Stourbridge Glazed Brick & Co* (1910) 2 KB 269; *Great Northern Railway Co v Dawson* (1905) 1 KB 331). In the Australian countryside, rural workers are commonly provided with housing, meat, wood, milk etc, as part of their remuneration."

75. From my limited researches I have not been able to locate any authority which goes against, or seriously doubts, any of these

authorities. Mr Bryant did not take me to any authorities to support his contention that remuneration was limited to wages paid only.

76. I therefore find that for the purposes of the definition of "normal weekly earnings" in assessing what the worker's gross weekly remuneration was that he earned the Court is not limited to the actual wages received but may look at all the benefits of the employment. The onus would be upon the worker to establish that any particular benefit was in fact part of his remuneration, and then to introduce sufficient evidence to enable the Court to quantify it.

77. The next question is whether any of the amounts sought by the worker are an "allowance". If any of them are an allowance then they would therefore be excluded by section 49(2) unless they were an "over-award payment, climate allowance, district allowance, leading hand allowance, qualification allowance, shift allowance ... and service grant". There was no evidence to suggest that the worker was covered by any award that effected his terms and conditions. Therefore, as there was no award relating to the worker none of the amounts sought by him could be "over-award payments".

78. A "service grant" would appear to refer to a "grant" related to the service provided by a worker. The use of the word "grant" would appear to suggest a formal giving or legal transfer of some kind. The word is often used in connection with "a sum of money given by the State for any of various purposes, esp to finance education" (*The Concise Oxford Dictionary of Current English - 8th edition*). I would have some doubt that any of the payments here under consideration would fall within this meaning, but I do not finally decide this aspect, as the matter was not fully argued before me.

79. I now turn to consider the meaning of the word "allowance". Allowance is defined (in the *Concise Oxford Dictionary of Current English - 8th edition*) to mean: "an amount or sum allowed to a person, esp regularly for a stated purpose. An amount allowed in reckoning. A deduction or discount."

80. In the case of *Mutual Acceptance Company Limited v The Federal Commissioner of Taxation* (1944) 69 CLR 389 the facts were that travellers employed by a company to collect instalments due under hire-purchase agreements were paid a weekly wage and a commission on the amount collected. Some of the travellers provided and used their own motor cars and in respect thereof an additional weekly payment was made to them of a fixed amount agreed between the company and each traveller as representing an arbitrary and rough and ready assessment of two-thirds of the expenditure estimated as likely to be incurred by the traveller in using his motor car. The expenditure actually so incurred by each

traveller was always greater than the additional payments received by him. A majority of the High Court (Latham CJ Starke and Williams JJ, with Rich and Dixon JJ dissenting) held that the additional payments were allowances paid to employees as such and therefore wages as defined by s.3 of the Pay-roll Tax Assessment Act

1941-42. At pages 396-397 Latham CJ said:

""Allowance" in the relevant sense is defined in the Standard Dictionary as meaning - "that which is allowed; a portion or amount granted for some purpose, as by military regulation, operation of law, or judicial decree; also, a limited amount or portion, as of income or food; as an allowance of rations; an allowance for costs; an allowance for tare or breakage; an extra allowance for services; to put one on an allowance of bread." When the word is used in connection with the relation of employer and employee it means in my opinion a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of that service. Expense allowances, travelling allowances, and entertainment allowances are payments additional to ordinary wages made for the purpose of meeting certain requirements of a service. Tropical allowances, overtime allowances, and extra pay by way of "dirt money" are allowances as compensation for unusual conditions of service.

The latter class of allowances represents higher wages paid on account of special conditions, and may fairly be described as part of wages in the ordinary sense. A victualling allowance has been held to be part of the wages of a seaman (*The Tergeste*). Allowances which are wages in the ordinary sense are, however, included in the word "wages" itself where it appears in the definition. If the word "allowances" were limited by construction to allowances which fell within the ordinary concept of "wages", the result would be that the word "allowances" in the definition would have no application, and would not operate to extend the ordinary meaning of the word "wages". It would have no significance of effect. Accordingly, in my opinion it is proper to reject the contention that only such allowances as are remuneration for services are included within the word "allowances" in the definition."

Therefore, in my opinion, to be an allowance to be excluded under s.49(2) it must be a payment or portion allowed which of itself does not form a part of the worker's remuneration in the ordinary sense. It must be something different.

81. In my opinion the correct approach to the problem would appear to be: firstly to ascertain what money or other benefits the Employer gave to the Worker; secondly to decide what portion (if any) forms part of the worker's remuneration, namely reward or

payment for the service provided by the Worker to the Employer (and then to quantify this); thirdly to look at the remaining money or benefits and see whether they fall within the inclusive words in s.49(2) (and if so, they should then be quantified and added to the remuneration figure); and finally to disregard any remaining money or benefit as not being relevant under the Act.

82. The employer did not seek to adduce any evidence before me as to the reason that the extra benefits were bestowed upon the worker. None of them on their face have the appearance of being intended to be a (full or partial) recompense for extra expenses that the worker might need to incur in order to perform his duties. In my view, they are all properly characterised as extras provided to the worker to take account of the special conditions of his employment (particularly the remote locality) and to attract a person to the position, and they may therefore be fairly described as part of his remuneration in the ordinary sense. They were all reward or payment for his services. If they had not been provided then I would have expected that there would have needed to be an increased salary required in order to attract anyone of any experience or quality. The Worker would appear to fall within this category.

83. If someone were to have asked the Worker what he got for being the station manager with this Employer then I think the correct answer would have been that he got so much in money, plus free accommodation, plus free meat, plus free electricity and gas, plus free telephone (subject to being at a reasonable level). The Worker did not press for the six return airfares (per year) to Darwin for himself and his family to be included in his remuneration and therefore I decline to express any view on this aspect.

84. I find that each of these items fall within his remuneration.

(emphasis added)

168. That decision went on appeal to Mr Justice Bailey in the Supreme Court. In the decision *Palumpa Station Pty Ltd v Fox* (1999) 132 NTR 1, His Honour held that whilst I had erred in my approach to the interpretation of s 49(2), I correctly identified the value of housing, meat, electricity and gas benefits provided to the respondent as forming part of the respondent's remuneration for the purposes of calculating his normal weekly earnings. I have not set out that decision in greater detail because in a subsequent Court of Appeal decision of *Murwangi Community Aboriginal Corporation v Carroll* (2002) 12 NTLR 121, the Court (Angel, Riley JJ and Priestley A/J)

held in paragraph 20 that “the reasoning adopted by the Supreme Court in *Palumpa v Fox* and in the court below in this case ought not be followed.”

169. Before the Court of Appeal in the case of *Murwangi Community Aboriginal Corporation v Carroll* the appellant employer argued that the non-monetary benefits received by the worker were excluded from consideration of the normal weekly earnings of the worker by operation of *s 49(2) of the Act*. In a joint judgement Their Honours said at paragraphs 2 to 20:

> [2] In 1998 the respondent was employed as an abattoir supervisor at a remote location in the Northern Territory. Under the terms of his employment he was paid a monetary wage and also provided with free food, accommodation and electricity. His remuneration package was made up of cash and non-monetary benefits.
> [3] On 12 March 1998 the respondent was injured in the course of his employment and, as a result, he was partially incapacitated for work from that date. Notwithstanding his reduced capacity for work he continued his employment with the appellant for almost two years. In that time his employer provided him with modified duties and additional manpower to assist him in the fulfillment of his employment obligations. His employment was terminated by the appellant on 31 March 2000 at which time his incapacity remained partial and ongoing.
> [4] Subsequent to the cessation of his employment the worker pursued a claim for compensation in the Work Health Court. By the time the matter reached this Court only two issues continued to be agitated.
> **Normal Weekly Earnings**
> [5] The first of those issues centred upon the interpretation of s 49 of the *Work Health Act (NT)* and, in particular, whether an amount reflecting the value of the provision of free food, accommodation and electricity was to be included within the normal weekly earnings of the worker for the purpose of determining the compensation payable to him.
> [6] There is no dispute that the worker was in receipt of a cash wage and, in addition, part of his entitlements included non-monetary benefits in the form of rent free accommodation, free electricity to that accommodation and the provision of three meals per day. In the Work Health Court the combined value of those items was assessed at $155 per week and the Court included that amount in the calculation of the normal weekly earnings of the worker. The appellant/employer contends that to do so was an error of law.
> [7] Normal weekly earnings is defined in *s 49 of the Work Health Act* (NT) by reference to various circumstances. For present purposes the relevant definition is contained in par (d)(ii) of the definition which provides that where the worker is remunerated in whole or in part other than by reference to the number of hours worked, normal

weekly earnings means:
"the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he or she was engaged in paid employment."
[8] The first issue to be determined is what is included in the expression "remuneration ... earned by the worker ...", and, in particular, whether the identified non-monetary benefits received by the worker are to be included. This is a question of fact.
[9] In our view there can be little doubt that the remuneration of a worker in this case is not limited to the wages paid to the worker but extends to include benefits of other kinds received by the worker in respect of services rendered for or on behalf of the employer. The identified non-monetary benefits form part of the reward for work done and services rendered and therefore comprise "remuneration ... earned by the worker ...". Similar cases are gathered in the decision of Mr Trigg SM at first instance in *Fox v Palumpa Station Pty Ltd* (1999) NTMC 024. We make reference to three of those cases.
[10] In *Skailes v Blue Anchor Line Ltd* [1911] 1 KB 360 Cozens-Hardy MR said (at 363-4):
"Now 'remuneration' is not the same thing as salary or cash payment by the employer ... I do not think it is open to this Court, after our decision in *Dothie v Robert Macandrew & Co*, to take any other view. We there held that the value of board and lodging must be brought into account in considering whether the remuneration of the deceased man exceeded £250, and that the mere cash salary was not to be solely regarded."
[11] In the same case Fletcher Moulton LJ said (at 369):
"If in addition to wages there is remuneration in kind, such as gratuitous board and lodging, it must take a fair estimate of the annual value of such remuneration to the workman."
[12] In *Dawson v Bankers and Traders Insurance Co. Ltd*. [1957] VR 491 Sholl J said (at 497):
"Board and lodging are properly included in remuneration, - at any rate where they are not provided solely for the benefit of the employer".
[13] In more recent times the Australian Industrial Relations Commission in *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78 said (at 81):
"The term now used is 'remuneration', a term which denotes a broader concept than salary or wages. 'Remuneration', in our view, is properly defined as the reward payable by an employer to an employee for the work done by that employee in the course of his or her employment with that employer. It is a term that is confined neither to cash payments nor, necessarily, to payments actually made to the employee. It would include non-pecuniary benefits and payments made on behalf of and at the direction of the employee to another person out of moneys otherwise due to that employee as salary or wages."

[14] In the hearing before this Court the employer did not seek to argue that the benefits received by the worker by way of free rent, board and electricity were not to be regarded as items of remuneration. Rather it was contended that such benefits were to be excluded from the normal weekly earnings of the worker by operation of *s 49(2) of the Work Health Act (NT).* That section is in the following terms:

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

[15] The submission of the employer was to the effect that in the circumstances of the present matter the benefits of free rent, board and electricity received by the worker must be regarded as "allowances" for the purposes of *s 49(2)* and, as they do not fall within the inclusionary provisions of *s 49(2)* they must be excluded as "any other allowance".

[16] It is therefore necessary to consider what is meant by the term "allowance" in the context of *s 49 of the Act*. In *Mutual Acceptance Co Ltd v The Federal Commissioner of Taxation* (1944) 69 CLR 389 Dixon J said (at 402):

"'Allowance' is one of the many words which take their meaning from a context rather than affecting or controlling the meaning of other words of the context in which they occur. For, considered alone and at rest rather than at work with other words, it means the allowing of a thing or a thing allowed. It is only by its application that you discover the kind of thing in mind."

[17] In that case Latham CJ considered the meaning of the word in the context of an employment relationship. His Honour said (at 396-7):

"When the word is used in connection with the relation of employer and employee it means in my opinion a grant of something additional to ordinary wages for the purpose of meeting some particular requirement connected with the service rendered by the employee or as compensation for unusual conditions of that service. Expense allowances, travelling allowances, and entertainment allowances are payments additional to ordinary wages made for the purpose of meeting certain requirements of a service. Tropical allowances, overtime allowances, and extra pay by way of 'dirt money' are allowances as compensation for unusual conditions of service."

[18] The purpose of *s 49(2) of the Work Health Act (NT)* is to identify some payments made to a worker that are to be taken into account in assessing his or her normal weekly earnings and to exclude all "other allowances" from that assessment. It is to make clear in relation to those payments what is and is not to be included in normal weekly earnings for the purpose of assessing

compensation. The amounts identified for inclusion are not limited to allowances. For example an over award payment is not necessarily an allowance. Although it is not clear what is meant by the expression, a service grant would seem unlikely to be an allowance. By operation of the section there are included within normal weekly earnings some payments that would qualify as an allowance and some that may not. However it is clear that payments excluded are limited to "any other allowances", that is, allowances other than those that have been specifically included. The section does not expand the meaning of the expression "normal weekly earnings" but, rather, it identifies some payments that fall within the ambit of the expression and clarifies how those payments are to be treated for the purpose of calculating the entitlement of a worker to compensation.

[19] In our view the benefits received by the worker in this case in respect of rent, board and electricity are not allowances and they are therefore not "other allowances" as contemplated by *s 49(2) of the Act.* Rather they are part of the remuneration of the worker simpliciter. They, along with the amount that he is paid in cash, make up his remuneration. There was no additional cash payment made to the worker in respect of those items. None of the benefits was a grant of something additional to ordinary remuneration for the purpose of meeting some particular requirement connected with the service rendered by the worker or as compensation for unusual conditions of that service. The provision of the benefits was part of his remuneration. That being so none of the benefits was an "allowance" to be excluded by the application of *s 49(2) of the Work Health Act (NT).*

[20] Although the result is the same, in our opinion the reasoning adopted by the Supreme Court in *Palumpa Station Pty Ltd v Fox* (1999) 132 NTR 1 and in the Court below in this case, ought not be followed. In our opinion the non-monetary benefits received by the worker for food, accommodation and electricity were correctly included in the assessment of his normal weekly earnings albeit for reasons different from those expressed by the Court below. We would dismiss the appeal on this ground. (emphasis added)

170. Ms Mangan correctly points out that this decision was limited as “In the hearing before this Court the employer did not seek to argue that the benefits received by the worker by way of free rent, board and electricity were not to be regarded as items of remuneration. Rather it was contended that such benefits were to be excluded from the normal weekly earnings of the worker by operation of *s 49(2) of the Work Health Act (NT)”.* Hence the ratio of the decision of the Court of Appeal is limited to that issue. Anything beyond that is obiter, but clearly of some weight. The next decision on this

topic from the Supreme Court is by Mildren J in *Normandy NFM Ltd v Turner* (2003) 180 FLR 212, where His Honour said:

> [1] This is an appeal pursuant to s 116 of the Work Health Act from a decision of the Work Health Court.
> [2] The facts are in a small compass. The respondent worker was employed by the appellant at its mine known as The Granites Gold Mine in a remote part of the Northern Territory.
> [3] The terms and conditions of the employment were covered by an enterprise bargaining agreement referred to as "The Granites Gold Mine Enterprise Agreement 1994."
> [4] Outside the terms of that agreement, the employer also provided the respondent worker with free meals three times a day and free accommodation at the mine site. The respondent was supposed to work two weeks on and two weeks off. He normally lived in Alice Springs. However, the learned Magistrate found that in fact the respondent worked for 35 weeks of each year.
> [5] The question which arose was whether or not the value of the food and accommodation should be taken into account in the proper calculation of "normal weekly earnings" pursuant to *s 49(1) of the Work Health Act.*
> [6] The learned Magistrate held that the respondent was entitled to have an amount representing food and accommodation included in this calculation.
> [7] The grounds of the appeal to this Court are as follows:
> 1. The learned Magistrate erred in failing to distinguish the decision in *Caroll (sic) v Murwangi Community Aboriginal Corporation* [2002] NTCA 9 in respect of the provision of meals.
> 2. The learned Magistrate erred in failing to provide any or any adequate reasons for his finding that the present case was indistinguishable from *Caroll's (sic) case* in respect of meals.
> 3. The learned Magistrate erred in finding that the present case was indistinguishable from *Caroll's (sic) case* in respect of accommodation.
> 4. The learned Magistrate erred in failing to provide any or any adequate reasons for his finding that the present case was indistinguishable for *Caroll's (sic) case* in respect of accommodation.
> 5. The learned Magistrate erred in finding that the provision of accommodation constituted a benefit to the worker."
> [8] In my opinion none of these ground are entitled to succeed.
> [9] In *Murwangi Community Aboriginal Corporation v Carroll* (2002) 171 FLR 116 the Court of Appeal held that an abattoir supervisor employed at a remote location in the Northern Territory who under the terms of his employment was paid a monetary wage and also was provided with free food, accommodation and electricity was entitled to have relevantly the food and the accommodation included within the expression "normal weekly earnings" for the purposes of determining the amount of compensation payable to him. In that

case their Honours said at par 9:
"In our view there can be little doubt that the remuneration of a worker in this case is not limited to the wages paid to the worker but extends to include benefits of other kinds received by the worker in respect of services rendered for or on behalf of the employer. The identified non-monetary benefits form part of the reward for work done and services rendered and therefore comprise "remuneration ... earned by the worker ...".
[10] Their Honours then referred to a number of cases gathered in a decision by Mr Trigg SM at first instance in *Fox v Palumpa Station Pty Ltd* (1999) NTMC 024 and make reference to three such cases, namely *Skailes v Blue Anchor Line Ltd* [1911] 1 KB 360, *Dawson v Bankers and Traders Insurance Co Ltd* [1957] VR 491 at 497 and *Rofin Australia Pty Ltd v Newton* (1997) 78 IR 78 at 81. On the hearing of the appeal the employer in *Carroll's case* did not argue that the benefits received by the worker by way of free rent, board and electricity ought not to be regarded as items of remuneration but rather contended that such benefits were to be excluded from "normal weekly earnings" by operation of *s 49(2)* of the Work Health Act. The Court held that such benefits were not "allowances" and therefore not "other allowances" as contemplated by *s 49(2)* but rather they were part of the remuneration of the worker simpliciter and that the non-monetary benefits were correctly included in the assessment of his normal weekly earnings.
[11] The learned Magistrate's reasons were very brief. He considered that the case was indistinguishable from *Murwangi Community Aboriginal Corporation v Carroll*, and said that he was unable to follow how the accommodation was a benefit for the employer, as surely it was a benefit for the worker. I do not consider his Worship's reasons to be inadequate. It is difficult to see on what possible basis *Murwangi Community Aboriginal Corporation v Carroll* is distinguishable from the facts of this case. First it was put that an inference should be drawn that in the circumstances of this case these benefits were not part of his remuneration because they were not included in The Granites Gold Mine Enterprise Agreement 1994. It was put that his remuneration was payment in cash on hourly rates. I do not think that that argument can be sustained. That may have been his wages but it was not his only remuneration. Nor do I think it matters whether or not the terms of the engagement expressly provide that the employer will pay for the accommodation and food. The fact is that these items are met by the employer and it must therefore be implied that this is part and parcel of the conditions of the contract of employment: see *Skailes v Blue Anchor Line Ltd* [1911] 1 KB 360 at 364 where Cozens-Hardy MR made the distinction between voluntary gratuities and the drawing of an inference that certain sums were paid as extra wages, notwithstanding that the extra amounts were not contained within the written agreement between the employer and the employee.
[12] It has long been the case that whenever the employer provides free food, clothing or accommodation that the value of these items

are treated as part of the employee's remuneration: see for example *Great Northern Railway v Dawson* (1905) 1 KB 33; *Dothie & Ors v Robert MacAndrew & Co* (1908) 1 KB 803; *Skailes v Blue Anchor Line Ltd* [1911] 1 KB 360 and *Sharpe v The Midland Railway Co* (1903) 2 KB 26. This is the same line of authority as was approved by the Court of Appeal in *Murwangi Community Aboriginal Corporation v Carroll*. I think the learned Magistrate was right when he held that the question had been decided by that case.

[13] Likewise the argument that the provision of food and lodging is for the benefit of the employer and not for the benefit of the employee simply cannot be sustained. Reliance was placed upon an observation by Sholl J in *Dawson v Bankers and Traders Insurance Co Ltd* [1957] VR 491 at 497:

"Board and lodging are properly including in remuneration, - at any rate where they are not provided solely for the benefit of the employer."

[14] It is difficult to imagine a circumstance under which the employer provides food and lodging for the benefit of the employer and not for the benefit also of the employee. Perhaps Sholl J was referring to cases where the food and lodging was paid, not as part of the terms of the employment, but merely because of some other arrangement or relationship which existed between the employer and the employee. It may be, for example, that the employee was the employer's son. In such a case it may be a question as to whether or not the father was meeting his son's food and accommodation expenses because of that relationship, or whether it was being provided as part of the consideration for the contract of employment. Where, however, as in this case, there is no evidence of any such relationship or other arrangement between the worker and the employer which might suggest that the employer is providing the food and accommodation gratuitously or for some reason other than that which arises out of the contract of employment, the only available inference according to the authorities is that it is part of the worker's remuneration.

[15] Another possible point of distinction that was raised is the fact that the accommodation was provided only on a two weeks on, two weeks off basis. I do not see how that has anything to do with it. The railway guard in *Sharpe v Midland Railway Co* was paid an allowance for lodgings whenever he was away from home (an entitlement which under the circumstances he got irrespectively of whether he incurred any out-of-pocket expense or not), but it was nevertheless held to be part of his remuneration. Similarly, the food and accommodation provided to the ship's master in *Skailes v Blue Anchor Line Ltd* was held to be part of his remuneration notwithstanding that he also had a residence in his home port.

[16] Even if strictly speaking the decision in *Murwangi Community Aboriginal Corporation v Carroll* supra is distinguishable on its facts as the real ratio concerned whether or not the benefits were not allowances excluded by s 49(2) of the Work Health Act, I nevertheless consider that the conclusion which the learned

> Magistrate reached is perfectly correct and indeed was the only decision which he could have reached in the circumstances for the reasons I have already given.
> [17] The appeal is therefore dismissed. (emphasis added)

171. This decision is binding upon this court and, in my view, is sufficiently similar on the facts to make any attempt to distinguish it artificial. In any event, on the state of the law at this time I see no reason to change the views that I expressed in *Fox* (supra) some seven years ago.

172. I find that the provision of free food, accommodation and facilities at the village were part of the worker's remuneration for the time that he was present at the village (for 2 weeks out of 3, less "25 days accrued annual leave for each year of continuous service" – according to ExW3, as there was no evidence introduced as to whether this was changed). I turn to consider the quantification of these parts of the remuneration.

173. The worker called Mark Harris to give evidence on the valuation of these items. He obtained a Bachelor of Business Studies (Valuation/Property Management) in 1989 in New Zealand. He is a Certified Practising Valuer in Australia, a Registered Valuer in Queensland, a Licensed valuer in Western Australia, and a Registered Valuer in New Zealand. According to his curriculum vitae (ExW10) he commenced employment with Integrated Valuation Services (NT), Darwin as a senior valuer in March 2005. His current role remains as a commercial and residential valuer. He prepared a valuation report dated 4 May 2006 which was put forward as an expert opinion. Ms Mangan objected to the report and any evidence of an expert nature being introduced through Mr Harris.

174. I allowed the evidence to be led and the report to be tendered (it became ExW11). In doing so I indicated that I was relying upon section 110A of the Act, which states:

> (1) The procedure of the Court under this Division is, subject to this Act, the Regulations and any rules or practice directions made or given specifically for the conduct of the business of the Court, within the discretion of the Court.

> (2) The proceedings of the Court under this Division shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matter permits.
>
> (3) Subject to this Act, the Court in proceedings under this Division is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks fit.

175. I considered (as I still do) that Mr Harris had some expertise as a valuer, but whether he had expertise in this particular area was best decided after hearing all of the evidence. In addition, Mr Harris had made various enquiries and gathered information which I considered was relevant to my considerations. It was more convenient for this information to be introduced through Mr Harris than through multiple original source witnesses.

176. Because of my ruling in this regard the employer then chose to introduce evidence in it's case through Martin Gore. According to ExE2 Mr Gore obtained a Bachelor of Applied Science (Valuation) from the S.A.I.T. in 1983. He became a licensed valuer in South Australia in 1984 and an Associate of the Australian Property Institute Certified Practising Valuer in 1985. He has been a valuer in the Northern Territory since 1987 and is a Director of McGees (NT) Pty Ltd. He also produced a valuation report that became ExE3. Further, Mr Gore also made various enquiries and gathered information which I considered was relevant to my considerations. It was again, in my view, more convenient for this information to be introduced through Mr Gore than through multiple original source witnesses.

177. Ms Mangan made a separate written submission in relation to the admissibility of the expert evidence of valuers, and I thank her for her assistance. There are a number of pre-requisites before a person will be permitted to give evidence as an expert, namely:

- Expert evidence "is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it": *Clark v Ryan* (1960) 103 CLR 486 @ 491;

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

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

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

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

- The jury cannot weigh and determine the probabilities for themselves if the expert does not fully expose the reasoning relied on……..Underlying these observations is an assumption that the trier of fact must arrive at an independent assessment of the opinions and their value, and that this cannot be done

unless their basis is explained." *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 733;

- In short, if evidence tendered as expert opinion evidence is to be admissible,

  1. it must be agreed or demonstrated that there is a field of "specialised knowledge";

  2. there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;

  3. the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";

  4. so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way;

  5. it must be established that the facts on which the opinion is based form a proper foundation for it; and

  6. the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded.

  7. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R* (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise" (at [41]). *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743-4.

178. In ExE3 Mr Gore sets out the following, which I consider to be a very fair assessment of the difficulties of the task that he was asked to perform, under the heading “Basis and Principles of Valuation”:

> As a valuer I am typically engaged to determine the fair market value or fair market rental of freehold / leasehold property. The role of the valuer is to interpret the market and apply that to the property being valued.
>
> To determine the value of a property there are various valuation methods which can be considered. Common methods of valuation include Direct Comparison, Capitalisation of Income and Summation Approach. In all cases we will have a primary method of valuation and a check method.
>
> The primary method of valuation which will be used depends on the type of property. For example an income producing property may best be valued by capitalising the income derived from the property i.e. the Capitalisation Approach. This is suited for Commercial / Industrial properties. In valuing a residential property, Direct Comparison with other properties sold, is the primary method.
>
> When determining a rental value the primary method is by direct comparison to other properties which have been leased. An example of this is our company undertakes the valuation work for Defence Housing Authority. Their leases require a fair market rent to be set annually. To do this we consider similar homes which have been leased in the ‘open market’ in arms length transactions and compare them to the subject homes.
>
> I have been requested to determine the ‘value’ of the Non-Cash Benefits the employee received as part of his employment at The Granites Mine Site. These benefits relate to accommodation and meals.
>
> <u>Market Rental Value</u>
>
> The *Australian Property Institute* defines market rental value as:
>
> *“……. the estimated amount for which premises should rent, as at the relevant date, between a willing lessor and a willing lessee in an arms length transaction, wherein the parties had each acted knowledgeably, prudently and without compulsion and having regard to the usual market terms and conditions for leases of similar premises.”*
>
> Previously cases under the Work Health Act, has suggested that it is the value to the employee to be determined.

I have considered the value to be determined, should be on the lines that had the employer not provided such benefits, what it would have cost the employee to provide them himself. In effect, to purchase those services from the employer as a 'non' employee.

The difficulty with this task is that the market evidence which a valuer traditionally relies upon does not exist. There are no mine sites where a market rental is charged, which can then be compared to the subject camp and accommodation.

It is fair to say that the subject accommodation is provided out of necessity and not as an 'extra'. If the mine were located near a township, the employee would have the choice of leasing accommodation in the town, or staying at no cost on the mine camp site. The value of the accommodation could be compared to the cost to rent a room within the near by town. This choice does not exist at the subject mine site.

In addition to this, there is no alternative lessee / consumer for the employer to offer the accommodation to and the employee has no alternative choice of accommodation. Therefore it does not fit the definition of "willing" and "without compulsion" for either the lessee or the lessor (employee or employer).

The rent considered for the subject accommodation cannot be described within the definition of the Australian Property Institute and I consider it best described as a 'restricted / closed rental value', as there is no other market for the accommodation other than the employees / contractors."

All this high lights the difficulty in settling a rental value for the subject accommodation and the in-exact nature of this task. (emphasis added)

179. It is apparent from the evidence of Mr Harris and Mr Gore that this area of valuation work is relatively new (probably only arising since the decision in *Fox v Palumpa Station*) and as such I doubt that a field of expertise has built up such that it is truly within the scope of "expert evidence". Rather, both Mr Harris and Mr Gore have made some subjective assessments based partly on their market enquiries. However, both accept that they are not comparing like with like, and therefore the "direct comparison" method is not directly appropriate. The reality is that isolated mine sites do not charge the cost of on-site food and accommodation to mine employees at all, let alone at a commercial rate. Similarly, oil rigs do not charge for food and accommodation. What Mr Harris and Mr Gore have both done is to try

and seek information from other dissimilar situations and tried to fit that into the current circumstance. They have each purported to use the “direct comparison” method, whilst conceding that there is in fact no direct comparison. In my view, it doesn’t really work.

180. In my view, having considered the evidence of Mr Harris and Mr Gore (and their reports), I find that their evidence is not “expert evidence” as it does not fit within the requirements laid down in *Clark v Ryan* (as referred to supra). However, they have gathered together some information that may be of assistance to the court. Further, they have expressed views which (although not expert opinion) may be of some assistance if treated more as submissions by persons who have expertise in the general area of valuing.

181. Both Mr Harris and Mr Gore have accepted in their reports that Renner Springs Roadhouse is the most comparable serviced daily accommodation premises (although Mr Harris has also added in the Safari Lodge in Tennant Creek as well). However, that acceptance also highlights the difficulty. Renner Springs Roadhouse is situated on the Stuart Highway, 150 kilometres north of Tennant Creek and therefore has a regular passing trade of potential customers. It seeks custom. The village is not on the road to anywhere. It exists solely because of the mining operations there. It does not seek any outside custom.

182. Mr Harris listed Renner Springs at $35 per day and the Safari Lodge at $38 per day. He then goes on (without explanation) to assert that a rate of $40 per day is appropriate for the village. Mr Gore arrives at the same result by a different process. He notes the 2 month agreement between Adrail and Renner Springs accommodating between 9 and 15 workers. He stated “at $64 per day allowing for what meals were provided and (sic an) allowance of $40 per day for accommodation is fair and reasonable”. Mr Harris then simply multiplied $40 by 7 days to arrive at a total of $280. Mr Gore applied a 30% discount (which would appear more appropriate) to allow for the long-term nature of the occupancy. Thus he arrived at a weekly figure of $195.

183. But the village was not commercial premises and was never intended to be. It was in the middle of nowhere. There was no reason to be there apart from the mine. The weather conditions were extreme. The surrounding landscape (as seen in some of the photos in ExW2) was not scenic. The worker was there purely as a place to refresh and recover in preparation for his next shift. I therefore do not consider that a $40 a day figure is appropriate or reasonable in the circumstances. I consider that to attempt to try and arrive at a commercial rate for the village is artificial. The village has no commercial value. If the mine should close the village would likely be moved wholly or partly abandoned. I do not follow or adopt the opinions or views of either valuer in this case. I do not accept that a field of expertise exists in the valuing of mine accommodation, such that expert evidence can be given on it. Further, whilst I accept both valuers as experts in their field, I do not find that they are able to give expert evidence on this topic, due to the relatively new nature of it. I will make my own assessment. In doing so I have taken on board what the two valuers have said in evidence more as a submission, rather than as expert evidence. In this regard I have given more weight to what Mr Gore has said, as I considered his approach more reasonable.

184. Clearly the village does have a value, as it provides the worker with air-conditioned accommodation and shelter from the elements, and some amenities to make the stay more bearable. I consider that a broad-brush approach is necessary. I consider that $240 per week ($40 per day) is excessive for accommodation that has no real commercial value, and which is only used because of the mine. I assess the value of the accommodation and facilities in the village (excluding meals) at $100 per week for those weeks that the worker was at the accommodation.

185. In addition, a value needs to be place upon the meals at the village. Mr Harris has assessed this at $10 per day for breakfast, $10 per day for lunch and $15 per day for dinner. He then arrives at a total of $245 per week. At first blush this appears too high. Mr Gore has arrived at a figure for meals of $181.78 per week. He has arrived at this amount by starting at the cost

that Newmont charge contractors ($206.78 per week) which is for food and servicing of rooms, and then deducted $25 for the cleaning portion. However, this figure would also include the room itself and appears too artificial. It is the value to the worker, not the cost to the employer that is to be assessed. Accordingly, I do not accept the valuation of meals as suggested by Mr Harris or Mr Gore.

186. If there were a supermarket at the village and employees could buy their own supplies and prepare their own meals the cost to the worker would be considerably less than $35 a day. Again I consider that a broad-brush approach is necessary. I would assess the value of breakfast as between $3 and $7 a day depending on whether toast and/or cereal was consumed up to the higher figure if a cooked breakfast was had. This averages at $5 a day. I would assess the value of lunch at $5 a day also given that he either prepared a sandwich himself or had a pie or similar. Clearly the evening meal was more substantial, and I would assess this as between $7 (for pasta or fish and chips) and $12 (for steak etc). This averages out at $9.50 a day. I therefore assess the value of meals at $19.50 per day or $136.50 per week that he was at the village.

187. Accordingly, the weekly value of accommodation and amenities ($100) and food ($136.50) to the worker for each week that he was at the village was $236.50.

188. In any year the worker was entitled to 25 days leave, which leaves 340 days for his work cycle of 14 days on and 7 days off. 340 divided by 7 days equates to 48.57 weeks. 48.57 weeks divided by 3 (for the 3 week cycle) and then multiplied by 2 (for the 2 weeks out of every 3 that he was at the village) equates to 32.38 weeks that he would be present at the village.

189. $236.50 times 32.38 weeks equals $7,657.87 per annum, which when divided by 52 weeks equals $147.26 per week, for each week of a calendar year. **I therefore find that the worker's normal weekly earnings before the date on which he first became entitled to compensation was $1,540 + $147.26 which equals $1,687.26 per week, or $3,374.52 per fortnight.**

190. Pursuant to section 64(1) of the Act the worker is entitled to be paid the difference between what he actually earned in employment during a week and his normal weekly earnings immediately before the date on which he first became entitled to compensation, in respect to any period during which the total period does not exceed 26 weeks. The 26 week period goes from 16.8.04 until 13.2.05 inclusive (and not to 28.2.05 as Ms Farmer, solicitor for the worker, has asserted in ExW18). In addition, in ExW18 Ms Farmer has also applied an indexing to the workers NWE as and from 1.1.05. In my view, this is not correct. The indexing of a worker's NWE only arises after the first 26 weeks of incapacity under section 65(3) of the Act. In addition, Ms Farmer has based her calculations on the wrong figure as indicated above. In addition, Ms Farmer has not included any figure for the value of the accommodation (etc) to the worker as part of the normal weekly earnings. It is therefore necessary to do my own calculations.

191. At the date of injury (16.8.04) the worker had completed 6 shifts of his 14 for that work period. In my view, the proper calculations for the 26 week period up to 13.2.05 should be as follows (based upon ExW18, the schedule of past income received by the worker):

Period	days	NWE for period	Amount paid	Balance due
16.8.04-29.8.04	14	3,374.52	0	3,374.52
30.8.04-12.9.04	14	3,374.52	777.37	2,597.15
13.9.04-26.9.04	14	3,374.52	3,029.56	344.96
27.9.04-10.10.04	14	3,374.52	2,729.56	644.96
11.10.04-24.10.04	14	3,374.52	2,729.56	644.96
25.10.04-7.11.04	14	3,374.52	2,729.56	644.96
8.11.04-21.11.04	14	3,374.52	2,729.56 + 178.60 + 178.60 +	0

			178.60 + 142.88	
22.11.04-5.12.04	14	3,374.52	953.78	2,420.74
6.12.04-19.12.04	14	3,374.52	2,329	1,045.52
20.12.04-2.1.05	14	3,374.52	2,582.95	791.57
3.1.05-16.1.05	14	3,374.52	2,771.02	603.50
17.1.05-30.1.05	14	3,374.52	2013.18	1,361.34
31.1.05-13.2.05	14	3,374.52	1,750.36	1,624.16
S. 64 TOTAL				**$16,098.34**

192. In arriving at these calculations I have assumed that the date "07.02.05" appearing on the tenth line of page 9, and the "15.02.05" appearing in the middle of page 9 of ExW18, are both typographical errors and should read "07.01.05" and "15.01.05" respectively.

193. For the period of any incapacity after the first 26 week total period the worker is entitled to be paid compensation at the rate of 75% of his loss of earning capacity or 150% of average weekly earnings, whichever is the lesser (*section 65(1) of the Act*). Pursuant to *section 65(2) of the Act*:

> For the purposes of this section, loss of earning capacity in relation to a worker is the difference between –
>
> (a) his or her normal weekly earnings indexed in accordance with subsection (3); and
>
> (b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if –
>
> (i) in respect of the period to the end of the first 104 weeks of total or partial incapacity – he or she were to engage in the most

profitable employment (including self-employment), if any, reasonably available to him or her; and

(ii) in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her,

and having regard to the matters referred to in section 68.

194. *Section 65(3) of the Act* goes on to state:

> The normal weekly earnings of a worker for the purpose of calculating his or her loss of earning capacity or for the purposes of subsection (8) or (9) at a particular date shall be taken to be his or her normal weekly earnings immediately before the date on which he or she first became entitled to compensation multiplied by the average weekly earnings at the particular date and divided by the average weekly earnings applying at the date on which he or she first became entitled to compensation.

195. Accordingly, from 14.2.05 (in accordance with *section 65(3) of the Act*) the worker's normal weekly earnings immediately before he first became entitled to compensation (namely $1,687.26) need to be multiplied by the average weekly earnings for 2005 (namely $966.40) divided by the average weekly earnings for 2004 (namely $905.80). When the average weekly earnings for 2005 are divided by the average weekly earnings for 2004 this gives a multiplier of 1.0669. This gives a new NWE for the remainder of the 2005 calendar year of $1,800.13, and not the $1,449.60 that Ms Farmer has based her calculations on. Again I need to do my own calculations for the remainder of the 2005 calendar year. $1,800.13 per week is $3,600.26 per fortnight.

196. I find that the amounts that the worker received in his employment with the employer and subsequently with McMahon Contractors Pty Ltd from 14.2.05 were the amounts that he was from time to time reasonably capable of earning. I further find that the worker was engaging in the most profitable employment that was reasonably available to him. The worker's entitlements for the remainder of 2005 are as follows:

Period	NWE	Less amount	75% of	150% AWE	Lesser

p/f	p/f	able to earn p/f	difference	p/f	amount
14.2.05 to 27.2.05	3,600.26	1,666.90 = 1,933.36	1,450.02	2,899.20	1,450.02
28.2.05 to 13.3.05	3,600.26	2,519.77 = 1,080.49	810.36	2,899.20	810.36
14.3.05 to 27.3.05	3,600.26	2,407.67 = 1,192.59	894.44	2,899.20	894.44
28.3.05 to 10.4.05	3,600.26	1,020.22 = 2,580.04	1,935.03	2,899.20	1,935.03
11.4.05 to 24.4.05	3,600.26	2,232.50 = 1,367.76	1,025.82	2,899.20	1,025.82
25.4.05 to 8.5.05	3,600.26	2,657.25 = 943.01	707.25	2,899.20	707.25
9.5.05 to 22.5.05	3,600.26	1,457.73 = 2,142.53	1,606.89	2,899.20	1,606.89
23.5.05 to 5.6.05	3,600.26	431.03 = 3,169.23	2,376.92	2,899.20	2,376.92
6.6.05 to 19.6.05	3,600.26	2,859.84 = 740.42	555.31	2,899.20	555.31
20.6.05 to 3.7.05	3,600.26	2,711.94 = 888.32	666.24	2,899.20	666.24
4.7.05 to 17.7.05	3,600.26	2,676.14 = 924.12	693.09	2,899.20	693.09

18.7.05 to 31.7.05	3,600.26	2,601.66 = 998.60	748.95	2,899.20	748.95
1.8.05 to 14.8.05	3,600.26	2,819.18 = 781.08	585.81	2,899.20	585.81
15.8.05 to 28.8.05	3,600.26	2,740.68 = 859.58	644.68	2,899.20	644.68
29.8.05 to 11.9.05	3,600.26	3,049.56 = 550.70	413.02	2,899.20	413.02
12.9.05 to 25.9.05	3,600.26	2,522.22 = 1,078.04	808.53	2,899.20	808.53
26.9.05 to 9.10.05	3,600.26	2,692.08 = 908.18	681.13	2,899.20	681.13
10.10.05 to 23.10.05	3,600.26	2,464.63 = 1,135.63	851.72	2,899.20	851.72
24.10.05 to 6.11.05	3,600.26	3,219.36 = 380.90	285.67	2,899.20	285.67
7.11.05 to 20.11.05	3,600.26	3,014.75 = 585.51	439.13	2,899.20	439.13
21.11.05 to 4.12.05	3,600.26	3,724.84 = (124.58)	0	2,899.20	0
5.12.05 to 18.12.05	3,600.26	3,296.76 = 303.50	227.62	2,899.20	227.62
19.12.05 to 31.12.05 (13	3,343.09	3,257.04 = 86.05	64.53	2,692.11	64.53

days)					
TOTAL					**$18,490.16**

197. It is apparent from ExW18 that whilst in the employ of the employer the worker was, for some unexplained reason, apparently paid on a daily basis for each day worked. Once his employment was taken over by McMahon Contractors Pty Ltd, in about April of 2005, he was then paid on a fortnightly basis. However, this pattern was varied on 16.12.05 and 6.1.06. It is apparent from an analysis of ExW18 that the worker was paid every 14 days after this pattern commenced on 15.4.05. However, the pay received on 16.12.05 was only 7 days after his last pay, albeit that the amount would appear to be for 2 weeks rather than one. Likewise, the next pay is received on 6.1.06, which is 21 days after the last pay, but again the amount would appear to be for 2 weeks rather than three. Thereafter the 14 pattern resumes. It is probable that the pay due on 23.12.05 was brought forward a week because of Christmas. Strictly speaking the two payments fall within the period from 5.12.05 until 18.12.05 and should be applied there, with zero payment for the next period. However, in my view, given what is likely to have occurred and the likely reason for it, I consider that to do this would be unfair on the employer, and give the worker an unfair windfall. Hence, I have allocated the two amounts to the periods to which they actually relate. If the worker had only been paid for one weeks work on 16.12.05 then, in my view, the situation would have been different.

198. I now proceed to consider the worker's entitlements for 2006 up to the end of the fortnight where the figures in ExW18 stop. I do not understand why there was not a figure available for the additional fortnight immediately before the hearing herein commenced, but that figure was not included as part of ExW18. Hence I am not able to calculate the exact amount owing as at the date of hearing. Again, (in accordance with *section 65(3) of the Act*) the worker's normal weekly earnings immediately before he first became entitled to compensation (namely $1,687.26) need to be multiplied by the average weekly earnings for 2006 (namely $1,039.00) divided by the

average weekly earnings for 2004 (namely $905.80). When this is done it gives a multiplier of 1.1471. This gives a new NWE for the 2006 calendar year of $1,935.45, and not the $1,569.78 that Ms Farmer has based her calculations on. Again I need to do my own calculations for the 2006 calendar year. $1,935.45 per week is $3,870.90 per fortnight. 150% of the 2006 AWE equals $1,558.50 per week, or $3,117 per fortnight.

199. I find that the amounts that the worker received in his employment with McMahon Contractors Pty Ltd in 2006 up to and including 20 May 2006 were the amounts that he was from time to time reasonably capable of earning. I further find that the worker was engaging in the most profitable employment that was reasonably available to him. The worker's entitlements for the first part of 2006 are as follows:

Period p/f	NWE p/f	Less amount able to earn p/f	75% of difference	150% AWE p/f	Lesser amount
1.1.06 to 14.1.06	3,870.90	3,005.87 = 865.03	648.77	3,117	648.77
15.1.06 to 28.1.06	3,870.90	3,979.94 = (109.04)	0	3,117	0
29.1.06 to 11.2.06	3,870.90	2,470.58 = 1,400.32	1,050.24	3,117	1,050.24
12.2.06 to 25.2.06	3,870.90	3,022.75 = 848.15	636.11	3,117	636.11
26.2.06 to 11.3.06	3,870.90	2,113.63 = 1,757.27	1,317.95	3,117	1,317.95
12.3.06 to 25.3.06	3,870.90	3,118.02 = 752.88	564.66	3,117	564.66
26.3.06	3,870.90	2,836.85 =	775.53	3,117	775.53

to 8.4.06		1,034.05			
9.4.06 to 22.4.06	3,870.90	2,024.00 = 1,846.90	1,385.17	3,117	1,385.17
23.4.06 to 6.5.06	3,870.90	3,561.60 = 309.30	231.97	3,117	231.97
7.5.06 to 20.5.06	3,870.90	3,102.00 = 768.90	576.67	3,117	576.67
TOTAL					**$8,572.24**

200. Accordingly, I find that the worker has been underpaid (from the date his entitlement to compensation commenced up to and including 20 May 2006) the total sum of $43,160.74 by way of weekly compensation. I trust that before I make formal orders herein that counsel (or their instructing solicitors) will check my calculations. Pursuant to *section 89 of the Act* the worker is entitled to be paid interest on each underpayment until such underpayment is in fact paid.

201. I adjourn this matter for the consideration of the form of my final orders (including submissions that either counsel may wish to make about any error in the calculations that I may have made) the question of costs, penalty interest and any additional orders to a date to be fixed by me, after hearing as to the reasonable availability of both counsel.

202. In addition, I find that the employer is obliged to comply with all of it's other obligations under the Act (including the payment of weekly compensation) from the date of injury up until the date the hearing concluded, and continuing thereafter until such time as the worker's entitlements are cancelled or reduced in accordance with the Act.

203. It follows, and I find that the employer is responsible for the reasonable costs of the worker's re-do shoulder operation (assuming that he did proceed to have it done as he indicated in his evidence) and rehabilitation thereafter.

Dated this 3rd day of August 2006.

_____

DAYNOR TRIGG
STIPENDIARY MAGISTRATE