CITATION:	*Wallin v Masterpath Pty Ltd* [2007] NTMC 065
PARTIES:	STEWART ROSS WALLIN
	v
	MASTERPATH PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health Court - Alice Springs
FILE NO(s):	20306752
DELIVERED ON:	10 October 2007
DELIVERED AT:	Alice Springs
HEARING DATE(s):	30 - 31 July, 1 - 2 August 2007
JUDGMENT OF:	G Borchers SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Worker:	Sally Guerin
Employer:	McNamanee

Solicitors:

Worker:	Morgan Buckley
Employer:	Cridlands Lawyers

Judgment category classification:	B
Judgment ID number:	[2007] NTMC 065
Number of paragraphs:	82

IN THE WORK HEALTH COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20306752

BETWEEN:

STEWART ROSS WALLIN
Worker

AND:

MASTERPATH PTY LTD
Employer

REASONS FOR JUDGMENT

(Delivered 10 October 2007)

Mr G BORCHERS SM:

1. This is an appeal against cancellation of benefits by a worker under the Work Health Act. Mr Stewart Wallin (the "worker") suffered an injury at work on 11 June 2002 when employed by Masterpath Pty Ltd (the "employer").

2. The worker's Amended Statement of Claim filed 18 January 2007 alleged that on 11 June 2002 the worker suffered an injury to his back when he was pulling steel pickets out of the ground during the course of his employment. The injury was said to be a L5/S1 and L4/5 disc derangement with right L5 nerve root impingement. On about 12 June 2002 the worker lodged a Workers Compensation Claim Form with his employer and on about 27 June 2002 payments of compensation from the date of injury were commenced, although the issue of liability was deferred. The claim was deemed accepted on 22 August 2002 in accordance with s.87 of the Work Health Act (the "Act").

3. The parties have agreed on what amounts constitute normal weekly earnings and have agreed to defer the question as to whether the payment of superannuation is part of those earnings for the purpose of the Act.

4. By Form 5 Notice dated 14 February 2003 and pursuant to s.69 (3) of the Act the employer cancelled payments of compensation on the basis that the worker had ceased to be incapacitated for work. Attached to the Notice was a medical certificate prepared by Dr Andrew Fagin dated 6 February 2003. As a result payments of compensation ceased on 7 March 2003, although the Court was informed that subsequent "without prejudice" payments were made up until March 2005.

5. There does not appear to have been any further material in the form of a statement pursuant to s.69(4) on which the worker could understand the reasoning behind Dr Fagin's opinion to certify that he had ceased to be incapacitated for work. Dr Fagin had examined the worker on 12 November 2002 and provided a report to both the worker's treating general practitioner and the employer. No issue is raised in regard to the delay between the date when Dr Fagin examined the worker and the date of the Form 5.

6. It is alleged by the worker that he remains totally and/or partially incapacitated for work as a result of his back injury and he appeals the decision to cancel benefits. The employer denies this and has filed a counterclaim in which it is asserted that the worker is not entitled to compensation on and from 14 February 2003 as

> "at 12 November 2002 the worker had ceased to be incapacitated for work by reason of any injury arising out of or in the course of his employment with the employer."

If there is any continuing incapacity for work beyond 12 November 2002 then it

> "is related to the worker's pre-existing degenerative back condition."

If however there exists some incapacity for work as a result of the injury sustained on 11 June 2002 ("which is denied") the employer asserts that the worker is only partially incapacitated and has been fit to undertake full-time and/or part-time alternative employment as from 12 November 2002.

7. The Counterclaim asserts that due to the worker's vocational background and transferable skills he is capable of working up to 40 hours per week as a park ranger/park guide, pet shop attended/kennel hand, fishing tackle shop assistant or marine sales assistant.

8. Alternatively the employer also contended that if the worker suffered any work related incapacity beyond 12 November 2002 the worker ceased suffering from any work related incapacity for work on 2 September 2004.

9. Finally the employer pleaded that the worker suffered an unrelated injury on 8 October 2004 and any incapacity as from that date was not work related and was not the responsibility of the employer.

10. There were a number of medical and related reports tendered by consent on behalf of the worker:

    (a) Reports from the worker's treating general medical practitioner. Dr Sue Bain dated 20 January 2003 and 27 July 2003 (Exhibit A1) and her treatment records (A16)

    (b) Mr Graham Lewis, a consultant orthopaedic surgeon, dated 10 July 2003 and 31 August 2005 (Exhibit A2)

    (c) Dr Tim Semple, a pain medicine specialist and anaesthetist, dated 10 September 2003 (Exhibit A3)

    (d) Mr Anthony P Pohl, orthopaedic surgeon, dated 25 July 2006 (Exhibit A4)

    (e) Dr Michael Epstein, psychiatrist, dated 10 August 2006 (Exhibit A5)

    (f) Michelle G French, occupational therapist, dated October 2006 and 21 June 2007 (Exhibit A9)

    (g) Dr Helen Suzanne Sutcliff, operational physician, dated 19 December 2006 and 28 June 2007 (Exhibit A10)

(h) Professor Peter Reilly, neurosurgeon, dated 14 August 2006 (Exhibit A11)

11. The worker called Michelle French, Dr Sutcliffe and Professor Reilly and each was cross-examined on behalf of the employer. The only other evidence was that given by the worker. The employer did not call any evidence but tendered a number of documents, including practice notes from the Alice Springs Physiotherapy and Sports Injury Clinic (Exhibit R4) and two reports prepared by Barbara Atkinson, rehabilitation consultant, dated 30 June 2004 and 15 August 2005 (Exhibit A4).

12. The authorities are clear that when hearing an appeal against a decision of an employer to cancel benefits under s.69 of the Work Health Act, the onus lies on the employer to justify the cancellation. The employer bears both the legal and evidentiary onus of satisfying this Court that the worker has ceased to be incapacitated for work, or given the pleadings in the counterclaim the extent of his incapacity and that any incapacity subsequent to 8 October 2004 was not work related.

Evidence – The Worker – Mr S Wallin

13. Mr Wallin was born in New South Wales on 18 December 1967. He left school at about the age of 11 and moved from Sydney to Western New South Wales where his father had accepted work as a station manager. Mr Wallin did not return to formal education but assisted his father until he was 16 or 17. He learnt a number of skills generally associated with farming; machinery maintenance, stock management, mustering, fencing. He then spent two years doing similar work in the Northern Territory before returning to Minto in New South Wales where he obtained work in a factory and joined the Army Reserves. His factory work consisted of assembling louvre panels for buildings and he drove trucks in the Army Reserves. Next he spent four to five years in Queensland rebuilding commercial catering equipment.

14. At some date in 1996 Mr Wallin came to Alice Springs and shortly after arriving he commenced work with the employer as a labourer on a concreting crew. By this date Mr Wallin had been employed all his working like, had developed expertise

in many skilled and semi-skilled occupations, but had no formal training in any. Within eight months of being employed by the employer, the worker had been promoted to leading hand.

15. It appears from the evidence that the employer undertakes the maintenance and construction of all matters pertaining to roads, except road surfaces. It constructs and maintains kerbs, guttering, footpaths, cattle grids, sign posts and roadside guide posts. The work for which the worker was responsible included the use of heavy equipment such as whacker packers, sledge hammers and jack hammers, digging up concrete and laying concrete and loading equipment. In addition as the employer had contracts for its work anywhere in the southern region of the Northern Territory the worker travelled considerable distances on rough roads to various work sites. The work was unskilled work in the sense that no formal education was required.

16. The worker gave evidence that he hurt his back in the course of his employment with the employer twice before the incident of 11 June 2002. The first occasion was in or about April 1997 while lifting and moving a heavy trailer. He took some time off from work on sick leave but did not make a claim for workers compensation benefits. Next in or about October 1998 he again injured his back while loading a semi-trailer at the employer's place of employment in Alice Springs with batteries that were to be taken to Adelaide for scrap metal. The worker took time off work on his annual holidays and then returned to work. After this second incident he was conscious that heavy lifting might aggravate his back so he attempted to avoid heavy lifting or obtain assistance to share the load. However he continued with his normal duties including using jackhammers, sledge hammers, crow bars and shovels as well as laying concrete and moving heavy equipment and objects.

17. On 11 June 2002 at the completion of concreting a footpath in Alice Springs, the worker was attempting to remove steel posts which had been driven into the ground so that buntings could be hung from them to prevent the public from walking on the wet concrete. The steel posts had been driven in to the ground by a sledgehammer and the worker was trying to remove them by hand. After removing 10 – 12 steel posts he experienced extreme pain across his lower back and

collapsed onto the ground. A short time he drove himself back to the employer's work place, reported the injury to his supervisor and went to his general practitioner Dr Sue Bain who arranged some physiotherapy at the Alice Springs Physiotherapy and Sports Injury Clinic. This episode of lower back pain was more severe than he had previously experience. He submitted a claim for workers compensation payments.

18. With the assistance of the Commonwealth Rehabilitation Service he returned to light duties with the employer. These light duties included driving to various sites and picking up rubbish, sweeping footpaths, climbing ladders and painting roadside shelters and pruning trees. All these activities to some extent aggravated the pain in his lower back.

19. The worker was also directed to perform lighter duties work at the Red Cross where he experienced difficulties lifting wheelchairs onto a bench where they were to be serviced, Meals on Wheels where he had difficulties getting in and out of the motor vehicles and Pets R Us where he worked about two hours per day. However the owner tolerated the worker working flexible hours and missing days due to his back condition. The owner and the worker became friends and although the worker was unable to continue with the work, he regularly visits this place of employment on a voluntary basis, largely due to his love of animals and to occupy his time.

20. The worker gave evidence that before 9 June 2002 he was physically active. He went camping and bushwalking, played golf, rode mountain bikes and kicked a football with friends. He shared domestic duties with his then partner. He described his drinking as consistent with that of a binge drinker. Up until recently he described himself as a heavy drinker, who drank daily. Now he is physically inactive and whatever physical activity he attempts is largely determined by the pain in his lower back.

21. The worker gave evidence that he experiences "good days and bad days". On bad days he does very little. He daily takes medication which prior to 11 June 2002 he did not. This included valium and an anti-depressant.

22. During examination in chief and cross-examination of the worker two incidents were raised which go to the credit of his evidence insofar as that evidence supports his contention that he has been totally incapacitated for work since compensation payments ceased on 7 March 2003 pursuant to the s.69 Notice.

23. The second relates to his arrest at 1.18am on 3 December 2005 for an offence of driving a motor vehicle whilst having a blood alcohol reading higher than that which is legally permissible contrary to the Traffic Act (NT). The offence took place on the Stuart Highway 23 kilometres north of the Ali Curung Community turn off. The worker was said to be travelling south at the time. When asked by the learned Magistrate whether he agreed with the circumstances surrounding the offence as alleged by the police prosecutor the worker, who was unrepresented, replied "They're close enough, sir, yes". The relevance of this matter is the suggestion by the employer that the worker had not, as he gave evidence, been slowly making his way to Tennant Creek, but rather he had driven to Tennant Creek and was on his way back to Alice Springs at the time of his arrest. The worker says he was taking his time because he could not drive for long periods at a time. The employer argues he drove directly to Tennant Creek and was on his return journey to Alice Springs, travelling south, when apprehended suggesting that he was capable of sitting and driving motor vehicles for lengthy periods. I do not find any support for the employer's contention. Accepting at its highest, that the worker was travelling south, at the time of the apprehension it does not follow that he had been to Tennant Creek. He may well have stopped at the Wycliffe Well Roadhouse which is in the immediate vicinity of his arrest and had been driving south to find a camping place for the night. Whatever inferences that could have been drawn from the very limited facts presented by the police prosecutor are largely matters of conjecture and unsupported by factural evidence.

24. The first incident relates to a number of criminal offences involving the worker that took place on 10 October 2003. The worker was charged and convicted of unlawfully assaulting a police officer, resisting police officers in the execution of their duties and behaving in a disorderly manner. The circumstances surrounding these offences are not particularly relevant except that the worker was intoxicated and that during his evidence he asserted that there was a struggle with police

officers, he was thrown face first to the ground and that a person dropped his full weight onto the worker's lower back using his knee. The worker said his back had not been the same since the incident. He attended to his general practitioner, Dr Sue Bain, four days after the incident. He did not give any evidence of specific medical treatment received for his lower back as a result of this incident although Dr Bain's clinical notes (Exhibit A16) noted that he was suffering from increased lower back pain "as with usual flare up". The learned Magistrate observed that "the defendant's memory of the night is severely impaired by his alcohol consumption" that his account "is selective and he has a spasmodic recollection of the incident", and that he "was not a credible witness".

25. The employer argues that the sworn evidence given by the worker in regard to the 10 October 2003 incident explains why his current condition is a right-sided disc protrusion at L5 – SI which was not the result of the June 2002 injury. It was caused by a non-work related incident, possible on 10 October 2003 and the employer is not liable for his current incapacity to work as his current condition did not arise from a work related injury. Leaving aside the worker's current medical condition, there appears to be some doubt as to what actually occurred on 10 October 2003. While the worker gave sworn evidence of an impact to his lower back caused by a police officer falling with his full weight onto the worker's back, the learned Magistrate did not accept that evidence. I do not find that it provides support for the employer's contentions that an incident on 10 October 2003 is the cause of the worker's current incapacity to work.

MEDICAL EVIDENCE

Dr Susan Bain

26. The Worker's Compensation Medical Certificates signed by Dr S Bain and the medical records prepared by her in regard to the worker were tendered in evidence. The Medical Certificates confirm that on 8 October 1998 the worker was suffering low back pain caused by "ongoing heavy lifting/bending exacerbated by lifting batteries", on 11 June 2002 he was in severe pain across his lower back after pulling three foot star pickets out of the ground and that he was unfit for work from 11 June 2002 until 27 June 2002. By 1 July 2002 the worker

was certified fit for light duties. However on 17 October 2002 Dr Bain was of the opinion he was again totally unfit for work. Her clinical findings were that the worker suffered "constant lower back pain, decreased range of movement, sleep disturbance, unable to get in and out of vehicles, pain aggravated by recent work". He remained totally unfit for work until 29 March 2004 when Dr Bain certified he could return to light duties and work substantially reduced hours. However by 7 May 2004 he was again certified totally unfit for work. Since that date there have been other limited periods when the worker has been certified fit for light duties worked during limited hours; 8 June 2004 to 5 July 2004, 26 July 2004 to 9 September 2004, 27 September 2004 to 30 September 2004, 1 November 2004 to 14 January 2005 and 18 February 2005 to 10 March 2005.

27. The medical records confirm the clinical observations noted on the Medical Certificates particularly in regard to her examinations of the worker on 11 June 2002 when she prescribed anti-inflammatory medication, analgesia and referred him to physiotherapy. The records also note that on 15 October 1998 the worker was observed with low back pain which had been "intermittent for 18 months, exacerbated on Thursday 8 October 1998 lifting batteries, occasionally radiating down back of legs".

Mr Graham Lewis

28. Mr Graham Lewis, a consultant orthopaedic surgeon, provided two reports dates 10 July 2003 and 31 August 2005. Mr Lewis's opinion in his 2003 report was based upon his examination of the worker, x-rays, CAT scans and the Medical Certificates of Dr Fagan dated 6 February 2003 upon which it was determined by the employer that the worker was fit to return to work on 19 February 2003. Mr Lewis noted that the CT and MRI scans showed "widespread degenerative changes. The CT scan also showed an L4/5 mild central disc bulge which extended to the lateral recess". He was of the opinion that the worker was "unable to do any sort of work at the moment" and that "his current condition is due to the injuries he sustained during the course of his employment".

29. Mr Lewis's 2005 report was based upon his re-examination of the worker in August 2005. X-rays and physiotherapy and medical reports obtained by the

worker's solicitors (Dr Tim Semple and Dr Robyn Campbell) and medical reports obtained by the employer's solicitors (Dr Robin Jackson, Dr Andrew Fagan, Dr Ahmad Hanich and Dr David Millons). Mr Lewis was provided with a more complete description of the worker's employment history including information concerning incidents that occurred at work with the same employer in or about April 1997 and October 19998. Mr Lewis was specifically asked for his opinion as to whether the employment with the employer caused an underlying degenerative back condition which the worker suffers from. Mr Lewis noted that a CT scan of the workers' lumbar spine taken 7 October 2004 showed a generalised disc bulge at L4/5 and a moderate right-sided posterolateral disc prolapse at L5/S1. An MRI scan of the worker's lumbar spine taken 5 August 2005 showed widespread degenerative changes, a generalised disc bulge at L4/5 and the L5/S1 disc bulge abutting the L5 nerve root.

30. Mr Lewis was of the opinion that the worker's incapacity for work "is due to his work injuries" based upon the worker's employment history "he experienced no symptoms at all with his back until the work injuries and since the most recent injury he has experienced ongoing and severe pain". "It is not possible to state whether the current condition is related only to the injury on 11 June 2002 or to the other previous incidents. However I would assume that the current incidents and the June 2002 incident are at least partly responsible for his current condition".

Dr Tim Semple

31. Dr Tim Semple, a specialist and anaesthetist with the Royal Adelaide Hospital Pain Management Unit provided a report dated 10 September 2003. While his report confirms that the worker suffers severe pain in his lower back and details the treatment administered for this it does not deal with the relevant issues. Dr Semple does note:

> "In regard to the relationship between his current condition and the work he has previously preformed I suspect that it is most likely that the severity of his current pain is associated with a flare up secondary to his multi level disc degeneration. The flair up of pain would appear to

be directly related to his work. The continuation of pain over the past 14 months is likely to be of a non specific muscular ligamentous nature as well as related to mechanical disc and facet joint factors. It is likely that a significant component of his lumbar disc degeneration was present prior to the work event in June 2002. The degenerative of his lumbar spine condition may well be related to the nature of his employment over the period of years but it is not possible to be definitive on that matter."

Mr Anthony Pohl

32. Mr Anthony Pohl, an orthopaedic surgeon, provided a report dated 25 July 2006. Prior to examining the worker Mr Pohl was provided with medical reports provided to the worker's solicitors (Mr Graham Lewis, Dr Sue Bain, Dr Tim Semple and Dr Robyn Campbell), medical reports provided to the employer's solicitors (Dr Robin Jackson, Dr Andrew Fagan, Dr Ahmad Hanich and Dr David Millons) together with a radiological report regarding the worker's lumbar spine dated 13 June 2002, a CT scan report dated 18 July 2002 and 7 October 2004 and a MRI radiological report dated 5 August 2005.

33. Mr Pohl was of the opinion that the work circumstances that led to the 11 June 2002 injury are consistent with "if not classical of that producing a tear of the intervertebral disc. His history of both feeling and hearing something give way in his back is classical of a significant injury". He was also of the opinion that the worker suffers from degenerative intervertebral disc disease aggravated by work. He also suffers from lower lumbar facet arthropathy causally related to his work and work injuries "either directly or secondary to degenerative intervertebral disc disease". As he suffers from multi-level degenerative intervertebral disc disease the worker is unfit for and will remain permanently unfit for work of a heavy physical nature" and is therefore permanently unfit to resume his previous occupation as a concreter/leading hand with Masterpath Pty Ltd.

Dr Michael Epstein

34. Dr Michael Epstein, a psychiatrist, provided a report dated 10 August 2006. He was provided with all the documentary material that had been provided to Mr

Anthony Pohl. Dr Epstein was specifically requested to provide an opinion on whether the worker suffered from any functional order as two medical reports provided to the employer from Dr Hanich, a neurosurgeon and Dr Millons an orthopaedic surgeon caused the employer to argue that the worker may be suffering from a functional disorder.

35. After considering the material and examining the worker on 27 July 2006, Dr Epstein was of the opinion that the worker had developed "a chronic Adjustment Disorder with depressed mood arising out of the chronic pain, discomfort and disability from a back injury which appears to have become significantly worse during the course of his employment on 11 June 2002". He did not "form the view that he (the worker) had a functional disorder that is that there is no underlying pathology… From a psychiatric point of view it does appear that his present condition is related to his physical injuries as his level of depression is as a consequence of pain discomfort and disability". Dr Epstein also noted that the worker had been alcohol dependent for a number of years and his recent increase in consumption may involve some form of self-medication to cope with his depression and pain.

Professor Peter Reilly

36. Professor Peter Reilly, a neurosurgeon, from the Royal Adelaide Hospital prepared a medical report dated 14 August 2006. Professor Reilly had been provided with all the same material, X-rays and the MRI lumbar spine reports dated 5 August 2005 as had been provided to Dr Anthony Pohl and for the purposes of preparing his report he examined the worker on 26 July 2006.

37. Professor Reilly confirmed that the MRI scan of the worker's lumbar spine showed degenerative changes at several levels of the lumbar spine. It also showed a bulge of the intervertebral disc at L5/S1 on the right and "signal change within the lumbar disc consistent with dehydration the exception being the L3/4 disc".

38. Professor Reilly noted that the worker's condition at the time of examination was consistent with a degree of depression and that functional factors may certainly to some be responsible for the prolongative of the pain experienced since June 2002. It was his opinion that the degenerative changes in the lumbar spine could not

accurately be dated but had been present for a number of years and "perhaps to some extent" was a product of the nature of the heavy work the worker had performed throughout his working life. He was of the opinion, however, that the worker's present state appears to date from the June 2002 incident and is largely a consequence of that event. Further he noted that both physical and radiological examinations alone were unable by themselves to explain the persistence of the worker's pain and his inability to undertake even light work duties which he considered the worker could do.

Dr Helen Sutcliffe

39. Dr Sutcliffe was provided with medical reports prepared for the worker (Dr Sue Bain, Mr Graham Lewis, Dr Tim Semple, Professor Reilly, Dr Anthony Pohl and Dr Michael Epstein) and medial reports prepared for the employer (Dr Andrew Fagan, Dr Robyn Campbell, Dr Robin Jackson, Dr Ahmad Hanich and Dr David Millons) together with occupational rehabilitation documents prepared by CRS Australia and APM Rehabilitation. In preparing her opinions she appears to have relied on these documents and her interview with the worker on 13 December 2006.

40. Dr Sutcliffe's opinion in her report dated 14 December 2006 is that the worker sustained an L5/S1 and L4/5 disc derangement with right L5 nerve root impingement as a result of a twisting, forceful injury to the lumbar spine in 2002 in the course of his occupation. As a consequence he has experienced unremitting low back and leg pain ever since. His persistent work related disc derangement with nerve root irritation resulting in both leg and neuropathic pain, apparently immediately aggravated by physical activity results in him permanently having no capacity to preform his pre-injury occupation and no capacity for any occupation he previously performed. His medical condition will not improve. His opioid medication for pain has reduced his occupational options and limited his retraining opportunities particularly in regard to the use of machinery and commercial vehicles. Although the worker is relatively young, given his lack of formal training, his limited education, the nature of his injury, his depression, opioid medication and use of alcohol, Dr Sutcliffe was of the opinion that the worker's capacity for retraining is limited and that he is consequently unfit for

full-time and part-time employment except in limited circumstances where he controls the nature of the light duties he could undertake and the hours that he would be able to work.

41. As the employer has in its Defence argued that the worker has been fit for full-time or part-time work since 12 November 2002 and has identified working as a park ranger/guide, pet shop attendant/kennel hand or fishing tackle/marine sales assistance, Dr Sutcliffe prepared a further report dated 28 June 2007 in which she assessed these employment opportunities. It was her opinion that the worker was not fit to undertake any of these occupations as they all required walking or standing for prolonged periods of time, lifting objects from various heights and interfacing with the public. She was also of the opinion that in suggesting these occupations there was a lack of understanding of the nature of the worker's injuries and the tasks inherent in these three occupations.

Michelle French

42. As the Worker has made a claim in his Amended Statement of Claim for payments pursuant to s.78(1) of the Act for the reasonable cost of home modifications required to deal with his long-term incapacity the worker tendered a report dated October 2006 from Michelle French, an occupation therapist.

43. Michelle French was provided with all the same information that was given to Professor Reilly and Dr Anthony Pohl. She was also provided with the employer's Counterclaim wherein it is asserted that the worker has been fit since 12 November 2002 to undertake full or part-time alternative work such as that of a park ranger/guide, pet shop attendant, kennel hand or fishing tackle/marine sales assistant. Ms French was provided with labour market research reports prepared by Ms Barbara Atkinson, a rehabilitation consultant, in relation to the duties required to be undertaken by each of those occupations. Ms French interviewed the worker on 27 July 2006.

44. Ms French provided two reports, the first dated October 2006 and the second 21 June 2007. In her first report it was Ms French's opinion that the worker's pain levels would be reduced and his independence in the community enhanced by the provision of a range of aids and equipment such as a recliner lift lounge chair,

banisters and grab rails strategically placed throughout his house and other modifications to his home and regular physiotherapy and domestic helps.

45. While these recommendations are considered appropriate by Ms French to address the worker's pain and discomfort they are somewhat academic as he does not own his own home, nor does he have a permanent place of abode. He is staying with friends, sharing their kitchen. That is not to say that some of the equipment such as an orthopaedic mattress and bed base, reclining lift lounge chair etc could not be purchased.

46. In regard to the occupations which the employer argues the worker is fit to undertake, either full-time of part-time, Ms French in her report dated 21 June 2007 was of the opinion that given the worker's "functional performance skills at the time of my assessment in July 2006, along with his level and frequency of pain and his educational and vocational background", it is highly unlikely that he would be able to undertake the physical duties required by those occupations. The occupations would require substantial job modification before the worker could successfully apply for the positions and even then there would need to be flexible hours of work to cater for his functional impairments.

The Worker's Claim

47. The worker filed a Further Amended Statement of Claim on 17 July 2006 in which he appeals the decision of the employer to cancel payments of compensation and seeks the following orders:

(a) a determination that the worker had not ceased to incapacitated for work as at the date of the Form 5 Notice;

(b) the worker suffered an injury arising out of or in the course of his employment on 11 June 2002 resulting in incapacity;

(c) an entitlement of compensation of normal weekly earnings in accordance with s.49(2) and 49(3) of the Act from the day of the injury and continuing including superannuation payments;

(d) compensation for medical and rehabilitation treatment pursuant to s.73 of the Act;

(e) home modification, vehicle modification and additional travel costs and household services and attendant care services in accordance with s.77 and/or78 of the Act;

(f) permanent impairment compensation in accordance with s.71 of the Act;

(g) interest on underpayment of compensation including superannuation from the date of injury pursuant to s.89 of the Act;

(h) further an in the alternative the employer pay to the worker interest on unpaid compensation in accordance with s.109 of the Act; and

(i) costs incidental to these proceedings at 100% of the Supreme Court Scale.

48. At the hearing the worker indicated that he was not pursuing his claim under s.71 of the Act and produced no evidence in support of an order for vehicle modification under s.77 and 78.

The Employer's Case

49. The employer has filed both a Defence to the Further Amended Statement of Claim and Counterclaim. The employer claims that the worker is not entitled to compensation on and from 14 February 2003 as the worker as at 12 November 2002 ceased to be incapacitated for work by reason of any injury arising out of or in the course of his employment with the employer. The employer claims that if the worker suffers any incapacity for work beyond 12 November 2002 this is related to the worker's pre-existing degenerative back condition and that the effects of the injury sustained on 11 June 2002 were no longer operative as at 12 November 2002. In the alternative the employer argues that if the worker has not recovered from the injury sustained on 11 June 2002 (which is denied) then

(a) the worker is only partially incapacitated for work;

(b) the worker has been fit to undertake full-time and/or part-time alternative employment as from 12 November 2002;

(c) the worker has a varied vocational background with transferable skills and he is capable of working up to 40 hours per week in alternative employment such as park ranger/guide, pet shop attendant, kennel hand and/or fishing tackle/marine shop assistant.

50. The employer also argues that

(a) as from 14 February 2003 the worker has been reasonably capable of earning $500 gross per week in the most profitable employment reasonable available to him;

(b) alternatively as from 11 June 2004 the worker has been reasonably capable of earning $500 gross per week in the most profitable employment reasonable available to him, whether or not such employment is available to him and having regard to the matters in s.68 of the Act

51. In the alternative if the worker continued to suffer any work-related incapacity for work beyond 12 November 2002 (which is denied) then

(i) the worker ceased to have any work-related incapacity on or from 2 September 2004

(ii) the worker had recovered from the effects of any work-related injury as at 2 September 2004.

52. In the alternative if the worker continued to suffer any work-related incapacity for work beyond 12 November 2002 (which is denied) then the worker's condition and incapacity for work on or after 8 October 2004 was the result of a new and unrelated injury or condition and that as a consequence the worker is no longer entitled to any compensation after 8 October 2004. The employer seeks the following determination:

(A) A determination that the worker ceased to be incapacitated by reason of any work injury on or by 12 November 2002.

(B) A determination that the cancellation of benefits by Notice of Decision dated 14 February 2003 was valid.

(C) A determination that the worker is not entitled to compensation under s65 of the Act on or after the cessation of payments on 7 March 2003.

(D) Alternatively, a determination that the worker ceased to be incapacitated by reason of any work injury on or by 2 September 2004.

(E) Alternatively, a determination that the worker is not entitled to compensation under s65 of the act on or after 2 September 2004.

(F) Alternatively, a determination that the worker has been capable of earning $500.00 gross per week in the most profitable employment reasonably available to him from 14 February 2003 to 11 June 2004.

(G) A determination that the worker has been and is capable of earning $500.00 per week in the most profitable employment in which he could engage, from 11 June 2004 to date and continuing.

(H) Alternatively, a determination as to the worker's entitlements to weekly compensation under s65 of the Act between 12 November 2002 and 11 June 2004, and from 12 June 2004 to date.

(I) Alternatively, a determination that the worker has no entitlement to compensation from 8 October 2004.

(J) An order that the employer have credit for all payments made to the worker on an interim or without prejudice basis since 19 February 2003.

(K) Costs of and incidental to the Application and this Counterclaim.

53. The employer did not call any medical evidence and relies upon its cross-examination of Professor Reilly, Dr Sutcliffe and Michelle French and an interpretation of some of the medical records based upon a CT scan of 8 October 2004 and an MRI scan of 5 August 2005. It is argued that although there was an injury to the worker's lower back on 11 June 2002 arising from his duties with the employer that injury was an exacerbation of an underlying condition being a degenerative condition or disease there was no evidence that the injury was a L5/S1 disc protrusion which showed up in the 8 October 2004 CT scan. The employer argues that this injury is unrelated to the worker's work with the employer and was caused by some source other than in the course of the worker's employment with the employer.

Cross-examination of Professor Reilly

54. It was put to Professor Reilly that his description of the worker's injury taken from the MRI scan dated 5 August 2005 to the effect that he noticed degenerative changes at several levels in the lumbar spine, a bulge of the intervertebral disc at L5/S1 on the right and signal change within the lumbar disc consistent with dehydration, the exception being the L3/4 disc, did not reveal when the bulge occurred.

55. Professor Reilly was also asked to comment on the results of two CT scans of the worker's lumbar spine taken on different dates. On 15 July 2002 a CT scan showed a "minor posterior disc bulging with poor discrimination between the protruding disc and the thecal sac". A further CT scan taken 8 October 2004 showed "a moderate degree of posterior right lateral protrusion of the L5/S1 disc, indenting the anterior right lateral aspect of the thecal sac in the region of the abutting right S1 nerve root. It was also depressed by herniated disc matter slightly inferiorly". Professor Reilly was asked for his opinion as to whether these scans would be consistent with the actual protrusion reported in October 2004 having occurred at some time between July 2002 and October 2004? He agreed that that was a possibility but further investigation would be required. Professor Reilly also concluded that the protrusion observed in the MRI scan taken in August 2005 was consistent with the natural progression of the underlying degenerative condition.

56. Professor Reilly was asked if the worker was certified fit to return to full duties on 25 July 2002, some 6 weeks after the incident on 11 June 2002, the exacerbating effects on the worker's underlying degenerative back condition had resolved. He agreed with that proposition as he agreed that if the worker had returned to full duties and there was another incident that exacerbated his underlying condition then his back condition thereafter subject to further incidents would be referable to that later incident. However this would only be valid if there was a full recovery from the earlier incident and the history of work given to Professor Reilly by the worker indicates he had not. Up until 11 June 2002 he was able to undertake full duties, sustained heavy work and after that date he wasn't. He concluded by stating that it as reasonable to consider that the type of work performed by the worker was likely to accelerate the degenerative changes in his back.

Cross-Examination of Dr Sutcliffe

57. Dr Sutcliffe agreed that if the worker had presented with back pain and pain radiating down his right leg in 1996 and 1998 those episodes together with the 11 June 2002 event could be consistent with a diagnosis of an underlying degenerative condition. Each of these episodes might form an aggravation of that underlying condition and would require investigation to determine whether temporary or permanent damage had been caused.

58. Dr Sutcliffe did not agree that because a disc protrusion identified in a CT scan taken in 2004 was not present on a similar scan taken in 2002 this was evidence that the disc protrusion did not exist in 2002. She indicated that there were other factors to be considered including limitation with the CT scans themselves. She was asked a similar question in relation to MRI scans taken 11 November 2002 when no disc protrusion was evidence and 24 January 2004 when there was and expressed the view that this appeared at odds with her finding that the disc derangement was the result of the 11 June 2002 incident. Dr Sutcliffe agreed that if the worker was correct in his memory regarding the incident when he was arrested by police in Alice Springs in October 2003, where a police officer dropped his full weight onto the worker's back through his knee that could have been an event that could have caused a disc protrusion.

59. It was put to Dr Sutcliffe that exacerbation of the worker's condition on 11 June 2002 had resolved by late July as indicated by his statement to his treating physiotherapist to the effect that he had been engaging in very heavy activities including jack hammering and driving for three hours. She agreed that if that history was correct it was inconsistent with a disc lesion associated with unremitting pain have occurred on 11 June 2002. However on being taken to the medical certificate issued by Dr Sue Bain on 27 June, 11 June, 25 July and 16 August 2002 Dr Sutcliffe did not resile from her opinion that her report was consistent with the history presented in those certificates.

Cross Examination of Michelle French

60. Ms French agreed that her report of October 2006 was based upon the assumption that the worker's condition had remained constant in terms of his functional limitations since June 2002 and that those limitations were the ones she observed when she interviewed him in July 2006. She also assumed that those limitations would continue. However as an occupational therapist she was aware that people suffering chronic pain, pain of an ongoing nature and suffered pain on variable levels, some days are good but more frequently the pain is bad. These sufferers plan to undertake physical activity on days when the pain is less intense. While she conceded that the worker could perform many domestic chores her recommendations were designed to reduce his fatigue and pain levels and assist in maximising his functional capacity. She agreed that her recommendation that the worker would benefit from physiotherapy was outside her area of expertise. Ms French agreed that in her second report where she commented on the worker's capacity to work as a park ranger/guide, pet shop/kennel attendant or fish tackle/marine shop assistant she had assumed that his limitations and restrictions were as reported in the medical reports provided to her and her observation of the worker.

Employer's Argument

61. The employer's submissions are that the worker's case as pleaded is not consistent with the history and medical evidence he relies upon. The worker pleads that he suffered an injury on 11 June 2002 and that his incapacity flows

from that incident. The employer argues that as at 11 June 2002 the worker was suffering from a pre-existing degenerative condition in his spine. He had exacerbated that condition on a number of occasions with the employer prior to 11 June 2002, principally in 1997 and 1998. On 11 June 2002 he suffered another episode, albeit one significantly more serious then the previous two. He received medical treatment, including physiotherapy. The employer relied upon the notes prepared by his physiotherapist, which indicate that by mid July he was working on light duties, by 25 July he had resumed full duties and by 30 July he reported to the physiotherapist that his back was as good as it has been for four years. The employer argued that the exacerbation of the pre-existing degenerate condition on 11 June had ended. Also in support of this contention the employer points to two CT scans taken on 15 July 2002 and 7 October 2004. It is argued that the results of these scans lead to the conclusion that a right side protrusion to the worker's back occurred sometime after the first CT scan as it wasn't present at that time. It is further argued that as this was not present on 15 July 2002, subsequent employment incapacity resulted from that protrusion which was not caused by the incident on 11 June 2002 as pleaded. The employer also points to two MRI scans taken on 11 November 2002 when no disc abnormality was detected and 15 August 2005 when this condition was observed. Again the same argument applied in respect of the pleaded incident on 11 June 2002.

The Alice Springs Physiotherapy and Sports Injury Clinic Notes

62. The notes indicate that the treating physiotherapist recorded the following:

(i) 30 July 2002: "As good as it has been in last 4 years. Rest over last 4 weeks, stretches helping this. Jackhammer yesterday – not too bad. Examination next week depending on workload and concreting."

(ii) Prior to 6 August 2002 (but after 30 July 2002): "Sore since examination, starting aching and hasn't stopped since. Not loosening in morning. Yesterday lifting 100 plus kilogram gen. set between two. Three hour drive, jack hammered half dozen holes, drove back. Pain left side and left leg – groin, tests and left leg to calf. Same thing this morning."

(iii) 6 August 2002: “Good post examination – settled well. Leg pain disappeared post examination. Long weekend of. Truck all morning – still sore since.”

(iv) Prior to 12 August 2002 (but after 6 August 2002): “Drove to Barrow Creek yesterday – three hours – very sore and aching. Today good, Tuesday good.”

(v) 12 August 2002: “Braking up concrete last Friday, very sore. Jack hammer and heavy lifting.”

(vi) 15 August 2002: “Very painful yesterday, unable to walk after work (2hours). Finished today at 2pm – unable to straighten thereafter.”

The CT and MRI Scans Results:

63. The CT and MRI scans were variously reported as follows:

(i) X-rays – 11 June 2002: “Some tilting of the lumbar spine to the left, with an associated mild compensatory concave to the right. There was a loss of height of the lumbo-sacral space with some decrease in the L5/S1 nerve root foramina.”

“The posture vertebral alignment appears normal. There is no narrowing of the intervertebral disc spaces and no spondylitic change is seen. No other bony abnormality is visible.”

(ii) CT Scan – 15 July 2002: Showed a small central disc bulge extending to the right lateral recess at the L4-5 intersegmental level. There was no involvement of the left lateral recess. There was a minor posterior disc bulging at the lumbo-sacral level with poor discrimination between the protruding disc and the thecal sac. There was a mild facet arthropathy at the L5 – S1 level.

(iii) CT Scan – 18 July 2002: Lumbar spine. L3/4: focal disc lesion was seen. The facet joints appear normal the lateral recesses appear satisfactory.

L4/5: there is a minor central disc bulge which extends to the right lateral recess. This may cause very minimal displacement of the existing nerve root in the far lateral recess. The left lateral recess appears satisfactory.

L5/S1: there as usual minor posterior convexity. There is poor discrimination between this and the thecal sac. There may be minor compression upon the thecal sac. The lateral recesses appear normal. The facet joint appear satisfactory. No significant irregularity is noted at the S1 joint. There is minor subchondral sclerosis. No erosion was seen. No evidence of fusion seen.

(iv) CT Scan – 7 October 2004: Lumbo-sacral spine and sacro-iliac joints. Showed a mild disc bulge fixed and into the right lateral recess at the L4 – L5 intersegmental level. There was mild posterior disc protrusion of the lumbo-sacral disc with compression upon the thecal sac.

(v) CT Scan – 8 October 2004: Lumbar spine. Showed minor generalised bulging of the L4-5 disc with slight compression of the anterior aspect of the thecal sac and minor disc bulging into the interior aspect of the right intervertebral foramen, but no relation to the right L4 nerve root within the foramen. A moderate degree of posterior right lateral protrusion of the L5/S1 disc was reported at the lumbo-sacral level, indenting the anterior right lateral aspect of the thecal sac in the region of the budding right S1 nerve root, which was also depressed by herniated disc matter slightly inferiorly. This right posterolateral disc herniation was not described in the report from the previous examination of 15 July 2002 and would therefore seem to be a more recent occurrence.

(vi) MRI Scan – 11 November 2002: "This did not show any disc abnormality or disc bulge involving the nerve roots. – Mr Ahmed Hanich – Dated 24 January 2004"

"Showed degenerative change of the L1-2, L2-3, L4-5 and L5-1 disc spaces and did not show any disc abnormality or disc bulge involving the nerve roots."

(vii) MRI Scan – 5 August 2005: Showed widespread dehydration of the lumbar intervertebral discs, with the exception of the L3-4 intersegmental level. All other discs showed loss of height, loss of T2 signal and generalised disc bulges.

At L4-5 there was a generalised, broad based disc bulge with a little flattening of the anterior theca but no demonstrable central lateral recess stenosis. There was no post-foraminal impingement of the L4 nerve root.

At the L5/S1 there was a generalised disc bulge. The postero-foraminal right L4 nerve was abutting the L5 disc in its foramen, but not obviously displacing it. No significant lateral recess or central canal stenosis was demonstrable at that level. Mild degenerative changes were seen in the facet joints.

64. "Injury" is defined in the Act to include:

> "a physical or mental injury arising before or after the commencement of the relevant provision of the 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.

65. The definition is consistent with the authority in *Darling Island Stevedoring and Lighterage Co Limited v Hankinson* [1967] 117 CLR 19 dealing as it was with the 1926 Worker's Compensation Act (NSW).

66. It is agreed by both parties that the worker was suffering from a degenerative back condition immediately prior to 11 June 2002. This condition in all probability arose out of the nature of the physical work performed by the worker since he left school and commenced working with his father in Western NSW. It was further agreed that this condition was exacerbated to some extent by the incidents in 1997 and 1998.

67. The parties also agree that the worker suffered an injury on 11 June 2002, and as a result made a claim for payment under the Work Health Act scheme. The employer called no evidence before this hearing although it relied in cross-examination of the medical practitioners called on behalf of the worker on an interpretation of the diagnostic aids, the CT scans and MRI scans of the worker's

lumbar spine. If that interpretation, that the aggravating effects of the 11 June 2002 had run their course and any subsequent incapacity was due to another incident which had not been pleaded, had of been supported by expert opinion the employer could and should have called that evidence. However it chose not to call that evidence, and instead ran its case seemingly on the basis that the worker bore the onus of proof. Although inferences can be drawn in accordance with *Jones v Dunkel* (1959) 101 CLR 298 this is a case where no evidence has been presented on behalf of the employer.

68. As previously indicated I do not find that the incident with the police on 10 October 2003 provides the employer with any assistance as the presiding Magistrate who dealt with that matter cast doubt over the veracity of the worker's evidence. Similarly I do not give any weight to the evidence regarding the worker's involvement with police on 2 December 2005 when he was charged with a number of Traffic Act (NT) offences as support for the contention that he was capable of working at that time as he was shown to have been able to drive long distance. That interpretation of the facts is a matter of inference which I am unable to support.

69. I prefer the evidence of Professor Reilly who considered that the work undertaken by the worker in late July and early August 2002 should viewed in the context of the of the injury he suffered on 11 June 2002. It was Professor Reilly's opinion that the worker was unable to "sustain" full duties and heavy work since that date. Support for this opinion is found in the contemporaneous notes of his treating general practitioner, his physiotherapist and his own evidence that he has good and bad days. Ms French the occupational therapist called on behalf of the worker confirmed that people suffering chronic pain as is the case of the worker frequently have variability of that pain on a day to day basis. He did not have good and bad days before 11 June 2002 nor did he suffer chronic pain. In fact he led a full physical life, with some care taken to avoid activities that might exacerbate his underlying degenerative back condition. The question is has the worker's incapacity since 11 June 2002 resulted from the injury? (See *Darling Island Stevedoring and Lighterage Co Ltd v Hankinson* [1967] 117 CLR at 25). The answer appears clear from the evidence that it has and that it has been

continuous since that date. Professor Reilly supports the proposition that because of the injury he suffered on 11 June he was unable to sustain any further periods of employment regardless that he tried to go back to work.

70. In cross examination of Dr Sutcliffe, an occupational physician called on behalf of the worker she agreed that the worker could not have been suffering continuous unremitting pain as a result of the 11 June 2002 incident if he was able to return to full duties in early August 2002. Does it follow as argued by the employer that this is evidence that the injury sustained on 11 June 2002 was a temporary aggravation that had resolved itself by late July early August 2002? While undoubtedly the nature of the work performed by the worker subsequent to the 11 June 2002 caused further aggravation I am not satisfied that the worker only suffered a temporary aggravation of his underlying degenerative condition on 11 June 2002 that was no longer present by late July or early August 2002. He may well have been attempting to get back to full heavy duties but plainly on the evidence presented to this court he was unable to do so.

71. Has the worker been fit since 14 February 2003 to undertake full-time and/or part-time work, other that the duties he performed for the worker immediately prior to 11 June 2002? The employer asks the same question of this Court in respect of 11 June 2004, 2 September 2004 and 8 October 2004. The employer did not provide any evidence in support of why it contended the worker was fit for full-time or part-time work on these dates.

72. I prefer the evidence of the worker's medical experts that the worker has not been fit to undertake full-time and/or part-time since 14 February 2003 and that this state continues today. I also note that while the worker attempted to perform light duties and at times his pre- 11 June 2002 duties, over time he has been unable to sustain any work. He was assisted in these efforts by CRS Australia.

73. The worker also seeks an order pursuant to Division 4 of Part V of the Act to the effect that the worker is entitled to the costs incurred for home modifications, vehicle modifications, household and attendant care services as are reasonable and necessary as he suffers a long-term incapacity (see s.78). The worker readily admits he has not incurred any such costs as he does not own a house or motor

vehicle and in any event cannot afford such items on his current pension. He relies on the scheme of the Act which is one that requires employers to do more than just insure themselves against the effect of injuries suffered by their employees. The Act now requires employers to take remedial action to assist injured employees rehabilitate themselves. Reliance is also placed on *Maddalozzo and Ors v Maddick* (1992) 108 FLR 159 and in particular the following observations of Mildren J at page 167:

> "Unlike the former Act, an employer whose employee suffers a compensable injury is required by the Act to take a real interest in his employee's welfare. Section 61 of the Act, now repealed and replaced by s 75A of the Act, requires an employer to provide suitable employment to an injured worker or find suitable work with another employer for him and to participate in efforts to retrain the employee. The focus of the Act covers a wide range: Pt IV of the Act deals with occupational health and safety, and there is also a heavy emphasis on the rehabilitation of injured workers, not merely on providing a scheme for mere monetary compensation. Thus the Act seeks to prevent injuries from occurring, as well as to rehabilitate those who are injured and to provide for monetary compensation.
>
> The shift of emphasis, when compared with the former Act, is apparent when it is realised that the former Act provided solely for compensation for injured workers and for a compulsory insurance scheme to make sure that the compensation would be paid. Under the former Act, an employer could ignore the welfare of his injured worker and leave the whole problem, including the problems associated with compensation, to his insurers. This is plainly no longer the case."

74. The employer argues that no such order can be made as no costs have been incurred, no claim has been made and accordingly no power exists with this Court to make the order. The employer pointed to observations made by Deputy President Roche of the New South Wales Workers Compensation Tribunal in *Robinson v Foster Tuncurry Memorial Services Club Limited* [2007] NSWWCCPD

84. Although not binding on this count the argument which the employer emphasises is that s.78 is an indemnity provision and orders for payment are only authorised after costs have been incurred.

75. The purpose of Division 4 of Part v of the Act is set out in s.75:

> **75. Purpose**
>
> (1) The purpose of this Division is to ensure the rehabilitation of an injured worker following an injury.
>
> (2) For the purposes of subsection (1), "rehabilitation" means the process necessary to ensure, as far as is practicable, having regard to community standards from time to time, that an injured worker is restored to the same physical, economic and social condition in which the worker was before suffering the relevant injury.

76. *Robinson v Foster Tuncurry Memorial Services Club* involved the relevant New South Wales legislation and in particular the definition of "compensation". The definition of compensation in the Northern Territory legislation includes "a benefit, or an amount paid or payable under the Act as a result of an injury to the worker". Sections 77 and 78 are expressed in terms "In addition to any other compensation under this Part".

77. The employer conceded that where costs had not been incurred, but a valid claim would be paid, general orders are often made. The worker seeks nothing more than a general order. I am satisfied on the basis of the purpose for which Division 4 Part V was enacted and from the wording of s.77 and 78 that this Court has the jurisdiction to make a general order.

78. Finally the worker seeks an order under s.109 (1) (a) of the Act.

> **109. Unreasonable delay in settlement of compensation**
>
> (1) If, in a proceeding before it, the Court is satisfied that the employer has caused unreasonable delay in accepting a claim for or paying compensation, it must –

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

79. After the Form 5 Notice dated 14 February 2003 was served upon the worker and compensation ceased on 7 March 2003 the worker filed an application for a claim for compensation pursuant to Part V of the Act on 24 April 2003. It is agreed that the worker continued to receive compensation up until 11 March 2005. It was suggested that the worker had not pursued interim payment after 11 March 2005 but no evidence was given in support of this contention.

80. A Further Amended Statement of Claim was not filed until 18 July 2007 although there had been earlier pleadings.

81. The worker says that there has been unreasonable delay in accepting his claim. This argument appears to be based on both the manner in which the employer has chosen to deal with his application and what he claims to be the obvious incapacity he suffered as a result of the incident on 11 June 2002. I am not convinced that the manner in which the employer has chosen to meet his application has necessarily caused unreasonable delay. If anything, it appears to relate more to the complicated medical diagnosis involved in determining the worker's injury and what incapacity to work in any may flowed from that injury. Accordingly I decline to make an order under s.109 (1) (a) of the Act for interest on the unpaid compensation after the interim payments were terminated on 11 March 2005.

82. The orders of this Court are:

(a) a determination that on or about 11 June 2002 the worker suffered an injury during the course of his employment with the employer and was totally incapacitated for work from that date

(b) a determination that the worker had not ceased to be incapacitated for work as at 14 February 2003

(c) payment of compensation of normal weekly earnings in accordance with s.49 (2) and (3) of the Act from the date of the injury to date and continuing, including superannuation payments

(d) payment of compensation of medical and rehabilitation treatment pursuant to s.73 of the Act

(e) payment of compensation pursuant to s. 77 and 78 of the Act of the reasonable costs in respect of home modifications, vehicle modifications, household services, attendant care service and travel costs

(f) interest on underpayments of compensation including superannuation under s.49 (2) and (3) pursuant to s.89 of the Act from 11 March 2005

(g) payment of the worker's costs of and incidental to these proceedings at 100% of the Supreme Court Scale

(h) the employer's counter-claim is dismissed

Dated this 10th day of October 2007.

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Greg Borchers
STIPENDIARY MAGISTRATE