CITATION: *Jennings v Calman Australia Pty Ltd [2008] NTMC 079*

PARTIES:	DEBBIE JENNINGS v CALMAN AUSTRALIA PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Workers Rehabilitation and Compensation Act (NT)
FILE NO(s):	20631181
DELIVERED ON:	12 December 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	7, 8, 9, 10, 11 April; 18, 21, 22, 24, 29, 30 July; 15 August; 25 September; 21 October; 28 November 2008
JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

WORK HEALTH – REHABILITATION – PROVISION OF HOUSEHOLD SERVICES – VEHICLE MODIFICATION – ATTENDANT CARE

Workers Rehabilitation and Compensation Act (NT) ss 3, 65, 78, 77, 75(2)

Jones v Dunkel (1959) 101 CLR 298
Maddalozzo v Maddick (1992) 84 NTR 27

REPRESENTATION:

Counsel:

Worker:	Ms Gearin
Employer:	Mr Barr QC

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	B
Judgment ID number:	[2008] NTMC 079
Number of paragraphs:	42

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

No. 20631181

[2008] NTMC 079

BETWEEN:

DEBBIE JENNINGS
Worker

AND:

CALMAN AUSTRALIA PTY LTD
Employer

REASONS FOR DECISION

(Delivered 12 December 2008)

JENNY BLOKLAND CM:

Introduction

1. These proceedings require consideration of whether Debbie Jennings ("the Worker") is entitled to certain benefits from the Employer pursuant to s 78 *Workers Rehabilitation and Compensation Act* (NT). The proceedings commenced by Statement of Claim filed 14 May 2007. Both parties' pleadings were substantially amended prior to the commencement of the hearing (Worker's Further Amended Statement of Claim – 8 April 2008; Employer's Defence to Amended Statement of Claim and Counter Claim – 7 April 2008; Worker's Defence to Counter Claim – 8 April 2008). A number of issues relevant to the calculation of Normal Weekly Earnings ("NWE") and an alleged underpayment have since been substantially resolved. Significant areas of dispute still remain concerning whether and to what extent the Worker is entitled to personal and/or domestic assistance pursuant to s 78 *Workers Rehabilitation and Compensation Act* (NT).

The Injury and Treatment History

2. There is no dispute concerning the circumstances of the original injury or that it arose out of the course of the Worker's employment with the Employer. The Worker was injured on 1 August 1997. She injured her right wrist. At the time she was employed by the Employer as a part-time secretary. She moved a heavy drum containing liquid which crushed her right wrist. The drum was a 25 litre drum filled with cleaning product stationed 4 feet above floor level. She pulled the drum forwards towards herself, tilted it forwards with her left hand and placed her right arm under the drum. During this manoeuvre the drum fell 1-1½ feet landing on her right forearm and wrist. Initially the injury was not regarded as significant, although she notified her Employer and was placed on light duties. She felt some pain at the time of the injury and bruising and swelling developed.

3. Liability was accepted formally on behalf of the Employer on 18 November 1997 (Exhibit W3) and normal weekly earnings at the date of the injury were accepted as $401.10 ("Notice of Decision", Exhibit W3). The Employer has paid the Worker benefits under the Act since then. The injury occurred when the Worker was living in Darwin, however she moved to Townsville soon after as her husband was transferred with the Army. The history of surgery and treatments is astounding. It is a tragic situation that the Worker has endured approximately 15 medical procedures or interventions on her wrist or arm, including some 12 operations. The Worker was right hand dominant. The Worker gave some evidence of these medical procedures. They are also documented in Dr John Olsen's report (Exhibit 4) with various summaries of the procedures and operations attached to his report. As the performance of these procedures is not in dispute it is convenient to note them together with other relevant medical interventions as listed in the Worker's chronology:

23 October 1997	Seen by Dr Badderley. Anthrogram performed, diagnosis probable triangular ligament injury right wrist.
08 December 1997	Seen by Dr Ness in Brisbane. Referred to Occupational Therapy Department at Townsville General Hospital for the fitting of an appropriate wrist splint.
14 April 1998	Dr David Ness:- EMG report shows no abnormality of median or ulna nerves, confirms wrist anthrogram shows a rupture of the triangular fibrocartlidge and a rupture of the luno triquetral ligament.
09 June 1998	Seen by Dr Bruce Low Orthopedic surgeon, still leaning to use left hand wearing a wrist splint at all times.
10 June 1998	MRI demonstrated tear of the triangular fibro cartilage.
19 June 1998	Dr Ness examines and diagnoses irritation of the dorsal branch of the ulna nerve in the right hand probably caused by the wearing of a thermo plastic splint.
21 July 1998	**First operation** – hospitalized and arthroscopy performed by Dr Coleman operative findings of:- • tear of the radial side of the triangular fibro cartilage • irregularity of the ulna head suggesting impingement • almost complete tear of the schapholunate ligament
27 July 1998	Report by Dr Coleman:- • not working as wrist too painful

- at home does most activities but pain with twisting such as taps and door handles.

- uses a keyboard at home and gets discomfort with prolonged writing

10 November 1998 — **Second operation** – performed by Dr Coleman:-

- Arthroscopic repair of the complete tear of the scapho lunate ligament which was then repaired and pinned

- Proximal pole of the scaphoid had been rotated and procedure to stabalise the distal pole of the scaphoid

January 1999 — **Third operation** – for removal of the K wires

March 1999 — **Fourth operation** – performed by Dr Tony Berger:-

- Removal of 3 to 4mm of ulna shortening

06 April 1999 — psychological report of Derek Maker recommending psychological counselling to deal with her depression

June 1999 — X-ray showing early union of the ulna taking place

29 August 1999 — seen by Rheumatologist Dr Geoffrey McColl:-

- diagnosed with regional pain syndrome

- mechanical pain associated with crepitis of the wrist

30 August 1999 — report by Dr Hunter Fry for the insurer:-

- she has home help 3 times per week and her husband helps her as well
- she would be able to drive if she had a vehicle with power steering
- recommended gym work for general wellbeing
- prolonged recovery due to delayed union of the ulna osteotomy

September 1999 — **Fifth operation** – performed by Dr Tony Berger:-

- Arthroscopic debridement of right wrist

15 September 1999 — seen by Dr Berger for insurer

- reported deterioration of right wrist pain localised to the dorsal aspect of the distal radius adjacent to the extensor tendons and on the ulna aspect of the distal ulna
- reported having difficulty with many activities of daily living and also driving a car
- *Recommendation – I think home help would be of value until her problem has been sorted out.*

15 December 1999 — diagnoses with reactive depression by Dr Jackson

07 January 2000 — **Sixth operation** – performed instrumental carpel fusion

14 March 2000 — seen by psychiatrist Dr Likely

April 2000 — attempted suicide

18 April 2000 — seen by psychiatrist Dr Likely

18 August 2000	seen by Dr Blue for the insurer;- • normal range of movement of right shoulder • right shoulder problems as unable to freely rotate her right forearm and uses her shoulder for this particular movement • consequent minor shoulder and scapula symptoms
20 October 2000	**Seventh operation** – performed by Dr Boland being sauvekapandji procedure (fusion of the distal radio ulna joint)
Late 2000	**Eight operation** – performed by Dr Boland being removal of the fusion plate
March 2001	**Ninth operation** – performed by Dr Frawley:- • Arthroscopy for pain in the elbow
April 2001	**Tenth operation** – performed by Dr Phil Frawley:- • stabilisation of the distal ulna by pinning the remainder of the ulna head and the ulna shaft
May 2001	seen by psychiatrist Dr England:- • reported panic attacks whilst driving and inability to continue driving • diagnosed with depression complicated with panic attacks
July 2001	Stellate nerve block performed by Dr Todd Hunter
August 2001	**Eleventh operation** – performed by Dr Frawley:-

- right shoulder arthroscopy performed for impingement type symptoms

24 November 2001 — X-rays shows:-

- osteoarthritis of the distal radius ulna joint
- loosening of the Steinman pin from the Sauvekapinji procedure (operation 7)

04 December 2001 — seen by Dr Boland

- ongoing wrist pain particularly related to her ulna side of her wrist
- problems with lifting and problems with rotation
- pain and downward pressure and a neutral wrist position
- recommended distal radial ulna joint replacement

May 2003 — **Twelfth operation** – performed by Dr Steve Coleman:-

- removal of screw in the distal ulna in the rod inserted at operation 7

4. Dr Olsen's summary of the Worker's history and condition is as follows:

> "Ms Jennings has sustained injuries to her right wrist which was treated with injections and multiple surgical procedures. The outcomes were mixed, over a period of 10 years or so there was gradual deterioration with further treatment. She was severely affected and surgery was attempted in order to relieve her severe pain and severe loss of function. The outcomes were not good and she now presents with multiple secondary disorders which are related to the original injury and the subsequent treatment. Perhaps as a consequence of the constination of time, chronic pain and disappointment with the outcomes she now has substantial psychosocial and psychological disorder impacting on the chronic

pain. She also has developed CRPS1 possibly as a complication of surgical procedures or possibly as a result of lack of use with chronic pain.

Ms Jennings is not fit for any occupation whether part time or full time. She has sustained severe loss of function resulting in significant impairment and inability to participate in activities of daily living. She relies on moderately high doses of narcotic medications and new generation anti-depressant agents".

5. The extent to which Dr Olsen's conclusions can be accepted without qualification rests in part on an assessment of the Worker's credibility as her evidence has been vigorously challenged. At one level, there is a significant amount of independent medical evidence supporting the Worker's case. On another view there is significant disparity between the levels of pain relief reported by the Worker at various times and a significant challenge is made to the extent of her disability on the basis of allegedly exaggerated levels of pain relief required. The Employer has also produced film showing the Worker engaged in a number of activities said to be inconsistent with her case or inconsistent with the level of disability she describes.

Summary and Assessment of Evidence Presented

6. The Worker's evidence is that in an average week in terms of "good days and bad days" she would "have about three good days and four bad" (T37). In cross-examination the Worker said that this pattern emerged "a couple of years ago". The Worker no longer works in paid employment, indeed it is conceded the Worker is taken to be totally incapacitated under s 65(6) *Work Health Act*. She reports a significant deterioration in her abilities as a home maker. She reports further deteriorations in her well being due to her psychiatric condition that means she is unable to participate fully in domestic and social activities that she was once involved in. She is married to Karl Jennings who as indicated above was in the Army prior to her injury and they have four sons – Ben (D.O.B. 20 October 1983), Kyle (D.O.B. 26

May 1986); Peter (D.O.B. 11 July 1990) and Christopher (D.O.B. 8 July 1992). She gave birth to another son on 1 January 1985. He died on 12 April 1985.

7. The Worker's social history is relevant to the assessment of whether any order ought to be made under s 78 *Workers Rehabilitation and Compensation Act* (NT). The Worker described an active younger life involved with sports, looking after animals and other activities. After marrying and having children she was involved in speedway activities, (on account of her husband's interest), some sporting participation herself as well as involvement in sports with her children, significant amounts of gardening and a lengthy history of looking after animals, in particular dogs but also birds and horses. She explained some difficulties she had with some of her sons, in particular Kyle who had been diagnosed with ADHD and Ben who she described as rebellious. She said Peter was easy going when he was growing up but there were signs of rebellion after her injury and she said he ran away from home last year. She said he moved in with his girlfriend and her family because "*her mother can do everything*".

8. She said that prior to her injury her husband always travelled a deal with his work (previously the Army and more recently in the mining industry). She explained he would help out with mowing and tidying up garden beds. She said he would cook about two nights a week but didn't really do any washing or ironing save for his Army uniforms and a minor amount of cleaning. She would drive the children around prior to the accident and she would care for the animals including showing the dogs. She said prior to the injury her husband would do about 12 – 15% of the housework however he was away often. Essentially she said her husband did very little inside domestic work but helped outside doing heavy work, gardening, washing the car and he would go shopping and occasionally cook.

9. Of her current activities and what she is able to now do she states “it is a bit of an experiment like with the vacuuming we have tried three different vacuum cleaners. Say for an example vacuuming the house might have taken me half an hour, it will take me an hour to an hour and a half. I have got to stop in between and rest. So I might do that maybe once a week. Mopping the floors, I can’t use a normal mop any more. We had to go and buy a steam mop”. (T32) She also states “I can no longer iron because I am right handed. I don’t do gardening at all now because I can’t hold a shovel or anything like that. With the animals we have got my son is the one who really helps out a lot with them”. (This is a reference to her 15 year old son Christopher who still lives at home). She states “yeah I can brush and sit there and I can brush the dogs, but anything physical to do with the dogs Chris does it as in washing them. I don’t participate in any sport what so ever any more”.

10. She states that in terms of normal household things she has “good and bad” days. She says on a “good day” she will vacuum and do the floors and wipe the benches down, put a load of washing on and put it in the dryer. She says that is the maximum of what she can do on a good day and “then I’m out”. By that she means she is in pain; she goes to bed and doses herself up on pain killers and is in bed for maybe 24 – 48 hours. She says she does the shopping on a “good day” but her son comes with her. She says she can’t do it on her own. She says she can drive to the local shops. She says if she needs to go further than 10 kilometres she takes someone in the car so she doesn’t get “panicky”. She says she mostly drives on a good day. She says that now between her and her son (Chris) she can cook a meal but she says she is unable to cook a meal on her own because she can’t lift saucepans that are full and she can’t grate cheese because her hand gets swollen if she uses it to grate. She says she needs assistance helping to cook. If her son isn’t there she says she has a microwave frozen meal as “back up”. Mrs Jennings said that prior to the accident she would cook a variety of meals including

baking items for her children to take to school. She says she can peel vegetables but uses a magic slicer (instead of chopping them) with stoppers on the bottom of it so that it can't slide.

11. In relation to moving from a dominant right hand person to being a left handed person she said she thought initially "I can get over this lets go". She said as time went by things got worse with her children arguing and she went from running "24/7 constantly going to my world stopping. I felt useless as a mother. I then had, I had the kids caring for me instead of the other way round". By this she said she meant the children putting the washing out; if she was in bed the boys would come in and offer to do housework including one of the sons looking after younger boys, and cooking meals. She said she felt her role had changed in relation to her children; she got to the stage where the children wouldn't go on school camps especially Ben (her eldest) as it felt as though her safety net was being taken away in relation to helping with the rest of the children. She said "it got to the stage where I didn't think I was worth living any more so yeah I tried to kill myself". That was in about 1999. She said after being seen by Dr Ness in the occupational therapy department at Townsville General Hospital, she was fitted with a wrist splint. She said this restricted her as she would automatically go to do something with her right hand but would need two hands to do a variety of chores such as pulling the washing out of the washing machine or using two hands for a mop. She said in relation to driving she ended up getting a ball for the steering wheel; she said at that time they had a manual vehicle and it was getting difficult to use her right hand to drive and change gears; she confirmed she would drive short distances but not long distances as after about 15 – 20 minutes she starts to hyperventilate.

12. In relation to the vehicle, the Worker said she couldn't actually drive manuals any more and was given a disabled sticker. She and her husband sold the manual land rover and bought an automatic. She said she forwarded

the contract of sale through to the Employers insurance company in January of 2007 but didn't receive a response. (The receipt for the Nissan XTrail and a steam mop for $49.00 became Exhibit MFI5). The receipt indicates the previous vehicle was traded in for $12,000 and the new XTrail was purchased for $30,608, the contract being subject to finance.

13. In relation to pain relief the Worker's evidence was that at the time of hearing she took 450 milligrams of anti-depressants ("Effexor"); Endone, Tramadol (also referred to as Tramal in these proceedings), Panadeine Forte, Mercindol Forte, Panadeine 15, normal Panadol, normal strength Mercindol and (because of heart burn) takes Mylanta also. She said on a good day she would take up to twelve pain killers excluding the three anti-depressants. She said on a bad day she could take anywhere up to 18 pain killers and there are some nights that she doesn't sleep because of pain so she takes Endone or Tramadol with her sleeping tablets (T36). That part of the evidence would tend to indicate up to twelve pain killers on a good day and up to eighteen pain killers on a bad day plus Endone and Tramadol to assist with sleeping on some days.

14. The Worker gives further evidence about medications with reference to Dr Olsen's report and confirmed she was currently on Efexor 150mg, (three times a day for depression); Tramadol 50mg, (up to four capsules a day) – she states she believes Tramadol is a pain killer "one down from Morphine". She says that on a bad day she would mainly take Mercindol Forte and Panadeine Forte during the day and would take a couple of Endone. She says she would take some Tramadol also during the day but doesn't take Endone with Efexor because it can cause problems; at night time she will take two to three Tramadol with some sleeping tablets. Initially she said the Endone was 10mg twice per day; she was asked for some clarification on Dr Olsen's report that said Endone "10mg two tablets twice a day"; she agreed that that would be 40 mg. She said she could take up to eight Panadeine a day and could take up to eight Mercindol Forte a day. She said she

sometimes takes two sleeping tablets. She said she could take up to eight Mercindol Forte in a day – (day strength). She said on a bad day she would take all of those medications (T64). She said on a good day she would take Mercindol Forte (possibly about four) before bed and three Panadeine Forte and some sleeping tablets.

15. In cross-examination the Worker agreed that she was taking three Mercindol Forte in the morning; four Mercindol Forte in the afternoon; one or two Panadol Forte at bedtime; and "no Tramadol or Endone on a really good day" (T98-100). On a "bad day" the Worker said she might take four Mercindol Forte in the morning and three hours later possibly another four; that she would take between six to eight Panedeine Forte; she may well take up to ten or twelve Mercindol and about six Panadeine; in the evening she may take two Tramadol or one or two Endone when the pain was really bad. She estimated she would take four to six Endone over a weekly period and a similar amount with Tramadol. This evidence differed from the history given to Dr Olsen noting two tablets twice a day. Under "present medication" Dr Olsen has noted Endone as 2 mg tablets twice per day. It is submitted on behalf of the Employer that Dr Olsen relied on the list of medication indicated on page 8 of his report. Dr Olsen also noted on page 8 of his report:

> "The predominant pain however is at the right wrist and forearm; it is at the ulnar side and is severe and unremitting. She has numbness over the ulnar border of the right hand. The pain extends from the wrist along the ulnar border to the forearm to the elbow. She does not have any wrist movement at all because of the fusion of the wrist. She experiences skin changes with pink blotchy colour of the palm of the hand the dorsum of the hand becomes quite white and she experiences a burning sensation associated with that. This generally occurs around two to three times per week, it generally begins with pins and needles affecting the second to fifth fingers of the right hand and then the pain begins at the wrist and forearm. When this occurs she experiences allodynia, that is a severe pain reaction to very light touch, this occurs at the distal right ulnar aspect of the right forearm and adjoining wrist. The onset of this appears sporadic and not related to any particular thing.

> The elbow pain is centred around the olecranon (tip of the elbow), it is not present at rest, it only occurs during activity. The shoulder pain is in the prascapular region and is worse when the upper limb is unsupported".

16. In evidence Dr Olsen explained Chronic Regional Pain Syndrome:

> "It consists of intractable pain of a most unpleasant nature, it is essentially the same as neuropathic pain. It is a pain that is non specific, you can't really localise it very well and it is generally severe". (T153)

17. Further, Dr Olsen agreed in re-examination (T175) that with regional pain syndrome such as that suffered by Ms Jennings there was limited use of the arm and then "pain on top of that". Dr Olsen explained that he considers medication to be an important aspect of assessing the severity of pain. (T154) He agreed with the proposition that he had taken into account the "massive amounts of medication" set out in his report as a substantial matter in assessing the severity of her pain.

18. The Worker was cross-examined extensively on the discrepancy between the Worker's reported doses and the record of pain relief drugs purchased from Jimboomba Pharmacy 1 October 2006 to 30 April 2008. It is common ground the insurer on behalf of the Employer pays for the pharmaceuticals purchased at Jimboomba (and elsewhere if receipts are produced) and significant detail of those records was before the Court. (Exhibit 11 and 12) The calculations by the Employer demonstrates that the medications the Worker purchased from Jimboomba Pharmacy are a very small percentage of the amount one would expect the Worker to have purchased based on her evidence and history given to both Dr Olsen and Dr Webb. The totals of pharmaceuticals dispensed from the Jimboomba Pharmacy, (given certain assumptions concerning the number of tablets in some packets), for the selected period are as follows: 260 Mersindol Day; 280 Mersindol tablets; 120 Mersindol Forte; 140 Panadeine; 68 Painex and 120 Tramadol or Endone.

19. After the first part of the hearing in April this year, the case was adjourned before cross-examination was complete. During that adjournment I made orders that the Worker produce copies of medications or pharmacist labels and receipts and associated documents she had referred to. She had told the Court a number of these were at her home. During the period of adjournment the Worker purchased a packet of Tramadol and Endone. If that purchase was not included in the total of medications, it would be 80 rather than 120 as noted above.

20. The Employer provided a table (Table 2 Employer's submissions) indicating how much of each type of pain relief would have been consumed per day and per week over the relevant 577 days or 82 weeks. The table does reflect a significantly lesser consumption of medication than referred to in the Worker's evidence or her statements to medical practitioners. The Employer also made calculations of how many tablets of each type would be expected if the Workers evidence were accepted. The discrepancy is significant, for example for Mersindol the amount purchased is 15.25% of what would be expected; for Panadeine it is 5.2%; for Tramadol it is 12%; for Endone it is 11.8%. The Employer submits that this amounts to a gross exaggeration to the point that it demonstrates a form of malingering because it implies a level of pain of more significance than the reality of the experience.

21. When the Employers' calculations were put to the Worker she explained the alleged discrepancy in different ways, for example in relation to Tramadol by stating "that's not an indication. As I stated that I have been getting also some medication off my mother from under the counter" and she said "I didn't count exactly how many bad days I had, I didn't write them off on a calendar". The Worker indicated that she had purchased some medication in July the year previously when she was in Townsville and had run out of pain killers. She said she paid for them but hadn't sent the receipts off. Along with evidence the Worker gave about acquiring pain killers from her mother, she also referred to obtaining them from a family friend who was a doctor.

She was asked how her mother could get something like 20 to 30 packets of Tramadol and the Worker said "my mother has – we have a family friend who is a doctor. My mother does have major back problems and she has had a back fusion and she will get medication. If mum thinks that she is not going to use that medication she will get more and she will pass it on to me". She said the doctor was her dad's very good family friend but she did not know his full name only that his first name was "Don". She repeated that sometimes her mum would pass on Tramadol or Endone to her if she was not using them. She also gave evidence that when she was in Melbourne and her father was dying, she ran out of medication and she bought some in Melbourne and had also done so in Sydney. She also said she had receipts "sitting at home, but I have never claimed it". She said she possibly had packages with pharmacist's stickers on it at home. After extensive cross-examination on how many packs she may have received from her mother she agreed she did not know. She said she had purchased some pharmaceuticals at Browns Plains but did not know if she had purchased Tramadol. She said it was possible as there were a pile of receipts at home.

22. In relation to compliance with the Court orders ordering discovery of pharmacist stickers and packets of medications kept at home, there was no production of Tramadol or other pain killers with Victorian pharmacist labels. (Exhibit E16). The documents produced did not correlate with the types of medications that may have been expected after the evidence the Worker gave. This did not reflect well on the Worker's credibility.

23. Although the cross-examination of the Worker and the production of the Jimboomba pain relief purchases was effective to emphasise a disparity between certain statements of the Worker and the purchases, on further consideration it is not as stark as it may seem when first confronted with the calculations. First, the records produced did not take account of repeat medications which may well be a significant factor. The Worker's counsel

criticised the Employer's tactics on the basis that it was a selective period. In my view it was reasonable to be selective to make the point that the employer was seeking to, save for the fact that the Worker was interstate for some of that period. The combination of not taking account of repeat medications nor prescriptions from other pharmacies may well account for some of the disparity. This is particularly so given the Worker's evidence that she did spend a lot of time in 2007 in Victoria around the time of the death of her father. I did not however find the Worker's evidence about the doctor who was a family friend convincing. That evidence was not credible.

24. Whatever the precise figures of medications taken, the Worker has been on pain relief medications for a very long time and there is a risk of inaccuracies and poor recollection. In my view the likelihood is that the amount of medication is over stated by the Worker for the period selected however not overstated to the degree the employer suggests given the different factors that may impact on the overall accuracy of the figures put to the Worker in cross-examination. By its nature, the "good day/bad day" description the Worker uses, although necessary to give some general description is not by its nature a precise measure. I have come to the view that the Worker has overstated her medications for some of the period in question but not to the degree asserted by the Employer. Obviously the amount of medication she has taken has varied over a period of time. It would be difficult for anyone to be accurate about that given her circumstances. The Worker has been on pain relief of various kinds since the accident.

25. In terms of the impact on Dr Olsen's report and conclusions, I don't agree that the basis of the opinion has been weakened to a significant degree. If there has been over statement by the Worker to Dr Olsen, it is not to the degree asserted by the Employer. Even if the basis of the opinion has been slightly weakened, it must be remembered that Dr Olsen also had the reports of other doctors who performed the various procedures on the Worker. Dr

Olsen conducted his own pain and functional inability survey with the Worker; he also made a number of observations via clinical examination of the Worker. I note the observations he made as to colour and mottling. He also performed tests on the Worker during his clinical examinations. Although I of course accept his evidence that his opinion was influenced significantly by the amount of pain relief reported, there are also other significant facts forming the basis of his opinion. Given the calculations made on behalf of the Employer may not represent the full picture, I would not discount Dr Olsen's opinion to any significant degree.

26. The Occupational Therapist, Dr Ng summarised that the Worker would need the following assistance around the home:

For preparation and washing up	3.5 hours
Vacuuming	.5 hours
Cleaning the bathroom and toilet	1 hour
Push/Ride on and tractor mowing the lawn	2 hours
Garden maintenance (weeding and pruning)	.5 hours
Animal care (washing dogs and feeding horses)	2 hours
Total hours per week	**9.5 hours**

27. Mr Ng's opinion was queried and critiqued on the basis that he relied to a very great deal on self reporting by the Worker and did not conduct clinical tests. The information he obtained and relied on as well as bearing in mind he did visit the Worker personally, is obviously what he gathered in his professional capacity. It is of course as a matter for him as an expert but there is no reason to believe he did not rely on the methods most appropriately accepted by his profession. Although clearly her relied in large part on personal history, much of what Mr Ng has said in his assessment is consistent with some of the other medical evidence, notably that of Dr Olsen. I note at paragraph 65 and 66 of his report (Exhibit W8)

Mr Ng has noted the movement and associated indicators of the right shoulder, right elbow and wrist. His results are also what one might expect given the Worker's medical history.

28. The video evidence (Exhibit 13 and 14) shows significant adaptation on the part of the Worker in terms of using her left hand and right hand. She was shown (T 282) at the end of 24 December 2006 using her right arm to hold a water hose and moved it up and down to water the area. There is also a deal of video footage of her shaking the fruit and vegetable bags when she was shopping. In video footage of 10 February 2007 the Worker is seen (T 325) driving a ride-on mower for a reasonable amount of time, reversing and manoeuvring the steering wheel. The Worker told the Court that it was an easy mower to use and it had light steering. It is clear from the video evidence that the Worker has a variety of outings, including shopping, visiting and going to the Jimboomba markets. There is much video evidence of her walking and eating.

29. There is a deal of evidence of her using both hands apparently without difficulty. There is evidence (T 367) of her selecting items for example under shop shelves. On being asked "do you agree that you are using your left and right arm indiscriminately; in other words, not favouring one or the other?" she answered "whatever the video footage shows". (T 368) She agreed that the footage of July or August (T 368) showed her lifting things from the trolley onto the conveyer belt for the cashier. She agreed that it was her son packing the shopping on that occasion. The video evidence is of limited use in determining the issues in this case as the Worker has not suggested that she doesn't use her right hand, it is just that she is exhausted after any significant physical activity utilising her right hand. The video is useful in that it does indicate a reasonable amount of use of the Worker's left hand. In my view the sorts of tasks the Worker has indicated she has difficulty with are tasks which common sense indicates a person who has a weakened dominant hand might experience. They are also some of the tasks

indicated by Dr Ng including certain work in the kitchen and other housework.

30. An issue has arisen concerning video footage that was not shown but has, I was told, been provided to the Worker's representatives. The Worker submits I should draw on *Jones v Dunkel* (1959) 101 CLR 298. I appreciate that adverse inferences can sometimes be drawn from a party's unexplained failure to call a material witness or tender a document or item of real evidence. In my view it is reasonable to infer that the other video evidence would not have assisted the Employer however, that failure to tender the remaining video evidence does not constitute evidence in itself, that is the failure to tender the video evidence cannot be used to draw the conclusion that the uncalled evidence would have been damaging to the Employer's case. So although I am content to conclude that the video evidence did not assist the Employer's case, it is not of additional probative benefit to the Worker's case either. That there was more video evidence that has been provided to the Worker remains a matter that is neutral in these particular circumstances.

31. A great deal of this case has focussed on the Worker's credibility. In relation to amounts of medication, there is some unreliability, however as mentioned, that has to be balanced against the lengthy history of which there is no doubt she has taken pain relief. The video evidence illustrates that the Worker is able to perform certain chores and manoeuvres, however, her evidence has never been that she cannot perform tasks at all – it is that having performed certain functions she ends up in pain and exhausted, hence the "good days/bad days". The preponderance of medical evidence supports her position. There is also evidence given by her husband, Mr Karl Jennings of a supportive nature. The reliability of the Worker's evidence is by no means perfect but on the major points she makes, I would not reject it. I disagree with the proposition put on behalf of the Worker that for the Employer to argue the case that they have, required them to allege fraud.

This is a credit issue, not an uncommon issue in workers' compensation cases.

Rehabilitation of Workers under the *Workers Rehabilitation and Compensation Act*

32. The purpose of Part 5 Division 4 – Rehabilitation and Other Compensation is set out as follows:

> **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.

33. The definition of "compensation" (S 3) *Workers Rehabilitation and Compensation Act* is as follows:

> ***compensation*** means a benefit, or an amount paid or payable, under this Act as the result of an injury to a worker and, in sections 132 to 137 inclusive and section 167, includes –
>
> (a) an amount in settlement of a claim for compensation; and
>
> (b) costs payable to a worker by an employer in relation to a claim for compensation.

Sections 77 and 78 are expressed in terms "in addition to any other compensation under this part". Section 77 and 78 provide as follows:

> **77 Additional travel costs**
>
> (1) In addition to any other compensation under this Part, an employer shall pay to a worker who has suffered a significant reduction in his or her mobility in the community as the result of his or her suffering a permanent or long-term incapacity and who has not

received a benefit under section 78 by the modification of a vehicle, and would not safely be able to drive a motor vehicle no matter how reasonably modified the vehicle, any costs incurred by the worker (in excess of those which he or she would have incurred had he or she not suffered the incapacity) as are reasonable and necessary for the purpose of this Division to enable the worker to achieve reasonable mobility in the community.

(2) Without limiting the matters which may be taken into account in determining what is a reasonable and necessary payment referred to in subsection (1) in a particular case, there shall be taken into account –

(a) the effect of the payments on the likelihood of the worker obtaining and retaining gainful employment;

(b) the difficulty faced by him or her in achieving reasonable mobility in the community; and

(c) the alternative means of transport available to him or her.

78 Other rehabilitation

(1) Subject to this section, in addition to any other compensation under this Part, an employer shall pay the costs incurred for such home modifications, vehicle modifications and household and attendant care services as are reasonable and necessary for the purpose of this Division for a worker who suffers or is likely to suffer a permanent or long-term incapacity.

(2) Without limiting the matters which may be taken into account in determining what are reasonable and necessary home modifications, vehicle modifications and household and attendant care services in a particular case, there shall be taken into account –

(a) in relation to home modifications –

(i) the cost, and the relevant benefit to the worker, of the proposed modifications;

(ii) the difficulties faced by him or her in –

(A) gaining access to;

(B) enjoying reasonable freedom of movement in; or

(C) living independently in,

his or her home without the proposed modifications;

(iii) the likely duration of his or her residence in the home;

(iv) where the home is not owned by the worker, the permission of the owner;

(v) the likely cost of reasonable alternative living arrangements; and

(vi) the likely psychological effect on the worker of not having the proposed modifications made;

(b) in relation to vehicle modifications –

(i) the cost and relevant benefit to the worker of the proposed modifications;

(ii) the difficulty faced by him or her in –

(A) driving or operating;

(B) gaining access to; or

(C) enjoying freedom and safety of movement in,

the vehicle without the proposed modifications;

(iii) alternative means of transport available to him or her; and

(iv) the effect of the modifications on his or her likelihood of obtaining and retaining gainful employment;

(c) in relation to household services –

(i) the extent to which household services were provided by the worker before the relevant injury and the extent to which he or she is able to provide those services after that date;

(ii) the number of household family members, their ages and their need for household services;

(iii) the extent to which household services were provided by other household family members before the relevant injury;

(iv) the extent to which other household family members or other family members might reasonably be expected to provide household services for themselves and for him or her after the relevant injury; and

(v) the need to avoid substantial disruption to the employment or other activities of the household family members; and

(d) in relation to attendant care services –

(i) the nature and extent of the worker's injury and the degree to which that injury impairs his or her ability to provide for his or her personal care;

(ii) the extent to which such medical services and nursing care as may be received by him or her provide for his or her essential and regular personal care;

(iii) where he or she so desires, the extent to which it is reasonable to meet his or her desire to live outside an institutional environment;

(iv) the extent to which attendant care services are necessary to enable him or her to undertake or continue employment;

(v) any assessment made, at the request of the insurer, by persons having expertise in the worker's rehabilitation;

(vi) any standard developed or applied by a government department or public authority in respect of the need of disabled persons for attendant care services; and

(vii) the extent to which a relative of the worker might reasonably be expected to provide attendant care services to him or her.

(3) An employer shall not be liable to pay the costs incurred for home modifications except where the worker for whose benefit the modifications are or are to be carried out is severely impaired in his or her mobility or ability to live independently within the home.

(4) In this section ***attendant care services***, in relation to an injured worker, means services (other than medical and surgical services or nursing care) which are required to provide for his or her essential and regular personal care.

34. To emphasise the importance of rehabilitation under the Act, the Worker has referred to *Maddalozzo v Maddick* (1992) 84 NTR 27 at 35 per Mildren J:

> "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, nor merely on providing a scheme for mere monetary compensation. Thus the Act seeks to prevent injuries 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".

35. I accept the primary issue for determination in these proceedings is what is necessary to ensure as far as practicable and having regard to community standards, that the Worker is restored to the same physical economic and social condition as she was before suffering the injury in terms of s 75(2) *Workers Rehabilitation and Compensation Act*. I agree with the Worker's submission that the Employer clearly has responsibility for rehabilitation as it is understood under the Act.

Household Services

36. In relation to household services, in my view it is appropriate that an entitlement be provided to the Worker. I note that the Employer at various times has provided assistance at home after the Worker's operations, however, it there is clearly a need for ongoing support. Although she is able to use her left hand to some degree and accepting it is reasonable that she has assistance from both her son and her husband, it is also apparent that she has always participated in meal preparation and home maintenance. It is not reasonable that her son Chris be expected to do more than his share given his age (15). It is also clear from Dr Webb's report that some light amount of work or activity is beneficial for the Worker. The Worker should be placed in a position where she can continue with those activities without suffering ill effects from becoming over tired. I accept there is some merit in the Employer's submission that the Worker is under no time pressure such as when in paid employment to complete her tasks at home, however given all the medical material and what appears to be reasonable in terms of the sort of assistance one might expect, the Worker should have the assistance around the home in the way Mr Ng has suggested. The evidence indicates some assistance would allow her to regulate work around the home without leaving her exhausted.

37. I would not, (given the Worker's husband does most of the outside work and notwithstanding there is footage of the Worker using the ride on tractor), order household services extend to that of heavier outside work. In my view it is reasonable within the meaning of the section that those tasks be carried out by the Worker's husband or son. Within the Worker's household, that would be a reasonable way to deal with the heavier outside work. I also bear in mind that the Employer has submitted that animal care should not include horses as the horses, (or some of them), are primarily owned or ridden by the Worker's son. Clearly the Worker is someone who has always and will continue to have animals around her in the foreseeable future and those animals will need care. In my view the Worker should be entitled to 7.5 hours per week in household services. That would allow her still perform to do some household tasks herself but be able to structure her tasks so that the more difficult ones are done with assistance.

Vehicle Modification

38. In terms of the claim for "vehicle modification", that claim arose from the Worker and her husband trading in their Land Rover for the Nissan XTrail. I do not find that evidence satisfactory in terms of making out a claim for vehicle modification. It is doubtful that the trade-in amounts to a "modification" however even if it does the Worker traded in a seven year old vehicle and bought a new vehicle (the XTrail) in July 2004. No claim was made in respect of the vehicle until 2007. I don't find that evidence satisfactory in terms of supporting a case for payment for vehicle modification and I reject that part of the claim. On the related issue of travel costs, I disallowed an amendment to pleadings at the commencement of the case to introduce a claim under s 77 *Workers Rehabilitation and Compensation Act*. Clearly the Worker does drive, at least many of the short trips. Doubts have been expressed in these proceedings on whether it is safe for her to drive or not. There must be times where the Worker considers that it is safe for her to drive, possibly when the effects of her medication

are not felt. Consistently with the philosophy of the Act, it is obvious also that for the longer trips she is often accompanied by her other son or other family members, or her husband and that is not an unreasonable position in the context of this family. In any event, if given assistance with household chores as indicated above, the Worker should be in an improved condition to drive or otherwise get around in the community. All matters considered, I will not make any orders in relation to travel costs.

Attendant Care

39. The Worker has given clear evidence of not being able to cut her toenails and of the need for some care and comfort when her pain is severe. The Worker has a history of depression which is described in various ways in being related to her reduced mobility, self esteem and management of the pain. Her psychological condition appears to have deteriorated, possibly compounded by marital issues. The Worker was taken to hospital in June of this year due to an attempt on her life. The medical material before the Court indicates the Worker's psychological issues are significant. In my view the need for attendant care in her circumstances does not mean there needs to be someone present all night. Attendant care for two hours per evening while the Worker's husband is away is reasonable as attendant care services could assist her in settling for the evening and attend to her personal issues before she sleeps. I would allow six hours per week of attendant care, bearing in mind the evidence is the Worker's husband is away regularly. Averaged out this allows attendant care for two hours three nights per week. That could incorporate assistance with cutting her toe nails and other personal care issues that she may have difficulty with. I appreciate the Employer sought to adjourn this part of the claim to allow the Worker to be assessed, however there is a lengthy history of psychiatric problems, in part associated with pain management enough to persuade me to make an order for this assistance to be made available.

Arrears of Weekly Benefits

40. The Worker originally sought a ruling that she be paid arrears on weekly benefits. During the course of the hearing solicitors for both the Worker and the Employer have retrieved documentation and continued making calculations resulting in an agreed position that the Worker has received $27,800.00 in excess of her legal entitlement from 13 March 2003 to 31 August 2008. The way this appears to have come about is by reference to the various formulas under s 65 *Workers Rehabilitation and Compensation Act* that requires the Worker's spouse's earnings to be taken into account at various stages. In these circumstances and bearing in mind both the written and oral submissions of both counsel on 28 November 2008, it is appropriate that I record there has been an overpayment of $27,800.00 paid by the Employer to the Worker. Both counsel take the view that as there is no provision in the *Workers Rehabilitation and Compensation Act* to allow repayment or other remedy concerning the overpayment, I should not go further than note this fact. I accept those submissions and authorities on which they are based and other than finding that this is a matter that has been proven in the course of these proceedings albeit by agreement, I make no further orders.

Conclusions

41. A significant amount of argument occurred pre-trial and at the commencement of the trial concerning pleadings. Many of those matters have been resolved.

42. In terms of the matters that remained in dispute until towards the end of the hearing I find the following:

    42.1 The Worker's Normal Weekly Earnings as at August 1997 are $401.10 (Determined by agreement between the parties).

42.2 The Employer has paid the Worker in excess of her entitlement the sum of $27,800.59. (Determined by agreement between the parties).

42.3 The Worker is entitled to 7.5 hours per week of assistance by way of household services pursuant to s 78(c) *Workers Rehabilitation and Compensation Act*, to be provided by the Employer.

42.4 The Worker is entitled to 6 hours of assistance per week by way of attendant care services pursuant to s 78(d) *Workers Rehabilitation and Compensation Act* to be provided by the Employer.

By arrangement with the Court's Chambers this decision will be forwarded to the solicitors for the parties today and listed for final orders and any application for costs on 12 January 2009 at 9.30am. Further, the evidence before the Court indicated household and attendant care services at $26.22 per hour (Exhibit W8, Mr Ng). I will hear the parties on whether it is preferable or necessary to order the specific sum. If that date is not suitable, the parties have leave to approach the Magistrates Chambers.

Dated this 12th day of December 2008.

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Jenny Blokland
CHIEF MAGISTRATE