CITATION:	*Dunkel v Northern Territory of Australia* [2009] NTMC 048
PARTIES:	HEATHER PHILOMENA DUNKEL v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Work Health Court
JURISDICTION:	Workers Rehabilitation and Compensation Act (NT)
FILE NO(s):	20814517
DELIVERED ON:	19 October 2009
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JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

WORKERS COMPENSATION – PLEADINGS – INJURY – PRE-EXISTING CONDITION – AGGRAVATION
DEFERRAL OF ACCEPTANCE OF LIABILITY – ONUS OF PROOF – VALIDITY OF NOTICE OF DISPUTE

Workers Rehabilitation and Compensation Act (NT), ss 3, 69, 85, 87

Robert Hicks v Bridgestone Australia Limited, NT (CA), 29 May 1997 (unreported)
Johnston v The Commonwealth (1982) 150 CLR 331
Darling Island Stevedoring & Lighterage Co Ltd v Hankinson (1967) 117 CLR 19
Collins Radio Constructors Inc v Day (1998) 143 FLR 425
Makita v Prowles (2001) 52 NSWLR 705
Ramsay v Watson (1961) 108 CLR 642

REPRESENTATION:

Counsel:

Worker:	Ms Gearin
Employer:	Mr Barr QC

Solicitors:

Worker:	Ward Keller
Employer:	Hunt and Hunt

Judgment category classification:	B
Judgment ID number:	[2009] NTMC 048
Number of paragraphs:	87

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

No. 20814517

[2009] NTMC 048

BETWEEN:

HEATHER PHILOMENA DUNKEL
Worker

AND:

NORTHERN TERRITORY OF AUSTRALIA
Employer

JUDGMENT
(Delivered 19th October 2009)

JENNY BLOKLAND CM:

Introduction

1. Ms Heather Philomena Dunkel ("the worker") is employed in the public sector by the Northern Territory ("the employer"). She has generally worked in administrative positions. She has an employment history of some 30 years. As a result of four work place accidents, the worker alleges she suffered injuries entitling her to relief under the *Workers Rehabilitation and Compensation Act* (NT). The worker claims the injuries comprise pain, (put forward in various ways relevant to the incident alleged to be causing the pain); material aggravation of pre-existing bilateral arthritis of both knees; aggravation of medial compartment osteoarthritis of both knees, and synovitis and crepitus in both knees (relevant to the fourth injury claimed).

2. The Worker made a *Work Health* claim in relation to the fourth injury and purported to make a claim in relation to the first, second and third injuries. The employer does not admit liability, denies the worker made valid claims

in respect of the first, second and third alleged injuries, alternatively the employer argues the first three claims are out of time. A variety of issues arise on the question of purported or actual deferral of the question of liability under *Workers Rehabilitation and Compensation Act* (NT).

3. The primary issue concerns whether there has been an "injury" as provided by s 3 *Workers Rehabilitation and Compensation Act* (NT), relevantly:

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

4. Some history and consideration of the evidence of the four incidents alleged to amount to "injuries" is required before turning to some of the technical issues raised in the pleadings.

Relevant History

5. As noted at the outset the Worker has a lengthy employment history. Previous employment she engaged in involved supervision of staff and within those positions, in terms of physical functions, standing and walking. She told the court she would not be able to do that type of work now as her current standing tolerance is between three to five minutes – otherwise the pain begins in her knees and she feels the need to stand in a way that will relieve the pressure. The Worker commenced work with the Defendant in

(the then) Transport and Works Department Registry in 1989. The registry position involved climbing stairs and delivery of documents. At that stage the Worker said she had no difficulty with her knees. She said she weighed approximately 100 kgs.

6. Around 1990-1991, the worker said her duties involved typing up contracts and she also worked in the "Workers Comp" area; she was made a permanent "AO2" (the relevant public sector classification at that time). She worked in salaries, recruitment and generally in human resource roles. In terms of the physical demands of the position her work time was mainly spent in sitting positions, however she would walk to the photocopier, do filing and faxing and at times pulled the compactus apart; the worker said there was a "*fair bit of movement*". She says she would have great difficulty completing those tasks now because of the pain in her knees. She says pain in her knees is currently triggered by simply standing, and she attributes this in part to her weight. In her current position, the Worker says the pain is relieved by ensuring she is located close to the printers and faxes, and she organises her work in particular ways to minimise walking and standing.

7. In 1997-98 the Worker was appointed to a permanent AO4 position with Power and Water (NT). She was the rehabilitation coordinator, responsible for new claims and liaising with the participants involved; the position involved annual travel once per year to Tennant Creek, Alice Springs, Katherine and Yulara and disseminating information on developments in the workers' compensation field. She says it would be difficult now for her to do the travelling she once did in that position. She says she could still complete those duties that can be undertaken while seated. She now organises meetings at her own work place rather than travelling elsewhere.

8. The Worker said she does not recollect experiencing knee pain in 1998, nor using the term "bilateral knee pain" when talking to her doctor at that time. Her recollection was she was placed on Voltaren in April 1998 for shoulder

pain. The shoulder pain was the result of a whiplash injury from two car accidents; this was treated with Cortisone. She says she had no incapacity for work as a result of the shoulder pain. Complicating the Worker's medical-legal history is the assessment of the extent of the underlying condition of osteoarthritis and the issue of obesity which has been difficult to treat.

9. Around 1999/2000 the Worker was employed with The Department of Corporate and Information Services ("DCIS") and was seconded to Power and Water as the rehabilitation coordinator; this position involved a substantial amount of moving around on her part as she was located at Jape Plaza (the administration section of PAWA); the rest of the staff were located at the Ben Hammond workshop in Stuart Park. The Worker spent a considerable amount of time at the Ben Hammond workshop. Following are descriptions of the alleged injuries primarily drawn from the Worker's Evidence. It must be remembered the Worker's description of each incident was not in itself challenged, however the impact of each incident in terms of its specific contribution to the alleged aggravation has been placed under serious challenge and is dealt with later in these reasons.

"The First Injury"

10. The incident leading to the first alleged injury is noted in the Workers Compensation Injury Report of 31 January 2000 occurring on or about that date: (Exhibit W1 derived from Exhibit E11). The Worker says she was taking her files as usual to her meeting, she pressed to go into the lift which was not sitting flush – she had not noticed this because she had her files in her hand; she stepped in and went straight down on her knee; she tried to steady herself. She said her knee was a bit sore and she thought "Bugger", but she "got over it". She went to her meeting, and told her manager about the fall; the manager told her to make an incident report: (Exhibit E11; and Ex W1). The "*Antecedents circumstances of the incident*" are noted in W1

as "Tripped Into Lift and Fell Heavily on Right Knee and Right Palm". The "*Nature and Extent of the injuries*" are noted "Superficial injury. Knee". The Worker said she did not seek medical treatment because she had some Voltaren and Ibuprofen which she took and "didn't have a problem after that". When asked if she was incapacitated at all physically in relation to her ability to do her work she said "not incapacitated at all". (T41)

"The Second Injury"

11. The Worker fell at work on 26 March 2002. At that time she had been working as the Human Resources employee relations officer for the Department of Local Government, Housing and Sport. The Worker said she was walking out of her office and the phone rang; she turned to answer the phone; the metal strip holding down the carpet and linoleum was in front of her office door; she thought she caught her heel in it as she fell first on her left knee, then on her right knee, fully down "sprawled flat right out"; two people came to help her up. At her director's request she saw Dr Tracey. She couldn't recall if she had any time off of work – she says if she did it would have been only a short time; she said she had no ongoing problems because she was still taking "inflammatories" (T43). She said she started finding slowly she was having difficulty walking, there was pain, she was afraid of falling again so she would walk to the printers and faxes using the assistance of the wall. She stopped wearing heels and went to flat shoes. Later in her evidence the Worker (T48) stated she did not start to get problems with her knees until "Towards the latter part of 2002".

12. The Worker also gave evidence about a motor vehicle accident in September 2002 (T48); she could not recall whether her knee problems started before or after that date. The Worker expressed the belief that at that time she thought her knees were causing her problems because of difficulties with weight loss and a gastric-banding procedure. Her medical advice at the time was that she would require an arthroscopy.

"The Third Injury"

13. The incident giving rise to the third alleged injury occurred on 2 April 2007. The Worker gave evidence she sat on a chair and the leg broke, she went backwards, hit her head and lower back and her knees ended up against the desk. She said her knees hit with significant force. The Worker completed an accident report (Ex W3); on the part of that report headed "*Part of body injured*", the Worker has ticked "Lower back"; on the part headed "*Nature of Injury*" the Worker has ticked "strain".

"The Fourth Injury"

14. The Worker gave evidence that at this time renovations were in progress at the AANT Building; that on 5 September 2007 the tradesmen engaged in that work had dragged some cords across the floor and had not taped them down; the worker's sandal was caught on the cord, she tripped over and jarred her right knee. She described jarring her right knee "to steady (her) self". The Worker added "but I already had a couple of days off for rec leave approved and so I did self-administer stuff. I was taking medication at that stage and just had hot packs and all that sort of stuff". The Worker submitted an incident injury report on 10 September 2007.

Summary of the worker's evidence of medical treatment received and the impact of the injuries on her condition and capacity.

15. The Worker recalled she started to experience problems with her knees towards the end of 2002; she did not recall whether problems with her knees started before or after the second injury (T48); she started to increase her intake of Ibuprofen as the pain was increasing in both knees and she was having difficulty walking; she had spoken to her doctors about the increase in pain that she believed was from the accident. As the pain was increasing she had an arthroscopy on her left knee in April 2005; she didn't sleep well at this time and found walking difficult; she would transfer her weight from the left to right knee to ease her pain when standing.

16. She had consulted Dr Baddley in relation to the arthroscopy. Dr Baddley told her it was her weight causing the problem; she tried to lose weight, apparently thinking that after the arthroscopy she would be able to manage her day to day activities. This hoped for state of affairs did not eventuate after the arthroscopy; the recuperation was four months, she was still on heavy medication and the right knee began to give her trouble.

17. The Worker had four months off of work, (as an AO5 at that stage with Housing and Local Government), as a result of the arthroscopy. After this recuperation period she worked at higher duties (as an AO6) for Tiwi Health Services. She agreed she had worked in the workers compensation area from about 1994-2000, including working under the *Work Health Act* (NT) and various pieces of employment legislation primarily in the public sector. She case managed claims. She agreed she was familiar with making claims and the relevant time limits. She received advice to take "Simbic", (spelling from transcript at 46), an experimental gel medication. Her work at Tiwi Health services involved all manner of duties associated with human resources. These duties were completed while seated, aside from using the fax and photocopier and going to meetings – gradually she said she found that level of activity was difficult and if she needed to meet people she would arrange to have them come to her. She found it difficult to fly in small planes, climbing up to the plane; climbing stairs and walking distances. She continued working around those restrictions.

18. In November 2006 she had the right knee arthroscopy; she said her weight at that time would have been close to 126 kilos; she was hoping for a result similar to her left knee as combined with the use of *Simbic,* she had received relative relief; she assumed if she had the right knee arthroscopy she would have the same level of mobility and function properly (T50). This was all prior to "the third injury" in April 2007, noted above (para 13). In August 2007 the Worker had her gastric banding re-done to assist with weight loss; between April and August 2007 she described her knees as "pretty bad,

pretty painful". Through the re-banding she was anticipating losing significant weight and relieving pressure on her knees. Between the re-banding and the "fourth injury", the worker thinks she reduced weight from 126 kgs to 115 kgs.

19. After the "fourth injury" (noted above, para 14), (in September 2007), the Worker sought medical treatment. She said she was already on the maximum allowable level of Feldene, Panamax and Digesics and it would have been dangerous to take more. In cross-examination she also said she used Voltaren from time to time; she said it was the Digesics and Doloxene that increased. She said she saw Dr Saunders and they tried another Simbic treatment because of the pain.

20. In October 2007 the Worker says as part of her employment she was transferred to Block 4 at Royal Darwin Hospital. Her duties involved doing recruitment work for remote health. She found it difficult to walk from the car park to work; she parked illegally so she was close to the work place; she wouldn't leave the work place until she left for the day to go home; she would store up any photo copying and faxing work and do it all at one time. She said that was a work practice she had started in 2002.

21. After the "fourth injury" she would take the lift; she couldn't walk up the stairs – when the lift wasn't working she would remain in one spot.

22. She said it was from after 2000 that she needed to employ a cleaner because she couldn't do any housework or "heavy duty" work; she had difficulty shopping, couldn't cook and rarely entertained. In terms of work she said she would always try to have the meetings at her own office rather than going elsewhere. After the fourth injury she would try to get out of meetings completely. She said her medication increased to four hourly compared to previously at six hourly; she started to take heavier medication; she said she took Panamax and Feldene, and if the pain was stronger she

would take Digesic and Doloxin. At night time she would take Panadeine Forte.

23. She lodged a workers compensation claim after the fourth injury as she said:

> "I felt I had done everything I could to try and resolve the issue. I had arthroscopies and I was led to believe that if I had done the arthroscopies and tidied up the knees and cleaned and smoothed the bones and what ever else I'd –I'd get relief. And if I took my medication and lost weight I would get relief. And so I did all of that and I still wasn't getting any relief and I was deteriorating to this point where I was literally crawling around. I couldn't walk."

24. The Worker served the claim on 4 March 2008 incorporating a statement, certificate from Dr Tracey and the four incident reports (Exhibits W5 & W6). The Worker's statement (at para 5,3 Ex W6) states:

> "Prior to the incident on 31 January 2000, I had never previously suffered any injury to either of my knees and I had no problems with either of my knees.
>
> Over the years on and after 31 January 2000 to date, the condition of both of my knees has deteriorated. I have suffered arthritic changes in both knees and I am satisfied that these four work incidents, or a combination of any one or more of them, have triggered or at least materially contributed to the development of the arthritic condition of both my knees."

25. After "the fourth injury" the Worker states she took recreation leave – just "the odd day here and there" when she needed it, but apart from that she "did her job"; she described the employer as "very sympathetic" and she was accommodated in the workplace. She had time off when she had the knee replacement performed by Dr Crowley in April 2008. She said she finished work at the end of February; she was unable to have the knee replaced until April; she then used a wheelchair and walker and did not return to work until September 2008. The employer continued to be accommodating.

26. She went back to work on a graduated return to work during September 2008 – November 2008 in a level lower than her previous level. She was then

back to full time work, five days per week. In the position she worked in at that time, she was back at her substantive level (not on higher duties). She said she has been given tenure for four months with the Strategic Indigenous Housing division, located at Sports House, Fannie Bay. As the office was on the first floor of a building where the lift didn't work, she said she would crawl up and down the stairs. After four days she could no longer do this as her "knees were just killing [me]"; she was placed in an office on the ground floor. At the time of the Worker giving evidence she said her disability was such she could stand for a short period; at the supermarket she relies on support from the trolley; she can walk one or two hundred metres, probably three hundred metres on a good day; her standing tolerance is about three-five minutes and then she needs a rest or needs to be seated; she said her hydrotherapy, swimming and other exercises help. She said if she didn't have a sympathetic employer she would not be able to work.

27. In cross-examination the Worker said prior to 1998 she had stopped seeing Dr Sankorayya and was seeing Dr Tracey and other doctors at the Carpentaria Medical Centre. She also went to Territory Sports Medicine and saw Dr Thompson and Dr Harris. She was referred to Dr Baddley and Dr Purser.

28. The Worker agreed that it had emerged in the preparation of her case that she had seen Dr Sankarayya in relation to pain in both her knees in February 1998; she agreed she had forgotten about this when she put in her claim. She said she could not recall having a "baker's cyst" on her knee – that none of the doctors had mentioned it. She agreed she had seen Dr Sankarayya in February 1998 and was prescribed Voltaren – that it was "possible" she was prescribed more Voltaren five/six weeks later. She agreed Dr Sankarayya referred her to have an X-ray, although she did not remember this.

29. The worker saw Dr Sharland in April 2008. She told him she didn't have any X-rays from Dr Sankarayya's referral in February 1998. The Worker

said she had checked all her X-rays at home and didn't have any for the knees; she keeps most of her X-rays. She agreed this was "quite possibly inconsistent" with her statement (set out above) where she had said she had never had any knee problems before 2000. She agreed it was likely she was experiencing some considerable difficulty with her knees sufficient to motivate her to see a doctor in February 1998.

30. She said prior to seeing Dr Sankarayya in February 1998 she had not had difficulty with walking or squatting or going up or down stairs affecting her knees. She agreed that in 2005 Mr Baddley assessed her as needing some knee replacements; she said it was possible that Mr Baddley had referred her for total knee replacement of both knees; she agreed Mr Baddley was reluctant to do that surgery in 2005 as she was overweight. She agreed he explained the difficulty of rehabilitating from surgery if there were weight issues. She said it was probable Mr Baddley told her she needed to have total knee replacements. She agreed he couldn't conduct the surgery at that stage in 2005 because of her weight.

31. The worker agreed she had the arthroscopies before she lost the significant weight Mr Baddley had suggested she needed to lose. She agreed with the proposition that she had the arthroscopy in April 2005 and subsequent to that Dr Baddley had suggested she needed to lose weight to undergo the recommended total knee replacement procedures. She agreed she is also affected by arthritis in her shoulders, hands and fingers.

32. The worker also agreed she had told Dr Angel in an assessment on 14 April 2008 that she had not experienced any difficulty with either knee prior to 31 January 2000; she said she had told Dr Angel about the information Dr Sharland had given her in relation to Dr Sankarayya's notes. She said she also told Dr Angel there was a record about her having X-rays through Dr Sankarayya but she had checked her X-rays, didn't have one and couldn't remember having an X-ray. She denied concealing the 1998 attendance

from Dr Angel. She said she recalled contacting Dr Sankarayya in December 2007 to discuss a workers compensation case. She said that discussion was about obtaining medical records.

33. Ms Dunkel said that to her knowledge there had been no other incident outside of work that caused any impact or stress to her knee joints. She said she first started to have difficulties with her knees specifically when travelling in about 2003 when she would sometimes have pain in the knees; the workplace injuries were the only ones she could think of that were significant. She said after the 2002 incident she had pains in the knees and started to slow down and increased her medication.

34. In relation to reporting the incidents the Worker agreed the report of the second incident was signed by her on 17 July 2002. She agreed this second report was three and a half months after the incident. She agreed there was no reference in that report to her right knee. She agreed that use of the word "crush" (or perhaps it should have been put to her as "crushing") in W2 was wrong. She agreed that after making the report to Dr Tracey as suggested by her supervisor she didn't go back for any other attendances in relation to that injury. She said it was possible she had gone to see Dr Tracey in October of that year when there was mention made of her left knee in medical notes of 1 October 2002. She agreed she may have also had pain elsewhere – in particular her right arm. She said she may have discussed weight reduction with Dr Tracey and discussed her left knee being painful.

35. In relation to the third injury of April 2007 the Worker agreed she had only mentioned her lower back in the incident report (W3) and there was no mention of any injury to either knee. She agreed that "strain" in that report referred to a strain in her back. She agreed she did not mention her head in the incident report. She said she didn't recall that she made any medical appointment or sought any treatment in relation to that injury.

36. In relation to the fourth injury she said she remembered seeing Dr Rush at Carpentaria Medical Centre. She said she believed there had been a flare up of her arthritis following the trip on the electrical cord the week before. She agreed that at the time of the fourth incident she was a candidate for total knee replacement of one knee and arguably both. She said that had been the case for a couple of years. She said that within some months of that incident she went on to have the surgery. She agreed Dr Thompson's advice had been that she should lose as much weight as she could. She thought that by September 2007 she was overdue for the knee replacement. When asked whether the only reason she was given for not carrying out the knee replacement was that she had not attained the appropriate weight she said "and my age".

Medical Evidence

37. The Court received two medical reports from Dr Kevin Angel (Exhibit W13). Dr Angel is a consultant orthopaedic surgeon with a major specialty in sporting injuries, knee surgery, arthroscopic surgery and associated lower limb surgery. In his report of 17 April 2008 Dr Angel stated the incident in 2000 was minor; the incident in 2002 changed the subsequent progress with regard to both knees.

38. In relation to the incidents in 2007 he said the first incident seemed to be somewhat minor but from the worker's history he said the second incident led the worker to feeling she jarred her knee very badly and this precipitated her taking heavier medication. In relation to the question of obesity and osteoarthritic changes, Dr Angel's report (17 April 2007) states:

> "I do not consider it can be said that her osteoarthritic changes are as a result of morbid obesity and lack of exercise as there are many morbidly obese people who do not necessarily need knee replacements. There is no question, however that knees being a weight bearing joint that the increase in weight does place more stress upon the knees"

39. He confirmed the incident in 2000 was minor and that the Worker blames the 2002 incident as the beginning of a "downhill trend". Dr Angel also states:

> "I would agree that all of her subsequent incidents have been somewhat minor but nevertheless they would certainly have been acting as an aggravation of probably pre-existing degenerative changes".

40. He concludes by saying it is very difficult to state the exact relationship of the falls and her condition and that her medical history prior to 2000 needs to be taken into account. He says her prognosis is good.

41. For his later report (19 March 2009) Dr Angel had been provided with the medical records of Dr Sankarayya. As a result of the hand written note in those records (that she had bilateral knee pain), Dr Angel agrees that the worker would have been suffering from pre-existing osteoarthritis in both her knees irrespective of the incidents in her employment. Dr Angel was adamant the Worker did not discuss seeing a GP for bilateral knee pain in February 1998.

42. In relation to when the Worker's symptoms first commenced, Dr Angel said the Worker told him the first time she knew of pain in her knees was following the incident on 31 January 2000. (T115). Dr Angel said there was no significant history of injuries before her developing pain in both knees and presumed degenerative changes. Dr Angel agreed that he placed some significance on the Worker's history in relation to the injury of 27 March 2002. When the Worker's evidence was put to Dr Angel in relation to her stating she had no problem as a result of the fall and that the problems with her knees started in the latter part of 2002, Dr Angel said that was different to what he had been told by her.

43. When asked whether the Worker's position of having no significant problems until the end of that year indicated that the fall was not a

significant factor, Dr Angel stated: "Well that's your words; not mine and not Ms Dunkel's when she reported to me as I have put in my report". Dr Angel said his reports express the opinion that the fall of 26 March 2002 was a minor aggravation on a pre-existing idiopathic osteoarthritic condition. (T117) He confirmed all the incidents that occurred were relatively minor aggravations. He said every aggravation will be "just a little added towards the ultimate state needing knee replacement". He said there could be a slow deterioration over a long period of time which could be aggravated or worsened with each exacerbating injury.

44. Dr Angel said he did not agree the degenerative bone on bone osteoarthritis in the medial compartment was purely because of the Worker's weight. He agreed that statistically overweight people are more prone to osteoarthritis and part of the treatment was weight reduction. Dr Angel agreed that the right knee in November 2006 was consistent with a very serious deteriorating underlying arthritic condition. At that stage he agreed the Worker would be a candidate for total knee replacement. He agreed it is usually pointed out to patients who need to, that it is advisable to lose weight before surgery.

45. Dr Angel agreed that in assessing the fourth injury he had taken into account the Worker telling him that she had taken heavier pain relief since that incident. Dr Angel also expressed the view that the incidents to the knees could be accumulative until eventually the total knee replacement is necessary. He also said he believed there were underlying impacting osteoarthritic changes and she would ultimately need a knee replacement "no matter what happened". He said the documented incidents can aggravate the condition or the symptoms can settle. He said "you never know whether there is a small amount of further damage done to…, such as another small piece of articular cartilage borne [query whether transcript should say "worn"] away or knocked off or whatever."

46. Dr Wallace Tracey gave evidence the Worker has been his patient. The following exhibits were received: (Exhibit W 14 Consultation Records; Exhibit W15 Notes; Exhibit W16 Worker's Compensation and related certificates; Exhibit W17 Medical Reports; Exhibit E 18 – notes of 18 /01/08; 28/02/08; 01/05/08; Exhibit W19 Notes from Dr Sankarayya tendered through Dr Tracey in re-examination). Dr Tracey's notes are broadly supportive of the worker's case, however there are a number of indications of history given by the Worker in his notes subject to scrutiny. Dr Tracey's view overall was it was probable, rather than possible, that the trauma of the falls in 2000 and 2002 significantly contributed to ongoing knee problems culminating in total knee replacement: (see eg letter to TIO 02/05/08 in W 17).

47. One of Dr Tracey's notes scrutinised was from 26 March 2002, "She has severe degenerative osteoarthritis which is unlikely to be attributable to this incident. Her knee problems are severely exacerbated by her pathological obesity". Dr Tracey described this as a *throw away line* at the end of an email. He said everyone over 30 years of age has some degenerative arthritis to some degree and he had meant to convey that her discomfort was increased by obesity. He said the problems all appeared after the work-related injuries. He said the fact of obesity doesn't mean the arthritis will be of any more severity than someone of normal weight – he said the obesity will aggravate the symptoms.

48. Dr Tracey agreed that prior to 2002 the Worker had not mentioned any knee problems in his practice. He said he was aware Dr Baddley had treated her previously. He had seen records of Dr Sankarayya seeing the Worker but no record of her mentioning knee pain to him. In re-examination he confirmed Dr Sankarayya's note of 25 February 1998 noting a large Baker's cyst (left side) which he explained is a swelling of the joint capsule in the posterior part of the knee joint with joint fluid that may require an ultrasound to confirm diagnosis.

49. Dr Tracey was taken to a number of notes after the initial consultation from March-2002 to September 2002 that record other medical issues, aside from knee problems. Dr Tracey made the point that not everything that transpires in a consultation is recorded in the notes; that the notes are an *aid memoir*; Dr Tracey said orthopaedic injuries may settle from the initial injury and re-emerge months or years later. On the notes of 26 March 2002 that did not record any issue with the right knee, Dr Tracey said he recalled the Worker had mentioned her right knee but if there were more pain in the left knee he would have focussed on that. He also said he had prescribed medications in September 2002 that were anti-inflammatories that would have been for joint pain; those medications were continued from time to time – a number had been prescribed by other medical practitioners. He could not say that the medications were directed to knee pain specifically.

50. Dr Sharland's reports (Exhibit W20, 11 April 2008, 26 February 2009) conclude there was a pre-existing degenerative condition being bilateral knee arthritis, however, he says this appears *from the worker's point of view* to have been insignificant prior to January 2000. He is of the view the first and second injuries materially aggravated the underlying condition. He said these incidents were more significant than the later 2007 incidents. His conclusion was that the Worker's condition would be less significant if not for the initial two falls. In his report of 26 February 2009 Dr Sharland notes it is the right knee that causes the most significant problem however it was 60% better after the knee replacement; she can walk up to 150 metres and can push 200 metres; her standing is five minutes maximum. He would place restrictions on walking and lifting at work. He found it difficult to make any conclusion on the degree of incapacity if only the left knee were the problem; given the bone-on-bone arthritis, he thought there would still be considerable disability from the left knee alone. He concluded the Worker's weight was impacting on her capacity to work as the pain in the knees would generally be worse given the weight issues.

51. On reviewing the medical material available Dr Sharland said the *Baker's cyst* reference is usually a secondary phenomenon to the arthritis. He said he did not note that but it is something that "comes and goes"; it shows an arthritic process "in play", in this instance presenting with bilateral knee pain. He said the symptoms usually commence with pain – usually bad enough to wake the patient at night, followed by swelling or stiffness. He referred to particular onsets of pain after use of the joint being particularly associated with patella femoral arthritis, (he explained this referred to underneath the kneecap) – not the kind suffered by the worker. He said the "narrowing of the medial compartments of the knee joints" referred in the 1998 X-ray report suggests moderate osteoarthritis – it may be so minor as to not show up on the X-ray. The medial compartment is the commonest place where arthritis is sourced. He said it probably wasn't that significant in 1998.

52. Dr Sharland said the later X-rays in 2004 show changes in all three compartments suggestive of significant progression of disease between 1998 and 2004. Because of the incidents in 2000 and 2002, and noting the progression on the X-rays, Dr Sharland thought it reasonable to suggest those two incidents had a role in the significant progression of arthritis. Dr Sharland said people carrying a lot of extra weight experience greater levels of pain with their arthritic knees. He qualified this saying that although weight is on balance probably causing a more rapid progression of the arthritis, he did not think it was proven one way or the other. He said he thought in some people it does contribute to the arthritis but in others it does not.

53. Dr Sharland said the Worker did not tell him the first incident increased her symptoms; he said after the 2002 incident the Worker told him that things had started to get much worse; he also had the impression that the symptoms had started to get worse from the time of the second injury. He based his opinion in part on her history. He agreed on the basis of the arthroscopy

report from Dr Baddley that the worker would have required a knee replacement; he said given the worker was still young and overweight, he would try to "hold off" on a knee replacement operation. He said it was likely that at the time of the left knee arthroscopy the right knee would be in a similar condition.

54. The Employer tendered four reports from Mr Baddley that were not challenged by the Worker: (7 April 2005; 13 April 2005; 20 April 2005; 28 April 2005. Exhibit E 23). The 7 April 2005 report indicates the Worker has severe symptoms with her left knee and moderate symptoms with her right knee with well established medial compartment degeneration. He suggests arthroscopy and tightening the gastric band to assist her in achieving weight loss of 40 kgs; he says she will need to lose that amount of weight prior to a recommended knee joint replacement. His report of 13 April 2005 notes increasing right knee pain that onset during a flight; he injected a steroid into her right knee for relief. His report of 20 April 2005 concerns the arthroscopy on her left knee, stating she has "severe degenerative bone on bone osteoarthritis in her medial compartment because of her weight". He notes the knee replacement is "out of the question" due to her weight. His final report primarily concerns the issue of the need for weight loss prior to surgery for knee replacement.

Issue of the Breadth of the Pleadings

55. The Worker has pleaded primarily *pain* and *material aggravation of pre-existing bilateral arthritis* of both knees as the "injury" as is understood in the definition in the *Workers Rehabilitation and Compensation Act* (NT) (set out above, para 3): (Statement of Claim paras 4, 5, 7, 9). In both final written and oral submissions counsel for the Worker referred to each alleged "injury" in terms of an "aggravation, acceleration, exacerbation, recurrence or deterioration of the pre-existing injury". The Employer objects to this apparent expansion of the claim and to the submission as it embraces the

whole of the definition of injury, rather than being confined to "pain" and "aggravation" as pleaded.

56. This is not such a significant issue in this case. The alleged development of the injury from the initial pre-existing bilateral arthritis has, from the outset and throughout the proceedings been put in terms of an "aggravation". During submissions counsel referred to *Robert Hicks v Bridgestone Australia Limited*, NT(CA), No AP5 of 1996, 29 May 1997, (unreported). Although not specifically on the same pleading point, the Court of Appeal found error in the approach of the Work Health Court on the question of proof of an "injury". In that case medical evidence had been given of a "classic facet joint injury". What was accepted however from a pleadings point of view, albeit a different question, was whether "injury" itself could be regarded as meaning a number of different terms. The majority cited the single appeal Judge decision with approval:

> "I consider that it is clear that in normal usage 'physical injury' means 'physical hurt of harm, or damage'; this connotes disturbance of the physiological state of the body – see Accident Compensation Commission v McIntosh [1991] 2 VR 253 at 256-7, per Murphy J. Physiological change is simply change to the functioning of the human body; compensable 'physical injury' embraces harmful physiological change to which the employment was a contributing factor – see Kellaway v Broken Hill South Ltd (1944) 44 SR (NSW) 210 per Jordan CJ at 212 and Oates v Earl Fitzwilliam's Collieries Coy [1939] 2 All ER 498 at 502.
>
> 'Injury' is commonly defined in workers' compensation legislation as it is in s3(1). I accept Mr Barr's submissions at p19 as to the formulation of the question to be addressed. However, whether 'injury' is regarded as meaning "harm or damage" or "physiological change" or "harmful effect" or "a disturbance of the normal physiological state" does not matter; all of these expressions mean essentially the same thing. I accept the submission by Mr Tippett of counsel for the respondent that his Worship's formulation of the question did not affect the outcome. The harm or damage to the body must of course arise "out of or in the course or" the worker's employment."

57. The Work Health Court had held that to establish "injury" it was necessary for the Worker to establish a physiological change. On this approach Martin (BF) CJ and Gallop J stated:

> "There is no authority to support the Magistrate's approach to the proof of injury. A finding of the precise physiological change was not necessary. There was evidence to support a finding of facet joint injury and the Magistrate should have been satisfied, on the balance of probabilities, of that ingredient of the appellant's statutory right to compensation.
>
> "In failing to be so satisfied, the Magistrate made an error of law and in failing to correct that error, the Supreme Court like wise made an error of law. Far from not affecting the outcome of the claim, as submitted by the respondent and accepted by the Supreme Court, the Magistrate's finding was fatal to the Appellant's claim in the Work Health Court. However, as Starke J said in *Williams v Metropolitan Coal Co Ltd* (1948) 76 CLR 431 at 44,
>
> > "Compensation is not payable for the injury but for loss of power to earn caused by the injury, that is, for incapacity for work which results from the injury. The question is whether the injury has left the worker in such a position that in the open labour market his earning capacity in the future is less than it was before the injury."

58. His Honour Mildren J was content to accept pain, or more specifically a "painful back condition" as capable of constituting "physical ailment" and consequentially "injury" for the purposes of the Act. His Honour stated:

> "Further, the definition of injury includes a "disease" which is defined to include "a physical or mental ailment, disorder of morbid condition, whether of sudden or gradual development…" The point was not raised in argument, but it seems to me that the words "physical ailment" are, wide enough to include a "facet joint injury", or for that matter, a painful back condition, whatever may be the cause. *Favelle Mort v Murray* (1976) 8 ALR, and the authorities referred to by Kearney J and by the learned Magistrate dealt with very different statutory definitions of "injury" than that which appears in this Act. Accordingly, I would doubt whether it is necessary to establish a physiological change at all, in order to establish an injury within the meaning of the Act".

59. The Work Health Court is a Court of pleadings. The case has been run on the basis of the alleged injuries being an "aggravation". I accept on the basis of His Honour Justice Mildren's view that "pain" or "painful condition", provided it meets the other criteria of "injury" *may* constitute an "injury" in terms of the *Workers Rehabilitation and Compensation Act* (NT); whether it is capable of supporting relief under the Act may depend on other factors such as the pain's contribution to loss of capacity. A point of distinction that may have been relevant concerning *Hick v Bridgestone Australia Limited* is that in that case, there does not appear to be an underlying condition as there is here, hence the *painful condition* was accepted as an injury in itself. Here, the "pain" that is separately alleged in the pleadings can only refer to "pain" sourced in the work place injury that is quite distinct from any aggravation of the pre-existing bilateral arthritis of both knees. From that point of view, "pain", whether described as an "increase" in pain or utilizing the language of s 3 "injury" (aggravation, exacerbation etc…) makes little difference. For the Worker to succeed on "pain" alone, the Worker needs to prove any pain alleged is sourced only in the work place injury and separate from the underlying condition for which "aggravation" only is pleaded. That is something that is difficult to show in the context of this case. In my view the Worker is bound by the pleadings in this case however, it is of little moment as the case has been genuinely contested on the basis of an "aggravation" of a pre-existing injury and "pain". The pain must be more than transient. If the pain has settled it is unlikely to be compensable under the Act unless it has contributed to the "incapacity".

60. I note and accept the authorities submitted on behalf of the Employer to the effect that "aggravation" refers to "an increase in gravity or seriousness"; "the concept of aggravation implies a worsening": (*Johnston v The Commonwealth* (1982) 150 CLR 331 at 338-9). Further, the Employer's submissions contain the following useful quote from Taylor J in *Darling*

Island Stevedoring & Lighterage Co. Ltd v Hankinson (1967) 117 CLR 19 when discussing "aggravation" in the context of NSW legislation:

> "Whilst I agree that compensation in respect of incapacity resulting solely from the aggravation of an existing disease must be limited to the incapacity produced by the aggravation it by no means follows that the aggravation of a disease may not, itself, cause permanent incapacity."

Onus of Proof – Alleged Invalidity of the Notice of Dispute

61. In terms of onus of proof in these proceedings, I had assumed the Worker, who in this case asserts a number of the primary issues, would bear the onus: (this is not a case under s 69 – *Workers Rehabilitation and Compensation Act* (NT) – Cancellation or Reduction of Compensation - where it is settled that clearly the onus is on the Employer to justify cancellation or reduction). It is necessary to deal with a number of issues relevant to the question of invalidity of the "Notice of Dispute". Although initially it appeared the Worker was submitting the Employer bore the onus on the question of the invalidity issue, the Worker appeared to suggest the Employer bore the onus on the case as a whole: (T 208-210). The argument is the Employer bears the onus in these proceedings as a result of its alleged failure to properly comply with s 85 and 87 *Workers Rehabilitation and Compensation Act* (NT) – Deferral of acceptance of liability and Failure to decide within specified time.

62. As pleaded in the Statement of Claim, (paragraph 12), the Employer purported to defer its response to the Worker's claim and commenced payments of weekly benefits pursuant to s 85(4)(b) *Workers Rehabilitation and Compensation Act* (NT). The Employer admits it deferred its response in relation to liability for the claim and commenced payments of weekly benefits pursuant to s 85(4)(b) *Workers Rehabilitation And Compensation Act* (NT) . Section 85 provides as follows:

"**85**. **Decision as to eligibility for compensation**

(1) An employer shall, on receiving a claim for compensation:

(a) accept liability for the compensation:

(b) defer accepting liability for the compensation; or

(c) dispute liability for the compensation,

And shall notify the person making the claim of the employer's decision within 10 working days after receiving the claim.

(2) Where an employer accepts liability for the compensation claimed, the employer shall, in the case of a claim for weekly payments (whether or not other compensation is claimed), commence those payments within 3 working days after accepting liability.

(3) Where a claim for compensation is for a lump-sum payment of compensation or for a benefit other that a weekly payment, the employer shall, where liability for the compensation claimed is accepted, make the payment or provide the benefit as soon as practicable after the claim is accepted.

(4) Where an employer defers accepting liability for the compensation claimed:

(a) the deferral shall remain in force for 56 days from the date the notification under subsection (1) is given or such longer period as the Court may allow unless, within that period, the employer notifies the person making the claim that the employer accepts or disputes liability for the compensation;

(b) where the claim is for weekly payments (whether or not other compensation is claimed), the employer shall, within 3 working days of making the decision to defer accepting liability for the compensation claimed, commence those payments; and

(c) where the claim is for weekly payments and relates to an injury involving mental stress – section 75A(1) and 75B apply during the period of deferral to the employer and the person making the claim as if the employer had accepted liability for the compensation claimed.

(5) Where an employer accepts or disputes liability for compensation under subsection (4)(a), the employer shall notify the person making the claim of the employer's decision.

(6) Notification required to be given to a person under this section shall be in writing and given to the person by:

(a) delivering it personally to the person;

(b) placing it in a properly addressed envelope and leaving it with a person who has apparently attained the age of 16 years at the person's address as shown in the claim form given to or served on the employer under section 82; or

(c) sending it in a properly addressed envelope by pre-paid post to the person at the person's address as shown in the claim form given or served on the employer under section 82, and notification shall be deemed given when the envelope is posted.

(7) Where payments are made to a person under subsection (4)(b) or by virtue of subsection (4)(c), or where the employer pays the costs of a worker's reasonable rehabilitation treatment or training or workplace return to work programs before accepting liability for or being found liable to pay compensation, those payments:

(a) are made on a without prejudice basis and are not, in any subsequent proceedings under this Act, to be construed as an admission of liability;

(b) if they are made under subsection (4)(b) or by virtue of subsection (4)(c) – are to continue to be made until the employer under subsection (5) notifies the person making the claim of the employer's decision to accept or dispute liability for the compensation claimed;

(c) are to be taken into account in determining the amount of the employer's liability under the claim, where liability is accepted or deemed accepted or an order for compensation is made; and

(d) are not able to be recovered by the employer notwithstanding that the employer may not be liable under this Act to pay the compensation claimed.

(8) At the same time as an employer notifies a claimant under this section that the employer disputes liability for compensation claimed, the employer must give the claimant a statement in the approved form:

(a) setting out the reasons for the employer's decision to dispute liability;

(b) to the effect that, if the claimant is aggrieved by the employer's decision to dispute liability, the claimant may, within 90 days after receiving the statement, apply to the Authority to have the dispute referred to mediation;

(c) to the effect that, if mediation is unsuccessful in resolving the dispute, the claimant may commence a proceeding before the Court for the recovery of compensation to which the claimant believes he or she is entitled;

(d) to the effect that, if the claimant wishes to commence a proceeding, the claimant must lodge an application with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2);

(e) to the effect that the claimant may only commence the proceeding if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful; and

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

(9) For the purposes of subsection (8),the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the claimant to whom the statement is given to understand fully why the employer disputes liability for the compensation claimed."

63. It was accepted, (subject to the Worker's reservation that due to alleged non-compliance the deferral could be regarded no more than a *purported* deferral),by both parties the Employer had both notified (or purported to

notify) deferral and commenced payments after the claim. The Worker's claim, (Exhibit W6) was given to the Employer on 4 March 2008. It was also accepted the Worker received the letter from the Employer's insurer dated 18 March 2008 (Exhibit W7). (See Consolidated pleadings, paragraphs 12 – 14). Taking 18 March 2008 as the relevant date, it is accepted the Employer's response to defer the claim was not within the ten days as provided in s 85(1) *Workers Rehabilitation and Compensation Act* (set out above).

64. The admitted consequence of that breach is the Employer is *deemed* to have accepted liability for compensation pursuant to s 87. Section 87 *Workers Rehabilitation and Compensation Act* provides:

> **87. Failure to decide within specified time**
>
> (1) If an employer fails to notify a person of his or her decision within the time specified in section 85(1), the employer is deemed to have accepted liability for compensation payable under Subdivisions B and D of Division 3 until:
>
> (a) the expiry of 14 days after the day on which the employer notifies the person of his or her decision in pursuance of that section; or
>
> (b) the Court orders otherwise.
>
> (2) If an employer defers a decision on liability but fails to make a decision to accept or dispute liability within the period for which the deferral remains in force under section 85(4)(a), the employer is deemed to have accepted liability for compensation payable under Division 3, Subdivisions B and D until:
>
> (a) the expiry of 14 days after the day on which the employer notifies the claimant of a decision to accept or dispute liability; or
>
> (b) the Court orders otherwise.
>
> (3) An employer notifies a claimant of a decision for the purposes of subsection (1)(a) or (2)(a) if (and only if):

(a) notification of the decision is given in accordance with section 85(6); and

(b) in the case of a decision to dispute liability, the employer complies with the further requirements of section 85(8) and (9).

65. Although the Employer admits that pursuant to s 87 *Workers Rehabilitation and Compensation Act* (NT) it is deemed to have accepted liability on and from 19 March 2008, the Employer argues its liability ceased on or about 21 May 2008, being 14 days after notification of the Notice of Decision, (in reference to s 87 (1)(a) – set out above).

66. The Worker alleges the Notice of Decision (to dispute liability) of 6 May 2008: (Exhibit E 23) was invalid on two grounds. First on the ground the Notice did not state that payments of weekly benefits to the Worker would continue until the expiry of 14 days after the day on which the Employer notified the Worker of its decision. Second, on the ground the Employer did not pay weekly benefits to the Worker until the expiry of 14 days after the day on which the Employer notified the Worker of its decision. (Statement of Claim para 19).

67. The Worker relies substantially on the authorities concerned with non-compliance under s 69 *Workers Rehabilitation and Compensation Act* (NT) dealing with cancellation of payments. In particular, *Collins Radio Constructors Inc v Day* (1998) 143 FLR 425 is relied on for the proposition that strict compliance with the requirements of s 69 is required and failure by an employer to so comply will mean that a Worker's right to receive compensation has not been validly terminated. At 430-431 the Court states:

> "However, in this case, the words chosen in the certificate do not convey the essential meaning for the two reasons previously identified. It may be that the words "for work" can be implied from the circumstances and from the form of the certificate, but even if this be so, to say merely that the worker is no longer totally incapacitated for work, is not another way of saying that the worker is no longer incapacitated for work.

> Mr McDonald QC tried to persuade us that the Form 5 certificate somehow remedied this defect, but even if recourse could have been had to that Form, the certificate itself carried the matter no further. Moreover, there are patently other difficulties with the certificate in that: (a) it purports to cancel the payment forthwith, whereas s 69(1)(a) requires 14 days notice of an intention to cancel payments- in this respect, we note that the prescribed form in the regulations is defective in that the prescribed form does not correspond with the requirements of s 69(1)(a); (b) the reasons given for cancelling the benefits do not comply with s 69(4)."

68. The compliance regime around s 69 *Workers Rehabilitation and Compensation Act* (NT) differs materially from ss 85 and 87. Section 69 specifically requires that notice of 14 days must be given before benefits can be cancelled or reduced. Further, a number of specific requirements listed in s 69(1) (b) must be complied with. The notification and compliance provisions of s 85 require notification in writing; delivering the notice personally, or to a person apparently of 16 years or over or by post in accordance with the section; further, it must state (pursuant to s 85(8)) the reasons for the decision to dispute liability; the right to refer to mediation; the right to proceed to Court and various other related procedural notifications. I agree the principles of compliance underlying both s 69 and s 87 are similar in that they are derived from the need to ensure employers meet their obligations under the Act and that workers will not be prejudiced. The fact remains the two regimes differ markedly in terms of the requirements and the consequences of non-compliance. There is no requirement under s 87 read with s 85 to state that payments of weekly benefits would continue until the expiry of 14 days after the date of notification of the Employer's decision.

69. As noted, the Employer admits it did not pay the full amount of weekly compensation to the Worker up to 21 May 2008. By virtue of the operation of s 87(1)(a) the Employer's liability continues until the expiry of 14 days after the notification. The fact that the Employer continued to be liable for unpaid payments in that period does not affect the deemed acceptance of

liability nor the validity of the notice disputing liability. The remedy for any failure to pay the correct amount of compensation is under s 89 *Workers Rehabilitation and Compensation Act* (NT), - late payment of weekly payments plus interest. I conclude the Notice of Decision – (Disputing liability 6 May 2008) - was valid.

70. Having come to that conclusion, I conclude also the Worker bears the persuasive onus on the balance of probabilities in these proceedings.

Observations on the Strength of the Worker's Evidence

71. While accepting the evidence is strong that the Worker suffered from bilateral arthritis of both knees since around 1998, it is difficult to ascertain whether as a result of any of the four incidents described by her or accumulation of them have aggravated the progressive condition or, as suggested in the authorities whether the evidence positively satisfies there is a causative connection between the injuries and the worker's present condition and incapacity.

72. I broadly accept the description of the four incidents as narrated by the Worker. There is no evidence to the contrary. Although I accept broadly the description of those incidents, a competing consideration is that the Worker has not always reported reliably to health professionals or indeed in some of the documentation concerning her claim. I am not suggesting this is intentional on her part but it does undermine her reliability and credibility to some extent. In turn, this also impacts somewhat negatively on the strength of various medical opinions given that would otherwise be supportive of her case.

73. At the outset, although I acknowledge the difficulty with remembering dates and consultations with medical practitioners over such a lengthy history, the fact the Worker stated in her statement accompanying her claim that prior to the incident on 31 January 2000 she had "no problems" with either of her

knees does not inspire great confidence in the Worker's reporting reliability – it is not fatal in itself by any means but it does suggest it is fair to place the Worker's recollections and impressions under some scrutiny.

74. In relation to the first incident of 31 January 2000, the worker did not seek any treatment and said she was not incapacitated by it. It was specifically her right hand and right knee that were identified as the parts of her body that were injured. The medical evidence is either non-supportive of the worker's case or inconsistent with her evidence that she "got over it" or that she didn't have a problem after taking some Ibrufen or Voltaren. Dr Angel's opinion was that this was minor and that the Worker had stated she had recovered. Although Dr Sharland's opinion at first blush appears to support the Worker's case, he did not have any information from the Worker on the nature of any increase in symptoms specifically in relation to the first injury. Bearing in mind the importance of any medical opinion needing to have a proper basis in evidence, this usually means that evidence of the history on which the opinion is based will need to be proved: *Makita (Australia) v Sprowles* (2001) 52 NSWLR 705, otherwise, the opinion may be of little weight or little value or in some instances be inadmissible altogether: *Makita* (above); *Ramsay v Watson* (1961) 108 CLR 642. Dr Tracey had previously offered the opinion that the falls of 2000 and 2002 significantly contributed to knee problems, however there were no notes as to any reported problems with the Worker's knees prior to 2002. Any pain suffered in the right knee and right hand was on balance of a temporary nature, not contributing to any incapacity.

75. Balancing the Worker's evidence, and the state of the medical evidence, in my view the Worker's case is very thin. I am not satisfied on the balance of probabilities the incident of 31 January 2000 caused an aggravation of the pre-existing injury, nor that there was pain amounting to an injury.

76. In relation to the second incident occurring 26 March 2002 the Worker obtained medical advice because her director insisted she do so. Her evidence was she fell on her left and then right knee. Dr Tracey's notes indicate only the left knee, (and other parts of her body but not the right knee). I accept Dr Tracey recalls she did mention her right knee but that was not the focus – the left knee was more significant. It will be recalled the Worker's accident report (Exhibit E12; W2) mentioned only the left knee. The Worker did not have any time off as a result of this incident but was still taking medication "inflammatories"; she stated in evidence she did not start to have problems with her knees until the latter part of 2002; out of all of the attendances at Dr Tracey's practice throughout 2002 there was no mention in the notes of knee pain until October 2002 – (Left knee). Dr Tracey's evidence is that this does not mean knee pain was not discussed. I accept this may be so. Presumably however it was not so significant as to warrant focussing on the problem until October or the Worker did not seek any additional assistance with her knee until October 2002.

77. Dr Angel's report indicated it was this second incident that changed the subsequent progress with regard to her knees. His opinion was based on the Worker's history that he took. Dr Angel appeared reluctant to engage with propositions that might test his conclusions based around differences in the Worker's evidence *vis a vis* the history and information he based his opinions on. His concern appeared to be that counsel was trying to suggest he was told things that he had omitted to put in this report. Some of his evidence was not totally satisfactory, perhaps because he appeared to believe it was being suggested he had omitted certain things. For instance, Dr Angel was asked that if it was not until much later in the year the Worker started to have problems, would that fact tend to indicate the second fall was not significant in terms of the deterioration of her condition. He replied "Well that's your words, not mine and not Mrs Dunkel's when she reported to me as I put in my report". He disagreed he had been significantly

influenced by the Worker's impressions that the March 2002 fall aggravated her condition. He said "that's what she said to me". He emphasises these incidents are minor aggravations, however he also says "every aggravation will be just a little added towards the ultimate state of needing a knee replacement". This view is somewhat softened by his other answers to the effect that the incidents "can aggravate" …and further "you never know whether there is a small amount of further damage…" (see quotes in paras 44 and 45 above).

78. Dr Sharland's evidence indicated his opinion was based largely on the idea that the pain became worse for the Worker from the time of the second incident. This did not accord with her evidence at the hearing and is consistent with the fact that the symptoms did not feature in Dr Tracey's notes until October 2006. Given the inconsistent evidence about the onset of symptoms after the March 2002 incident; given the history Dr Angel and Dr Sharland relied on to form their opinions was in important parts not consistent with the worker's evidence; given the probable progression of the Worker's underlying arthritic condition; I cannot be satisfied on the balance of probabilities the worker has sustained an aggravation of pre-existing bilateral arthritis of the knees and therefore cannot be satisfied there was an injury in terms of the *Workers Rehabilitation and Compensation Act* (NT). Further, I am not satisfied that any pain separately experienced as a result of this indicent amounts to an "injury" in the terms of the Act.

79. In relation to the third incident of 2 April 2007 the Worker did not mention her knees in her report of the incident. (Although as noted above, in her evidence she referred to hitting her knees with force; they ended up against the desk (see paragraphs 13 and 35 above). She continued working and did not seek treatment. This incident or any injury related to it is not recorded in Dr Tracey's notes in the relevant period. Dr Angel regards it as "somewhat minor" and Dr Sharland thought neither of the two 2007 incidents were of significance.

80. What supportive material is available about the impact of the third incident has to be weighed against the other material concerning the progression of the Worker's bilateral arthritis: the Worker was suffering pain, restrictions and mobility problems with both knees and was treated extensively for that throughout 2005; in 2005 Dr Baddley said she had severe symptoms in her left knee and moderate symptoms in her right knee (see para 54 above); by 20 April 2005 Dr Baddley had performed the arthroscopy on her left knee and reported severe degenerative "bone on bone" osteoarthritis, due to her weight. Dr Baddley was of the view in 2005 there should be total knee joint replacement in relation to the left knee. Dr Sharland agreed, based on the reports and history before him it was likely the Worker's right knee would have been in a similar position. The Worker was treated in November 2005 with Synvisc injections to the left knee and to the right knee in May and August 2006; she had the right knee arthroscopy in November 2006.

81. There is contested evidence about the issue of weight and its effect on the knee condition – whatever the answer to that issue, it is clear Dr Baddley did not want to operate back in 2005, because of the Worker's weight even though he thought the knee replacement was desirable at that time. Dr Sharland was of the view that weight may increase the pain for some people. Balancing all of these factors against consequences of the third incident asserted by the Worker, I am not satisfied on the balance of probabilities that the third incident is proven to be an aggravation of the pre-existing bi-lateral arthritis of both knees and consequentially, I am not satisfied there is an "injury" within the meaning of the *Workers Rehabilitation and Compensation Act* (NT). I am not satisfied on the balance of probabilities the "pain" pleaded amounts to an injury under the Act.

82. By the time of the fourth incident in September 2007 the Worker was, as indicated, already a candidate for knee replacement. She reported "strain" to her upper leg right; knee lower leg right" as a result of the fourth incident. Prior to that incident in April and August 2007 the Worker

described her knees as "pretty bad, pretty painful". Dr Rush recorded the consultation concerning "flare up of arthritis". As stated, Dr Sharland did not consider either 2007 incident to be significant. Dr Angel understood this incident to lead to the Worker taking heavier medication. The evidence of the level of medication is confused with the Worker stating she was "taking medication at that stage and just had hot packs and all that sort of stuff" (para 14 above); she took recreation leave when she needed it; she said her medication increased from four hourly to six hourly; she was already on Feldene, Panamax and Digesic; however, the Worker said she was already "pretty much on my maximum limit".

83. This does call into question the basis of Dr Angels' opinion about this injury as he seems unaware the Worker was already on her safe maximum dose of medication prior to this incident. Dr Angel agreed the Worker told him she began to take heavy medication in the form of Feldene, Panamax and Digesic after and only after 5 September 2007 (T120). I think all that can be said of the fourth injury is that it is possible the condition of the knees including pain was aggravated for some time, but they were already in such a compromised state and the evidence around the extent of the increase in pain relief in not at all clear. What positive evidence there is that favours the Worker's case in this regard has to be balanced against the evidence of the significant deterioration before the fourth incident. All things considered, I am not satisfied on the balance of probabilities the Worker suffered an aggravation of medial compartment osteoarthritis of both knees or material aggravation of bilateral arthritis of both knees or synovitis or crepitus in both knees as a result of the fourth incident. I am not satisfied the jarring and pain in both knees amounts to an injury under the Act.

Summary of Findings

84. I have included a number of conclusions throughout these reasons. I confirm I am not persuaded on the balance of probabilities that any of the

injuries individually or cumulatively constitute an aggravation of the pre-existing bilateral arthritis of both knees. I confirm also that where pain is alleged in the pleadings I am not satisfied on the balance of probabilities the pain constitutes an aggravation of the pre-existing condition in terms of the *Workers Rehabilitation and Compensation Act* (NT). I am not satisfied that the "pain" pleaded amounts to an injury under the Act. It may not therefore strictly be necessary to make this finding but in case of doubt I find the Worker's treatment and consequent costs of treatment did not arise as a result of an injury in the course of the employment or that the employment materially contributed to injury requiring treatment and consequentially the Employer is not liable to pay past medical expenses. I find pursuant to s 87 of the Act the Employer was deemed to have accepted liability but that its liability ceased on or about 21 May 2008. I find the Notice of Dispute was not invalid.

85. This was a complicated set of circumstances for the Worker to grapple with. She has held various beliefs about the basis or cause of her worsening condition. In those circumstances of a lengthy and complicated history, there is reasonable cause for not making a claim within six months of the alleged injury and I would allow her to bring the claim for the first three alleged injuries to be made, although they are out of time. (s 182(3)) *Workers Rehabilitation and Compensation Act* (NT). In any event allowing those claims to be made, the Worker was not successful.

86. Towards the end of finalising these reasons I was provided with a communication by way of letter from the Employer's solicitor with a copy to the Worker's solicitor concerning a possible re-opening of an issue concerning a concession. After an initial communication through the Judicial Registrar to list the matter to find out more information, I requested the matter not be re-listed until after these reasons were handed down.

87. I will forward these reasons to the parties today and list the matter for mention on Thursday 22 October 2009 at 9.00am when I will make an order dismissing the Worker's claim and consider costs. If that date is not suitable I respectfully request the parties consult and contact my Chambers.

Dated this 19th day of October 2009.

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JENNY BLOKLAND
CHIEF MAGISTRATE