

CITATION: *Nasir v Northern Territory of Australia* [2010] NTMC 055

PARTIES: CHARLENE NASIR

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: Worker's Rehabilitation and Compensation Act

FILE NO(s): 20828827

DELIVERED ON: 8 September 2010

DELIVERED AT: Darwin

HEARING DATE(s): 10-14 August, 17-21 August, 1 September, 5 October 2009 & 7 January 2010

JUDGMENT OF: R J Wallace

CATCHWORDS:

WORKER'S COMPENSATION – *Worker's Rehabilitation and Compensation Act* (NT) s 69 – Reduction of Benefits contrasted with cancellation of benefits – Notice of Reduction - Counterclaim

REPRESENTATION:

Counsel:

Worker: S Gearin
Employer: P Barr QC

Solicitors:

Worker: Ward Keller
Employer: Hunt & Hunt

Judgment category classification: C
Judgment ID number: [2010] NTMC 055
Number of paragraphs: 221

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

No. 20828827

BETWEEN:

CHARLENE NASIR
Worker

AND:

NORTHERN TERRITORY OF
AUSTRALIA
Employer

REASONS FOR JUDGMENT

(Delivered 8 September 2010)

Mr R J Wallace SM:

INTRODUCTION

1. This is a claim for worker's compensation brought pursuant to what is now the *Worker's Rehabilitation and Compensation Act* ("the Act").
2. The Worker, Ms Nasir, was employed as a school teacher – indeed, as a Faculty Head – at Casuarina Senior College. She was injured in a fall on these premises while she was at work. The Consolidated Pleadings, ("the pleadings") filed by Mr Neill, then of Messrs Ward Keller, Ms Nasir's solicitors (and now a magistrate) efficiently laid out the relevant history and issues.
 1. Worker's Statement of Claim dated and filed 26 November 2008.
 2. Employer's Notice of Defence and Counterclaim dated and filed 9 January 2009.

3. Worker's Reply to Employer's Defence dated and filed 30 January 2009.
4. Worker's Amended Defence to Employer's Counterclaim dated and filed 4 August 2009.
- SC1 The Worker was born on 16 September 1948 and is currently 60 years of age.
- D1 The Employer admits the allegations contained in paragraph 1 of the particulars of claim.
- SC2 The Worker at all material times was employed by the Employer as a teacher.
- D2 The Employer admits the allegations contained in paragraph 2 of the particulars of claim.
- SC3 On or about 7 August 2003 the Worker fell in the course of employment and suffered injuries ("the injury").

Particulars of the Injury

- (a) Left wrist – undisplaced fracture of the scaphoid;
 - (b) Right shoulder – rotator cuff tear;
 - (c) Low back injury – exacerbation of degenerative disease of L5/S1 with associated spinal stenosis;
 - (d) Right knee – soft tissue injury.
- D3 The Employer admits the allegations contained paragraph 3 of the particulars of claim.
 - SC4 The Worker made a claim pursuant to the then *Work Health Act* on or about 14 August 2003 ("the claim").
 - D4 The Employer admits the allegations contained in paragraph 4 of the particulars of claim.
 - SC5 The Employer accepted the claim.
 - D5 The Employer admits the allegations contained in paragraph 5 of the particulars of claim.

- SC6 The Worker returned to work pursuant to a graduated return to work program on or about 30 August 2005.
- D6 The Employer admits the allegations contained in paragraph 6 of the particulars of claim.
- SC7 As a result of the injury the Worker suffered total or in the alternative partial incapacity for work from and including 8 August 2003 to and including 29 August 2005.
- D7 The Employer admits the allegations contained in paragraph 7 of the particulars of claim save that the Employer does not admit that the Worker's incapacity was total.
- SC8 From on or about 30 August 2005 to date and continuing, the Worker has suffered and continues to suffer partial incapacity for work.
- D8 The Employer admits the allegations contained in paragraph 8 of the particulars of claim.
- SC9 On or about 9 September 2008 the Worker received from the Employer a Notice of Decision dated 8 September 2008 reducing the amount of weekly compensation payments from \$887.65 per week gross to \$153.76 per week gross with the reduction to be effective 14 days thereafter ("the Notice of Decision") and a letter dated 9 September 2008 from the TIO on behalf of the Employer to the Worker.
- D9 The Employer admits the allegations contained in paragraph 9 of the particulars of claim.
- SC10 The Notice of Decision included a statement in the approved form ("the statement") pursuant to subsection 69(1)(b) of the Act as follows:
- “(a) You suffered a work related injury on 7 August 2003.
 - (b) Your indexed normal weekly earnings for 2008 is \$1,547.76 gross per week.
 - (c) You currently have an earning capacity based on your fitness to carry out full time work in an alternative position such as a Counsellor or in a full time administrative role.

- (d) You have been certified by Dr David Millons as fit to undertake such full time work duties with the restrictions that you must be able to stand and sit as needed and you must avoid lifting anything heavy or undertaking excessive bending.
- (e) A suitable position has been identified with your employer as a Careers Counsellor on a T9 level. With your many years of teaching experience, and the capacity of your Employer to provide the flexibility you require, this position is suitable for you and would comply with the restrictions provided by Dr Millons.
- (f) As you are fit to work in the alternative position as a Careers Counsellor you have the earning capacity of at least \$1,342.75 weekly.
- (g) Therefore your weekly compensation entitlement pursuant to Section 65(2)(b)(ii) of the Act is reduced to 75% of the difference between your indexed normal weekly earnings and your earning capacity, namely \$153.76 per week”.

D10 The Employer admits the allegations contained in paragraph 10 of the particulars of claim.

SC11 Payments of weekly benefits to the Worker were reduced to \$153.76 per week from on or about 23 September 2008.

D11 The Employer admits the allegations contained in paragraph 11 of the particulars of claim.

SC12 The Notice of Decision and the accompanying letter did not enclose any medical reports or any medical certificates from Dr Millons or at all.

D12 The Employer admits the allegations contained in paragraph 12 of the particulars of claim.

SC13 The Notice of Decision and accompanying letter did not enclose any material of any nature relevant to the Careers Counsellor position, or any other potential employment.

D13 The Employer admits the allegations contained in paragraph 13 of the particulars of claim.

SC14 The reasons set out in the Statement in breach of sub section 69(4) of the Act did not provide sufficient detail to enable the Worker to understand fully why the amount of compensation was being reduced to that particular figure or at all.

Particulars

- (a) The Employer did not enclose details of the position of Careers Counsellor with the Notice of Decision.
- (b) The position of Careers Counsellor did not exist or in the alternative if it did, the duties were not those advised to Dr Millons.
- (c) The Notice of Decision failed to provide any information, or in the alternative, any sufficient information about the position of Careers Counsellor.

D14 The Employer denies the allegations contained in paragraph 14 of the particulars of claim. Insofar as the particulars alleged the Worker did not have sufficient information or details about the position of Careers Counsellor or did not understand duties of such position, the Employer says the Worker has carried out the duties of a Careers Counsellor for the Employer both before and after the work injury.

Reply In reply to paragraph 14 of the Employer's Notice of Defence dated 9 January 2009 the Worker denies that she carried out the duties of a Careers Counsellor as alleged because the Employer in its Notice of Decision dated 8 September 2008 failed to identify the position of a Careers Counsellor or the duties involved in any such position or the qualifications and/or experience required for that position.

SC15 The Notice of Decision is invalid.

D15 The Employer denies the allegations contained in paragraph 15 of the particulars of claim.

SC16 The Worker hereby appeals from the Notice of Decision.

D16 The Employer does not plead to the allegations contained in paragraph 16 of the particulars of claim.

SC17 The Worker seeks the following remedies:

- (i) a ruling that the Notice of Decision is invalid.
- (ii) An Order that the Employer resume payments of weekly benefits to the Worker from the date of Order, in accordance with the Act.
- (iii) An Order that the Employer pay arrears of weekly benefits to the Worker from the date of the reduction of weekly benefits to the date of Order in such amount as this Honourable Court determines.
- (iv) An Order that the Employer pay interest on the arrears of weekly benefits pursuant to Section 89 of the Act from 7 days after the reduction notified in the Notice of Decision took effect to the date of payment, in such amount as this Honourable Court determines.
- (v) An Order that the Employer pay the Worker's costs of and incidental to the proceedings and to the dispute giving rise to the proceedings to be taxed in default of agreement at 100% of the Supreme Court Scale.

DEFENDANT'S COUNTERCLAIM

The Employer claims as follows:

- CC1 If, contrary to the Employer's pleadings in the Defence above, the Notice of Decision was invalid (whether because the Employer did not include any medical report or medical certificate from Dr Millons or because the Employer did not enclose any material relevant to the Careers Counsellor position or any other potential employment, or because the reasons set out in the Notice of Decision did not provide sufficient details to enable the Worker to understand fully why the amount of her compensation was being reduced to the amount stated in the Notice of Decision, or for any other reasons), the Employer claims an order or ruling as to the Worker's entitlement to receipt of compensation and the amount of such compensation on the basis of the facts pleaded below.
- CC2 As at 9 September 2008, the Worker's normal weekly earnings as indexed were \$1,547.76.
- WD1 In response to paragraph 2 of the Counterclaim, the Worker admits that the Employer has relied on the figure of \$1,547.76

as the Worker's indexed normal weekly earnings for 2008 in the Employer's Notice of Decision and Rights of Appeal dated 8 September 2008 but does not otherwise admit that the figure of \$1,547.76 represents the Worker's indexed normal weekly earnings in 2008.

- CC3 As at 9 September 2008, the Worker had the capacity and experience to work as a Careers Counsellor in a full time position or in some other full time administrative position with the Employer subject to the restrictions that she avoid excessive use of her right arm above shoulder height, that she avoid lifting more than 10kg, and that she avoid working in awkward or confined spaces.
- WD2 The Worker denies paragraph 3 of the Counterclaim and says that the position pleaded of a Careers Counsellor has not been identified either in terms of its duties or the qualifications and/or experience required for any such position, so that it is not possible to determine whether the Worker had the capacity and experience to work as a Careers Counsellor in either a full time or a part time position.
- WD3 The Worker further denies paragraph 3 of the Counterclaim in that she denies that she had the capacity and experience to work in some other full time administrative position with the Employer as pleaded subject only to the restrictions as pleaded, because no such full time administrative position was identified and the duties of any such position and the Worker's qualification or experience for any such position cannot be know.
- CC4 Given the Worker's capacity pleaded in paragraph 3, the Worker was capable of undertaking and engaging in work as Careers Counsellor at the T9 remuneration level in which she was reasonably capable of earning a weekly amount of \$1,342.75.
- WD4 The Worker denies paragraph 4 of the Counterclaim which assumes her capacity pleaded by the Employer in paragraph 3 of the Counterclaim, which capacity is denied, and the Worker does not admit that if any work as a Careers Counsellor existed at 8 September 2008 that such a position paid a weekly amount of \$1,342.75.

CC5 As at 9 September 2008 and continuing to date the compensation payable to the Worker under Section 65(1) Work Health Act for loss of earning capacity has been \$153.76.

WD5 The Worker denies paragraph 5 of the Counterclaim and says that as at 9 September 2008 and thereafter the Worker's entitlement to be paid weekly benefits under the Act is to be determined in accordance with the Act.

CC6 The Employer denies that the Worker is entitled to the remedies claimed in paragraph 17 of the Statement of Claim.

3. The claim, then, is an appeal by Ms Nasir against the reduction of benefits once paid by the Employer. The claim having once been accepted by the Employer, the burden rests upon it to justify the cessation or (as in this case) reduction of benefits.

THE MECHANISM OF REDUCTION

4. Paragraphs 10 to 15 of the pleadings summarise the issues relating to the Employer notifying Ms Nasir of its decision to reduce her payments.
5. Section 69 of the Act provides:

69 Cancellation or reduction of compensation

- (1) Subject to this Subdivision, an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom it is payable has been given -
 - (a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and
 - (b) a statement in the approved form -
 - (i) setting out the reasons for the proposed cancellation or reduction;
 - (ii) to the effect that, if the worker wishes to dispute the decision to cancel or reduce compensation, the worker may, within 90 days after receiving the

statement, apply to the Authority to have the dispute referred to mediation;

- (iii) to the effect that, if mediation is unsuccessful in resolving the dispute, the worker may appeal to the Court against the decision to cancel or reduce compensation;
- (iv) to the effect that, if the worker wishes to appeal, the worker must lodge the appeal with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2);
- (v) to the effect that the worker may only appeal against the decision if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful; and
- (vi) to the effect that, despite subparagraphs (iv) and (v), the claimant may commence a proceeding for an interim determination under section 107 at any time after the claimant has applied to the Authority to have the dispute referred to mediation.

(2) Subsection (1) does not apply where -

- (a) the person receiving the compensation returns to work or dies;
- (aa) the person receiving the compensation fails to provide to his or her employer a certificate under section 91A within 14 days after being requested to do so in writing by his or her employer;
- (b) the medical certificate referred to in section 82 specifies that the person receiving the compensation is fit for work on a particular date, being not longer than 4 weeks after the date of the injury in respect of which the claim was made, and the person fails to return to work on that date or to provide his or her employer on or before that date with another medical certificate as to his or her incapacity for work;
- (c) the payments of compensation were obtained by fraud of the person receiving them or by other unlawful means; or

(d) the Court orders the cancellation or reduction of the compensation.

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

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

6. The Employer's Notice of Decision ("the Notice") became Ex 33 in the case. Its contents are fully reproduced in paragraph SC10 of the Pleadings [although the Notice's paragraphs are numbered 1 – 7 in the original, not "lettered" (a) – (g)].
7. It is agreed – see paragraph 12 of the Pleadings – that the Employer did not provide any medical certificate with the Notice. Ms Gearin, counsel for Ms Nasir, argues that the lack of such a certificate renders the Notice invalid. She cites the decision of Mildren J in *Newton v Masonic Homes* (not reported 25/9/09 SCC No LA8 of 2008). In that case, the Employer ceased all payments to the Worker, who was still admitted to be incapacitated for some work, because the Employer alleged she was capable of work remunerated well enough to reduce her entitlement under the Act to nil.
8. Mr Barr QC, counsel for the Employer argues, correctly in my opinion, that the *Newton* decision deals with a different situation than the case of Ms Nasir. In *Newton*, Mildren J's entire discussion of the cessation of her benefits is as a "cancellation". That being so, s 63(9) of the Act had to be complied with ie, a medical certificate had to be provided if the notice of decision were to be invalid.

9. But, Ms Barr argues, that is not the case of Ms Nasir. The Notice in this case is a reduction, not a cancellation of benefits. Section 69(3) involves a requirement for medical certificate only in a case of cancellation.
10. Looking at the provisions of s 69 as a whole, it is my opinion that this must be correct. The uses of “cancelled or reduced” “cancellation” (twice) “cancellation or reduction” (once) and “cancel or reduce” (twice) in s 69(1) and of ‘cancellation or reduction” in s 69(2), stand in marked contrast to the bare participle “cancelled” in s 69(3).
11. Ms Gearin next argues that the Notice does not comply with the requirements of s 69(4). Again, *Newton*, wherein Mildren J decided (at paragraphs 15-17) that that Notice did not comply with s 69(4) is to the point, but that case differs markedly from this. The Reasons for Decision of Ms Fong Lim, RSM (as she then was) in that matter in this Court (27/8/08, matter number 20718189) reveal that Ms Newton had worked, if briefly, as a teacher’s aide (see paragraph 181 of Ms Fong Lim’s Reasons); and it could therefore be assumed that she would have an adequate grasp of the work involved in that job. Ms Newton’s Notice had recited:
- “(i) You suffered a work related injury to your right thumb on or about 14 April 2005;
 - (ii) Your indexed normal weekly earnings for 2007 is \$516.90 gross per week;
 - (iii) You currently have an earning capacity based on your fitness to carry out at least 37 hours of work with an alternative employer as a teacher’s aid. Your earning capacity from such employment is \$600.00 per week;
 - (iv) You have been certified by Dr Philip Haynes as fit to undertake the work duties required of a teacher’s aid;
 - (v) You have been certified by Dr Goodhand as fit to undertake the duties with an alternative employer in 37 hours per week;

- (vi) You are fit to work as a teacher's aid for at least 37 hours per week and have an earning capacity of at least \$600.00 per week;
- (vii) Pursuant to section 65(2) (b) (ii) of the Work Health Act (NT) your weekly compensation benefits is reduced to 75% of the difference between your indexed normal weekly earnings and your earning capacity namely nil".

(From Ms Fong Lim's Reasons, paragraph 62).

12. Ms Gearin's complaint is twofold. First, she again refers to the lack of any certificate to accompany the Notice and to support the Notice's assertion (in clause 4) that "you have been certified by Dr David Millons as fit ... etc". Secondly, Ms Gearin argues that, as the test for compliance with s 69(4), which Mildren J has held in *Newton* to be an objective test, Ms Nasir could not possibly "understand fully why the amount" of her compensation was being reduced, because she did not know and could not know what was entailed in the jobs described in clause 3 of the Notice, "... a Counsellor or a full time administrative role".
13. On the evidence, Ms Nasir had never worked as a "Counsellor" and had no qualifications (if any are required) for that job. [On the evidence, it emerged that what the Employer had in mind when using the word "Counsellor", would have been better conveyed as 'Careers Advisor", a facility provided by secondary schools these days, performed by qualified teachers and work of which Ms Nasir had considerable personal experience.] As for a "full time administrative role", again, Ms Nasir had not done such work, at least not at all recently, and how, Ms Gearin asks, was she to have any comprehension of what was intended? [Again, the evidence established that what was intended was, for example, work in a small specialised unit of the Education bureaucracy.]
14. Clause 5 of the Notice goes some of the way towards bridging Ms Nasir's gap in comprehension, speaking as it does of "a Careers Counsellor on a T9 level" and referring to her "many years of teaching experience" as being

relevant to the Employer's conclusion that "... this position is suitable for you ...". There is no elaboration in the Notice of the "administrative role" and as far as that is concerned, I agree with Ms Gearin's submission that no reasonable Worker, even with her solicitor's help, could be expected to work out what it would mean.

15. As regards the "Careers Advisor" verses "Careers Counsellor (her teaching experience being relevant)" description, the case is, in my view ultimately the same. In my opinion a reasonable Worker in Ms Nasir's position, receiving this Notice would not be expected to understand that the fools who had drafted it had misnamed the job, rather than believing that the job was something different from the one he or she was experienced in doing. The misnomer in itself is not conclusively significant (although it is greater than the "teacher's aid/teacher's aide" error that may have existed in the *Newton* Notice). However, there is a further detail capable of confusing a reasonable Worker. The evidence is that, customarily, those teachers working as Career Advisors did not specialise solely in that work. They went on teaching classes for part of their working hours. The Notice speaks of 'full time work in an alternative position such as a Counsellor'. In my view, Ms Nasir could not reasonably be expected to understand that what was being proposed for her was a full time job doing what others by and large, did as only part (often the preponderant part) of their employment duties.
16. I am aware, in coming to this conclusion, that there is at least one teacher known to Ms Nasir, working at Casuarina Secondary College solely as a Careers Advisor. Mr David Cox gave evidence in the Employer's case. Mr Cox came into Careers Advising after returning to teaching work following what he described as a "nervous breakdown". For a time he taught as well, until he reached a point where he feared another breakdown. Rather than cease work (as his doctor advised), he chose to strike a deal with the Department whereby he works wholly as a Careers Advisor – work he enjoys

and values. Mr Cox's careers work is still only .75 of a full time position, and he is paid accordingly (and I assume work reduced hours accordingly). In effect, he has been excused working – school teaching in the old-fashioned sense – the .25 of his time that was once expected of him. So although exclusively a Careers Advisor, he is not a full time one.

17. That being so, the Notice spoke of work the description of which Ms Nasir says she did not recognise, on a full time basis, which in itself would tend to lead her away from identifying that the job was mis-titled. Although I have a lot of reservations as to Ms Nasir's creditworthiness – as will appear – even if I place no weight on her evidence that she didn't understand what the Notice was offering, it does not follow that I can conclude that she did and I am of the view that an ordinary reasonable teacher in Ms Nasir's position, receiving this Notice would not have know what "Counsellor" or "Careers Counsellor at a T9 level" meant. As for "a full time administrative role", what could be less informative? In my opinion, the Notice did not provide Ms Nasir with sufficient information to understand why the amount of compensation was being reduced. It could be paraphrased as saying "We have a doctor [Millons] who tells us that you are capable of doing a job we have in mind". In my opinion, a valid certificate needs to tell its recipient more than that.

THE COUNTERCLAIM

18. The Employer's Counterclaim in essence recapitulates the matters in the Notice. The pleadings for the Worker in answer to the Counterclaim again raise the issues of the words used describe the "Careers Counsellor" position and of the lack of detail (in the Counterclaim itself) concerning the "full time administrative position". In my opinion, the Worker's arguments on these heads are incapable of ultimate success. The details of the various positions emerge on the evidence. Ms Nasir's capacity to carry out these duties is for the Employer to prove. [Should the Employer succeed in

discharging that burden, a question arises as to the date from which payments could fairly be ordered to cease. As far as I know, there is no authority on that point and it might be that continuing uncertainty as to the position offered would weigh on the decision as to that date.]

19. Not only does the Employer bear the burden of proof, but it is also *dux litis*. Mr Barr QC, counsel for the Employer set out to prove that Ms Nasir was sufficiently less disabled by her injuries that she had previously been, or had previously been believed to be, that she was capable of undertaking remunerated work in either, if not both, of the two full-time positions that came to be described. At the foundation of Mr Barr's attempted proof lay an amount – a large amount – of video recorded material (which I shall refer to as “film” – not that any of it ever was). The line of argument built upon this foundation is a familiar one.
20. First, it is asserted that the film shows Ms Nasir to possess physical abilities beyond what she had said are the limitations imposed by her injuries.
21. Secondly, it is argued that, if there is a significant discrepancy, Ms Nasir must, to that extent, be disbelieved and her credit on other matters – matters not themselves contradicted by film – cast into doubt.
22. Thirdly, to the extent that a discrepancy exists between what the film shows and what Ms Nasir has told her doctors, it is argued that the medical opinions based (at least in part) upon what she has said need to be revised in the light of the filmed material. [This part of the argument is simple enough in the abstract, but rather less so in practice. Its force depends upon findings in relation to a number of circumstances, none of them self-evident: how much reliance a given doctor placed upon a thing Ms Nasir told him (all the medical specialists in the case are male); how important that piece of information was among the factors – not all of them verbal information from Ms Nasir – leading to an opinion; how that doctor assessed the degree of discrepancy between the information, on the one hand, and the film, on the

other, and how he assessed the importance of that discrepancy. To add to the complications inherent in deciding such matters is the necessity for the Court to assess a doctor's willingness or capacity to revise his opinion, which may depend on many things, including the doctor's character. Stubbornness and pride, for example, would perhaps militate against appropriate revision, especially if their possessor were sympathetic to the patient. Anger at being deceived might tend to an exaggerated revision, especially in a doctor wearied by the impostures of malingerers.]

23. Fourthly, the Employer argues that such of the revised medical opinions that are at all acceptable establish that Ms Nasir has the capacity to perform the duties entailed in the position spoken of – Careers Counsellor (or Advisor), administrative role.

MS NASIR'S INJURIES – HER ACCOUNT

24. When a Worker is *dux litis*, the Employer has the opportunity to surprise him or her with filmed material contradicting – sometimes utterly confounding - the Worker's evidence in chief. The Employer in this case has not had that opportunity. Ms Nasir's testimony was given after the whole of the Employer's hand was uncovered. However, her testimony was not the first sworn statement she had made in the matter. Two affidavits, one sworn 10/10/08, the other 23/10/08 became Ex 36 and 37 in the matter. Ms Nasir swore these affidavits on connection with an Application by her for interim benefits. Such Applications are filed separately from the Application for Worker's Compensation and I know of it only what I have heard in open Court, in and around cross-examination centred on these affidavits. (I do not know, for example, whether interim benefits were awarded: something in the hearing left me with an impression that they may not have been, so vague an impression that I would not rely upon it for anything even if it were relevant to anything, which it is not). And there is a further statement of which Ms Nasir is the author, produced quite late in

the piece, commenting on her fitness for the various duties of a Careers Advisor. I defer discussion of that document until near the end of these Reasons.

25. Apart from her testimony and these Affidavits, Ms Nasir has of course made various statements about her injuries and capacities, most pertinently to various doctors.

(a) The Wrist

It will be recalled from the pleadings that Ms Nasir listed among her injuries are to her left wrist. In her testimony she described that injury and its treatment (see p 500-501 of the transcript). Ms Nasir was not cross-examined about her wrist injury and as I understand the evidence, it is not put forward that it has resulted in any ongoing impediment to her working. So far as it is relevant to the matters in issue, this wrist injury is significant because:

- (i) Ms Nasir was advised to have treatment for her shoulder wait upon resolution of the wrist – in order that she have one more or less working arm; and,
- (ii) the period her lower left arm stayed in plaster was longer than she had expected and so treatment of her shoulder was accordingly delayed.

(b) The Shoulder

Once Ms Nasir's wrist was unplastered and restored to some use, she had an operation on her right shoulder. By then three or four months had passed since the accident, and after the operation her shoulder was strapped into an immobile position for what she says were two or three months. She was led to expect her should to go on hurting for four or five months after the operation (or it may be, after the strapping was removed). Ms Nasir had spoken of the pain involved in working her one immobilised wrist back to useful life and her evidence implied she was expecting much the same thing from her shoulder. If so, she was doubly disappointed: first, in that the function eventually arrived at in that shoulder was far from fully resorted and secondly, in that the pain never went away (as it had with her wrist).

Ms Nasir's own evidence never clearly established the extent to which continuing problems – lack of complete movement, pain – with her shoulder would, on their own, disable her from work. But by aligning her evidence with the various doctors' reports, it is easy enough to gain an adequate picture. The most obvious reason why Ms Nasir's own evidence did not isolate the effects of her shoulder problem was that, even as she was convalescing from her shoulder operation, and waiting for function to improve and pain to diminish, she had increasing problems with her legs and back (see transcript 505-508).

(c) The Back

Ms Nasir's initial description of her injuries hardly touched on her spine. She had bruised areas near her hips and a badly swollen knee, but it was not until she began walking again, following the surgery to her shoulder, that her back began seriously to trouble her. The medical reports speak of a pre-existing degenerative spinal condition aggravated by the accident and Ms Nasir's evidence speaks of further aggravation being perhaps occasioned by ungainly but necessary movements on her part, when constrained by her shoulder injury and pain caused by it – for example, being unable to go down the stairs of her house other than on her backside, and hopping about (favouring one leg) and being too sore in the shoulder to use crutches (see transcript p 505-508). She arrived at a state where she had lower back pain much if not all of the time and sciatica now in one leg, now in the other and sometimes in both. Worse, she said, than the pain was an associated loss of sensation in her feet, causing her to be unaware of losing her balance until it was too late and she must fall.

She suffered many falls – 23 she said (p 506) – and was persuaded to have spinal surgery by the hope that it might restore feeling in her feet (and not in any expectation that it would relieve pain). It seems the surgery did what was hoped in respect of her feet and hence her balance. Her evidence is that pain persists.

(d) The Knee

Ms Nasir reported a grossly swollen right knee among her injuries soon after the accident. Continuing trouble with that knee played its part in the awkwardness which may have

contributed to Ms Nasir's increasingly bad back, but the first and last serious intervention to the knee itself did not occur until 2008, almost five years after the accident and as far as I can tell, the surgery then performed was successful (see p 516-578).

26. These, then, were the injuries described by Ms Nasir in her evidence and consistently described by her to the various doctors whose reports and testimony was in evidence – Mr Millons' (report of 12 March 2008, part of Ex 1), Dr McLaren (report of 16 September 2008, part of Ex 13) and Dr Olsen (report of 27 November 2008, Ex 40).
27. The injuries themselves and their treatment are not in dispute (s the pleadings made clear). The dispute is about the continuing effects of these injuries on her capacity to work.

SPECIALIST OPINIONS – MR DAVID MILLONS

28. I believe the first specialist's opinion in evidence is that of Mr Millons, general surgeon, dated 12 March 2008. There had been earlier reports by Mr Millons "the last ... dated 5 December 2005", according to the first line of the report 12 March 2008, but these earlier reports were not part of the "Millons Bundle", Ex 1. In preparing the report of 12 March 2008, Mr Millons had reference to his earlier reports; to an examination of Ms Nasir on 11 March 2008 and to the history she then provided and updated; to a report by Dr Vrodos (who had operated on Ms Nasir's spine) of 15 December 2006 and to various radiographic images of Ms Nasir's spine and right knee, taken in March, May (twice) and July 2006.
29. Mr Millons' report refers to Dr Chin, Dr Vrodos, Mr Sharland, Dr Tamayo and Dr Isherwood-Hicks as having had, or continuing to have parts to play in Ms Nasir's treatment. The letter of instructions he had received from Ms Osborne (of the Employer's solicitors), part of the "Millons Bundle" included various reports from the first three doctors. I assume that Mr

Millons' knowledge of the role played by Dr Tamayo (GP) and Dr Isherwood-Hicks (Psychologist) came from Ms Nasir.

30. Mr Millons' conclusions, beginning on page 6 of his report of 12 March 2008 were:

OPINION

Ms Nasir does not appear to be travelling too well. She still appears to be suffering the after-effects of the heavy fall on 7 August 2003.

She fractured her left scaphoid in that fall. That seems to have been treated appropriately and has apparently gone on to union in good position. She maintains some intermittent discomfort in the wrist. For completeness sake it might be appropriate at some stage that she have the wrist x-rayed just to be sure that the scaphoid fracture has united and that there are no complications there.

She appears to have torn the supraspinatus tendon at the right shoulder in the heavy fall. Dr Sharland addressed that appropriately. The shoulder remains stiff and irritable with evidence of ongoing capsulitis and impingement.

When I saw Ms Nasir last I felt it could be appropriate that she should undergo an MRI/arthrogram of the shoulder to check on the current situation. Two years have passed since then and while an MRI might demonstrate some problem I doubt whether any further treatment would be indicated and it is probably best at this stage to accept the status quo.

She does have difficulty using her right arm much away from her side and there may well be some subjective loss of strength through the right upper limb.

Ms Nasir has some ongoing problems with her neck which do not appear to have come in for perhaps twelve months after the fall. There are some degenerate changes in the neck which could be being aggravated by the normal activities of daily living.

There may be some referred pain from the restricted movements at the right shoulder with secondary effects on the right shoulder girdle and neck.

Ms Nasir had ongoing problems with her back since I saw her last. Those problems go back many years in time but it seems that the fall

in August 2003 could well have caused a significant aggravation of the underlying changes.

Dr Vrodos elected to proceed to an L5-S1 fusion in April 2006 with a disappointing outcome. Symptomatically she maintains ongoing problems with her lower back and lower limbs. Her back is stiff and irritable. There is no convincing evidence of any frank nerve root irritation or neurological deficit in the lower limbs. The findings of a stocking hypoesthesia through the left lower limb suggest that there is a degree of introspection and the non-organic about her presentation.

Ms Nasir claims to have some problems with her right knee. She injured the right knee in the fall. Radiologically there are some degenerate changes present. She is about to be reviewed by Dr Sharland with a view to an arthroscopy. I suspect that such problems as she may have in her right knee now would really be more a reflection of the normal activities of daily living and her weight playing on some constitutionally based attritional changes rather than specifically relate to the after-effects of the fall, although it would be hard to be dogmatic on that.

Ms Nasir is now attending Dr Chin for pain management. Her medications have been modified and no doubt she will continue to remain under his regular review.

On the work front she is only working three hours a day, three days a week as a school careers adviser. I would have thought that if she is able to manage three hours a day, three days a week that perhaps she could manage three hours a day, five days a week, but would accept that she would be incapable of returning to full-time teaching activities, both now and in the future.

I have reviewed the report from Site Safe NT. There they note her physical capacities and tolerances which are much in line with what she told me.

It is noted that the aim is to obtain agreement from medical providers regarding work hours and rehabilitation goals. It is noted that there her inflexible perceptions of her work abilities and reported pain are a primary barrier to exploring Ms Nasir's potential. That would seem a fairly apt comment.

Finally, I turn to matters raised by you in your instructing letter of 7 March 2008.

- Current physical status in relation to the various injuries

Outlined above.

- Confirmation of the tolerances discussed in the report by Site Safe NT

I can confirm the tolerances discussed in the report from Site Safe.

- Current Treatment

I have outlined that above.

Ms Nasir would certainly benefit from ongoing physiotherapy supervised hydrotherapy exercises to try and maintain a level of fitness.

I note that she is about to see Dr Sharland in regard to her right knee. An arthroscopy of the right knee may be suggested. I doubt whether an arthroscopic debridement will add much to the equation.

- Any investigations suggested in order to further assist Ms Nasir in relation to her incapacity

I suggested above for completeness sake the possibility of X-rays of the left wrist and an MRI of the right shoulder but I doubt whether such investigations will materially affect outcomes.

- View as to capacity for Ms Nasir in a sedentary role and restrictions and recommendations in relation to any potential role

Ms Nasir has limited sitting, standing, bending, lifting and walking capacity. She is currently working three hours, three days a week as a careers adviser, no doubt changing her position as needs demand. I suppose in that role she might be able to increase her hours to three hours a day, five days a week.

I would accept that she would be unfit to return to work as a teacher. Her restricted mobility and agility and restricted bending and lifting and restricted use of her right upper limb

would preclude her from working in the front of a class at the blackboard.

- Recommendations in relation to further rehabilitation for Ms Nasir

Rehabilitation seems to have really stalled and I would doubt whether any further rehabilitation from here is likely to be successful.

- Prognosis

The prognosis is guarded. Ongoing problems and complaints would appear inevitable.

31. Mr Millons was soon given reason to reconsider these conclusions. The Employer has had Ms Nasir under surveillance by private detectives for some time. By letter dated 7 April 2008 and part of the “Millons Bundle”, Ms Osborne informed Mr Millons of that fact. Her letter read (in part):

“We have extensive surveillance and I have enclosed (*) a summary of the surveillance reports and activities undertaken by Ms Nasir.

You are more than welcome to look at all the surveillance, however by way of example, I have enclosed (*) two tapes which contain similar activities to the remainder of the tapes. The two tapes I have provided you with are tapes dated 9 August 2007 and February 2008”.

32. And:

“You note in your report that Ms Nasir is only working three hours per day three days a week which seems to be in contrast with the abilities shown once she is not at work.

I also note your indication that Ms Nasir would not be able to work full time as a teacher, however I write to advise that Ms Nasir is a career’s advisor which is working in small groups or on a one to one basis. I wonder, with the tolerances shown on the tape, whether Ms Nasir would be able to undertake a position as a full time career’s advisor, or in any other administrative role, especially if she was able to move freely and alter her position at any time.

Once you have had a chance to consider the information provided, I would appreciate a further report as to your view of Ms Nasir's fitness for work. I would request you include your opinion as to her fitness to return to work as a counsellor as well as work generally. I would also ask that you suggest any restrictions and capacities she has based on the evidence you have at this stage".

33. The "summary" spoken of by Ms Osborne is a two page spreadsheet outlining the actions of Ms Nasir in 2007 (1 and 26 May, 25 August, 9 and 15 November) and 2008 (23 and 24 January, 15 February – 3 times, 21, 22 and 23 February and 7 March). It is perhaps worth remarking that the descriptions of Ms Nasir's actions in that summary are in the most neutral terms possible, eg "played a poker machine then walked to her car" (of 1/5/07) or "Attended Tropicus Centre" (of 15/2/08). In my opinion, there is no likelihood that such unexceptionable language could have unfairly prejudiced Mr Millons. As for the film supplied to Mr Millons and his thereby reconsidered opinion, he reported on 14 April 2008 (part of the Millons Bundle, Ex 1). I quote pages 2 – 5:

REVIEW OF VIDEOTAPES

Fifteen minutes of videotape shot on 09/08/07 show Ms Nasir walking along, pulling a shopping trolley behind her with her right arm and hand out behind her. She arrives at the car, opens the rear passenger door and puts two cartons into the back of the car. She then pushes the trolley away. At one point, she puts her right hand up behind her head.

She is then seen getting out of a car from the passenger side. The driver gets out. The driver has more of a problem than Ms Nasir does with, clearly, left hip and lower limb problems. Ms Nasir seems to walk away with a reasonable gait. She is very overweight.

She is then seen in the shopping centre, standing around. At one point, she puts her right hand up behind her back.

She is then seen at a counter in the shopping centre, reaching out with her right arm at least to 90° as she conducts a transaction over the top of the counter.

She is then seen back at the vehicle. She opens the rear driver side door. She transfers bags of shopping from the shopping trolley with her right hand and swings them in onto the back seat. She does that several times with bags of shopping and only uses her right arm to do that.

She is then seen walking along, swinging her right upper limb. She then gets into the passenger side of the vehicle.

A distant view is then seen of a garden.

Comment: The way Ms Nasir walks pulling the shopping trolley behind her with her right arm and then unloads bags of shopping with her right hand and swings them into the back of the car is not really indicative of someone who is carrying an active problem in the shoulder.

A short section of videotape shot on 10/08/07 shows Ms Nasir walking across a road.

I then reviewed one hour of videotape of activities undertaken by Ms Nasir on 22/02/08, playing poker machines apparently at the Casino.

She initially is seen sitting at a machine. At one point, she waves her right arm out sideways.

She spends some ten minutes sitting at the machine before getting up and walking away to another machine where she spends another seven minutes.

At times, she sits back in the chair. At other times, she seems to sit forward on the chair with her left foot on the rail and her right foot on the floor. She is seen reaching out with her right arm to touch something above the screen on the machine. She is then seen to lean back on the chair.

She then moves one machine to her left and spends a couple of minutes there before moving away to another machine where she spends a few more minutes.

She is then seen at a different machine again for some nine minutes, sitting forward and leaning back, playing the machine with her right hand.

There is a gap in the videotape for some seven minutes but, when the tape starts up again, she is seen still sitting at the same machine where she remains for another few minutes.

She is then seen standing, playing two machines, one in front of her and one out to the right. She reaches out to the machine on the right with her right arm and seems to be touching something over the top of the screen. She does that for some three minutes, then sits down playing the machine in front of her, still reaching out to the right.

She then stands again and plays the two machines.

She is then seen sitting at the machine on the right of the two for some 22 minutes. She uses her right hand on the buttons. She reaches with her arm above the horizontal to touch something above the screen.

She seems to field a phone call after a while. She has the phone in her left hand and has her right finger in her ear. She then holds the phone in her right hand for a couple of minutes.

She moves freely between the machines and uses her right arm with seemingly no restriction.

I understand from your instructing letter that Ms Nasir has been shown to spend many hours sitting at poker machines.

OPINION

Certainly the appearance of Ms Nasir on the videotape forwarded and certainly the activities demonstrated there are in quite marked contrast to how I found her when I saw her in March this year.

She claimed to have a sitting tolerance of 15 minutes maximum. While sitting at the poker machines, she did not appear to be in discomfort and certainly, at one point, she sat for more than 20 minutes without any obvious difficulty. I understand that she has been shown sitting for longer periods than that which tend to give the lie to her statement.

She was not shown bending.

She maintained problems with her head and neck. She did not really move her head and neck through a full range of movements through the length of the videotape that I saw.

When I saw her, she claimed to have considerable problems with her right shoulder and found it hard to reach out and reach up.

The videotape of her pulling the trolley behind her and then loading the vehicle with bags with her right hand and then spending long periods of time with her arm out in front of her, playing the poker machines and an ability to lift her arm above shoulder height, put her hand up behind her head and up behind her back are in contrast to how she presented to me.

She claimed to have right knee problems when I saw her. She does not appear to be particularly disabled as she walks.

You note that Ms Nasir walks from the car park at the Casino to the Casino on a regular basis and walks for significantly further than 20-30m which would seem to be in conflict with the walking intolerance that she told me about.

All in all, one would have to say that while Ms Nasir does appear to have injured several parts of her anatomy in the fall on 07/08/03 and does appear to have had various surgical procedures, she is not as disabled as she claims. One could not deny that there may be some irritability in the right shoulder and lower back as a result of problems sustained in the fall and subsequent surgical procedures.

One is reliant on the patient's statement as to how affected they are. Ms Nasir claims to be moderately affected. A review of the videotape would suggest that that is not the case.

When I saw her last, I felt that she should be able to work 3 hours a day, 5 days a week as a careers adviser. If she was just doing careers advising work on a one to one basis, then she should probably be able to handle that work full-time, particularly if she was able to spend long hours sitting down as demonstrated at the Casino.

I note when I first saw her that she was teaching tourism. Face to face teaching of a classroom of students may be difficult if one accepts that there is some minor irritability at the right shoulder and in the lower back.

To give her the benefit of the doubt, she would be advised to avoid excessive use of her right arm above shoulder height, to avoid lifting more than 10kg or working in awkward or confined spaces. Provided she was able to sit, stand and move around as needs demand, she should be able to handle work with those restrictions.

34. After some further correspondence with Ms Osborne, Mr Millons wrote, in a short letter of 30 April 2008:

I refer to our telephone conversation of yesterday's date in regard to the above matter following on my supplementary report to you dated 14 April 2008. That was in response to your communication of 7 April 2008.

I refer to your instructing letter. In that you ask me whether Ms Nasir with the tolerances shown on the videotaped evidence would be able to undertake a position as a full-time careers adviser or in any other administrative role, especially if she was able to move freely and alter her position at any time.

I understand that she could be moved into the Curriculum Branch where she could be offered work in an office based environment where she could sit and stand as needs demand, avoid lifting anything heavy or undertaking excessive bending.

By way of clarification then I accept that she would be capable of doing careers advising work on a one to one basis full-time.

I also believe that she could work full-time in an administrative role in an office area whereby she was afforded the facility to sit and stand as needs demand and was able to avoid excessive bending or lifting anything more than 10kg.

I hope that clarifies the matter for you.

35. Obviously there is a thematic connection between this letter and the Employer's Notice of Decision of 9 September 2008 reducing Ms Nasir's payments.
36. Just before that, by letter dated 1 September 2008, Mr Neill, then of Messrs Ward Keller, Ms Nasir's solicitors, had written to Dr Niall McLaren, Psychiatrist, confirming an appointment for consultation by Ms Nasir enclosing some reports from Mr Sharland, all the material Mr Neill then had to hand, and requesting a report. Mr Neill's letter is part of Ex 13, the "McLaren Bundle". So is the report dated 16 September 2008, the same day as Ms Nasir's consultation, and as it happened, Ms Nasir's 60th birthday.

37. The initial reason for Dr McLaren's involvement in the case – to see whether Ms Nasir was suffering from a psychiatric or psychological condition, and if so, whether it was work related – has come to nothing. No such condition or relation is pleaded. His involvement continues to be relevant in respect of the history provided to him by Ms Nasir and the incapacities etc described by her to him, compared to and contrasted with her activities and life as revealed by the film. Dr McLaren's report of 16 September 2008 reads:

Further to your referral, I saw the above-named today in order to assess her current mental state. Mrs Nasir said that she had just returned to work as a school counsellor after having five weeks off work with back pain. She has an accepted disability for a back injury which occurred some time in August 2003. At present, she works three hours a day, three days a week. She is taking ten separate drugs, including four for the pain relief.

She lives alone in a house which has internal stairs. She must use the stairs every time she goes out.

PRESENTING COMPLAINTS

At present, she frequently becomes “upset and emotional” and has trouble sleeping. Most nights, she sleeps poorly. She goes to bed at about 9.00pm and gets to sleep by 1.00-2.00am. She wakes at 6.00am, before the alarm, and does not sleep in on the weekends. Her sleep is broken due to pain. She said the delay in sleep onset is due to pain. Her appetite is not very good and she has lost ten kilos in the last 12 months, without any effort. She is pleased with the weight loss but she still weighs about 120kg. She has very little energy and her activity level is low. She has little interest or motivation in her private life but enjoys her work and would like to get back to work full-time although she is starting to think it will never happen. Socially, she avoids contact with people in her private life but gets on reasonably well with the people at work.

She described her memory as “shot”, by which she meant she is forgetful over daily details, partly due to lack of sleep and partly due to becoming distressed. Her concentration is not very good as her mind wanders, especially when she is tired. She delays making decisions where possible. She has trouble thinking clearly if she is tired and the thought content focuses on her pain and disability.

There were no disturbances of perception although she mentioned tinnitus.

She described her mood as “in turmoil and not coping”. She said she feels low and miserable about a third of the time but it was difficult to get her to describe the intensity. With close questioning, she said she is sick of things as they are and occasionally sick of life itself. Sometimes, she thinks that death would be a relief but there are no suicidal ideas. The unhappiness is due to “not coping”, by which she meant she has a great deal of trouble getting through her days due to back pain. She cannot do the things that she would like to do or feels she ought to do. There are no other problems in her life at present.

She described bouts of quite intense agitation, during which she has many somatic symptoms of anxiety. These include shaking, sweating, churning stomach, pounding heart, shortness of breath and dizziness. With these bouts, she feels tense and becomes weepy. She feels frightened during them and tries to get away from whatever is bothering her. She has two to three bouts per day lasting up to several hours each. They are due to “spasms in the back”. She becomes panicky if she feels she has to stand in a queue, eg at the ban [sic.] because she knows she will start to get back pain and won't be able to sit down. She also becomes agitated under any sort of pressure or with appointments (she had actually had five appointments today). She is greatly bothered by having to deal with this case and is also frightened of falling on uneven ground.

On direct questioning, she is frightened of heights and uneven or slippery surfaces. She fears open spaces because she will not be able to sit down. She is frightened of crowds, queues and actively avoids any sort of disputes. She denied all other significant fears but it would appear that she spends most of her time secluded from the world. She denied any paranoid symptoms and there were no obsessive compulsive phenomena.

Physically, she has constant low back pain, with pain going down the back of both legs to the knees. In addition, she has what she described as “muscle spasms”, which consist of bouts of quite intense pain travelling up the back from the operation site in the low back. The back pain is made worse by having to sit or stand for long periods (meaning more than five or ten minutes) and by walking on hard surfaces. She gets pain walking up stairs or by having to carry things, by bending or by hanging up things such as clothing, etc. She cannot kneel due to pain in the right knee, and has trouble with her right shoulder which was injured in the original accident. Her left thumb aches if she uses the hand too much and she has spasms of

discomfort in the right side of the neck. She appears to be in more discomfort if she leaves her home because she may have to sit for long periods or stand. She is able to sit 15 minutes comfortably but then wants to get up and walk around (in the interview, she sat 45 minutes before she stood up briefly).

RECENT HISTORY

On a day in August 2003, while at school, she tripped on a kerb and fell face forward into a bicycle rack. She suffered back, shoulder and knee pain from the time of the injury. She had a plaster on her left wrist for about 14 weeks and, some time after that was removed, she underwent surgery to the right shoulder (2004). In 2006, she underwent a spinal fusion but she is left with a considerable degree of pain. Prior to the accident, she said she had some back discomfort but nothing like what she experienced afterwards. At present, she sees a physiotherapist twice a week and goes to hydrotherapy three times a week. She also sees a psychologist at irregular intervals, mainly when she is upset. She had no previous psychiatric history.

PERSONAL BACKGROUND

She was born in Melbourne and raised in Darwin from the age of ten. Her father, who died in 1995 while in his 80s was a businessman. Her mother died of cancer in 1978, while in her mid-fifties. The mother owned hotels. She described both her parents favourably. She was the third of four children. A 66yo brother is a businessman in Darwin, a 65yo sister is a retired shop assistant living in Melbourne and a 58yo sister in Melbourne worked in childcare. She described her elder sister as “very bossy” but said the others are pleasant. There is no family history of mental illness, substance abuse or criminality.

She went to a private school in Melbourne then local state schools in Darwin after they moved. She left school at the age of 17yrs, having passed Year 12 with good marks. She said she got on extremely well with the teachers and “excellent” with the other children. She was not shy, nervous or aggressive and played plenty of sport. While at school, her home life was very good. On leaving school, she had clerical jobs to the age of 26yrs, then she became a nursing aide at the hospital for about two years. Subsequently, she worked in administration at a school and studied teaching part-time. She started teaching full-time in 1992 and has been at the same school throughout.

Socially, she was married between 1969 and 1982. She had two sons who are now in their late 30s, both of whom live in Adelaide. She feels the marriage simply drifted apart. She does not drink, uses no illegal drugs and has no police record. She leads a very quite social life and has no hobbies or other interests. Her general health is quite poor. She is grossly overweight and has hypertension, diabetes, hypothyroidism and high cholesterol.

SELF ASSESSMENT

She said that normally, she was a very happy person. She was not nervous and not bothered by guilt, shame, or self-consciousness. She has always been an assertive person but said she tries to keep the peace. She is tidy, patient, follows rules and gets on well with authority. She is a trusting and social person, who is not jealous and does not hold grudges. She sees her temper as “very moderate”, her intellect as “smart” and her self esteem as “high”.

MENTAL STATE EXAMINATION

The mental state showed a grossly obese, elderly woman dressed in clean, plain, casual clothing who limped heavily as she came into the office. She fidgeted constantly and did not settle and after 45 minutes stood for a few minutes. She was agitated, garrulous, vague and rarely answered questions directly. Her answers were long winded, tangential, oblique and it was only with difficulty that she was held to the point. She was anxious and agitated and took a long time to settle. In the main, she was unhappy but tried to laugh it off. She was not hostile or suspicious. There were no signs of a psychotic disorder and nothing to indicate an organic impairment of brain function. Intellectually, she is functioning in the bright normal range.

FURTHER INFORMATION

At the end of the interview, she was encouraged to speak freely. She said she has a 45 acre property at Berry Springs where she had hoped to retire to breed chickens but she is now aware that she cannot do this. She said her house “wears her down” as she cannot manage it and she doesn’t want to think about what to do about it. The uncertainty about her future is “really knocking me around. That was my future but all my plans are gone”.

I note the documents you provided as outlined in your instructing letter. The content of these reports is consistent with the history she

relayed to me. My reading of the orthopaedic reports is that they are conservative and practical.

OPINION

At present, your client's major problem is persisting back, shoulder and knee pain with a considerable limitation on her capacity to function independently. However, her mental state is cause for concern. She shows features of a variable, reactive type of depression of mild to moderate severity but the major finding is an untreated and moderately severe anxiety state. In my view, the anxiety state is a significant impediment to her returning to work and I would be most surprised if she were to make any further progress without a proper resolution of the anxiety symptoms. On her account, the anxiety is largely, if not wholly, related to fears for her physical wellbeing and her future security but a lot of these are unrealistic and would be addressed in formal treatment of her anxiety state.

I accept that her present mental symptoms are a complication of her accepted or work related disabilities. The mental symptoms are a result of her failure to adjust to her changed circumstances and it is therefore appropriate to assess her as having an Adjustment Disorder with Anxious and Depressed Mood. The work related injury of August 2003 was a major and direct contributing factor to her present mental injury.

She requires standard outpatient treatment for an anxiety state. There is nothing to be gained from further counselling sessions with a psychologist. She would require psychiatric treatment for approximately six to twelve months. I would expect that the total cost of treatment, including medication, would not exceed \$2,500.00. The outcome would be an improvement in the quality of her life and a reduction in the perceived levels of pain. It is possible that she would be able to increase her hours at work as a result of the psychiatric treatment but this, of course, cannot be guaranteed.

At the present, it is not possible to issue a permanent impairment assessment on the basis that her mental state is unstable and she should benefit from treatment.

38. By letter dated 17 October 2008, Ms Osborne informed Dr McLaren of the evidence of surveillance reports. The letter included a summary of the film taken between 12 September and 19 September 2008 (a few days either side

of Ms Nasir's birthday on which she saw Dr McLaren). I reproduce the text of the entire letter so that the bases for Dr McLaren's response is clear:

I refer to your report of 16 September 2008 which was provided to Ward Keller, Barristers and Solicitors, in relation to Charlene Nasir.

I advise that I act on behalf of the employer in relation to the worker's compensation claim by Ms Nasir.

I advise that we have significant surveillance reports in relation to Ms Nasir and they seem to be in contrast to the information provided by her to you.

I refer especially to page 2 of your report in which you indicate that Ms Nasir "spends most of her time secluded from the world". You make further comments in relation to her concern about leaving home as she may have to "sit for long periods or stand. She is able to sit 15 minutes comfortably but then wants to get up and walk around ...".

What follows is a brief summary of Ms Nasir's activities for the period around her appointment with you:

Friday 12 September 2008

Ms Nasir seemed to have family with her in preparation for her 60th birthday celebrations. She attended the Tropicus Centre for a session at the pool and then returned home. Ms Nasir then attended Casuarina Shopping Centre where she met with a female companion. Ms Nasir then met another female companion with whom she had lunch and then they browsed and shopped around the centre. After departing from Casuarina Shopping Centre she attended at the Oriental Emporium and was there for a few minutes before she returned home. At home she seemed to engage with a number of family and friends for the afternoon.

Saturday 13 September 2008

Ms Nasir remained at home all day interacting with family and friends, and was observed preparing food on the balcony and making other arrangements seemingly in preparation for a party. Party equipment was seen to arrive at the address and the party started at about 8.00pm. A number of people arrived and the party lasted until after midnight and appeared to be with a number of family and friends.

Sunday 14 September 2008

Ms Nasir remained at home all day and was observed cleaning up after the party. This activity included removing rubbish to bins, watering plants, moving chairs, using a sweeper and/or a mop. She also had a number of family and/or friends over and socialised freely with them.

Monday 15 September 2008

Ms Nasir was observed sweeping, watering plants, cleaning around the property generally, feeding the chooks and moving vehicles around the property. She then attended Darwin Private Hospital and Casuarina Secondary College.

Tuesday 16 September 2008

Ms Nasir attended the Darwin Day Surgery in Fannie Bay and then returned home. She then attended on the ANZ Bank in Darwin then returned home once again. Shortly after she left in the company of two males and went to the Casino and then returned home where she was picked up by a driver. Ms Nasir was located at the Casino playing pokies from approximately 1.00pm to 6.30pm. During this period, she played on the poker machines remaining seated for the majority of the time with occasional periods of entering the Keno lounge. It appears she had two female friends also playing.

Wednesday 17 September 2008

No observations of Ms Nasir.

Thursday 18 September 2008

Ms Nasir was at home with a friend and then she attended the Darwin Day Surgery in the morning and in the afternoon attended at the Casino from the early afternoon until approximately 6.30pm. She appeared to be in the Platinum Room at the Casino for this period.

Friday 19 September 2008

Ms Nasir attended the Tropicus Centre in the morning for her hydrotherapy and then attended the Careers Advisory Centre.

I understand that your diagnosis and suggested treatment of Ms Nasir is based on the history she provided you in your discussions on 16 September 2008. You have accepted that Ms Nasir's physical

problems had limited her capacity to function independently and that the reported difficulties she has on her day to day life leads you to assess her as having an adjustment disorder with anxious and depressed mood.

I wonder whether the information we have provided as to Ms Nasir's considerable social and physical activity may lead to a different conclusion. I would be happy for you to view the video if that would be of any assistance and I am happy to discuss this matter with you.

39. Dr McLaren's response, like Ms Osborne's letter, part of the McLaren Bundle, also dated 17 October 2008 reads:

Further to your faxed letter of October 17th, I advise that I have reviewed the summary of the surveillance reports as provided, and have also reread my report of September 16th 2008. In brief, the surveillance reports place an entirely different light on my conclusions regarding the worker's physical and mental conditions.

You will see from my report that I questioned her in detail about her current physical symptoms. The reason is that her physical condition, including pain, is a major factor in her presentation and it would be remiss not to pay careful attention to it. Chronic pain definitely lies within the area of expertise of psychiatrists. However, most of my report concerned her mental state, and you will now be familiar with the history she gave me and the extent to which she claimed this is affecting her life.

The section entitled "Presenting Complaints" details the mental and physical symptoms she is experiencing in her current life. While taking this part of the history, I emphasise a number of times that we are concerned just with the past three or four weeks, ie it is meant to convey an accurate picture of the patient's current actual level of function, not what they used to do or what they would like to do. I avoid giving my own opinion during this state and will often give direct quotes from the patient's statements to show exactly the tenor of the complaints. I carefully avoid using terms such as "extremely" and other clichés or tendentious prose.

You will see at various points the following comments:

"Socially, she avoids contact with people in her private life..."

“...she has a great deal of trouble getting through her days due to back pain. She cannot do the things that she would like to do or feels she ought to do”.

“She has two to three bouts (of intense agitation) per day lasting up to several hours each”.

There are other comments, but these illustrate the nature of her complaints as she replied to specific questions during the standardised interview.

Manifestly, her self-reports symptoms and abilities are very substantially at variance with the surveillance reports. Pending a full viewing of the original video material, I have to withdraw the opinions expressed in the last part of my report of September 16th 2008. As it stands, I expect I would have to revise my report to a different conclusion. It may be the case that some of those opinions will be found to be justified but I cannot commit myself at present. If you require more specific details of the points of variation of that report, I would need to view at least some of the material.

40. This alteration of his opinion, I should stress, was given, as Dr McLaren notes, based upon written summaries of film, not viewing film itself.
41. In June 2009, Dr McLaren provided two more reports, the first at the request of Ms Nasir’s solicitors, and the second at the request of the Employer’s. In each report Dr McLaren clearly sets out a summary of the material provided by the solicitors. I reproduce the text of Mr Neill’s letter of 12 June 2009. (The attachments to that letter in the McLaren Bundle are well over a centimetre thick).

I confirm that we continue to act on behalf of Mrs Nasir whom you saw on our behalf on 16 September 2008 and in respect of whom you have provided a report dated 16 September 2008.

Subsequently, lawyers Hunt & Hunt on behalf of the employer/insurer wrote to you and provided you with some further reports/surveillance material. This caused you to reserve your position, pending clarification of what appeared to be significant inconsistencies between what Mrs Nasir had told you, and the material provided to you by Hunt & Hunt.

Shortly after you first saw Mrs Nasir on our behalf, we arranged to have her assessed by Brisbane specialist occupational physician Dr Johnn Olsen. He provided his initial report dated 27 November 2008 before he became aware of surveillance material and contrary opinions. We have subsequently provided Dr Olsen with copies of all the surveillance material including video/DVD material which the solicitor for the employer has made available to us, and Dr Olsen has provided us with a further report dated 9 June 2009.

I enclose herewith for your consideration copies of Dr Olsen's reports dated respectively 27 November 2008 and 9 June 2009. In addition to Dr Olsen's report dated 9 June 2009 I also enclose a copy of his article entitled "Injured Workers & Psychological Health".

As you may have noticed from previous reports for previous clients provided by Dr Olsen, he makes a practice of having clients complete a questionnaire relevant to their psychological health when he assesses them for their physical health. This enables him to express a preliminary opinion as to whether psychological issues of any significance might be involved in each particular case. In so doing, Dr Olsen does not intend to provide any definitive opinion, rather he is simply observing an indication.

In the case of Mrs Nasir he did this in his first report and recommended that she should be assessed by a qualified psychologist/psychiatrist. In his second report, he has expressed the opinion that psychological issues are playing a significant role in Mrs Nasir's case, as he believes they do in many similar cases.

Your Report

I should be grateful if you would consider Dr Olsen's reports, particularly his recent report and if you would then advise me whether you would be prepared to receive and view all the surveillance material which Ward Keller provided to Dr Olsen? Alternatively, I invite you to advise me whether you believe you need to receive and view that material in the light of the detailed analysis which Dr Olsen has made in his report dated 9 June 2009?

On a purely preliminary basis, in the light of Dr Olsen's enclosed reports, are you still concerned that there is a major inconsistency between Mrs Nasir's original presentation to you on which you based your first report, and material which you subsequently became aware of?

If you no longer see such a major inconsistency, then I request that you be prepared to prepare and provide me with a further report in relation to Mrs Nasir. Would you like the opportunity to see her again to assess her in the light of all this further material, before provided such a further report? If so, we shall make the necessary arrangements for her to see you, at Ward Keller's expense.

CONCLUSION

I look forward to receiving your prompt response to this further material. Thank you for your assistance.

42. That letter and its attachments drew this response from Dr McLaren:

Further to your letter of 12th June, I have reviewed the reports provided by Dr Johnn Olsen, an occupational physician in Brisbane. These are dated 27th November 2008 and 9th June 2009. The first report relates to his examination of Mrs Nasir. He concludes that, nearly six years after the original injury, she remains quite severely disabled, partly by physical symptoms and partly by mental symptoms. He is pessimistic as to the likelihood of her returning to work or even increasing her present hours.

His report of June this year summarises the extensive video surveillance material provided to him, which I have not seen. He noted that she appeared to perform better in the video material than during his examination but did not see reason to amend his opinion that there would be no significant increase in her present working hours.

His findings in the report of November 2008 are similar to my original report, dated September 16th 2008. I found that she was significantly affected physically and mentally and I did not think that there would be much improvement until the mental symptoms had been brought under control. Subsequently, as you are aware, I provided a supplementary report based on summaries of the video material provided by the employer's solicitor. My view was that the descriptions provided by the solicitors were at variance with the level of symptoms she conveyed to me, and that this required me to revise my opinion.

Dr Olsen's review of the video material clearly indicates that she was able to do more than she had stated during the original interview, which was my conclusion as well. He then said he doesn't expect there will be any significant improvement in the next three to five

years. However, that is not an opinion I can support because I have not seen the video material.

The finding that her symptoms tend to vary a lot more than she indicates is not inconsistent with the diagnosis of a psychiatric component to her total disability. Moreover, it does suggest that, with appropriate treatment, her functional level could be improved quite significantly, certainly more than the nine hours she is working at present. From her point of view, this is important. I would not care to suggest she will ever recover function to the extent of moving to her property at Berry Springs to raise chickens, as per her original retirement plan, but she should be much more mobile and independent than appears to be the case at present.

In the absence of viewing the twelve hours or more of video material, I am not able to give a definite opinion as to the likelihood of her increasing her hours at work. I am not in the position to commit myself to finding free time in the next few weeks but I could do so, if you consider it necessary, once I return from annual leave in mid July. I will await your further instructions.

43. Ms Osborne wrote to Dr McLaren on 23 June 2009. The text of her letter is a little longer than Mr Neill's, but owing to her extracts from the opinions of Mr Millons, it is necessary to reproduce it. (The attachments to Ms Osborne's letter, entirely comprised of surveillance reports, came to a fractionally thicker file than Mr Neill's attachments to his.). The underlining, I think, is Ms Osborne's:

Ward Keller have provided us with a copy of your report dated 17 June 2009.

We seek your further opinion as requested below, and you may need to view an hour or so of video film, but not 12 hours.

The essential issue in this case is whether Ms Nasir is and was as at 8 September 2008 capable of doing (1) careers advising work on a one-to-one basis full-time and/or (2) full-time office work in an administrative role whereby she were afforded the facility to sit and stand as needs demand and was able to avoid excessive bending or lifting anything more than 10 kg.

Our client's case is that, if the worker can sit at the casino for many hours without having to cease gaming activity, or needing to take

substantial breaks, she has the ability to participate in the duties of a career counsellor or to do general administrative work on a full-time basis.

Mr Millons opinion in his report dated 14 April 2008 was as follows:-

“If she was just doing careers advising work on a one-to-one basis, then she should probably be able to handle that work full-time, particularly if she was able to spend long hours sitting down as demonstrated at the Casino”.

And in his report dated 30 April 2008, Dr Millons wrote as follows:-

“By way of clarification then I accept that she would be capable of doing careers advising work on a one to one basis full time”.

“I also believe that she could work full-time in an administrative role in an office area whereby she was afforded the facility to sit and stand as needs demand and was able to avoid excessive bending or lifting anything more than 10 kg”.

Dr Olsen wrote in his report dated 9 June 2009 (at bottom page 32):-

“Although I do not have a description of the nature of the work performed by Ms Nasir, I understand the work performed by a careers counsellor at high schools. A careers counsellor would access source documents both in written format and also via the internet outlining various facts related to careers and personal and individual characteristics which may indicate that a career may be suitable or not suitable for any particular person. This therefore is by nature a helping profession and one which involves minimal physical exertion, it would be in the category of the lowest physical demands in occupations generally. I would consider it on an equal basis in terms of physical demands as general administrative work.

“Although there may be certain things such as accessing a compactus, accessing faulty filing cabinets and draws and lifting archive boxes which may be performed in administrative occupations, such tasks are not essential and could easily be excluded in any person’s work description. It is therefore not the nature of the work itself in my opinion that would prevent Ms Nasir from resuming work on a full-time basis”.

Dr Olsen nonetheless was of the view that Ms Nasir could not increase her hours beyond 3 hours per day, 3 days per week. We do

not understand his reasons – but they are set out by him at pages 33-34 of his report dated 9 June 2009. At page 34.4 he stated that his opinion was not “simply based on any clinical examination findings”. He went on to say (at page 34.5):-

“... any medical specialist who gives an opinion as to whether a patient is capable of increasing their working hours or not must consider other factors than those that are usually ascertained by most of my specialist medical colleagues. By this I mean that a much more extensive enquiry is necessary. I have performed such an extensive enquiry and it is my opinion after watching 12 hours 50 minutes of surveillance video that Ms Nasir remains unfit for any increase in her present working hours”.

Dr Olsen had said (at page 30) that his viewing the 12 hours or more of video did not provide “assistance over and above the clinical findings ... obtained [in October 2008]”, because the film was in short segments and thus did not contribute to Dr Olsen’s assessment “in relation to her endurance and her capacity for sustained work”.

Dr Olsen also stated that most doctors would be at a disadvantage in assessing whether the worker is capable of working full-time on at by virtue of “not having a consultancy status in occupational medicine or extensive experience with the examination and treatment of injured workers”.

We seek your opinion as to the following matters:-

Is there any reason – in terms of a psychiatric or other medical condition on which you are qualified to comment – which prevented Ms Nasir as at 8 September 2008 from doing (1) careers advising work on a one-to-one basis full-time and/or (2) full-time office work in an administrative role whereby she were afforded the facility to sit and stand as needs demand and to avoid excessive bending or lifting anything more than 10kg?

(We are not asking you to exclude the existence of a possible psychiatric condition, simply to comment on the extent to which it may have affected her ability to do the specified work).

We enclose:-

Typed surveillance observations (pages 3 – 7) for Thursday 21 February 2008, Friday 22 February 2008 and Saturday 23 February 2008.

Report of Willoughby's dated 31 October 2008 with particular note of the following dates Thursday 28 August 2008, Thursday 4 September 2008, Saturday 6 September 2008, Tuesday 9 September 2008, Friday 12 September 2008, Saturday 13 September 2008, Tuesday 16 September 2008, Thursday 30 September 2008, Wednesday 1 October 2008.

We ask you to assume that the summary and typed surveillance observations accurately record the observations made by the operatives and are consistent with the video film. Should you wish to see the video film or any part of them please contact Nikki Williams of this office and let her know the dates and times you would like to see.

44. Dr McLaren, having perused that mass of material and having viewed some film, then wrote (on June 29, 2009):

Further to your recent enquiry, I have perused the highly detailed surveillance report and have watched the first DVD, dated September 12th 2008. You will recall that this was just a few days before I saw Ms Nasir in order to provide an assessment of her mental state. I understand you have a copy of my report dated Sept. 16th 2008. The remaining two DVDs did not play, so I cannot comment on them. I found the relevant section in the surveillance report and was satisfied that the report was an accurate description of events as I watched them.

The DVD I saw consisted of about an hour of playing time. It showed a woman consistent with my recollection of the employee in this case, and physically consistent with my description of her in my report. She spent a lot of time sitting on a balcony, of which there is little doubt that it is her address (10 Charles St, Stuart Pk), watching some workmen in the yard below. She appears to have been talking to them and giving instructions at times. Her mood appears jovial. Several times, she is filmed walking about the yard in the area where the men had been working with a Bobcat loader. Other film shows her in Casuarina Shopping Centre, at Rapid Ck shops, and what appears to be the physiotherapy office in Coconut Grove. She is seen walking comfortably through the shops, conversing at length in a friendly manner with different people, moving around, leaning getting in and out of chairs with minimal effort, lifting shopping bags into her car and getting in and out of the car. She appears on ground level and on the first floor balcony.

In the main, she shows no restrictions upon her physical movements and no limitation of her social life. She appears to be involved with a considerable number of people, interacting in an animated and affectionate manner. She shows no evidence of anxiety at any stage of the recording. Despite claiming to have a fear of heights, she leans over the balcony. Despite her claims of being socially restricted, she is freely able to move through the shopping centres and engage socially with one person after another. At home, she appears to enjoy a busy social life. She engages with the workmen with no obvious handicap. She moves with no more discomfort or restriction than would be expected of any woman of her age and build. In general, the appearances she displays in the DVD are not consistent with her description of her behaviour just two days later.

I understand from the surveillance report that on her birthday shortly after (given as Sept. 16th), she was again able to interact with people and move with little visible restriction.

Based on the material I have seen, there is a considerable discrepancy between her reported state of physical and mental health, and her ability to function independently in the community. There appears to be no reason why she should not be able to work full-time in her position as school counsellor.

I trust this will be of assistance to you. If you require further information, please contact me at the above address. This office will be closed between June 29th and July 10th inclusive.

DR JOHNN OLSEN

45. Dr Olsen is a Consultant Physician in Occupational and Environmental Medicine. By letter dated 1 September 2008, ie, a week earlier than the Employer's Notice to Ms Nasir, her solicitor Mr Neill wrote to Dr Olsen requesting that he examine her in relation to her workers compensation matter. The examination followed on 15 October 2008 and Dr Olsen's report – 39 pages including his 4 page CV – is dated 27 November 2008. It and Mr Neill's letter form Ex 40.
46. Dr Olsen's report is much too long to reproduce in full. At pp 5 – 6 of it, Dr Olsen wrote (under the heading "Present Condition"):

In order of significance Ms Nasir has chronic persistent low back pain which extends to both sides and through both lower limbs. She describes the back pain as mostly heavy and dull being present most of the time. In addition she has an activity related low back pain which is rather sharp in nature and quite distinctly different to the dull pain which is described more as an ache.

Ms Nasir has bilateral leg pain which she describes as sharp, stabbing and lightning in character. She also has numbness which affects both feet, mostly along the lateral aspects.

The second greatest problem is the right shoulder pain. She describes this pain as positional and activity related particularly on reaching, moving anything with resistance, laying on her right shoulder. She is aware of the pain most of the time, she describes the frequency to be in the order of 75% of the time. The most common pain is more niggly than severe pain. When however she is more active she can develop a moderate degree of pain which may be present for as long as 2-3 weeks. The pain becomes severe if she attempts to elevate her right arm or to place the arm into abduction.

The third most significant problem is the intermittent right knee pain. The pain is intermittent in that when she is resting in a sitting position the pain disappears, when however she walks, particularly on stairs, then the pain increases. When she does walk up and down stairs she uses a sequential step, for example ascending stairs she will step up with her left leg first and then right leg follows and so on. If she is walking downstairs it is the reverse, she will place the right leg first and then the left.

The fourth most significant problem is chronic left wrist pain. She however only has pain when she aggravates the condition, for example using strong hand grip or twisting against resistance. She relies greatly on her left hand because of the problems with the right shoulder. For that reason she has some problems, for example, carrying groceries.

She obtains relief from hydrotherapy, she still attends three times per week in a group. She also has individual physiotherapy sessions twice a week.

Things that Ms Nasir cannot perform includes upwards reaching, outwards reaching, kneeling and squatting.

47. And at pp 7-8, (in a short section under the heading “Social History”) he wrote:

Ms Nasir indicates that prior to the accident she enjoyed gardening including permaculture, breeding bantams, walking, window shopping and visiting the botanical gardens.

Currently she has no sports, her hobbies are now home based, mainly internet research.

48. And at p 10, under the heading (on p 8) “Pain Function and Mood”, following a table on p 9, he wrote:

Pain levels, activity limitations or interference and effects of pain on mood is performed by patient self assessment.

The results indicate that Ms Nasir has pain which fluctuates from moderate to moderately severe ranging up to near excruciating. Her pain is very highly related to physical activity and her pain to some extent is present almost all of the time.

Her activity limitations are very significant, particularly her problem with standing for longer than say 30 mins, which she is unable to do. She has indicated that her tolerance if not moving around is only a few minutes. She has great difficulty sleeping due to the pain, she has great difficulty with social activities, her walking is extremely limited, her daily activities are almost non existent and she almost completely limits all her physical activities. She indicates that the pain interferes completely with relationship with others. She has only mild to moderate inabilities in relation to self care.

Mood is a significant problem, the worst being very high level of anxiety and worry that the symptoms or pain may become worse. She also has severely depressed mood and moderately severe overall mood effects including both low mood and anxiety.

49. Dr Olsen’s paragraph above beginning “Her activity limitations ...” is, I think, the only part of his report summarising Ms Nasir’s description to him of these limitations. Although her reported capacity to stand has a nominated limit – 30 minutes – her walking is more vaguely delineated – “extremely limited”, and the rest of it even vaguer. No figure is given for her limitation in respect of sitting, bending, lifting etc. This is in some contrast to Mr Millons’ report, which include some such activity limitations and ever greater contrast with Dr McLaren’s.

50. On the other hand, Dr Olsen's report evidence an extremely thorough clinical examination involving among other things, the measurement of the range of movement of her spine, limbs and joints; of musculature (in order to assess muscle wasting consequence upon lessened use of a limb), coupled with a very thorough study of various imaging studies of Ms Nasir's several injuries from 7/8/03 to 25/7/06 (pp 15-21 of the report). [So when he came to compare the Ms Nasir of his examination with the Ms Nasir of the film (as to which, see below), Dr Olsen looked not so much for discrepancies in Ms Nasir's activities; rather, he looked in a more disjunctive way, for discrepancies between the reported and filmed functions – of a limb, a joint, the spine].
51. Dr Olsen's report also includes a section headed "Psychosocial Factors" pp21-26. I reproduce the text (leaving out Dr Olsen's tables) between pages 21 and 24:

Psychosocial factors were tested by the OMPQ questionnaire. [Dr Olsen writes the "O" in OMPQ with a Swedish accent over it, like an umlaut.] The questionnaire has been developed at Orebro University Hospital Sweden. The questionnaire is used for screening to identify patients at risk for developing long term musculoskeletal pain and disability. The questionnaire has been designed for those with acute and subacute pain although the writer uses the questionnaire more extensively. The questionnaire is stated by the authors to be reliable and valid for early identification of patients at risk for developing persistent pain problems. The publication cited below offers good support reliability, validity, sensitivity and specificity. The authors state that the maximum possible score is 210. The higher the score a person has, the higher the risk of poor prognosis.

It has been shown that an elevated OMPQ score is associated with the development of chronic pain. Naturally the questionnaire is more helpful when used in the early period of rehabilitation to enable intervention. It is well known that when an injury has remained chronic for periods of 1-2 years or longer that the prospects for rehabilitation become significantly worse, perhaps one could reasonably say that after two years the prospects for rehabilitation are almost non existent.

I have utilised a scoring method suggested by Linton. I have used the interpretations of the scores as suggested by NSW WorkCover. The quantifiable scores are as follows:

OMPQ Score >105 Mildly Significant

OMPQ Score >105-130 Moderately Significant

OMPQ Score >130 Highly Significant

The score is clearly significantly elevated indicating that it is likely that there are strong psychosocial factors which contribute to the way that Ms Nasir experiences her pain. It is common for an injured work experiencing one or more injuries resulting firstly in intractable severe chronic pain and in particular where surgical intervention has been unsuccessful and even more particularly when that intervention has been spinal surgery, the finding in this questionnaire therefore is no more than I would expect. Nevertheless such a finding is not always inevitable, when it does occur then the outlook for recovery is worse that it would otherwise be.

GENERAL HEALTH QUESTIONNAIRE

The general health questionnaire comes in a longer and shorter version, GHQ-28 and GHQ-12. The questionnaire was designed to detect psychiatric morbidity in the general population. The second publication indicated that the GHQ-12 has been found to be robust and valid, it works as well as the longer questionnaire.

SCORE 12/12

The score in the GHQ-12 is quite extreme. It is indicative of poor mental health. I did find that during the clinical interview Ms Nasir had an almost obsessional approach to describing her symptoms. When she completed the written questionnaire she added numerous comments explaining details which were not required and were not requested in the questionnaire. It appears that based on the GHQ-12 that together with the other observations that I have made, that Ms Nasir does have a psychiatric condition which in my opinion is likely to be secondary to her injuries and ongoing pain and loss of function. This means that she does require psychiatric assessment and treatment as appropriate.

52. Dr Olsen then goes on to describe the results of a test he applied to screen Ms Nasir in respect of a possible diagnosis of post traumatic stress disorder.

He concludes that on the basis of that screening test, “she has a high probability of having the condition of PTSD” (p 25).

53. As to that, Dr McLaren was of a different view, as can be seen by any reader dogged enough to pursue a few pages of procedural silliness up to p 170 of the transcript, read with the document the tender of which – an addition to the McLaren Bundle – is recorded on that page. The document is headed “Northern Territory ats Nasir, Summary of conversation Barr/McLaren Wed 12 Aug 8.01 to 8.44am”.

54. One of Mr Barr’s notes of his conversation with Dr McLaren apropos of Dr Olsen’s report (Ex 10) pages 25-39 read:

The questionnaire for PTSD is a gross screening questionnaire, for general screening of the population. A low score indicates that it is unlikely that a person has PTSD. A high score indicates that it is possible, but not necessarily likely, that a person has PTSD. It identifies the 1,000 in 10,000 who might have PTSD.

In any event, the situation described at top p. 26/39 is more appropriately diagnosed as an adjustment disorder. It is not appropriate to for an occupational physician to change the diagnosis criteria for PTSD.

55. In this field Dr McLaren is the expert, and to the extent that his opinion is in conflict with Dr Olsen’s, I accept that of Dr McLaren. There is certainly a conflict as to the appropriate description of Ms Nasir’s psychiatric condition, (although, given the pleadings in this matter, the relevance of that condition, however described, is tangential). As to the two doctors’ different expressions of probability in relation to the test’s results, it is not much of a conflict at all. (Dr McLaren is well known to deplore sloppy use of language in any context, but especially in that of his speciality.)

56. Dr Olsen’s references to the use he made of the OMPQ questionnaire also drew criticism both from Mr Millons and Dr McLaren, the latter of when

according to Mr Barr's note (immediately after the passage I have quoted immediately above) said:

The OMPQ questionnaire is devised to be predictive of chronic outcome at the early stage of injury. It has no validity when used with patients who already have or allegedly have that chronic outcome.

57. Dr Olsen was cross-examined as to his and the proper use of the OMPQ questionnaire, principally between p 712 and 717 of the transcript. From this, it became clear that Dr Olsen is engaged in a research project which involves, among other things, a use of the results of the OMPQ questionnaire additional to those for which the questionnaire was first developed by its (Swedish) inventors. Dr Olsen's additional use is novel and it seems, unorthodox, at least by today's standards. It is not unpublished – Ex 41, which is principally a further report in which Dr Olsen comments on the filmed surveillance of Ms Nasir, also contains the PowerPoint screens of a presentation Dr Olsen gave on 22 May 2009 at the Annual Scientific Meeting of the Royal Australian College of Physicians in Sydney (see p 33 of Ex 41). As at the date Dr Olsen gave his evidence (21 August 2009), that presentation had not been turned into a scientific paper for review, publication etc. At this time, Dr Olsen's additional use of the OMPQ seems not to be an accepted established part of the expert practice with which his evidence is concerned. It may, in the fullness of time, become an orthodox usage: it may, like many another promising idea, fail to live up to its promise.
58. I reproduce the final few screens of Dr Olsen's PowerPoint presentation for their capacity to puncture the conceit of anyone who thinks cases like this can be easily decided:

CONCLUSIONS 1

- Psychological Disorder can be expected in injured workers with long term reported severe pain

- Pain Scores by Patient reporting appear to represent something other than true Pain; perhaps it is a Statement of Distress

CONCLUSION 2

- Normal relationships between factors such as Pain, Functional Inability and Mood Disorder Scores; Objective Findings; pharmacotherapy; and work status all break down
- It is not possible to assess Patient Function by Objective Findings; Time since Injury; Opioid use; Spinal Motion and Work Status

CONCLUSION 3

It is not possible to assess fitness for work; based on Pain, Functional Inability and Mood Scores; Objective findings; Scans; use of Opioids and Psychotropics; and time since injury

CONCLUSION 4

If that is the case then how do we assess Fitness for Work and how do we get a better outcome for the Patient

59. Not surprisingly, perhaps, this pessimism about bases for prediction in such cases in general emerges in Dr Olsen's comments on the case of Ms Nasir in particular. Ex 43 is a Supplementary Medical Report by Dr Olsen, sought in order to elicit Dr Olsen's comments on the revisionist reports by Mr Millons ie the reports made after Mr Millons viewed some film (and read summaries of the contents of more film). On p 4-5 of Ex 43, Dr Olsen writes:

I personally would give the patient the benefit of the doubt when expressing views on functional capacity based on the patients activities which are mostly leisure and activities of daily living.

I have performed statistical analysis on a case series of 64 injured workers that I examined for the purpose of Independent Medical Examination. I found that working status was not significantly correlated (using $p < .05$) with pain scores, functional inability scores, mood scores, objective findings, scans, use of opioids and psychotropics and the length of time since injury. The findings were not surprising to me as I have worked with injured workers, including assessment, treatment and prevention for over 25 years.

With long standing work related injury that is associated with significant chronic pain the normal relationships between demographic, clinical and behavioural factors appear to break down.

My findings are not new in the sense that work in Sweden Linton et al has described the powerful effect of psychological and psychosocial factors resulting in long term occupational disability.

Linton is in fact the author of the OMPQ and it is clear that this measure is the best indicator in workers with long term injuries of whether that person is back of [sic] work or is likely to return to work.

It is only too simple to watch the patient play poker machines, reaching for things, walk around and sit around and assume that there is nothing to stop her returning to work because the effort required of her work is no different to the effort required to play poker machines, reach for common objects, walk around the street and speak to her family and friends. There is however no scientific basis on which one can reasonably insist that that is the case. [My emphasis]

I recognise that some of my colleagues may disagree, I also would consider that many would not, when I say that for a person such as Ms Nasir to return to work, she would require at least medium term cooperative rehabilitation with a qualified and competent rehabilitation provider able to deal with the psychological and psychosocial issues involved in returning to work and generally coping with her pain. Even with such an approach however, I consider that the horse unfortunately has already bolted and that she will not be able to return to work to any extent greater than what she is at the present time. In my opinion if Ms Nasir is required to resume work 5 days per week and with the intention of longer hours, then the rehabilitation will break down and she will not work at all.

60. And on that despairing note, I leave the medical specialists, for the time being, and pass onto Ms Nasir's rehabilitation providers.

MS NASIR'S REHABILITATION PROGRAMME

61. Stephen Anthony Pennington ("Mr Pennington"), an Occupational Therapist, was retained (or more strictly, his company SiteSafe NT Pty Ltd was) by the Employer to assess Ms Nasir and to devise for her an appropriate return to work programme. The letter of referral from the Employer's insurer, TIO, is not properly dated, but was apparently faxed to Mr Pennington on 26 April

2007. it appears towards the bottom of a copy of Mr Pennington's file on Ms Nasir, which is about an inch thick and which became Ex 23. The referral reveals that there had been a previous supplier of rehabilitative services retained by Ms Nasir, namely "APM" [Advanced Personnel Management], who, says the referral, "have since been asked to close their file and forward a Closure Report".

62. The referral also included apparently, at least most of the documents beneath it on Mr Pennington's file – claim forms, medical reports and so on, those documents likewise bearing a facsimile date of 26 April 2007. The one exception is a four page report to TIO over the signature of Michelle Gailey of APM, dated 9 October 2006, and not carrying any sign of having been transmitted by facsimile. I don't know how or when that report came into Mr Pennington's hands, but from its position in his file, I assume at much the same time as the faxed material.
63. Another APM document (this one bearing the 26 April fax date) is a Progress Report, again over Michelle Gailey's signature, dated 6 February 2007 and reporting that:

"Ms Nasir commenced a graduated Return to Work Programme (GRTWP) at Casuarina Senior College (CSC) on 5 February 2007 performing careers counselling work completing three hours per day, three days per week in accordance with medical recommendations".

64. That was the state of play when Mr Pennington received the referral. It had been the professed Rehabilitation Goal of APM (see their Progress Reports dated 2 January and 6 February 2007):

"To assist Ms Nasir to return to fulltime suitable duties with the Department of Education and Training (DEET). This goal is subject to ongoing medical review".

65. That became the professed goal of Mr Pennington too. As for the "medical recommendations" and "ongoing medical review" and the like, the situation was complicated. APM had, and Mr Pennington received copies of reports

from Mr Sharland and Dr Vrodos, surgeons, whose operations on Ms Nasir's shoulder and back have been already mentioned and a report from Dr Gavin Chin, generally referred to as a "pain specialist". Ms Nasir's contact with Dr Chin was ongoing, one of Ms Nasir's regular consultations. In her affidavit sworn 23 October 2008 (Ex 37) – one of her affidavits mentioned above, sworn in pursuit of her application for interim benefits – she says:

I go to work at Casuarina Senior College for 3 mornings each week, Monday, Wednesday and Friday.

I also go to hydrotherapy at the Tropicus Centre for 1 hour on 3 days each week, on Monday and Wednesday, after I finish my work for the day and prior to work on Friday mornings.

I attend at physiotherapy on 2 days each week, usually Tuesday and Thursday at the Fannie Bay Physiotherapy Centre.

I attend on my GP Dr Tomayo at the Stuart Park Surgery at least once each month, and sometime more frequently if my various health problems require a more frequent attendance.

I attend on my psychologist Dr Jan Isherwood-Hicks once every 3 weeks, or more frequently if necessary.

I attend on a visiting acupuncturist Dr Ng for 2 to 3 hours each day, for 4 consecutive days, once each month when he comes to Darwin. I find acupuncture is particularly helpful with my levels of pain.

I attend upon pain specialist Dr Gavin Chin once every 6 weeks. Dr Chin monitors my many medications and the interaction between them and liaises with my GP on an ongoing basis.

66. All in all, a fairly busy schedule (even if, for one reason or another Ms Nasir's attendance at some of them – work, in particular, but also others – was not invariably regular).
67. Mr Pennington began his task by assessing Ms Nasir on 3 May 2007, and compiling an Initial Assessment Report dated 8 May 2007, part of Ex 23, which recorded information from Ms Nasir consistent with what she had told various medical men. From p 3 and 4 of that Report:

CURRENT INJURY STATUS

Rehabilitation motives

Ms Nasir states she wants to return to teaching because she enjoyed the kids and she finds the work rewarding. She states however, her injuries will prevent her from ever returning to full time employment. Ms Nasir also reports making numerous lifestyle adjustments post injury and that she doesn't think she will return to her pre-injury status. She claims adjusting to her changed circumstance is ongoing.

Symptoms

At rest Ms Nasir reports a constant ache in her affected shoulder and lower back which she rates 9/10. She claims it is highly likely her current pain will never resolve. She reports her shoulder pain results in neck pain which then results in regular headaches. She states symptoms gradually increase during the day with activities and continuous movement aggravates her symptomology.

68. And:

Physical Capacity

Ms Nasir has difficulty in identifying activity tolerances claiming she is always in pain.

- Standing: Ms Nasir reports a limited standing tolerance claiming less than five minutes.
- Sitting: Ms Nasir reports a sitting tolerance of less than five minutes. At the time of assessment she was able to sit for approximately 15 minutes before needing to walking around the room or change her posture.
- Walking: Ms Nasir reports a limited walking tolerance. She reports when shopping she leans on the trolley to alleviate her back pain. She reports she only buys a few items at a time when shopping due to her limited standing tolerance.

Lifting/Carrying:	Ms Nasir reports a limited ability to carry or lift objects on her un-affected side. She reports she can manage a light hand bag.
Squatting:	Ms Nasir reports an inability to squat or reach floor objects.
Bending/Stooping:	Ms Nasir reports a limited ability to bend or stoop indicating she uses a long handled aid to collect objects from the ground.
AROM:	Ms Nasir demonstrated reduced range of movement in her affected shoulder. Flexion 40°; extension 20°; abduction 30°.

69. Thereafter, Mr Pennington fairly regularly compiled Progress Reports on Ms Nasir, each time composing a return to work programme. The Progress Report misdated 12 May 2007 (it should be 12 June) reports, among other things, that Ms Nasir was intending to go to Adelaide for the upcoming school holidays. In view of her tolerances for sitting and standing – self reported at less than five minutes each – such a journey seems a difficult undertaking. Sure enough, at the end of that holiday, Mr Pennington reports (in a Progress Report dated 14 August 2007):

PROGRESS

Medical

Prior to the school break Ms Nasir's remained fit for three hours, three days per week. She was due to return to school on the 23/07/2007 however she reports an increase in symptoms and being unwell which prevented her from flying until the 29/07/2007. Ms Nasir reports her increased symptoms continued when arriving in Darwin and she reports difficulty sleeping indicating an expectation she may have to sell her house to repay monies to TIO. She reported a SiteSafe NT on the 01/08/2007 Dr Tamayo had certified her totally unfit until the 13/08/2007. The claimant reported given her increased symptoms she would return to physiotherapy asap. Ms Nasir reports she was reviewed by Dr Chin on the 13/08/2007 who is now trialling anti-seizure medication to reduce her pain levels. Her next review with Dr Chin is scheduled for early September, similarly Dr Tamayo is scheduled for the 04/09/2007.

70. The reasons for the deterioration then reported by Ms Nasir could be many: the physical strain necessarily involved in the journey; detachment from her usual physiotherapy etc; overdoing it in some way in Adelaide; and so on. Mr Pennington's material dated in October 2007 has Ms Nasir back at work, three hours per day, three days per week (with her timetable of working hours changing here and there apparently to accommodate more comfortably her hydrotherapy sessions and associated travel): whether she resumed work on or about 13 August is not clear.
71. It seems that in this first six months or so of his dealings with Ms Nasir, Mr Pennington's ambitions for her rehabilitation diminished somewhat. Up to and including 14 August 2007, various of his documents recited that the goal of his work was:

“Unless medical advice indicates otherwise, the goal for Ms Nasir is to return to full time employment with her pre-injury employer in a similar role”.

72. There is a Progress Report by Mr Pennington dated 14 February 2008 in which it begins to emerge that this lesser goal may be overly ambitious, at least in Ms Nasir's view. From page 1 – 2 of that Report:

PROGRESS

Summary

During the last semester of school (2007) the rehab goal for Ms Nasir was to attain some consistency in her activity levels, to assist in stabilising her symptomology. It was hoped this would in turn present an opportunity to maximise her work potential. Unfortunately Ms Nasir's attendance at hydrotherapy was inconsistent and she was absent from work for extended periods of time on several occasions.

Ms Nasir reported several stressors in the early part of the semester that resulted in time off work. Initially she was concerned about repaying monies to the department as a result of her lower back claim being accepted by TIO. She also reported increased stress after she was detached from her pre-injury role. Her attendance was further

reduced after losing the use of an automatic car which resulted in the use of public transport. Ms Nasir also raised issues with not having an assigned desk at work. These issues were resolved in time.

In October 2007 with a change in medication Ms Nasir reported increased sleep levels and decreased pain. As a result increased work hours and the introduction of an independent hydrotherapy program was raised as potential rehab goals for the remainder of the semester. Ms Nasir reacted negatively to these suggestions.

In November Ms Nasir hydrotherapy attendance continued to be inconsistent and she was absent from work for two weeks after travelling interstate for a dental review. To this end few of the intended rehabilitation goals were realised in 2007.

The school year re-commenced on the 29 January 2008. Ms Nasir reports to have worked on the 30th however was absent on the 01 & 04 of February indicating hamstring pain.

Ms Nasir has also raised issues regarding her pay indicating her pay reflects 2 days rather than 2.5.

73. As at that time, Ms Nasir reported her capacity to stand less than 5 minutes (as before); to sit, 10-15 minutes (an improvement on 5); to walk, less than 5 minutes (seemingly a falling off from the previous “approximately 5 minutes).
74. Dr Chin was then thinking she should try to work for four hours per day, three days per week. Dr Tamoyo thought three and three. As for Ms Nasir’s thoughts, Mr Pennington wrote (on page 3 of that Report):

Rehabilitation motives

Ms Nasir reports a restful Christmas holiday period and nil regular exercise/hydrotherapy given her hamstring pain. As discussed with Ms Nasir when she was detached from her full-time position in 2007, the rehabilitation goal was to reach part-time hours. This was again raised with Ms Nasir recently. She is of the strong view this isn’t a realistic rehabilitation goal for 2008.

75. By April 2008, according to the Pennington progress Report No 8 (30 April 2008). There were some signs that increased expectations of Ms Nasir were

having the paradoxical effect of decreasing her capacity for work. From page 1 of that Report:

During the period Ms Nasir has attended work three days per week for three hours despite medical recommendations and return to work documentation that indicates 4hrs 3days per week. Ms Nasir attendance at hydrotherapy remains inconsistent, she describes fatigue as the primary reason for not attending. Ms Nasir is vague regarding specific attendance dates. Ms Nasir has attended work most school days however she was absent for a period indicating stress with regard to her suggested increase in work hours.

76. In the same Report there were also some positive signs. In the next paragraph on page 1:

In April Ms Nasir attended a two day work seminar which required all day attendance. She describes attending from 10am to 3pm both days, suggesting she was given permission from the workshop facilitator to do readings at home in her own time to make up for her absence. Ms Nasir describes few aggravating symptoms during the workshop reporting she alternated between sitting and standing at the back of the room.

77. On page 2, although Mr Pennington has it that “Ms Nasir’s physical tolerances have changed little during the period”, his Report of her reports of sitting, standing and walking tolerances are all a little longer than usual, and, under the heading “Rehabilitation motives”, Mr Pennington says:

“Ms Nasir reports she is willing to attempt increased hours at some stage in the future after her house is set up correctly, however, to contemplate additional hours at the moment is stressful”.

78. Mr Pennington’s next Progress Report, dated 25 June 2008, reports regress. The major apparent reason for this was that on 6 May Ms Nasir had arthroscopy on her right knee subsequent to which she was unfit for work for 2 weeks, attempted a return but reported additional knee pain, and was certified unfit for work until 20 June which was the last day of the school semester. At some point around then she again went to Adelaide, to stay

with family because she was not coping at home. During this period her self reported physical tolerances generally decreased.

79. That appears to be the last of Mr Pennington's Progress Reports. In his oral evidence (relying in large part on his case notes, also part of Ex 23), he said that she was late coming back from Adelaide, having been too unwell to get into a taxi to catch her booked flight on about 21 July 2008, but she was back in Darwin before 13 August. She was, however, certified unfit for work, as, as I understand Mr Pennington's evidence, she remained so throughout that semester.
80. Towards the end of that time in October and November, the Employer raised with Mr Pennington the possibility of a different job for Ms Nasir, a job of administrative (not teaching) character, to be located at Harbour View Plaza. Mr Pennington discussed that possible job with various officers of the Employer. He visited the premises and inspected them with a view to assessing whether they were suitable for Ms Nasir, given her difficulties. He discussed the possible job with Ms Nasir, who, understandably, wanted a written job description, which was never forthcoming. Mr Pennington's last two return to work programmes, dated 19 January and 20 April 2009 refer to the Harbour View Plaza job, but Ms Nasir never worked there, or even went there to explore or enquire about the potentialities of the possible job. Her reasons for rejecting it were many and various. For one, she preferred to stay at Casuarina Senior College (her evidence, p 567). For another, she did not fancy the prospect of getting "up to their building" (meaning, I think, going up the hill to it), (also at p 567). Again, she was resistant to the very idea of a rehabilitation provider, Mr Pennington, making proposals to her about alternative work which in her view should have been made to her, if at all by Departmental officers (see p 568). In addition to this demarcation dispute, was the fact that she had never had a written job description (see p 568-569) and perhaps a suspicion that the Harbour View job was not really a job at all, perhaps just somewhere to place her to get her out of the way.

Her suspiciousness – not to say paranoia – emerge in this answer in cross-examination on p 571:

Really, that was a position that you could have filled, I suggest, very easily if you'd been able to have the physical capacity to stay there and do the job?---You said it was a position I could have stayed in. To me there's no position, I'm just a stand-in with no number. I've seen people like that just tossed from one department to another, and I don't want to be like that. They took my position off me that I had all those years. I've never not had a position, and if I'm going to be put somewhere I want to have a position and I want to have a place, not just get shuffled from one to another doing odd jobs answering a phone. I'm sorry, it's upsetting, very upsetting.

81. Ms Nasir's concerns arising from what might be called the industrial affairs aspect of the proposed Harbour View job appear, in the light of the evidence of Ms Suzanne Angel, to have been somewhat misconceived. Ms Angel has worked in payroll sections of the NT Government, and at the time she gave her evidence was occupying an opaquely titled position with the Department of Business and Employment, "senior consultant, workplace injury solutions". Ms Angel was not involved, as far as I can tell, in the management of Ms Nasir's return to work at Casuarina Senior College or Harbour View Plaza, but she was able to give evidence about the technicalities of public service employment. In particular, in re-examination (on p 470) she explained that:

"In the Northern Territory Government, no-one owns a position number, you only own a level".

82. And she went on to explain that for various reasons employees could become unattached – that is, employed at their level, but not tied to a particular numbered position. That could happen for example, as a result of departmental restructuring. Becoming unattached carries no necessary implication that an employee is on the way out.

83. As to the reality of the Harbour View job, the evidence of Ms Lesley Bannan, established that the work done there was real and important. Ms

Bannan works for DEET as Manager, School to Work Programmes, a small unit within the department. Ms Bannan had occupied that position for less than a year when she gave her evidence. Before that she had worked in Katherine, latterly as a vocational, education and training teacher, earlier as a career advisor and most recently, in the wake of the creation of middle schools “to all intents and purposes the head of senior school” (p 473). Her evidence was that the other three members of her small unit had “been educational leaders in schools. They have wide experience in the vocational education and training and careers areas. All have been involved in school management to some degree, either as faculty head, or a coordinator of some description, and in the case of Central Australia, principal”.

84. Ms Bannan, a dynamic and apparently capable and competent educator and administrator, was of the view that her small unit never had sufficient time to carry out research (meaning, principally, keeping track of similar work in other Australian jurisdictions). In late 2008, a Ms Estberg, DEET’s human resources manager, contacted Ms Bannan to see if she could find a position for Ms Nasir. Ms Bannan seems to have been apprised of at least some of Ms Nasir’s difficulties, and also of her teaching experience. That experience was of very much the same order as the other unit members. Ms Bannan’s evidence was (p 477-8):

And so you told us earlier there was a lot of research that was available---?---Yes.

---but which your team was – didn’t have the resources or manpower to keep up with all the time? --- Definitely.

Did you see a role for Ms Nasir in relation to that?---Yes. That was – my immediate thought was, yes, I could definitely use another pair of hands, and in my head, I thought of that person as a Research Officer.

Yes. And did you intend that that person would be a member of your team in other ways?---Definitely.

Yes?---A bona fide member of the team.

And so apart from the Research Officer role, what other activities did you have in mind that could be completed by Ms Nasir, if she were to take up the position?---Well, my thoughts kept – the fact that I knew that this person would be supernumerary and would not perhaps always be available. But I felt that when available, that normal duties as a team member would also be a help: attend team meetings; provide a synopsis of a current piece of research; involve the team members in that research; take turns in chairing the meeting; taking minutes, distributing minutes.

Yes?---Those sorts of things.

And would she, as you envisages it, have had contact with career advisors within schools themselves?---I hadn't thought that this position would entail school visits or anything like that. Obviously, as a bona fide member of the team, to refer phone calls, you know, deal with general enquiries, yes.

And did you have enough work that needed to be done to justify full-time hours?---Absolutely.

85. No doubt if Ms Nasir had got in contact with, or been put in contact with Ms Bannan, Ms Nasir's expressed suspicion that the job was some sort of sham, might have been lessened. But the two did not get in touch. My firm impression was that Ms Nasir simply did not want to know about any alternative position. Indeed, one of Mr Pennington's case notes (of 22/12/08, part of Ex 23) has him paraphrasing her as saying almost that:

P/c to W who suggests coming to terms with new RTW however she describes disappointment she has received nothing in writing from the agency regarding her move. W indicates she is going to focus on her holidays/relaxing and doesn't want to think about the new RTW until closer to the time next year. Stephen Pennington (Occupational Therapist).

86. Ms Nasir's evidence was to similar effect. She remembered her objections to a move to Harbour View, and her grievances about not being given a job description, and about this possible job change not being handled through the proper channels. She did not remember things that might have made the Harbour View job more thinkable. From p 567-568:-

Let's perhaps look at it in a bit of sequence if we can. Mr Pennington said in evidence the other day that on 11 November he rang you and discussed a new return to work program at the Harbour View Plaza. Do you recall? --- He said he was going to develop one. He didn't know anything about the job or the duties or anything. He told me I don't know, when I asked him those questions.

He didn't know at that stage did he? --- No.

He explained to you that the goal of this placement was to facilitate part-time work by you? --- Well, yes, if it ever eventuated that he – the goal was a job, he said there may be a job at Harbour View, I don't know who it's with, I don't know what you'll be doing when I asked him who's it with and what I'm doing, he said he didn't know yet, and he did say, but he did tell me, that there is going to be a desk for you but he said about that rubbish in the way that it was a problem to him. But that's all he said. He was checking it out ergonomically, he told me that.

Yes, he told you that he would go and have a look at it to see if that was suitable? --- Yes, and find out, try and find out more information about it.

You expressed to him your unhappiness that you were to be relocated to Harbour View Plaza? --- Well, yes, I felt that I was – I wanted to stay at Casuarina. He knows that.

But you agree that Harbour View Plaza was in very close proximity to your own home at Stuart Park? --- Yes, that is a point but you've still got to get up to that building. I hate that.

You knew, though, that the agency was prepared to make arrangements so that you could have easy access to the building, weren't you; a car park? --- I didn't discuss that with him.

It wasn't discussed? --- I don't think so, I don't recall.

Ms Nasir, what happened then is that a month or so later Mr Pennington rang you – this is on 15 December – to discuss the return to work program at Harbour View Plaza? --- He may have, I don't know.

Again he explained to you that the Casuarina Senior College position wasn't going to be available to you any longer, do you recall that conversation? --- Maybe he did say that.

You told him that you had no knowledge, no direct communication from the agency, of that move to that time? --- I told him that, yes.

I take it you were a bit upset about that, you thought that wasn't very appropriate? --- I didn't think it was appropriate because he's a non-departmental officer telling me I've lost my job, to start with. Then he's telling me where I'm going and can't tell me what even the name of the department was, he couldn't tell me the person in charge, because I asked that in particular, because I know a lot of people that work there and I would have liked to have know who I'm working with or what they're doing. And, secondly, I said, well, what are the duties and he said I don't know yet. And, he's non-departmental.

87. Apropos of Ms Nasir's complaint, then (late 2008, early 2009) and later (when she was giving her evidence in August 2010) that the Harbour View job lacked a Job Description, and that she could not consider – could not have been expected to consider taking it on without one - seems a reasonable complaint at first blush. However, I am not at all sure that a Job Description is conventional public service terms would truly given an outsider, a newcomer, any real idea what the job involved, let alone any idea at all of the physical requirements. Ex 20 is a Job Description (of Ms Nasir's pre-injury position). It reads (in part):

JOB DESCRIPTION

Job Title:	Faculty Coordinator – Careers and Tourism
Designation:	Executive Teacher 2
Work Unit:	Casuarina Senior College
Position Number:	6372
Responsible to:	Principal

Primary Objective

As an educational leader, plan, develop and oversee the implementation and delivery of effective educational programs to a broad based client group; within the framework of Northern Territory Government and College Policies.

Key Responsibilities

1. Oversee the day-to-day administration of the faculty to optimise the learning outcomes for students; in compliance with Northern Territory Department of Employment, Education and Training (DEET) and College policies.
2. Ensure the welfare and security of students and staff in the faculty areas.
3. Provide educational leadership to faculty members and Aboriginal Liaison Officer, through faculty planning and policies, supervision of curriculum and assessment, and participation in the College's executive.
4. Operate the Casuarina Senior College Career Advice Centre.
5. Promote and evaluate professional development programs in the faculty.
6. Undertake a teaching load within the faculty.

Selection Criteria

Essential:

1. Registration with the Teacher Registration Board of the Northern Territory.
2. Demonstrated enthusiasm and success in working with students from a variety of ethnic and socio economic backgrounds with diverse learning needs.
3. Proven successful teaching at the senior level in at least one of the faculty subjects.
4. Knowledge of the curriculum and assessment requirements for subjects offered at Casuarina Senior College and future pathways, for appropriate dissemination of advice to students.
5. Demonstrated successful application of initiative, self-management, communication, negotiation and conflict resolution skills.
6. Proven expertise in organisational tasks, personnel management and team leadership.

88. Those portions of the Selection Criteria that touch on relevant experience expected from applicants make it at least possible that any qualified applicant would have a fair idea of what was entailed by the actions described in the Key Responsibilities paragraph. An outsider, like me, would have no idea. Even a qualified applicant might have doubts about some of them, and need to make use of the facilities provided in the Description's final paragraph:

FURTHER INFORMATION

Information about this position and the College is available from Assistant Principal Mary Rees 89201207 or the College website at www.csc.nt.edu.au.

89. An analogously drawn up description of the idea of a job that Ms Bannan had in mind is unlikely, in itself, to have told Ms Nasir, an outsider to Ms Bannan's unit, much about the nature of the work, and nothing about the physical requirements of the work. Necessarily, the way for her to get a grasp of what was on offer was to talk to someone who knew. That did not happen.
90. It ought not to be forgotten that the Harbour View proposal unfolded (and ultimately fizzled out) during a period – from about October 2008 (see page 16 of 23 of Mr Pennington's case notes, part of Ex 23, note dated 30/10/08) – during which every aspect of her work health matter must have been overshadowed, from Ms Nasir's point of view, by her receipt on or about 9 September of the Employer's Notice very substantially reducing her worker's compensation income. I can't begin to guess at the effect that news would have had on Ms Nasir's ability levelly to consider applying herself to a return to work programme. If there was any discernible effect, it was that she became, according to the medical certificates from Dr Tamayo, more often totally incapacitated from work, but that may be just a coincidence. Certainly she would have needed to busy herself instructing her solicitors in respect of her application for interim benefits. Ex 36, her

affidavit of 10 October 2008 in those proceedings is a substantial document – 6 pages of text and a few score pages of annexures, much of them consisting of copies of bank statements etc. concerning her financial affairs; documents which her solicitors might not already have had to hand, meaning Ms Nasir would have needed to find them. Annexure D to that affidavit is a copy of a letter by Mr Neill, her solicitor dated 9 September 2008, giving a further inkling as to how busy Ms Nasir must have been with her solicitors, both before and then straight after receiving the Employer's Notice. After that, she had to peruse an answering affirmation of Ms Osborne, solicitor for the Employer, and given instructions sufficient for her solicitors to draw up her own affidavit sworn 23 October 2008, Ex 37.

91. I can find no mention in Mr Pennington's evidence or in his written material (Ex 23) to Ms Nasir having received the Employer's Notice. Accordingly, there is no mention there of any of this flurry of competent, out of the normal activity by Ms Nasir: it is to be inferred only from the existence and contents of her two affidavits. Another very different and earlier example of competent unusual activity on Ms Nasir's part was her attendance at the seminar, mentioned in the second passage quoted above from Mr Pennington's Progress Report of 30 April 2008. One might also instance her managing to travel to Adelaide for her school holidays, and travelling back, eventually.
92. These small exploits give one cause to wonder just how grave the impediments were that prevented Ms Nasir performing her three hours per day work, sometimes, and from attending appointments with Mr Pennington. They various impediments – troubles with cars, feeling tired or stressed, wanting to finalise the modifications to her house before trying to work longer hours etc – are none of them implausible on the face of it, but, like any succession of excuses, the prolongation and elaboration of the series eventually gives rise to scepticism: to questions whether one excuse or another, or any of them, is true.

93. The salient instance in the evidence where this scepticism hardens into certainty occurs in relation to events on Friday, 9 November 2007. Mr Pennington's case notes (page 6 of 23, part of Ex 23) for that day read [I have expanded, I hope accurately, Mr Pennington's abbreviations. My expansions are in square brackets]:

29/04/2008

P/C [phone call] to W [Worker]; have discussed attendance at training course in Darwin CBD. W indicates starting at 10am and going home about 3pm W rpts [reports] fatigue and drowsiness nil increased pain; W describes alternating between sitting and standing to moderate her symptoms; W rpts completing some reading components of the course were completed at home;

09/11/2007

P/C to Marey Rees; have discussed W; E rpts [Employer Reports] Charlene isn't bring her laptop to work and other staff members have indicated she is using other computers to buy and selling items on eBay and perform personal banking; indicated OT [Occupational Therapist, ie Pennington himself] will visit school today and reiterate her work duties;

Stephen Pennington (Occupational Therapist OT) [02:012 10min]

09/11/2007

P/C to school careers, nil answer; p/c to W home, nil answer

P/C from W; rpts she is too tired to attend work after hydro and too fatigued to discuss with OT; have agreed to f/u [follow up] with W this pm;

P/C from W rpts; she can't sleep and will attend work after all; OT will f/u in workplace;

Stephen Pennington (Occupational Therapist OT) [02:010 15min]

09/11/2007

Conducted worksite visit; w reports fluctuating symptoms and poor sleep; W rpts she to be doubtful of any increase in activity levels as

discussed with Dr Chin; W rpts she is flying interstate next week to have her teeth done and will return in week;

W rpt typical physical tolerances – standing \leq 5 mins; walking \leq 5mins; sitting 10mins; lifting small shopping bags only rpts to shop more often given reduced lifting ability; squatting – nil; using long handled aid to reach ground height objects; medication only means of pain relief;

Stephen Pennington (Occupational Therapist OT) [02:010 15min]

94. (Nothing of any significance arises from Ms Nasir's use of the computer and her work time for non-work purposes. Mr Pennington raised that complaint with Ms Nasir in what he described as "an awkward conversation" – transcript p 341 – and that seems to be the end of that. Who doesn't do such things now and again?).
95. Mr Pennington's notes do not record the time when he made each of his calls or visits. However it is possible through other evidence to place one time constraint on his third note of the day, her "worksite visit". This must have occurred before 2.32pm because Ms Nasir's departure from the worksite – Casuarina Senior College, was recorded at that time, by the surveillance operators retained by the Employer's insurer. Her movements after that were to the ANZ Bank at Parap and thence to the Casino, where she stayed, playing poker machines for much of the time, until 9.43pm. As for what that feat suggests in relation to her earlier reported tiredness etc, it is no more than one instance among many, as to which, see the discussions below, of the film, and of Ms Nasir at the Casino.
96. More intriguingly, a record obtained from the Casino (which because Ex 4 – see below) establishes that Ms Nasir also attended the Casino on the morning of that day. Two sessions of her playing a poker machine – the same machine, if I read the record correctly – are recorded, ending respectively at 10.56am and 11.09am. Ex 4 does not contain a record of when a session on a machine starts. Obviously the second session cannot have been longer than 13 minutes and may have been shorter. In that time,

the machine turned over \$252.10. In the first session, the machine turned over \$4,735.80. (As to the meaning in this context of “turned over”, see below), about 19 times as much as the second session. Reason suggests that to put that some through would take some tens of minutes, at least.

97. If Ms Nasir went to her hydrotherapy session that morning, as she told Mr Pennington she had, it would have been between 9.00am and 10.00am. Subsequent to that, the burden of her call to him (his second case note that day) is that she has had long enough after the hydrotherapy to realise she is too tired to do her three hours work. After that, she has had long enough to realise that she can't sleep, so may as well try to go to work. Given that she finished work at 2.30pm, it is reasonable to infer that she started at 11.30am. Where, between 10.00am and then, can she find the time to put through \$4,735.80 at the Casino before 10.56am? It can't all be true. It seems pretty unlikely that she went to hydrotherapy at all that morning. It seems very likely that her calls to Mr Pennington were from the Casino. The best one can say for Ms Nasir on the day is that, whatever deceits she practised in those calls, in the end, she decided to give work a try after all. Her claim, in her first phone call to Mr Pennington of being “too tired” was, in my view, clearly deceitful, as evidenced by all she did later, at work and at play. This conclusion in turn leads one to question even more what reliance one can place on Ms Nasir's many other accounts of tiredness, disability, and inability etc, not checked by surveillance.

MS NASIR AND THE CASINO

98. There are in the evidence three sources of knowledge about Ms Nasir's patronage of the Casino. One is Ex 4, the record from the Casino itself, mentioned above. Another is surveillance evidence: film of Ms Nasir gambling etc in the public part of the Casino and observations of her entering and leaving the “Platinum Club”, an area generally inaccessible to and out of the view of the surveillance. The third is Ms Nasir herself, in her

two affidavits and in her oral evidence. Her affidavits are, on this topic, grossly misleading and her oral evidence untruthful.

99. The affidavits, it will be recalled, came into existence in connexion with Ms Nasir's application for interim benefits. As such applicants do, she set out her financial position – assets, liabilities, expenditure – in order to demonstrate her need for interim benefits. In the first affidavit, Ex 36, sworn 10 October 2008, paragraph 23 details categories of expenditure. There are 20 categories, and the last, subparagraph (t) is “Casino” cited as \$1,950 per year. This is further explained in paragraphs 31 and 33:

31. My calculation of weekly expenditure includes an amount I estimate I spend at the casino. I go approximately every second pay day. I might go at other times from time to time or I might miss my regular visit. I set myself a spend limit of \$150. I will spend this on food, drinks, keno and the pokies. I rarely if ever play the table games. [Pay days come around fortnightly].

And:

33. My calculation of my weekly expenditure makes no allowance for purely personal expenditure for entertainment other than when I go to the Casino. I do not drink or smoke. I do not eat out at restaurants or go to the movies or the theatre except very rarely.

100. Ms Nasir swore her second affidavit (Ex 37) on 23 October 2008, in answer to an affirmation of Ms Osborne (which became Ex 39). I quote paragraph 2 of Ex 37, which may have some relevance to Ms Nasir's Casino patronage, and paragraph 10, which is directly on point:

2. I have never intended to give the impression either to medical practitioners or to this Court that I am a recluse or unable to engage in social activities, whether because of my work injuries or any other cause. The correct position is that I always try to remain physically active, within the limits of my health generally, and I try to remain socially active so as to make the most of my life. I have always enjoyed interacting

with other people and I continue to enjoy interacting with other people.

10. In addition to the foregoing activities, I also attend at the Casino at least twice each month. I will usually go once each pay fortnight, although from time to time I will go twice in the same fortnight. I usually attend with one or more of my female friends. I have always enjoyed going to the Casino, before I suffered my injuries at work on 7 August 2003, and subsequently. It is my practice to allow myself \$75 per fortnight to spend at the Casino, and I note that I stated in paragraph 23(t) of my affidavit sworn 10 October 2008. If I win I play with winnings over several fortnightly visits and may exceed the \$75 limit.

101. Ex 4 provides a check on the general accuracy of Ms Nasir's description. A Mr Phil O'Connell, of the Compliance Division of the Sky City Casino, attached a covering letter to the documents produced in answer to the Employer's Summons. That letter is part of Ex 4, and says, among other things:

In terms of the specific documents listed in the Schedule we respond as follows:

1. Ms Nasir applied for membership to the Players Club (the casino's loyalty program) in August 2002. SKYCITY Darwin's loyalty program is now known as Action.
2. Attached as appendix 1 is a Player Balance History report for Ms Nasir. This report contains all the information we hold in relation to gambling conducted on Ms Nasir's loyalty card. It shows the dates on which the card has been used, the location at which it was used, the player's turnover for each gambling session (referred to as coin in), the points credited to and debited from the loyalty program and the overall balance. The report does not show a player's win/loss. Turnover includes re-invested winnings and represents the overall amount played – it is not indicative of a player's losses or the amount of currency inserted into each machine.

The report also shows the value of complimentaries credited to and debited from Ms Nasir's account. These complimentaries are an additional benefit associated with loyalty membership.

In accordance with the summons we have only supplied information for the period 1 January 2007 to date. However the totals as shown at the end of the report are based on activity since 2002.

102. In fact the Exhibit contains information for the period 30 November 2006 to 24 July 2009, pages 63 – 115 of 115 of the “Player Balance History Details”. Of the 32 months therein illuminated (December 06 – July 09), I can find five where Ms Nasir’s recorded sessions display a pattern of her attendance not greatly inconsistent – at least as to her frequency of attendance – with her affidavits. These are:-

- (a) March 2008, when she plays only the 2nd and 11th.
- (b) May 2008, when she plays only on the 14th.
- (c) October 2008, when she does not play at all.
- (d) November 2008, when she plays only on 12 and 25 November (there is also a points redemption on 2 November).
- (e) April 2009, when she plays on 2 and 22 April.

103. Further, in July 2007 and July 2008, much of which she spent in Adelaide, she did not play at all. Of these five months above in which her gambling complied with her affidavit’s description of it, May was the month of her knee surgery, and October the month of her affidavits and of a flurry of legal activity.

104. Of the other 25 months, her frequency of visits to the Casino is beyond, usually well beyond what she swore to in her affidavit. I should say that Ex 4 is not the ideal document from which to derive that frequency. In the following list I have assumed, safely, I believe, that when the record shows Ms Nasir having sessions of play either side of midnight (and hence on different dates) that was one visit. Less certainly, when there is a gap of some hours between sessions, I assume that Ms Nasir has left, to return on the same day. For example, having played seven sessions ending between

12.05am and 6.58am on 11 April 2008, Ms Nasir's next session that day ends at 10.13pm. I think it is safe to assume that was a second visit. To take a more ambiguous example, on 20 June 2008, having played nine sessions that finished between 1.26pm and 3.50pm, she next played a session ending at 8.33pm. Again it seems very likely, though less certain that she would have left the Casino during that interval. Doing the least I can, here is a summary by way of example, of the 12 months to and including October 2008, the month of the affidavits. Sessions of play are recorded in:

- (a) November 2007 – on the 6th (perhaps 2 visits), 7th, 8th, 9th, (perhaps 2, perhaps 3 visits), 16th (probably a combination of the later or least of the visit of the 15th), 18th (perhaps 2 visits), 19th – 20th (probably 1 visit – sessions ending from 1.24pm on the 19th to 4.11am on the 20th), 21st (perhaps 2 visits), 22nd, and 23rd (perhaps 2 visits);
- (b) December 2007 – on the 13th (perhaps 2 visits), 16th, 17th, 18th (perhaps a continuation of the visit of the 17th), 19th, 20th (perhaps a continuation of the visit of the 19th), 20th (a separate visit), 21st (possibly a continuation of the visit of the 20th), 22nd – 23rd (one visit) and 24th;
- (c) January 2008 – on 22nd, 24th, 27th, 28th and 31st. (I believe Ms Nasir was in Adelaide for Christmas 2007 and much of January 2008);
- (d) February 2008 – on 3rd, 7th, 11th, 14th – 15th (1 visit), 15th again, 16th, 17th, 21st – 22nd (1 visit), 22nd again, 23rd – 24th (1 visit), 25th and 29th;
- (e) March 2008 – as above, on 2nd and 11th only;
- (f) April 2008 – on 9th, 10th and 2 visits on 11th, the second stretching into 12th;
- (g) May 2008 – 1 visit only, on 14th, as above;
- (h) June 2008 – 15th – 16th (1 visit), 18th, 20th (probably 2 visits) and a probably separate visit early in the morning on 21st;
- (i) July 2008 – no visits at all, as above;

- (j) August 2008 – 9th – 10th (1 visit), 20th – 21st (1 visit), 26th and 28th;
- (k) September 2008 – 3rd – 4th (1 visit), 4th again (perhaps twice again), 5th (perhaps a continuation of the last visit on 4th), 6th, 7th, 8th, 16th, 18th, 26th, 27th and 30th;
- (l) October 2008 – no sessions, as above.

105. In my opinion, the discrepancy between the record, Ex 4 and the affidavit is sufficiently glaring to call for an explanation in default of which Ms Nasir's credibility must suffer.

106. In her evidence in chief, Ms Nasir said that she has been unaware of both the extent, and the appearance of her playing the poker machines at the Casino. As to the extent, that had been established for her (as for me) by Ex 4, a document she had not previously seen and into which she was unwilling deeply to look. As to the appearance, some of the film of her playing had been shown during the running of the Employer's case. Ms Nasir later said, in cross-examination, that she had viewed hardly any film before the hearing, and the tiny portion she had seen – 30 seconds or a minute – was not at the Casino (see transcript p 578-579). By the time she started her evidence on 19 August 2009 she had had about a week to dwell upon Ex 4 and the portions of film she had seen in the Court Room. She alluded to both in her evidence. I quote from pp 534 – 535 of the transcript:

Are there any things in your normal life that make you happy like you were seen in that video?---Something that makes me feel useful, or doing something. It worries me that I feel like I'm going to get mind dead, brain dead or whatever it's called. That worries me and I think that the only thing that I really took – I resorted more to casino just to feel I'm doing something. And, when I see those videos I'm just horrified that I've turned into that. Because if you asked me before would I go casino I'd say socially. But that's not social, when I see it here it's like a ghost sitting there pushing buttons. And, when I sat in the Court every day and you were talking about it, and that, I think they're talking about me. I used to be a real proud person. None of my children gamble or anything and I would tell

them off if they did. Then here am I sitting there like a lone shell sitting there pushing buttons. I suppose that's what I resorted to.

What I was asking you was is your life like it was shown in the video of 12 September when all of your family is here, or is it like what was shown in the rest of the videos?---It's like the rest of the videos.

That was just one special occasion, was it?---It was my 60th birthday.

In relation to the casino, until you – might the witness be shown exhibit 4, the Sky City attendances. Have you had a look at that document?---I've read the first two pages, I was disgusted, horrified.

Did you believe, prior to looking at that document, that that's what you were doing?---No. I still thought I only went two or three times a week socially.

When you say socially who did you think you were going with two or three times a week?---Years ago I would go with a friend, and we'd have dinner and play a while, or play Keno. That was socially, but this is not socially, this is addiction. I can't even look at it, it makes me sick. To me I need help.

Did you understand that before you saw that document?---No. Or, the videos showed it to me as like ---

Do you have a recollection of going to the casino as often as you did?---No, not at all. Not like this. I knew I went but I didn't know times. It's like when I go in the depression moods, I go in the room and I don't wash my hair and I don't shower and it's like I get really depressed and I don't change my clothes. I've talked to Jan Isherwood-Hicks about this several times.

107. And from p 540:

When you look at exhibit 4 that's there and look at, in terms of your attendances at the casino, do you now have a memory of going for all of those hours?---Not at all for all those hours, no. I do, can say I went, but I wouldn't be able to tell you – I was just looking at one of the sheets the first day and I just can't even imagine, and watching that black shadow sitting at the casino. That's just like it's not me. I can look at it and just stare at it. It is me but ---

Do you have a memory of being at the casino for six, eight, ten hours at a stretch?---No. I remember taking Panadol Forte down there, and staying – wait for three hours before you drive, because that's a rule

I've always made myself have because they told me I had to take all this medication. You take Panadol Forte you wait three and a half hours to four hours before you drive, and then take your next lot at home.

Right?---You always, wherever you are, even if you have to wait for two hours you wait your time after you take the Panadol Forte. That's all I know, and I would have done that. But I can't explain now. I just know I need help when I look at it.

Do you remember being there for those extended periods?---No, not at all. Not at all.

What do you remember, what do you ---?--- I do remember sitting there pushing buttons but time probably is irrelevant to me, I don't know. It must be for that.

How long did you believe you went there for?---If you ask me I'd say I go two maybe three times a week and I'd say socially. Because to me in my mind that's what I was doing. Looking at that now and looking at this it's not socially. That's like an addition or something.

108. "Two or three times per week" is in my view rather a lot more than "approximately every second pay day" (her first affidavit, Ex 36) or "at least twice each month" (her second affidavit, Ex 37). In fact, two or three times a week is a pretty fair statement of the frequency of her visits in the months when she gambled often, especially if "times" means "days". If it truly were the case that Ms Nasir had, until the hearing been under the impression that she was gaming two or three times a week, that impression would not explain why she swore in her affidavits to a figure a third or a quarter of that, nor would it explain her reported shock at seeing the record of her attendances, Ex 4. On the other hand, Ex 4's exposition of the length of some of her visits might come as a shock to someone in the grip of some sort of denial as to the reality of the scale of gambling. This is what Ms Nasir seems to be implying of herself, and if that were the truth of the matter, her evidence from page 540 "not at all for all those hours" etc would still strain credibility, in my opinion.

109. My opinion rests on my fallible and often faulty beliefs about human behaviour, but in this instance my opinion is supported by the evidence of Dr McLaren, as it emerged in Ms Gearin's cross-examination of him on 12 August 2009, recorded in the transcript between pages 200 and 214. It needs to be understood that neither party had knowledge, as far as I could tell, of Ex 4 – see p 72 of the transcript: it only came to light on 10 August, the first day of the hearing. Understandably, Ms Gearin had had to scramble to deal with this unexpected, no doubt unwelcome addition to the material in the case, and the organisation of her cross-examination was not what I would expect of her had she been given more time. Perhaps as a consequence I cannot find a succinct extract from Dr McLaren's evidence that epitomises his view, but I would refer to the large paragraph in the middle of page 202, wherein Ms Gearin quotes to Dr McLaren from a text of which he is the author (and Dr McLaren does not demur from his own learning), and Ms Gearin's saying in a question not immediately answered on page 211 "... it's almost like a fugue state ... [like a rat pressing bar]", with which Dr McLaren eventually agreed.

110. So the gambler might not have her ordinary consciousness of time passing and might not realise later just how much gambling she has done. [I should perhaps also mention that Dr McLaren was recalled to give further evidence on 14 August, but although he then touched on Ms Nasir's gambling, especially in re-examination by Mr Barr, his evidence was not apropos of the point I am now discussing.]

111. As for Ms Nasir's evidence as to her shock and dismay at her appearance, playing the machines, the film of her gambling is as she describes it in the passages quoted above from pp 534, 535 and 540. If Ms Nasir did sustain a mental picture of herself at the Casino as a social being, interacting with friends etc, then these images of her ghostly self, solitary at a machine might hurt. When her newfound knowledge, from Ex 4, of the scale of her

gambling is superimposed on this image of alienation, it might well be a hard thing to face.

112. On the other hand, playing a poker machine requires what it requires. You sit down, put in your money (and your Player's Club Card, if you have one), press the button, press the button and press the button until you're finished. The gift is given to few of us to see ourselves as others see us, but if you've seen one person play a poker machine, you've seen them all. Other players on the film look no more or less trancelike than Ms Nasir, as they push the buttons on their machines. Ms Nasir must have seen hundreds of them. Why should she think she looks any different? Why (beyond the normal outrage of anyone finding out she has been spied on) should she be so upset?
113. Similarly in relation to Ms Nasir's claimed lack of awareness of the time she was spending, one can accept, I suppose, that while gambling she might be in a sort of trance and while still in the Casino shielded from overt displays of the passage of time (even I know that casinos make it a practice to have no clocks on display), so the hours might glide by. But in the outside world, things unmissably happen. For the Casino visitor the sun rises over the Gardens and sets over Fannie Bay. Shadows in the car park shorten then lengthen as the day goes on. Pleasant mornings give way to baking hot afternoons. The busy evening traffic on Gilruth Avenue and on the other streets between the Casino, on the one hand, and Ms Nasir's destinations – home, ATMs - on the other disappears, replaced by streets empty of all but the occasional taxi and the odd staggering drunk. How could anyone spending the hours that Ms Nasir was be oblivious of all these things? I do not accept her evidence as to her unawareness of the time she was spending at the Casino.
114. In his cross-examination of Ms Nasir, Mr Barr brought up her visits to the Casino for various purposes. The character of Ms Nasir's answers varied among these purposes. When it came to questions giving her a chance to

inform me about technical matters to do with poker machines, Keno, the “Platinum Room” and its facilities etc, her answers were excellently to the point, easy to follow and very helpful. Like any aficionado of anything, her tone became slightly scornful when Mr Barr, or I, (or Ms Gearin), asked a question which demonstrated our ignorance of the Casino, but she was never sarcastic in these circumstances. In relation to questions about how much her gambling cost her, her answers seemed to be a mixture of realism eg “You’re never ahead at the Casino” (p 599) among a series of answers that suggested she had a secret belief that she might be – that all her gaming (of the extent of which, it must be remembered, she was simultaneously saying she was unaware) was afforded within the budget spoken of in her affidavits (which it must be remembered, even she conceded were wrong by greatly understating the number of her attendances at the Casino). I regard her evidence in respect of the cost of her gambling as deluded, but honestly so. Again, her answers, contradictory as they seemed, were responsive to the questions.

115. Questions that went to how often she attended and for how long – to the discrepancy between her affidavits and Ex 4 (and some of the film) – elicited much less responsive answers. For one thing, Ms Nasir’s answers concerning her affidavits were to the effect that she knew nothing of and did not understand anything about an application for interim benefits. For another, whenever her frequency of gaming was being spoken of, she answered in an agitated way, often almost shrieking, in what may have been distress, about her then lack of understanding of her gambling problem. To my observations, Ms Nasir’s reactions to these questions (see, for example transcript p 590-598, and p 673-688) did not create the impression of an ordinary evasive witness – the transcript gives a more evasive impression than I had when Ms Nasir’s evidence was viva voce – but the effect is much the same. At the end of the day, she did not provide any explanation why

her affidavits were so misleading on this issue. In the end, I could not believe her.

116. It may be that her medication (my idea – see p 605) or her anxiety disorder (Ms Gearin’s idea, also p 605) affected her giving evidence. It may be that these things also somewhat clouded her consciousness of how much time she was spending at the Casino. But ultimately I do not believe her when she says she was significantly unaware of it. I am persuaded that she had tried to mislead me in that respect, and even more so in her affidavits. I do believe she was surprised and distressed by her appearance on film.

MS NASIR’S SOCIAL LIFE

117. The above issue significantly damaged Ms Nasir’s credit. Mr Barr, for the Employer, pursued another topic, illuminated by film, in the hope of inflicting further damage on her credit. This was the question of the extent of Ms Nasir’s socialising.

118. I must say that I do not understand how this issue arose. Ms Nasir’s first affidavit (Ex 36) contains nothing to the point, except insofar as Dr McLaren’s report of 16 September 2008 (Annexure C to that affidavit) mentions it, on p 3 of that report: “She leads a very quite social life and has no hobbies or other interests”. That, to my mind, is the only report of Ms Nasir’s making any claim to anyone about social isolation. Mr Millons, in his original report of 12 March 2008 reports “Ms Nasir lives alone and does her own cooking ...”, which statement, taken out of its context in that report (where it seems more directed towards her activities than her social life) and juxtaposed to the statement to Dr McLaren, could be taken to have the same sort of flavour. But I do not accept that as a fair use of Mr Millon’s report.

119. Ms Osborne’s affidavit (Ex 39) answering Ex 36 annexes various things – Mr Millons’ reports and some surveillance logs, opening up some of the Employer’s information about Ms Nasir’s social activities. But there is

nothing specific in Ms Osborne's affidavit and nothing very pointed in the annexures that explain why Ms Nasir was moved to attest in paragraph 2 of her second affidavit (Ex 37):

2. I have never intended to give the impression either to medical practitioners or to this Court that I am a recluse or unable to engage in social activities, whether because of my work injuries or any other cause. The correct position is that I always try to remain physically active, within the limits of my health generally, and I try to remain socially active so as to make the most of my life. I have always enjoyed interacting with other people and I continue to enjoy interacting with other people.

120. In her evidence she did not represent herself as socially isolated either, except insofar as she was bedridden. It is very clear on the evidence that her statement to Dr McLaren was not true, just as the statement she made to him about her sitting tolerance was untrue – contradicted by her sitting during that consultation for longer than she said she could (as Dr McLaren noted). In fact, at the date of that consultation, her 60th birthday, Ms Nasir was in the midst of positive whirl of social activity – her family had gathered from far and wide for the occasion; there was a flurry of activity going on at her house – far in excess of her normal life, which was social enough with lodgers, friends, family, the Casino etc. That untruth appears to be isolated in the evidence, not part of a consistent or persistent misrepresentation, and not a basis in my opinion to have general doubts about Ms Nasir's credit.

THE FILM AND THE SURVEILLANCE – MS NASIR'S CREDIT

121. I mentioned earlier in these Reasons that there was a lot of film taken of Ms Nasir by those conducting covert surveillance of her. None of it is fun to watch; quite the reverse. Dr Olsen watched about 13 hours of it (see his report of 9 June 2009, Ex 41): Mr Millons (who had watched an hour or so himself) expressed his horrified admiration (see p 4 of Mr Millon's report of

30 June 2009, part of the Millons Bundle, Ex 1): Dr Olsen, in his last report (of 30 July 2009, Ex 43) acknowledged Mr Millons' comments thus:

I acknowledge Dr Millon's observation that I deserve something of a hero's reward for sitting through the 12 hrs and 50 mins of surveillance footage. I can report that in fact it was an excruciating experience which I endured for the sake of reporting fairly and accurately.

122. It's true that on occasion people have paid to watch this sort of thing. A note in a recent *New Yorker* (26 July 2010 p 6) reminds us:

Andy Warhol's "Empire", from 1964, is an eight-hour-long single view of the Empire State Building. The landmark film was programmed for Anthology Film Archives' "Boring Masterpieces" series by Jonas Mekas, who was its cinematographer.

123. The surveillance did not produce an observation, still less any film, which instantly and in a single blow, knocked her claims to pieces. That sometimes happens in some cases, but not in this one. There is no film of her running, jumping, trotting up or down stairs, lifting something heavy over her head or anything else that would be utterly inconsistent with what she has told doctors, Mr Pennington, the Court and many others of her limitations. Rather, the Employer's case is based upon the cumulative effect of the film in order to argue that she is nothing like as limited as she claimed. In making that argument, the longer Ms Nasir can be shown to sit, walk, stand etc, and the more often, the stronger the Employer's case. That being so, there seemed to be no practical way of forcing the parties – and in particular the Employer – to limit the amount of film, however tedious it became to watch. Also, in order that the filmed actions be fairly representative of Ms Nasir (at least during the periods film was being shot), it would not be right to permit the film to be edited so that only the more egregious of Ms Nasir's actions be shown. So I had no choice but to watch it all.

124. I have lost my record of how many hours were involved – I thought it was nearly 30, but I may have been counting some film twice. Some hours were played to various witnesses, including Ms Nasir during the hearing and I have seen all of that at least twice. Some of it, particularly the scenes of Ms Nasir playing the poker machines I found so mind-numbing that I was often unsure whether I had already viewed it – in Court, or after hours on my own – or perhaps seen it in a dream.

125. One use of the film, even at its most tedious, is to put flesh on the bones provided by the oral evidence (of the surveillance people) and the documents (their logs and also the Casino’s record, Ex 4). For example, in relation to 15 November 2007, Ex 4 (p 77 of 115) says this of Ms Nasir’s sessions of play:

15-Nov-2007	12:28pm	Session	Slot Rating	B0109	\$437.00
15-Nov-2007	2:46pm	Session	Slot Rating	C0114	\$8,758.66
15-Nov-2007	10:07pm	Session	Slot Rating	C0114	\$37,110.00
15-Nov-2007	10:11pm	Session	Slot Rating	C0114	\$234.00
15-Nov-2007	10:11pm	System Redeemed 93732	Redeemed: Nov 15 2007 10:11PM	Point Player	
15-Nov-2007	10:41pm	Session	Slot Rating	C0114	\$2,646.00
16-Nov-2007	12:43am	Point Adjustment		Anna Tebbutt	
16-Nov-2007	1:58am	Session	Slot Rating	C0114	\$16,536.00
16-Nov-2007	1:58am	System Redeemed 93744	Redeemed: Nov 16 2007 10:11PM	Point Player	
16-Nov-2007	2:04am	Session	Slot Rating	C0114	\$128.14
16-Nov-2007	2:04am	System Redeemed 93744	Redeemed: Nov 16 2007 2:04AM	Point Player	

126. Ms Nasir was under surveillance that day by operatives from Western Investigations. All of Western Investigations' film and their logs became Ex 22, and the log for the day reads:

FINDINGS: THURSDAY, 15TH NOVEMBER 2007 Weather: FINE

- 12.00 noon Whilst in the area on another matter the claimant's FORD FALCON Station Wagon Reg. No. 797 440 was observed parked in the SKYCITY CASINO carpark. We conducted a search of the Casino, however, the claimant was not located. We elected to remain within the Casino in an attempt to locate and observe the claimant.
- 1.08 pm The claimant was observed sitting and playing a pokie machine in the company of a female, who had previously been observed at the claimant's dwelling.
- 1.30 pm We called in the assistance of a 2nd AGENT.
- 1.37 pm The claimant sat and played a pokie machine, betting \$6.00 per spin.

FILM TAKEN

COMMENT Over the next 4.5 hours approximately, the claimant played the same pokie machine continuously, betting \$6.00 per spin.

- 6.00 pm As the claimant appeared content to stay within the Casino playing the pokies, both agents elected to cease coverage and depart the CASINO.
- 8.00 pm A spot check of the Casino revealed the claimant's vehicle was still present. We elected to enter the Casino and resume coverage.

FILM TAKEN

- 8.13 pm The claimant was observed sitting at the same pokie machine as earlier coverage, playing \$6.00 per spin. The claimant's female companion was not present.
- 8.40 pm As we had been in close proximity to the claimant for a considerable period of time, we elected to monitor the claimant from a distance.

10.08 pm The claimant continued to play and bet \$6.00 per spin at the same machine.

FILM TAKEN

11.30 pm The claimant continued to play the same pokie machine, as she had during all coverage. As she appeared content to stay at the Casino, we elected to depart the area and ceased our coverage.

127. And then there are the three segments of film spoken of in the log, thankfully a very small sample of Ms Nasir's playing that day.

128. Using all three resources, I can conclude:

- (i) That when the operatives first looked for Ms Nasir in the Casino after 12 noon, and failed to find her, she was indeed there: that she played a session ending at 12.28pm on a machine numbered B0109. My guess is that she was in the Platinum Club, but it doesn't matter.
- (ii) That, at 1.08pm Ms Nasir was observed playing on machine number C0114. That session finished at 2.46pm, by which time the machine had turned over \$8,758.66.
- (iii) That her next session on the same machine ended at 10.07pm, and in that session the machine had turned over \$37,110.00.
- (iv) That, unmentioned in the surveillance log, there must have been a break in play at 2.46pm. It may, I suppose, have been momentary and hard to spot, but I accept the Casino record on the point. Such a break would, I believe, at least involve Ms Nasir extracting, then re-inserting her card.
- (v) That \$8,758.66 is not divisible by \$6.00 (\$37,110 is), so there is something going on here that I do not understand.
- (vi) That \$37,110.00 divided by \$6.00 equals 6,185, which I take to be the number of times Ms Nasir has pushed the button during the long session observed (in parts) by the surveillance. On the film (of this and other gaming days), Ms Nasir's pushing of the button is never absolutely regular. She can be seen to pause occasionally – to celebrate a win, or to go through some arcane ritual, communing with the machine at a level a foot or so higher than the play button. But if she played about 15

games a minute on average consistently for the seven or so hours she played that machine (a rate consistent with what the film shows, although I must say I never tried precisely to time it), the numbers add up.

129. I do not know whether, after this marathon ended at 2.04am on Friday 16 November, Ms Nasir felt fit enough to attend her hydrotherapy session, or to do her three hours work at CSC. There are no notes by Mr Pennington very proximate to 15-16 November 2007. However, a week or so earlier, three sources coincide. I reproduce first Mr Pennington's notes (p 6 of 23 from Ex 23) for the days from 5 November 2007 to 9 November 2007:

05/11/2007

P/C from W; rpts she isn't able to attend work given increased sciatic pain; OT requests she attend a medical r/v to obtain a medical certificate for her work absence.

Stephen Pennington (Occupational Therapist OT) [02:010 10min]

07/11/2007

Amended RTW program No. 5 see attached; have forward to all parties;

Stephen Pennington (Occupational Therapist OT) [02:066 15min]

09/11/2007

P/C to Mary Rees; have discussed W; E rpts Charlene isn't bring her laptop to work and other staff members have indicated she is using other computers to buy and selling items on eBay and perform personal banking; indicated OT will visit school today and reiterate her work duties;

Stephen Pennington (Occupational Therapist) [02:010 15min]

09/11/2007

Conducted worksite visit; w reports fluctuating symptoms and poor sleep; W rpts she to be doubtful of any increase in activity levels as discussed with Dr Chin; W rpts she is flying interstate next week to have her teeth done and will return in week;

W rpt typical physical tolerances – standing ≤ 5mins; walking ≤ 5mins; sitting 10mins; lifting small shopping bags only rpts to shop more often given reduced lifting ability; squatting – nil; using long handled aid to reach ground height objects; medication only means of pain relief;

Stephen Pennington (Occupational Therapist OT) [02:010 10mins]

130. Secondly, I reproduce the Western Investigation log relating to surveillance on Friday, 9 November 2007:

11.30am We proceeded to CASUARINA SECONDARY COLLEGE (CSC), Parer Drive, MOIL. On arrival the claimant's FORD FALCON Station Wagon REG: 797-440 was present in the staff carpark.

We took up a surveillance position with a direct view to the exit of the car park.

2.32pm The claimant departed CSC in her vehicle.

2.41pm The claimant parked her vehicle at the PARAP shops, alighted and entered the ANZ BANK, Parap Road, PARAP.

2.44pm The claimant returned to her vehicle, entered and departed the area.

FILM TAKEN

2.50pm The claimant attended SKYCITY CASINO and parked her vehicle in a Disabled Park, within the Casino carpark. The claimant alighted her vehicle and walked into the casino from view.

3.00pm We elected to use a 2nd AGENT to assist in gaining film of the claimant within the Casino.

3.01pm We entered the Casino and located the claimant playing a pokie machine.

3.03pm The claimant sat and played a \$3.00 per spin pokie machine.

FILM TAKEN

COMMENT Over approximately the next 6.5 hours the claimant played the pokies, betting between \$3.00 and \$6.00 per spin. Whilst playing the claimant, at one stage, stood up and took a short phone call before returning to the pokie. The claimant was also observed conversing with other patrons of the Casino throughout this period.

FILM TAKEN

9.36pm The claimant stood and spoke with a casino employee. The claimant won \$7000.00 on the pokie machine and then walked across to the Cashier Desk.

9.43pm The claimant departed the Casino, assisted by a Casino Security Guard.

FILM TAKEN

9.45pm The claimant returned to her vehicle with the Security Guard. The claimant packed her handbag before entering her vehicle and driving from the carpark.

9.53pm The claimant returned to her dwelling.

10.00pm Both Agents ceased coverage and departed the area.

131. The descriptions in the log of the filmed segments of Ms Nasir's day are accurate and reliable, and I have no reason to doubt that the descriptions of the unfilmed segments are equally so.

132. Thirdly, I turn to Ex 4, the Casino record, which shows Ms Nasir to be playing at the Casino on 6 November 2007 (sessions ending 10.28am, 11.03am, 3.11pm and 5.08pm – my guess is that she did not leave except perhaps for a short while – a trip to the bank, say – during that 6 ½ hours or so); on 7 November 2007 (sessions ending 2.55pm, 3.48pm, 3.53pm and 4.29pm – a fairly short event); on 8 November 2007 (sessions ending 7.33pm – with a turnover of just over \$8,500 in that session, which I guess

would have taken a while – 7.41pm, 7.48pm, 8.57pm and 9.12pm – a longer visit: three or four hours perhaps), and 9 November 2007 (sessions ending 10.56am, 11.09am, 2.59pm, 3.02pm, 3.38pm, 3.42pm, 4.32pm and 9.38pm – that last session involving a turnover of \$28,806.66, which large amount accounts for the long time between the ends of the last two sessions.

133. I have already written about my suspicions as to where Ms Nasir was when she telephoned Mr Pennington on this day. What she told Mr Pennington about her being “too tired to attend work after hydro” and “too fatigued to discuss with [Mr Pennington], of her being doubtful of any increase in activity levels as discussed with Dr Chin” needs to be seen in the light of her being able to pass seven hours at the Casino straight away afterwards.
134. The film from the Casino from 9 November is not, in my opinion, materially different from any of the other Casino film in the matter. Ms Nasir sits for longish times. She often has a foot, perhaps both feet, up on the rail of the chair (rather like a bar stool with a low chair back attached). She shifts about a little in her seat. She gets off the seat to stand for a moment or two now and again.
135. Dr Olsen, in his report of 30 July 2009 (Ex 43) makes a respectable point about the film. Speaking of the film he had (heroically) watched, he wrote (p 2 – 3):

Dr Millons observes that she is able to spend many hours away from home. It is important to note however that although there was 12 hrs and 50 mins of video, the period over which this was taken was from 10 May 2007 until 24 October 2008. This is approximately 18 months. In approximate terms 18 months amounts to 540 days. Each of these days is 24 hr days, the video surveillance was therefore one-half of a day. It means that the video surveillance accounted for 0.1% of the time of that period. It is perhaps deceptive to think of 12 hrs as being an extra-ordinary amount of video, it is an extra-ordinary amount for any person to watch and I sympathise completely with Dr Millons. It is however not a long time in a person’s daily activities spanning 18 months. It would be prudent in my opinion to question the true value of such video footage as being

representative of what a person can do for 5 days a week of every week of the year.

136. Dr Olsen could have added that, in the nature of things, the film will unavoidably self select for those parts of Ms Nasir's life more likely to be active – because she can hardly be filmed anywhere unless she is up, out of the house (at least onto her balcony) and doing things. So the very thin slice of her life recorded on film is not representative.
137. All this is true enough. However, so far as the Casino film is concerned, I am satisfied (I have no reason not to be) that the small sample is indeed representative – at least of the time Ms Nasir spent at the Casino, and Ex 4 can, in my opinion, safely be used as a proxy for film during all of that time: not a dozen, but hundreds of hours.
138. I have taken a sample of 15 pages of Ex 4, from various times between pages 64 – the first I have - and 114 – the last complete page I have. As explained above, one must make guesses to convert the times of sessions recorded into time spent at the Casino, but, making guesses, the session times average out at 14 or 15 hours per page, pretty consistently throughout the whole set. There are 51 ½ pages, so I expect a close accounting would come to 700 – 800 hours on poker machines between 27 January 2007 and 23 July 2009 – 30, rather than Dr Olsen's 18 months. There are too many hours, her visits are too long, there are too many blocks of two or three or four successive days' visits to be explained by Ms Nasir having some good days, or by her analgesic medication being more effective at one time (after she puts on a new patch) than at others. Her use of the Casino is simply irreconcilable with the general picture she has given to the doctors, Mr Pennington and the Court.

THE FILM – MS NASIR'S CAPACITIES

139. It will be apparent that on its own, the film of Ms Nasir in the Casino refutes her claims, often made, as to how long she could sit. Those claims, or some

of them, seemed dubious even as they were made, as Dr McLaren and Mr Pennington noted at the times. Dr McLaren, Dr Olsen, Mr Millons were all told similar things, as was Mr Pennington, in his case on many occasions. It beggars belief that each and every one of these claims could have been the result of some misapprehension on Ms Nasir's part as to what she was being asked about. (I recall, but have failed to find the place in the transcript, her perhaps saying that the 15 minutes was her limit on her bad days). I can only conclude that she has not told the truth about this.

140. As to her capacity to stand, and walk, for periods of time and distances, the evidence against her claims is less emphatic, but still considerable.

141. In the first place, there are numerous filmed instances of Ms Nasir walking short distances – 50 metres or less – and standing for short periods – a few minutes. In this category I include the film of her getting out of her car and going to an ATM, or shop; of her walking from her house to the car, and vice versa; of her walking and standing in her garden, feeding the chooks and watering with a hand-held hose; of her walking within the Casino, and occasionally standing for a time. None of these many instances is inconsistent with her description of her limitations. She is never quick and sometimes distinctly slow in her walking, but I must say not especially slow compared to other older, heavier people captured on the film, including acquaintances of Ms Nasir (some of them being quite lame).

142. Still less inconsistent, in my opinion, are the filmed instances of Ms Nasir standing on her balcony leaning on the railing, talking to people below, or watching activity in her garden, or the world go by. I cannot tell how much of her weight is being borne by the railing, but at least at times, it looks as though she is leaning fairly heavily; enough to take appreciable weight off her feet, and perhaps stretch and relieve her back. I can't see how this film can count against her at all, or tell me anything about her capacity to do things.

143. In the second place, there are filmed episodes which show Ms Nasir standing, and more often walking, for times and distances which approach her self-reported limits. Foremost among these, again, is her activity at the Casino, in particular her walking to and from her car. Sometimes she used the car parks for the disabled, or owing to her status in the Casino's loyalty programme, she had the use of the 100 Club car park, rather less distant than those provided for less treasured gamblers, but the walk from that car park is still a hundred metres, more or less, somewhat uphill, to the Casino door, after which there is some distance to go before the poker machines are reached. The film that I have seen of Ms Nasir walking these metres is incomplete and these are not all that many examples to draw on, but it is safe, I believe to extrapolate from the little I can see on the film, to the scores of times she has attended. At no filmed stage of any of these walks does she look any less competent on her feet than at any other. The gentle ascent and descent does not seem to trouble her, by day (and, by inference, by night).
144. As for the film of her walking and standing within the Casino, none of that is inconsistent with her claimed limits. I have no difficulty accepting that some of her walking within the Casino would have been in order to loosen up and release her back: many a person with a healthy spine would feel the need of that after sitting at a poker machine for half the time Ms Nasir has done.
145. In the third place there is a handful of filmed instances in which Ms Nasir shows stamina, on her feet, of a higher order again.
146. On 25 August 2007 Ms Nasir was under surveillance for many hours. Of particular interest in relation to the present topic is the film (and log) of her attendance at the auction house LMPA, but I reproduce the Western Investigation log sheet from 8.15am to the end of the day:

8.15am The claimant was observed moving around the front garden area, watering plants with the garden hose.

8.26am The claimant moved in and out of view as she continued watering.

FILM TAKEN

8.27am A dark blue HYUNDAI EXCEL, two door Sedan Reg. No. 753 234 arrived and parked in the driveway, outside the closed gates. The claimant turned off the hose, picked up a large shoulder bag from the ground and entered the front passenger seat of the vehicle.

COMMENT: The vehicle was driven by an unidentified female, aged in her fifties, with short, brown curly hair.

The vehicle departed and proceeded via CHARLES STREET, STUART HIGHWAY, WINNELLIE.

8.34am The vehicle pulled over and parked on the verge of the STUART HIGHWAY and parked with numerous other vehicles, approximately 50 metres West of LMPA, 490 Stuart Highway, WINNELLIE.

COMMENT: LMPA PROJECT MARKETING SERVICES is a large compound, containing a number of large sheds. At this time a public auction of items, including light industrial machinery, offcut building materials, old computers, household appliances and bicycles, was taking place. The auction commenced at 8.30am.

FILM TAKEN

8.35am The claimant and her female companion walked along the STUART HIGHWAY, crossed over the road and entered LMPA through the main gate.

8.39am The claimant was observed as she browsed through the main shed of the property, to the right of the front gate, inspecting the items stacked in rows.

FILM TAKEN

8.44am The claimant and her companion walked out of the main shed and through the compound to a smaller shed at the rear where the action was being conducted at that time.

8.50am The claimant pushed her way through the crowd standing in the shed, in her endeavour to inspect the items displayed for auction.

9.05am The claimant stood watching the auction whilst her companion exited the rear shed.

FILM TAKEN

9.09am The claimant exited the shed and walked through the compound to the area of the main gate.

9.10am The claimant met her companion, who handed the claimant a sausage in bread, which she had purchased from a small food stand nearby. They both then walked back into the main shed and inspected the items whilst eating their sausages.

9.15am The claimant and her companion exited the main shed and returned to the smaller shed at the rear.

FILM TAKEN

COMMENT: The auction had now moved to the outside of the shed, where partially wrecked vehicles were on display.

9.22am The claimant and her companion walked from the rear shed, through the compound to the main shed, where the claimant stood at a small counter just inside the main door, to the right.

FILM TAKEN

9.25am The claimant moved away from the counter and into the shed and from view, before exiting the shed. She walked through the compound and from view near the rear shed.

9.31am The claimant walked from the rear shed, through the compound back to the main shed.

9.35am The claimant and her companion walked out of the main shed and through the main gates.

9.36am The claimant and her companion crossed over STUART HIGHWAY and continued to walk along the verge to their vehicle. The claimant entered the front passenger seat of the vehicle.

FILM TAKEN

9.37am The vehicle departed then travelled via STUART HIGHWAY, LEE STREET, WINNELLIE ROAD, HICKMAN STREET, REICHARDT ROAD, SWEET STREET to COONWARRA ROAD, WINNELLIE.

9.43am The vehicle entered CITY WRECKERS corner COONWARRA ROAD and BOWEN STREET. The claimant and her companion alighted the vehicle and entered the parts/office area.

9.46am The claimant's companion and an unidentified male returned to the vehicle.

9.47am The claimant's companion re-entered the office area.

9.48am The claimant and her companion returned to their vehicle.

9.48am The claimant entered the front passenger seat and the vehicle departed, travelling via COONAWARRA ROAD, BENISON ROAD, BISHOP STREET, ILIFFE STREET, ARMIDALE STREET, GRAHAM STREET, EDEN STREET, ANN STREET to Charles Street, STUART PARK, parking in the driveway of 20 CHARLES STREET.

COMMENT: 20 CHARLES STREET is a large, two storey private dwelling, with a large balcony on the upper level, overlooking the street. Two or three other vehicles were also parked at the premises, which is only approximately 100 metres from the claimant's address.

10.00am The claimant was observed seated at a large round table on the balcony, in company with at least two other persons.

10.40am The claimant remained seated at the table.

COMMENT: Several other vehicles arrived and departed the premises during this time. Approximately ten people were now at the table, including a number of small children.

12.07pm The claimant departed as a front seat passenger in the HYUNDAI and travelled via CHARLES STREET, STUART HIGHWAY, GERANIUM STREET, GARDENS HILL CRESCENT, MELVILLE STREET, GARDENS ROAD to GILRUTH AVENUE, THE GARDENS.

12.13pm The vehicle entered SKYCITY CASINO and parked in the public carpark, to the left of the building. The claimant and her companion alighted the vehicle and entered the Casino via the main entrance.

12.35pm We entered the Casino and observed the claimant and her companion seated in the Keno area, playing the pokie machines.

COMMENT: The claimant played various pokie machines, at times moving from one to another. She appeared to know and conversed with a number of other patrons.

2.20pm The claimant and her companion entered the gaming table area of the Casino and into THE PLATINUM ROOM.

COMMENT: To enter this room the claimant swiped a card, similar to a credit card and presumably a membership card, through a device next to the door, which activated a lock mechanism, allowing entry.

2.58pm The claimant and her companion exited the Casino and walked towards the public carpark.

- 2.59pm They returned to their vehicle. The claimant entered the front passenger seat and the vehicle departed.
- 3.00pm The vehicle proceeded via GILRUTH AVENUE, CHIN QUAN ROAD, GARDENS ROAD, MELVILLE STREET, GARDENS HILL CRESCENT, GERANIUM STREET, STUART HIGHWAY to CHARLES STREET.
- 3.05pm The vehicle parked outside the closed gates at the claimant's address. The claimant and her companion alighted the vehicle and entered the premises, closing the gate behind them.
- 3.10pm The claimant and her companion exited the premises, carrying medium sized carry bags and returned to the vehicle. The claimant's companion entered the driver's seat and the claimant returned into the premises.
- 3.12pm The claimant exited the premises, carrying what appeared to be a large pillow, and entered the passenger side of the vehicle.
- FILM TAKEN The claimant then alighted the vehicle, and walked through the front gate and back to the premises.
- 3.13pm The claimant, carrying a large black shoulder bag, exited the premises, closed the gate and entered the front passenger seat of the vehicle.
- The vehicle departed and travelled via CHARLES STREET, MARY STREET, BEATRICE STREET, FLINDERS DRIVE, JE NIEM ROAD, TIGER BRENNAN DRIVE, BERRIMAH ROAD, WISHART ROAD, ELRUNDIE AVENUE, WATER ROAD to FLOCKHART DRIVE, MARLOW LAGOON where it went from view travelling towards MUSTER ROAD
- COMMENT: MARLOW LAGOON is a semi rural estate, with most blocks approximately one acre in size and many of the dwellings hidden from the roadway.

- | | |
|--------|---|
| 4.00pm | An extensive search of the area failed to locate the vehicle and we ceased our coverage. |
| 9.30pm | A spot check of the claimant's address revealed the curtains closed and no lights on within the premises. |

147. So far as the log can be checked against the film, the log is reliable (although it must be said that there are logged details perhaps consistent with, but not discernible to me as I view the film. There are also some discrepancies of time – a minute or two here and there – which seem inconsequential to me). I see no reason to distrust the accuracy of the log so far as it is not corroborated by the film.

148. It is Ms Nasir's activities at the auction site which are of particular interest. She went there after a brief sighting at home, where she was active – not notably so, in terms of the issues in this case – watering the garden for ten minutes or so. Having been driven to LMPA, she walked competently – some of it on an unsealed verge – a distance to the main shed. Thereafter she is in and out of view, in and out of sheds, for about an hour, before leaving. Apparently not tired out by that, she got out of the car at the next stop, City Wreckers, and went into the building there for a few minutes. She was then driven to the house of a friend and near neighbour at 20 Charles Street, Stuart Park, for what reads like morning tea. After a couple of hours there, she went to the Casino for nearly three hours, then home, briefly, before going off to visit someone at Marlow Lagoon, where she stayed, probably, at least until 9.30pm.

149. Mr Barr cross-examined Ms Nasir about the events of that day (see p 735-750 of the transcript). Ms Nasir said that she had been to LMPA auctions – “I think I've been twice” (p 735); “I only go once a year, I think, if that” (p 736), and I accept her express and implied evidence that she has no definite recollection of this day, as distinct from the other(s). This places her at the

familiar disadvantage which leads to her reliance on the conditional mood in her answers, most relevantly from p 737:

Yes, but from the time that you arrived there to the time you were seen walking in to that shed at 9:23 do you agree that you'd been walking around the auction yard looking at things?---I would have looked at things in the yard, I don't usually buy things in the yard. I might have walked to the back shed, looked at what I wanted to buy. Or maybe it's already been auctioned and then I've walked back to the other shed whether you either pay or you look at other things. I don't know if I looked at other things.

So the LMPA is a large compound containing a number of large sheds, is that right?---It has two sheds. One shed has – they both have auction items in it. I would have walked to the shed, whatever shed had the item that her or I wanted.

150. And from the same page:

But do you agree that for an hour or so you walked around inspecting---? I won't say I walked the whole hour. I would have walked down and looked at what I wanted to look at or waited till it was bid, and you could sit on chairs in the other shed that are up for auction and lounges that are out everywhere, you sit on that and wait for your item to come up. And when it's finished they're usually at 9:30 that shed, everyone wanders up to the other shed where the main big shed sale is. And it's always about an hour from the other shed. So that's why we walked up an hour later I'd say.

151. And from p 738:

Let me say this to you. You didn't go into the big shed to sit down, did you, you went in there to inspect---?--- I have sat down in that big shed both times I've gone to the auction on furniture. There's lounges everywhere and chairs and office chairs. I don't stand up for an auction, there's chairs everywhere. Everyone at the auction sits on them.

So you disagree that in your inspection stage that you walked around browsing and looking at the items?---Well, my friend then had just had a knee replacement as well, so I don't think she would have done a lot of walking and we were together and she's only just come back from her knee operation.

152. And from p 739:

You pushed your way through the crowd, standing in the shed to inspect items displayed in that, that's in the smaller shed at the rear?--I pushed my way through the shed?

Well, perhaps if I could put it more neutrally, you---?---I don't have a habit of pushing my way through people.

You walked through a crowd of people who were standing in the shed to inspect items that were displayed for auction?---I probably did look at things. If I went to the shed I obviously went to look at something. And I object to you saying pushing.

All right, thank you. And then at 9:05 you stood watching that auction in the smaller shed?---It's quite likely, yes.

You then walked out of the smaller shed back through the compound towards the area of the main gate?---I probably was going home.

153. [I have inserted the question mark after the word "shed" in Ms Nasir's first answer].

154. It is obviously possible that Ms Nasir sat down at one time or another and, although I trust the surveillance log, I do not regard it as negating that possibility, indeed, likelihood if there was a convenient chair or lounge to sit on. I also accept that even if Ms Nasir had no detailed recollection of the day, she might accurately recall that her companion, whom she names as Jan Post, had recently had knee surgery. Indeed on the film Ms Nasir does seem to be getting along rather better than Ms Post. Still, Ms Nasir's overall physical performance, walking hither and yon, standing now and again, seems difficult, to say the least, to reconcile with her reported limits for both. Furthermore, her continued activity after the auctions makes it a lot less easy for me to accept her evidence (which I paraphrase) that when she overdoes it, she pays for it. On the contrary, on this day, she seemed ready for more.

155. Ms Nasir's evidence (see p 749) is that she infers, from her having picked up the pillow from home before going onto Marlow Lagoon, that she was going there to Ms Post's place, to stay the night. If so, Ms Nasir cannot

have been anticipating being laid up in consequence to her excessive exertions on the day.

156. On 23 September 2007, Ms Nasir was under surveillance for most of the morning. The relevant portion of the Western Investigation has read as follows:

8.54am An unidentified female, aged in her sixties and believed to be a friend of the claimant's opened the driveway gates and the HONDA was reversed out of the driveway by the claimant. The female closed the gates and entered the front passenger seat of the vehicle.

The vehicle proceeded via CHARLES STREET, STUART HIGHWAY, BAGOT ROAD to Trower Road, RAPID CREEK.

9.06am The vehicle entered RAPID CREEK SHOPPING CENTRE and parked in the driveway adjacent to the left of the building. The claimant and her companion alighted the vehicle and walked towards the rear of the centre.

COMMENT: At this time the RAPID CREEK SUNDAY MARKET was in progress.

9.15am The claimant and her companion wandered through the stalls and various shops at the market.

9.20am

FILM TAKEN The claimant and her companion purchased items at a stall inside the market and then walked towards TROWER ROAD.

9.27am

FILM TAKEN The claimant browsed around the stalls at the TROWER ROAD end of the market.

9.31am

FILM TAKEN The claimant returned to her vehicle, opened the driver's door for a short time before returning to the market/stall area.

9.33am

FILM TAKEN The claimant returned to her vehicle and entered the driver's seat.

FILM TAKEN

9.34am The claimant, with her female companion as a passenger, drove via SPRIGG STREET, RYLAND ROAD, TROWER ROAD, NIGHTCLIFF ROAD, PROGRESS DRIVE, PHOENIX STREET to Pavonia Place, NIGHTCLIFF.

9.42am

FILM TAKEN The claimant parked in PAVONIA PLACE, near PHOENIX STREET at the rear of the NIGHTCLIFF SHOPPING CENTRE. The claimant and her companion alighted the vehicle and walked along PAVONIA PLACE towards the NIGHTCLIFF MALL.

COMMENT: The NIGHTCLIFF SUNDAY MARKETS were in progress at this time.

9.44am The claimant and her companion entered an "Opportunity Shop" at the end of the mall.

9.50am

FILM TAKEN The claimant exited the shop and browsed through clothes racks, before returning into the shop.

9.51am

FILM TAKEN The claimant and her companion exited the shop and walked into the mall where the main part of the market was taking place.

The claimant and her companion stopped at every stall and entered every shop as they made their way through the market.

10.29am The claimant and her companion ordered some food and then sat at a table behind the food stall area, in the centre of the mall.

10.39am

FILM TAKEN The claimant and her companion continued to sit at the table, eating and drinking. The claimant's companion stood up and walked away from the table.

10.42am The claimant's companion returned to the table with an unidentified male. They both sat down at the table and conversed with the claimant.

10.58am The claimant, her companion and the male stood up from the table and continued walking through the market.

11.08am

FILM TAKEN The claimant and her companion walked back through the market towards PAVONIA PLACE and out of view.

11.11am

FILM TAKEN The claimant, now carrying a large stainless steel container and shopping bags, walked with her companion from the mall area and along PAVONIA PLACE, towards her vehicle.

11.12am

FILM TAKEN On arrival at their vehicle they place their shopping into the rear of the vehicle. The claimant picked up the large stainless steel container from the ground and placed it in the vehicle before entering the driver's seat and her companion entering the passenger seat.

The vehicle departed and travelled via PAVONIA PLACE, PHOENIX STREET, PROGRESS DRIVE, NIGHTCLIFF ROAD, BAGOT ROAD, STUART HIGHWAY to CHARLES STREET.

11.26am The claimant parked her vehicle on the nature strip at the front of her address, alighted and retrieved their purchases from the rear, which they then carried into the premises.

157. Again, what film there is corroborates the log, with minor inconsequential details differing slightly. Anyone familiar with the two markets – especially Rapid Creek – will appreciate that it would be a difficult milieu in which covertly to film someone – or overtly, for that matter. The film from Rapid Creek is exiguous. That from Nightcliff is rather better: longer takes, more coherent, fewer obstacles between camera and subject.

158. Mr Barr cross-examined Ms Nasir about her activities that day (see transcript p 750-755). In respect of the time spent at Rapid Creek market (which is not far outside Ms Nasir’s self-reported limitations), she said, at p 751:

MR BARR: Ms Nasir, what I suggest occurred that day was that from 9:15 through to 9:30 or thereabouts, you just walked around the Rapid Creek Markets with your sister?---I went there with my sister and obviously walked a bit, yeah, or walked around.

You wandered through the stalls and various shops at the markets?--- I don’t usually go into any shops at the market but I walk around – I would have looked at the stalls and bought food.

159. In respect of the time at Nightcliff Market, which is a lot longer, Ms Nasir again makes the point (on p 752) that she has no particular memory of this particular day, “you don’t really think I remember this, do you?”. Notwithstanding that, she doubted, sincerely in my judgment and perhaps correctly, that she had, as the log said “stopped at every stall and entered every shop”. Otherwise, she said, at p 753:

MR BARR: Ms Nasir, if in fact, you walked around in the markets for 45 minutes or so that day with your sister, that would indicate that you had a walking capacity of about 45 minutes, would it not?--- I don’t say I was walking the whole time. I would have – we would have stopped. She’s a tourist, she goes to a stall, she would have been buying gifts for her children, she would have been buying gifts

for her family, that's the intention of her coming to Darwin. And that would have been at both markets. But this market in particular is where all the things she buys. So that's not walking 45 minutes not stop, sir.

No, no of course. As I said to you, you were walking and stopping and walking and stopping?---So I'm not saying I'm walking 45 minutes there, no.

But you didn't sit down from 9:42 through to 10:29?---I don't know that and I don't recall.

160. And on p 754, having been reminded that she had told Mr Pennington on 13 September (10 days earlier) that she had a standing tolerance of five minutes or less, she said:

And yet on this day it appears as though you were able to walk and stop and walk around and stop for something like three-quarters of an hour?---Okay, and when I am standing, I'm talking about standing in a queue or you stand still, you're not moving. Here I can stop, stand, walk a little bit, right. I cannot stand in queues and I can't stand still. If I was standing there looking at a stall, if I started to get sore I'd walk a little bit or go the other foot, walk around. I can't do that in a queue and Stephen knows that, I always talked about queues, okay. As for the walking itself, I'll walk 50 metres straight, I can, right. Okay, sometimes I'm stiffer, sometimes I'm tight in my back and you can see how I'm walking. The next 50 I'll be walking slower. The next 50 I turn into Mrs Plod and that's when you see I have to walk like that, okay. And that's what I said myself, I walk out here, I can get across to that next corner and I'm walking not too bad or I think I'm not walking too bad, I'm not walking like you. But I walk the next 50 metres, I'm walking a very lot slower. And the next 50 metres I turn into Mrs – well, as my kids call it, Mrs Plod.

161. And (on the same page):

So what was depicted or what I've suggested to you occurred at the markets that day is consistent with your abilities throughout?--- Sometimes I have a good day and I have a bad day. Some days you won't see me do that.

162. After her return home, Ms Nasir stayed indoors and invisible to surveillance, which ceased at 3.30pm. Her car was still parked there at 5.05pm, but was

gone at 5.30pm, and not to the Casino. I assume Ms Nasir went out that evening. I wouldn't expect her to remember where. The car was still absent, and not at the Casino, at 8.20pm. Again, I conclude that the day's activities had not worn Ms Nasir out, and, as it happens, I can be sure she was not prostrated on the following day as a reaction to overdoing it, because there was surveillance on 24 September 2007 as well.

163. In the film taken that day, Ms Nasir is seen to walk from her house in Charles Street via Coronation Drive to the Westralia Street Shops, in particular to the Stuart Park Surgery to see her GP, Dr Tamayo, and, a little later, to walk home again. She walks slowly – perhaps a little more quickly than on her longer walks to and from LMPA on 25 August 2007, when she may have been fractionally slowed down by her lame companion – and steadily. To my eye it was not the case at all that her walking slowed on the journey of some hundreds of metres, nor that it changed in character in any discernible way. If Ms Nasir was ever “Mrs Plod” on that walk, she was Mrs Plod throughout it.

164. The Western Investigations log for the day notes that Ms Nasir's car was parked at her house that morning. It seems to follow that she had chosen to walk, rather than being forced to by want of any other option. The film of her walking is obviously inconsistent with the evidence she gave at p 754, quoted above. It is inconsistent with the limitation of “approximately 5 minutes” walking that she spoke of to Mr Pennington in August 2007. It is also difficult to accept that the 24th of September was a particular “good day”, given how well Ms Nasir had got about at the markets on the 23rd.

165. It is still more inconsistent with the limitations she described a few months later. Mr Millons' examination on 11 March 2008 (see his report of 12 March 2008, p 3 – part of Ex 1) has him saying:

“She can only sit for a maximum of fifteen minutes. Sitting is probably somewhat easier than standing. Walking can help but she

probably cannot manage much more than 20m – 30m before having a spell". [my emphasis].

166. To Mr Pennington she repeated (his Progress Report of 18 February 2008) "a walking tolerance of less than five minutes", then (his Progress Report of 30 April 2008) one of "approximately 5 – 10 minutes", then (his Progress Report of 25 June 2008 "a walking tolerance of less than 5 minutes before pain increases and she needs to rest". (All of Mr Pennington's Reports are in Ex 23).

167. On 22 May 2008 Ms Nasir was once again under surveillance by Western Investigations, whose log, relevantly for present purposes, records:

4.56pm The claimant departed as driver and sole occupant of the maroon FORD FALCON Station Wagon, registration number 797 440 and travelled a few hundred metres down the street where she parked from view in the driveway of 1/20 Charles Street.

5.39pm The claimant was observed to depart as rear left seat passenger of the maroon FORD FALCON Station Wagon, registration number 797 440. The vehicle was driven by an unidentified male with two other unidentified males and an unidentified female as passengers.

5.54pm

FILM TAKEN The vehicle arrived at CHARLES DARWIN UNIVERSITY where the claimant was observed to walk into the university grounds.

COMMENT We proceeded into the CHARLES DARWIN UNIVERSITY where the claimant was observed to enter as a visitor to a graduation ceremony. The ceremony was for ticketed guests only, so we returned to the car park.

8.23pm

FILM TAKEN The claimant was observed to walk back to the car where she stood at the rear conversing, before boarding the vehicle as left rear passenger.

8.27pm	The claimant departed the area.
8.54pm	The vehicle parked on Mitchell Street and, due to traffic conditions we had to pass by. Once we had parked our vehicle the claimant was from view.
9.30pm	We made a search of the surrounding restaurants and bars but were not able to locate the claimant and accordingly we ceased coverage.

168. Again, the log is accurate enough where it can be checked against film and there is not much reported but unfilmed which is of great interest. Ms Nasir's walking seems less steady than it had been in the 2007 films. There was an immediate reason for that: Ms Nasir had undergone surgery on her knee on 6 May 2008 – see transcript of cross-examination at p 655 and then, at p 669:

“You were still limping somewhat after your surgical procedure, is that right?-Yes.

169. The film of Ms Nasir walking does not show her covering a great distance – a bit more. I think, than she would have habitually done at the Casino. But she limps the distance competently enough, ascends a few stairs with the assistance of a hand rail and disappears into the graduation ceremony. On coming out, she walks just as well, or badly, back to her car, and then stands around, waiting according to her evidence (see p 679) for the graduate to return from being photographed etc. The wait was long enough for it to be expected that Ms Nasir would experience discomfort, at best, if her reports of standing tolerance were correct. She does lean on a motor car for much of the time – how heavily it is impossible for me to tell: the film is not at all clear in this instance – and she was of course free to shift her weight about, move a step or two etc. All the same, her walking, in the circumstances, and her standing, are both rather more than one would expect of Ms Nasir's normal reports of her respective capabilities, still less of the lamentable reports of March 2008 (to Mr Millons) before her knee surgery and June (to Mr Pennington) after it. I would have expected her to sit in the car at some

point, as she could easily have done, if she had been as bad on her feet as she said she was.

170. Considering these four filmed instances (22 May, 25 August, 23 September 2007 and 24 September 2008), I conclude that Ms Nasir has at least greatly exaggerated her degree of disability in standing and walking. I do not have enough evidence to say, confidently what her upper limit is, but it has been shown to be more than ten minutes walking, and more than half an hour on her feet at one time. There was no visible sign of her being anywhere near the end of her tether when she arrived at the Stuart Park Surgery on 24 September 2007, or after her protracted amble through the Nightcliff Market, or on either of the other films discussed above. Whereas in the case of her capacity to sit, the evidence is extensive, and persuades me that she is often able to sit for as long as she wants to, in respect of her standing and walking there is not enough evidence positively to conclude anything like that. But there is enough to conclude that her own accounts of her limitations are not true.

171. As to limitations on the use of her right arm, the film is, in my opinion, less conclusive that it is in relation to her walking and standing. There are a couple of instances where her arm is raised far in excess of what she told all the doctors, and Mr Pennington, was possible. These occur when she opens the boot of her car (the Falcon, not the present Honda). Film of that happening has been shown in Court during the Employer's case, and it must have made an impact on Ms Nasir (as it did on me) because she brought it up early in her examination-in-chief. At p 605 she says:

Does that pain in the top of your shoulder going across to your neck, that's behind your ear, how does that affect you in terms of what you do during the day?---Well, like everything I'm learning to live with what I've got. I mean if I don't I'm nothing. So, if I overdo it I pay for it that night a bit, and then the other times, like, once I shook hands with a man and he jerked my arm. For three weeks I had hell, and that was probably only 18 months ago. I never shake hands with men. You know, I do certain things to protect myself, you know.

Sometimes I stuff up, too. I mean I've got a car that's that automatic boot, it flings up I go up with it. It'll hurt, it will pull in here (indicating) after, and here (indicating). But that's part and parcel of it. I just have to accept these things and --- [my emphasis].

172. That is indeed, what seems to be happening when the boot opens. The film is not of wonderful technical quality, and the fact that I cannot see Ms Nasir flinch or reach in any way to what she says was an occasion of pain, may not mean that there was no pain. More troublesome is the question why, if this boot does run away with her arm to a painful degree of elevation, has she not learnt to open it with her other hand, or otherwise avoid the avoidable incident. Even more troublesome is the filmed event on 1 June 2007, described in Dr Olsen's second report (Ex 41) headed Video Surveillance. At p 6 of 39 he writes:

10:15 The video recommences showing Ms Nasir walking with a male person from the Thrift Shop premises. She has her shoulder bag on her left shoulder. She walks to her own car accompanied by the male person who appears to be carrying what appears to be an urn. He places the urn into the boot of the car and then shifts or rearranges objects within the boot.

Ms Nasir then closes the boot. She reaches forward with the left shoulder in forward flexion of approximately 90 degrees. **This therefore exceeds the displayed forward flexion of 70 degrees that I observed when I examined her.**

173. Again, I cannot recollect there having been any visible sign of unusual discomfort accompanying this, more voluntary, extraordinary flexion of the arm.

174. Dr Olsen noticed a few other anomalies in the 13 odd hours of film that he viewed. His conclusions in relation to the shoulder movement are on p 29 of 39:

With regards to the right shoulder, Ms Nasir displayed a significantly greater range of movement than that which I obtained when examining her clinically. I did however not see any abduction above 90 degrees on video and I did not see forward flexion above 90

degrees except for one single episode of forward flexion of the right shoulder of 100 degrees approximately in DVD No 8, 22.2.2008 at 16:10 and on a second occasion on DVD No 10, 13.9.2008 at counter setting 6:40.

I consider that the difference in the range of movement in regards to the shoulder is not any greater than what I would anticipate based on the known reliability and validity levels that apply to clinical examination of injured workers.

175. Should anyone wish to examine in detail the observations which led to that conclusion, I refer her or him to pp 3-27 of 39 of that Report (ex 41), reading which also gives a further insight into the ordeal of watching the film.
176. A fair proportion of Ms Nasir's filmed anomalous shoulder movements, as described by Dr Olsen in those pages, occur during her poker machine playing, either in her reaching to the higher level of the machine to insert or remove her card, or whatever else is done there, or in celebrating wins by punching the air. What I know, and Dr Olsen did not then know, is the extent of Ms Nasir's gambling. Again, it seems to me entirely fair to infer that she would have made the same or similar anomalous movements in proportion to the times recorded in the Casino document, Ex 4. I doubt whether that knowledge – that there may have been scores or hundreds of such anomalies, not just the filmed handful – would change Dr Olsen's overall opinion.
177. The other aspect of the film touching on incapacity deriving from the shoulder injury comprises the various items picked up and carried by Ms Nasir. As far as I can remember, the heaviest looking of any of them was a stainless steel object at the Nightcliff Markets, held in both hands. In my opinion, nothing shown on film demonstrates clearly that Ms Nasir has a much greater capacity to lift and carry things than she says. It also seems to me that taking the film as a whole, her lifting and carrying is done

disproportionately with her left hand (for a right handed person, as she is) enough to suggest to me that she favours her right arm when she can.

178. Overall then, I conclude, as Dr Olsen has, that Ms Nasir has somewhat overstated her incapacity. That overstatement has its effect upon her credit, especially when she persisted in it during her evidence, but I am not persuaded that the rather larger range of movement visible on the film translates into significantly more function than Ms Nasir has claimed.

179. As to limitations on Ms Nasir's bending forward – to pick things up and so on – Dr Olsen is similarly indulgent of observed anomalies. On pp 29-30 of Ex 41 he writes:

With regards to the low back, the display in the total footage was not inconsistent with my clinical findings. Although on a few occasions she was reaching to a level below that which she displayed when I examined her, the clinical examination was one in which there was no flexion of the knee allowed and in which the clinical setting frequently leads to a somewhat more strict or stiff performance of movement such as spinal flexion. I did notice that on some of the video footage when she was reaching forward to floor level she did so with one foot forward and knee bent, this significant increase in the available range of forward bending and reaching. That mere fact was a confirmatory factor that she did have restriction on the basis of the lumbar spine.

180. I don't suppose I can quarrel with that, restricted as it is to Dr Olsen's simple juxtaposition of the film and his examination of Ms Nasir. The material before me, however, is richer – more film for one thing, and more reports of descriptions by Ms Nasir, in particular, passim in the Progress Reports of Mr Pennington:

“Ms Nasir reports the continued use of long handled aid on her unaffected side to collect objects from the ground”.

181. And in Mr Millon's report dated 12 March 2008:

She cannot really bend. If she needs to get anything from the floor under the bed she has to lie down to do that. She avoids lifting.

When picking things up from the floor she uses a picker-upper. She carries her groceries in stages.

182. In seeking to explain some of these anomalies, Ms Nasir, in cross-examination (see p 845-6) said she had been taught, and had gradually learned to put into practice ways of working around her difficulty in bending. She was speaking in response to questions about a filmed sequence from 9 September 2008, and said:

MR BARR: Ms Nasir, I just noticed that when you bent down there, you put your hand on your knee to steady yourself when you bend over?---Mm.

Is that the way you've worked out to get around?---There's three ways I do it, I (inaudible) go down I use my hand up --to get up. Whenever I swing (inaudible) leg up here that's way, but swing one leg. I learnt things from when I was hospital in Adelaide they told me, when I started doing things.

So you could---?--- I could bend, but I -- I -- like if I -- if I go to the doctor they tell you to touch your toes, but I can't touch my toes.

Sure?---But I can go out and do other things.

But you managed to work your way around that bar ---?--- Well it's taken a long time.

---the techniques you've identified?---Well it's taken a long time, but I'm getting there.

Yes?--- I still do things wrong, unfortunately, but most of the time I get there.

183. And further, with particular reference to Mr Pennington's oft reported "long handled aid", at p 847 said:

MR BARR: Ms Nasir, you -- do you have things -- any devices like tongs to lift things up off the ground?---When I came from Adelaide I've got the long one and short one, I use them all the time, but over the last couple of years I haven't been using them. I can't even find them actually, they're in the house somewhere.

It appears as though you bend over and pick things up just using the -
--?--- I've – I've learnt – I've learnt to.

Yes?--- It's just that sometimes when you're downstairs – when I
first did I used to use them all the time, but – especially in Adelaide,
but not up here.

After your surgery?---Yeah.

Yes?---Mm. And that hospital got them for me.

But by 2007/2008/2009 you didn't ---?---No, no.

--- use them anymore, is that right?---No.

184. In the light of that evidence, I can't see how I could conclude that Ms Nasir is hugely incapacitated when it comes to bending forward. No doubt she needs to do it slowly, carefully, perhaps infrequently, and I accept that she cannot safely pick up weighty objects from ground level. I don't know how much worse that makes her than the average 60 year old who is grossly overweight, but it seems Ms Nasir has rehabilitated herself in this respect to an extent that will not disqualify her from doing a job just because the job involves a need to bend down.

CONCLUSIONS ABOUT THE EXPERT MEDICAL EVIDENCE

185. As will have been apparent for some time, I am of the opinion that Ms Nasir has substantially misled these doctors whose evidence I heard about the degree of her incapacities. Revision of the facts necessitated by the revelation that Ms Nasir's accounts were in various and to various extents, wrong, must lead to some revision of the opinions, if not by the doctors themselves, then by me, doing the best I can to work out how much a given opinion depends upon information now proved to be false.

186. Mr Millons has revised his opinion for himself, as set out in paragraph 33 of these Reasons. After a relatively superficial look – an hour or so – of some

film, and some surveillance logs, he concluded (at p 3 of this Report of 30 June 2009, part of Ex 1):

Summary

As far as one can gather then from the areas you direct me to, Ms Nasir does have a capacity to move around in a fairly unrestricted fashion, perhaps occasionally waddling. She does have a capacity to sit for long periods playing poker machines and she is able to spend many hours away from home.

187. I should add that by using the words “relatively superficial”, I do not mean adversely to criticise Mr Millons, only to compare the amount of film he reviewed with that reviewed by Dr Olsen (and by Counsel and me).
188. Mr Millons then went on to comment on, sometimes criticise, Dr Olsen’s second report (Ex 41) in which Dr Olsen describes his viewing of the 13 odd hours of film, and sets out his conclusions there from.
189. In the next passages, I quote Mr Millon’s final paragraph of such criticism, together with his report’s last words on Ms Nasir’s work capacity. From p 6 of the Report of 30 June 2009:

Dr Olsen goes on to note that any medical specialist who given an opinion as to whether a patient is capable of increasing working hours or not must consider other factors than those usually ascertained by most of his specialist medical colleagues. One wonders what those other factors are. One can only really rely on the clinical evidence, the impression of the patient and their statement when trying to ascertain capacity for work. If surveillance shows features inconsistent with the statements made, that would certainly lead one to modify one’s assessment of work capacity.

If Ms Nasir is able to spend many hours at the Casino with long hours sitting at the poker machines, then there should surely be no reason why she could not be in a workplace at least 3 hours a day, sitting at a desk dealing with student matters. I remain unconvinced that she is incapable of increasing her hours beyond their current level.

As previously stated, I can see no reason why she could not increase her hours to 3 hours a day, 5 days a week as a career adviser and there would probably be no reason why she could not increase her hours even beyond that.

She would clearly be advised to avoid work that entailed excessive use of her right arm above shoulder height, avoid lifting more than 10kg and avoid working in awkward or confined spaces. Provided she could get up and move around from time to time as needs demanded, she would probably be fit for fulltime (7.5 hours a day) light duties.

190. Dr McLaren, as has been seen, likewise revised his opinion on receipt of information about the results of the surveillance, including watching about an hour of film. In his evidence, particularly in cross-examination, he fairly conceded that his revision might be an overreaction if, for example, the film showed Ms Nasir at an atypically cheerful time, or for other reasons including, I thought, the smallness of the material he had viewed.

191. In any event, Dr McLaren's opinion in the case is not really a specialist's one. He was originally drawn into the case, it seems, when there was a thought that there might be a psychiatric component to Ms Nasir's injury. That possibility has not been realised in the pleadings. Dr McLaren's opinion is that of a medical practitioner who examined Ms Nasir once, using a questioning technique directed to a psychiatric assessment, and who was told things by her about her physical condition as it were *en passant*. The refutation of some of these things changed his opinion about her physical condition, as one would expect. An explanation for some of the apparent refutation tended to change some of the changes, as one would expect. In the circumstances, his assessment of her capacities does not carry a great deal of weight. The most significant use I make of Dr McLaren's evidence is in respect of my assessment of her honesty when talking to medical men.

192. Dr Olsen, as has been seen, hardly revised his opinion at all, notwithstanding the amount of film he closely viewed. He held his ground

in cross-examination, whatever examples of Ms Nasir's unexpectedly lively behaviour were thrown at him.

193. In the final analyses, I am persuaded, for a number of reasons, that I cannot accept Dr Olsen's opinion of Ms Nasir's capacities. First, he, like everyone else, has been supplied with an amount of false description by Ms Nasir, and denied by her knowledge of a wealth of other information, the prime example being her time at the Casino. That is to say, there has been a substantial *suggestio falsi*, and an even large *suppressio veri*. I know a lot more than Dr Olsen does about a lot of Ms Nasir's doings which contradict what she told him as to her capacities.

194. Secondly (although this is really another aspect of the same point), I am not persuaded that Dr Olsen even grasped properly – or even had a fair opportunity to grasp, to be fair to him – just how egregious these contradictions were. It appears from Ex 41 that Dr Olsen based his opinion on his original report, the film, and nothing else. In Ex 43, his report of 30 July 2009, he disapproves of Mr Millons having had regard to other material thus (p 3 of 10):

It appears that Dr Millons has taken account of my observations in relation to what I observed on the video. I would consider that to be reasonable. I do not consider it reliable and valid to base a medical report or medical opinions on basis of a private investigator's observations of what is seen and selectively reporting on the video.

195. Fair enough, I think, if Dr Olsen is referring to any judgment by the private investigator as to the quality of the observed actions – walking, arm raising, etc – but unduly restrictive in my opinion if Dr Olsen thereby fastidiously excludes from consideration broad, bare accounts of Ms Nasir's actions “she walked from A to B, then got in her car – drove to C – went in there for an hour, came out – drove to D, etc”, which accounts have, at times, Ms Nasir leading active, full days – for example, in three of the four examples of Ms Nasir standing and walking, treated in detail above (25/8/07, 23/9/07 and

22/5/08), the standing and walking were just a part of busy, reasonably long days. The Casino records Ex 4 have Ms Nasir leading many long, if not especially active days, and indeed, nights and early mornings. Had Dr Olsen been asked to consider this mass of facts, he would not have altered his opinion as to Ms Nasir's capacity to say, adduct her right arm, but one would hope that he would at least have subjected to reconsideration his earlier judgment as to how much work she might be capable of doing.

196. Thirdly, which in a way is a development of the first two points, the fact that Dr Olsen did not seem perturbed when, even as he was examining Ms Nasir, he received at least one set of information which he cannot have believed. This was Ms Nasir's answers to the General Health Questionnaire, recorded and commented on at p 23 and 24 of 39 in Ex 40, Dr Olsen's initial report: in the part headed (at p 21) "Psychological Factors". Dr Olsen wrote (p 24 already quoted at paragraph 51 above):

SCORE 12/12

The score in the GHQ-12 is quite extreme. It is indicative of poor mental health. I did find that during the clinical interview Ms Nasir had an almost obsessional approach to describing her symptoms. When she completed the written questionnaires she added numerous comments explaining details which were not required and were not requested in the questionnaire. It appears that based on the GHQ-12 that together with the other observations that I have made, that Ms Nasir does have a psychiatric condition which in my opinion is likely to be secondary to her injuries and ongoing pain and loss of function. This means that she does require psychiatric assessment and treatment as appropriate.

197. Commenting upon this, Dr McLaren said (in the note headed "Summary of conversation Barr/McLaren Wed 12 Aug 8.01 to 8.44am"):

"The CHQ score of the worker was 12/12 indicating a severe mental disorder, profound disability, need for hospitalisation. This was at odds even with her presentation to me on 16 September 2008 and is very much at odds with the activities described and depicted in the surveillance materials provided to me".

198. This note is part of the McLaren Bundle, Ex 13. Dr McLaren goes on in it to disapprove of the use of the GHQ at all, in the circumstances. I am not here concerned in their debate about its appropriate use. I am concerned about Dr Olsen being unfazed by obtaining a result from GHQ that obviously did not fit the circumstances of Ms Nasir when he saw her. My concern is not about Dr Olsen's competence, but rather about what this unremarked upon disparity shows about his willingness to accept psychological and social effects as contributing to the incapacity of injured people in general, and Ms Nasir in particular. Whether he is absolutely correct to do so is not the point for my purposes. The case before me is bound by the pleadings which assert on Ms Nasir's side that she is incapacitated by pain.

199. Fourthly, there is the matter raised at paragraphs 57 and 58 of these Reasons concerning Dr Olsen's opinions being based in part upon his own research findings. I refer in particular to Dr Olsen's fourth report, Ex 43, of 30 July 2009, leading to the passage I have quoted already (p 4):

My findings are not new in the sense that work in Sweden Linton et al has described the powerful effect of psychological and psychosocial factors resulting in long term occupational disability.

Linton is in fact the author of the OMPQ and it is clear that this measure is the best indicator in workers with long term injuries of whether that person is back of work or is likely to return to work.

It is only too simple to watch the patient play poker machines, reaching for things, walk around and sit around and assume that there is nothing to stop her returning to work because the effort required of her work is no different to the effort required to play poker machines, reach for common objects, walk around the street and speak to her family and friends. There is however no scientific basis on which one can reasonably insist that that is the case.

200. Here Dr Olsen's incorporation of psychological and psychosocial factors into his assessment of capacity could hardly be more explicit. I cannot, in

my judgment safely apply an assessment so arrived at to a case pleaded as incapacity caused by pain.

THE JOBS ON OFFER

201. It will be recalled that one of the positions asserted by the Employer as suitable for Ms Nasir's full-time employment was a Careers Advisor position. Ex 26 is a two page list of 50 or 60 dot points listing the tasks and duties of Careers Advisors. As a guide to assessing the physical requirements of the job, the list is fairly useless. What, for example, would a person have to do who was detailed to "Oversee enrolments for both NTOEC and interstate Open Access Colleges?".
202. A second document, also from Casuarina Senior College, apparently collects these dot points and rearranges them under 15 sub-headings that make it more possible to have some sort of idea what actions might be required to carry out each of them. This document was forwarded to Dr Olsen with a letter dated 12 June 2009 from Ms Nasir's solicitors, and the document and letter of instructions are attached to his Supplementary Medical Report, dated 15 July 2009, Ex 42. (Also forwarded to Dr Olsen was a document of which Ms Nasir was the author, in which she related her beliefs as to her capacity to carry out the tasks contained under those 15 sub-headings. I will come to Ms Nasir's document in due course. A copy of it became Ex 21 in its own right).
203. Two witnesses in the Employer's case worked as Careers Advisors at CSC, and their evidence fleshed out the bare descriptions provided by the documents. The second of these was Mr Cox, whom I mentioned in paragraph 16 of these Reasons. He was called principally, I think, to demonstrate the real (as opposed to theoretical) flexibility of the Employer when it came to dispensing with the usual classroom teaching component of a teacher mainly employed in careers advising. His touching evidence – that

the job had been a lifeline for him – did not much go into detail as to the physical demands of the job.

204. The first of the two was Ms Kylie Murphy. Her evidence and her cross-examination were largely concerned with expanding the information in the job description. On p 429 of the transcript, Ms Gearin, in the course of a question, said “... I can see that you’re a very enthusiastic and physically well person ...”. I thought so too. She was also fairly young – in her early thirties perhaps. The reader of her evidence, which was to the effect that the physical demands of the position are so trivial as to scarcely warrant a mention, needs to bear these things in mind, when measuring up the duties against Ms Nasir, who is hurt, looks older than her 61 years, and is anything but enthusiastic. Ms Murphy was one of these witnesses – Ms Bannan was another – whose commitment to and enthusiasm for the work they are doing, motivated by a belief in its value, make me feel ashamed to be a lawyer.

205. Dr Olsen, in his report Ex 42, considered the various tasks involved in the Careers Advisor job, and concluded that, by and large, the biochemical demands were low. He had some reservations in relation to her taking part in excursions – to work places, etc. Further, it is my opinion that Dr Olsen misunderstood the physical tasks involved under the heading “Careers Expo”. I make no criticism of that – the job description is quite opaque, and only Ms Murphy’s evidence – for example on p 418 – permitted me to grasp that this heading too involved excursions outside of the school being responsible for and (hopefully) in control of numbers of students. Had Dr Olsen had the benefit of that evidence, I am sure he would have had reservations about that task as well.

206. Once or twice in her evidence (at p 524, for example), Ms Nasir spoke feelingly of an episode that happened at Bunnings, when her sciatica flared up to the point where she simply could not go on. I was impressed by this piece of her evidence and I am persuaded that it happened. I do not know

how often similar things have happened to Ms Nasir when she was out and about – her evidence, where it tended to generalise from this example, was not persuasive. I also accept that such a thing having happened even once, she would be very apprehensive of its happening again. I accept her evidence generally that she cannot say in advance whether a given day in the future will be a good day for her, or a bad day. (As a general rule, if I understand correctly her evidence concerning her medications, the days immediately after she applies a fresh analgesic patch are quite likely to be good, and the days at the end of a patch's useful life are much less likely to be good, but neither is guaranteed).

207. Dr Olsen's opinion as to the biomechanical demand of the various tasks would seem to be unaffected whether Ms Nasir were working three hours per day, three days per week, or full-time. But his opinion as to Ms Nasir's capacities was that she would be limited to the 3 x 3 pattern of work. I infer that his reservations (about the tasks that involve her getting out and about) would be stronger if he could be induced to suppose Ms Nasir to be capable of working full time. These reservations might also extend to the tasks described as "Parent Information/Open Nights" and "Professional Development", if those tasks involve much in the way of movement by Ms Nasir without constant opportunity to sit down when she needs to.

208. Mr Millon's opinion of her capacities, revised in the light of the limited amount of film he watched was, as he wrote in his report of 14 April 2008 at p 5:

When I saw her last, I felt she should be able to work 3 hours a day, 5 days a week as a careers adviser. If she was just doing careers advising work on a one to one basis, then she should probably be able to handle that work full-time, particularly if she was able to spend long hours sitting down as demonstrated at the Casino. [My emphasis].

I note when I first saw her that she was teaching Tourism. Face to face teaching of a classroom of students may be difficult if one

accepts that there is some minor irritability at the right shoulder and in the lower back.

To give her the benefit of the doubt, she would be advised to avoid excessive use of her right arm above shoulder height, to avoid lifting more than 10kg or working in awkward or confined spaces. Provided she was able to sit, stand and move around as needs demand, she should be able to handle work with those restrictions.

209. As far as I could tell, even at the end of his cross-examination, Mr Millons had not been asked systematically to consider the biomechanical demands of the various tasks, properly explained, of the Careers Counsellor position. His discussion of the position appear to assume that the job is restricted to advising students, one on one, in the workplace setting i.e. at CSC, and doing the necessary moving about in that setting to collect materials pertinent to that task. Notably he was not aware, as far as I can tell, before being cross-examined, of the tasks that involve movements out of the office. If he had been, he would have been less well placed than Dr Olsen to comment on Ms Nasir's capacities to perform these tasks, because he had seen less of her moving in the (fairly short) sections of film he had watched.

THE "FULL TIME ADMINISTRATIVE ROLE"

210. Ms Bannan's evidence was touched upon in paragraph 84 above. I accept her evidence that the tasks she had in mind for Ms Nasir, if Ms Nasir joined her unit, was principally as a research officer. She said (transcript p 478):

"I hadn't thought that this position would entail school visits or anything like that. Obviously, as a bona fide member of the team, to refer calls, you know, deal with general enquiries, yes".

211. And Ms Bannan went on to say that there was enough work, by way of research, plus a bit of this general enquiry answering, to justify a full time position.

212. No description of the tasks associated with this position was ever given to Ms Nasir, nor to Dr Olsen or Mr Millons – for good reason: the job had

never been done; it was a new idea; its content would no doubt have evolved if Ms Nasir had taken it up. So I am not in receipt of any expert opinion as to Ms Nasir's capacities to perform this position's tasks. I must do what I can with the material I have.

213. I have twice (paragraphs 24 and 202) of these Reasons, mentioned another source of information from Ms Nasir, Ex 21. She wrote this document, her own commentary on her fitness for the various duties of the Careers Advising position, to be forwarded to Dr Olsen for comment. The document is ten pages long, single spaced and very repetitious. I quote a page or so of it, her comments in relation to one of the duties:

Question 1 Subject selection/subject advising

1. do I have the qualifications/an or skills to do this duty

I do have the qualification and skills to do these tasks. The Educ Dept has planned that in the future all employees must have a qualification in Career Advising and whilst on Work Comp leave and sick leave during the past two years I have undertaken the inservices required to pass this Certificate.

2. Walking, standing, sitting down time and face to face meetings with students and others

These tasks undertake one of the major roles in this position. At certain times of the year, Pre Sem 1, first five weeks of Sem 1, End Sem 1, Beginning of Sem 2, end of Sem 2 and during holiday breaks on enrolment teams, these tasks are constant.

It involves hours of sitting, walking about to get photocopies, find resources, do internet searches and to meet and greet parents and studies when they arrive and depart. Constant.

Face to face meetings with students and parents is virtually all day, everyday and particularly busy at recess, lunch and the rest of the time is attending to students, parents who are booking in at 20 and/or 30 minute intervals. It involves setting up the room, furniture, displays etc. both high and low displays, twisting, bending to adhere posters and attach drawing pins.

3. How this affects my health?

The major affect on my health is on a scale. On a reasonable day, I can attend to my booked in students/parents. I get up and down as required, but as it requires researching, copying etc. I find it impossible for me to stretch my back and ‘rock’ sideways to stretch whilst photocopying, but from my experience over the past five years whilst participating three days a week, 3 hrs a day, I am quite tired when I go home. I often go to Hydro to stretch and then go home to lie straight, to ease the resulting pain immediately across my lower back and sharp sciatica. The only way to alleviate it is to take two Panadol Forte and continue regular pain killer Norspan Patches and other medications and lie down for at least ¾ hour.

On the other hand, on a bad day, ie. a day when my lower back is already painful before I go there to work and the sciatica is already ‘ripping’ from my rump to the back of my both legs, the tasks are virtually unbearable. Even if I took two Panadol Forte and then started, it has been a nightmare for me to attend to ‘clients’ continuously as when I sit the pain in the lower back is accentuated when I have to lean forward to show students and parents information, lift up resources, get up and find the resources, both physical and online, walk to the printer and/or photocopier, return to clients, sit and go through that idea, then get up and follow up other options, repeating the task often dozens of times.

I am also conscious of how I am walking, ‘shuffling along’, ‘walking like a duck’, and I am more conscious of this when I have spoken to my Psychologist and I am in a depression period. When I have severe lower back and sciatica pain, I don’t stand straight and my right shoulder is always lower when I see a reflection in the glass doors, it embarrasses me to see the images.

On an average day, when lower back pain and sciatica is present, but appears in hand, it does increase the level of the lower back pain and sciatica, and by the end of the three hours, it is then necessary for further pain killers and lying flat.

4. What is difficult for me in my current role?

The major problem is not being able to say I am ‘work ready’ on any given day or for a nominated timeframe. An example, is, I do not shop on any given day or timeframe. I go when my lower back is not spasming or having sharp pain. As standing still aggravates this pain to an unbelievable level, waiting in shopping queues and bank lines is unbearable. So when I volunteered to return to work after my accident, I built up to three days per week and three hours per morning. As I cannot, and of course it is not possible, for me to

select these times, I find the three types of health I may be suffering as detailed above, really dictate my work activities, in addition to my home life, and daily tasks and activities.

I now realise that over the past years I have been suffering from many bouts of heavy depression. I cry very easily and often for no significant reason. I guess I am just sick of feeling sore and having spasmodic sleep patterns subject to sciatics and back and shoulder pain. I find that I am embarrassed about how I have to 'shuffle' and take very small steps to try to remain stable, and the pressure on my ankles. I once saw my reflection in the front double glass doors as I walked to greet a parent, and I was embarrassed to see my shuffling ways and my crooked dropped right shoulder reflection.

214. My assessment of this, as of Ms Nasir's evidence passim to much the same effect, is that I do believe she has suffered each of the pains she has mentioned, and sleeplessness caused, at least sometimes, by pain and some confusion caused sometimes perhaps by pain and by her medication. Her oral evidence and the way she gave it persuaded me of that. However, I am not persuaded that these acute episodes are frequent, and I cannot believe her evidence to the extent that she says they are. Her falsehoods, elaborated on at length above, have so destroyed her credit that I can't see how I could accept her uncorroborated evidence of such matters. Why should she be accepted as any more reliable as to these matters than the matters of walking, standing, sitting, bending?

CONCLUSIONS

215. My situation is similar in my assessment of Ms Nasir's capacities. I reject, for the reasons given above, Dr Olsen's opinions as to her limitations. Mr Millons (and Dr McLaren) have revised their opinion as to her limitations, based as it was on self reporting which they had been given later reason to reject. I can apply each doctor's reasoning to the material I have heard and seen, and I also have had opportunity to observe Ms Nasir during the two weeks of the hearing, where she seemed better on some days than on others, sat and stood for longer intervals on some days than on others, and occasionally swallowed a tablet – I assume a painkiller of some sort – in a

non-theatrical fashion. In appearance, as I have said above, she looked older than her years. The film was taken over a period of about 15 months or so, and her appearance does not greatly change in that time. A year or so after the most recent film, at trial, she looked to have aged more than one would have expected. Some of that I have no doubt is properly attributable to the strain of litigation. In giving her evidence she was sometimes very much to the point and at places in her cross-examination, she counterpunched with some wit and flair. On a couple of occasions, contrariwise, she seemed deflated, spiritless and somewhat unresponsive. I could not discern any pattern linking her listless periods with her more physically uncomfortable periods (signalled by her changing positions from sitting to standing to leaning more often, among other things) nor it seems, was there any clear connection between her use of medications and her spiritedness. She gave a lot of evidence on 19, 20, 21 August and 1 September, and a little on 5 October 2009. She was sitting, or standing, or (very occasionally), leaning in Court during nearly all of the Employer's case between Monday 10 and Monday 17 August. I was not, of course, paying much attention to her during that time, because evidence was being given.

216. In my opinion, the film, combined with the Casino records, clearly establish that Ms Nasir has been able, often, since her injury, to function physically doing things that she wants to do for much more than three hours per day, three days per week. Because of the misinformation, not to say falsehoods that she has given to doctors, to Mr Pennington, and to this Court in her affidavits, and because of her evasiveness on these matters in cross-examination, I cannot accept her claims as to how limited she is. In the end, I find that the film, unsatisfactory as it is in quality (and also quantity, although I cannot honestly say I wish there were more) is the most reliable guide I have to her capacities and the Casino records to her stamina.

217. In respect of the position in Ms Bannan's unit, the "administrative position", that there I am well satisfied that there is no task implicit in that job which is beyond Ms Nasir's capacities, and I am satisfied that it is more likely than not that Ms Nasir could perform those tasks on a full time basis.
218. In respect of the Careers Advising position, I am well satisfied that Ms Nasir could perform each of the requisite tasks of that job at CSC and that she could, more likely than not, perform them on a full time basis. I am not satisfied that she could perform the tasks that would involve her taking groups of pupils on worksite visits, etc and I have doubts of her capacities in relation to the other tasks that would necessitate her getting out and about. As I understand the Employer's case, the Employer would redefine the position to allow Ms Nasir to "teach" careers advising full time (with no class room teaching), but I did not understand it to be the case that the tasks of careers advising could be stripped down to those within Ms Nasir's capacities. On that understanding, I am not satisfied that she could return full time to that work. The crucial aspect of her capacities to this part of my decision is her slowness, evident in all the film of her moving. I cannot see how someone operating at that pace – and I have no reason to believe her capable of moving faster – could supervise and properly care for students outside the careers advice centre.
219. Accordingly, the Counterclaim succeeds, at least on the basis of the full time administrative position. The evidence suggests that it would have been reasonably possible for Ms Nasir to start work in Ms Bannan's unit at the commencement of the 2009 school year – I am not sure of the exact date, but I mean the day that teachers would be first expected to attend at school (whether there were pupils there or not) to start their year's work.
220. In view of my findings about the Employer's Notice, in the first part of these Reasons, and in view of my doubt about Ms Nasir's fitness to resume full time work as a Careers Advisor, I conclude that the reduction in her

benefits until that date in 2009 was not justified, and the reduction after it was.

221. I will hear the parties as to any further orders that may flow from this decision, and as to costs.

Dated this 8th day of September 2010

Richard J Wallace
STIPENDIARY MAGISTRATE