CITATION: *Betty Millar v ABC Merchandising and Sales* [2011] NTMC 047

PARTIES:	Betty Millar v ABC Merchandising and Sales Pty Ltd
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	21004782
DELIVERED ON:	2 November 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	2nd – 4th August 2011, 23rd August 2011
JUDGMENT OF:	Ms Fong Lim

CATCHWORDS:

Work Health – injury -causation –vulnerable knee – multiple causes- incapacity – economic loss – section 5, 65, and 73 Workers Rehabilitation and Compensation Act

Work Health – Deed of settlement – interpretation – effect on later claim – double compensation – burden of proof –section 54 Workers Rehabilitation and Compensation Act – section 17 Interpretation Act (NT)

Practice and Procedure – pleadings- failure to plead statutory provisions – Rule 8.01 Work Health Rules.

George Starr v NT of Australia unreported decision [23rd October 1998] - Applied
Australian Eagle Insurance Company Ltd v Federation Insurance [1976] 15 SASR 282 - Applied
Hopkins v Collins/Angus & Robertson [1997] 21st May 1997 unreported decision Supreme Court – considered
Normandy v Simpson [2002] NTSC 43 – considered
McIntyre v Tumminello Holdings No 1 [2004] NTMC 97 –considered - applied
Ju Ju Nominees v Carmichael [1999] 9 NTLR 1- considered - applied
Napper & anor v Bultitude [2009] 261 LSJS 62 – considered
Workcover/Royal & Sun Alliance (York Civil Pty Ltd) v Tarbotton [2003] SAWCT 40 - considered
Workcover/Royal & Sun Alliance (York Civil Pty Ltd) V Tarbotton [2005] SAWCT 34 – considered
Mansfield Pty Ltd v Mastrioanni [1998] NSWSC 259 – considered

Franklins Self Serve Pty Ltd v Wyber [1999] NSWCA 390 – applied
Manser v Spry [1994]HCA 50 - applied

REPRESENTATION:

Counsel:

Worker:	Mr Johnson
Employer:	Mr Crawley

Solicitors:

Worker:	Caroline Scicluna & Assoc
Employer:	Cridlands

Judgment category classification:	A
Judgment ID number:	[2011] NTMC
Number of paragraphs:	112

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

No. 21004782

BETWEEN:

Betty Millar
Worker

AND:

ABC Marketing and Sales Pty Ltd
Employer

REASONS FOR JUDGMENT

(Delivered 2 November 2011)

Ms FONG LIM SM:

1. Betty Millar is a 51 year old woman who suffers pain, instability and restriction of movement in her right knee particularly when she undertakes certain activities such as repetitive squatting, standing for any length of time and climbing up and down stairs. Ms Millar claimed her present knee condition has been caused by a work injury she suffered in 2005 when employed by ABC Marketing and Sales Pty Ltd.

2. Ms Millar's original claim for Work Health benefits from ABC was accepted and she was paid benefits for a period of time until her doctor gave her clearance to go back to work. From that time Ms Millar returned to work trying several types of employment the most significant being her work at Mining and Civil Services in 2008. While she was employed with Mining and Civil Services she suffered two work injuries one to her knee and the other to her upper body. Ms Millar made two claims for compensation arising out of that employment those claims were accepted and payments ceased when she was certified fit for work. Ms Millar was not satisfied with

how Mining and Civil responded to her difficulties and commenced proceedings for weekly payments and medical expenses relating to those injuries. Those proceedings were resolved by way of deed and Ms Millar was paid a lump sum of $80000.00.

3. Ms Millar is presently working as a security guard with Wilson Security at the Family Court. She is able to undertake all duties asked of her in her present employment. Ms Millar has been advised by medical practitioners that she may require further surgery to her knee in the future. She continues to have restriction, pain and instability in her right knee however as her weekly earnings from her present employment are more than her indexed normal weekly earnings with ABC she does not make any claim for weekly benefits for the present economic loss.

4. Ms Millar applied to the Court for a declaration that her present difficulties with her knee are as a result of the original 2005 work injury, an order that ABC Marketing and Sales Pty Ltd reimburse her for past and future medical expenses arising out of the 2005 injury and that she be paid weekly compensation for all of those periods of total and partial incapacity since 2009 up to her present employment.

5. ABC have denied any further liability for medical expenses or weekly compensation for Ms Millar's present complaints.

6. There is no dispute about Ms Millar's status as a worker, whether the original injury arose out of her course of employment or the calculation and indexation of Ms Millar's Normal Weekly Earnings.

7. Ms Millar claimed under section 65 and 73 of the Workers Compensation and Rehabilitation Act. She claimed weekly benefits under section 65 for periods of partial incapacity from 2009 until 14th January 2011. Under section 73 she claimed reimbursement of medical expenses paid in the past

for attendances upon doctors and physiotherapists, travel to doctor appointments and costs of retraining.

8. To succeed in her claim against ABC, Ms Millar must prove on the balance of probabilities that her injury in 2005 materially contributed to present difficulties with her knee between 2009 - 2011. Ms Millar also has to prove the difficulties she has with her knee have resulted in her suffering a loss of earning capacity.

9. If Ms Millar is successful in proving a compensable injury then the quantum of her claim is at issue. Ms Millar received $80000 from QBE, Work Health insurers, to resolve her claims against Mining and Civil and the question is raised whether that payment could amount to double compensation.

10. On the 23rd of August I called for further submissions from the parties, on who bore the burden of proof to prove the character of the payment of $80000 made to Ms Millar and how that payment could be taken into account in light of section 54 of the Act. On 30th September 2011 I ruled that the evidential burden lay with the Employer to prove there was a payment which could result in double compensation to Ms Millar and once that burden was discharged the burden then lay with Ms Millar to prove the character of that payment. My detailed reasons are set out later in this judgment.

11. **The issues:**

    (a) Are Ms Millar's present physical limitations in her right knee attributable to the original injury in 2005? Are they caused or materially contributed to by the injury in 2005?

    (b) Was the injury in 2008 an intervening event which has overcome any operation of the effect of the 2005 injury?

    (c) If the answer to (a) is yes or the answer to (b) is no, do the present physical limitations cause her an incapacity to work which results in a loss of income?

(d) Are the medical, retraining and rehabilitation expenses claimed attributed to the 2005 injury?

(e) What is the effect of the Deed between Ms Millar and QBE, the Work Health insurers for her employer in 2008, on any compensation payable to her by ABC? Who bears the onus of proof as to the effect of the payment made under that Deed?

12. **Is Ms Millar's present knee condition causally linked to the injury in 2005?** To be successful in her claim Ms Millar must satisfy the court on the balance of probabilities that the 2005 injury materially contributed to her present knee issues notwithstanding the effect of the injury in 2008.

13. ABC submitted Ms Millar's present knee condition is due to her naturally occurring degeneration and the 2005 injury is not a cause of that degeneration. In the alternative the ABC submitted that Ms Millar's present knee condition is due to the 2008 injury and any incapacity since that date is caused by that injury.

14. Ms Millar claimed even though her knee became worse since 2008 the 2005 injury left her with a degenerating knee and that was the cause of her injury in 2008 therefore the 2005 injury continues to have effect on her knee and her capacity to work.

15. The court heard evidence from Ms Millar, Dr Moore, Professor Bauze and Dr Patterson. Medical reports were tendered by consent. Ms Millar presented as an honest and straightforward witness, there was no guile about how she gave her evidence and her explanations of her actions over the years were totally believable. I find Ms Millar to be person who, over the years, has persisted in trying to find herself employment despite physical difficulties she may have been having. Ms Millar presented as a person who has a strong work ethic and someone who does not complain lightly about any ailments she may have.

16. All of the doctors who gave evidence agree that the injury Ms Millar suffered in 2005 left her with a vulnerable knee. They also agree that her knee condition became considerably worse after the incident at work in 2008. They do not agree as to the continuing effect the 2005 injury has on Ms Millar's knee.

17. I am satisfied that Ms Millar continues to have difficulties with her right knee. I am also satisfied Ms Millar has had periods of pain and swelling in her knee since the injury in 2005 and the restriction in the use of her knee has become considerably worse since 2008. However that does not necessarily mean Ms Millar entitled to the compensation from ABC Marketing and Sales.

18. Between 2005 and 2008 Ms Millar did not see the need to attend a doctor for her knee. Her evidence is that she had tried different jobs and each of those jobs caused some discomfort in her knee. There were some times when her knee would swell and become painful but that would resolve if she didn't undertake repetitive squatting, heavy lifting or climbing of stairs. There was no evidence of instability of the knee in that period of time.

19. After the 2008 incident Ms Millar was referred to Dr Paterson who conducted an arthroscopy which uncovered a tear in her medial meniscus which required a repair.

20. All of the doctors agree that the laxity in Ms Millar's ACL left the knee vulnerable to the tear of medial menicus in 2008 and the tear arising from the 2008 injury was the main cause of her pain in 2008 and surgical intervention. What is not agreed is the cause of that tear.

21. Dr Moore and Professor Bauze are of the opinion the injury to the ACL in 2005 left her vulnerable to the 2008 injury and therefore her continuing problems are linked to that 2005 injury.

22. Dr Moore is a general practitioner who saw Ms Millar after her injury in 2005 and after her second injury in 2008. Dr Moore was at pains to express her concern to Ms Millar that she had suffered a major injury to her knee in 2008 and she should be looking for alternative employment. Dr Moore's ultimate opinion was that the 2005 incident caused a laxity in the anterior cruxiate ligament (ACL) which left the knee vulnerable to the type of injury which occurred in 2008. She is of the further opinion that the present problems stem back to the 2005 injury.

23. Professor Bauze agreed with Dr Moore but conceded that his view was only one view given the history and pathology of Ms Millar. He accepted that the tear in the medial meniscus could possibly be because Ms Millar had a predisposition to this type of degenerative process but was of the opinion it was more likely the incident in 2005 which precipitated that tear. In his report of the 5th November 2010 he stated:

> "It is my opinion that her current incapacity is directly or consequentially due to the incident in 2005. I am aware that Dr Paterson and Dr Baddeley give contrary views. Unfortunately I do not think that any proof can be one way or the other. It is a matter of opinion."

24. Professor Bauze was critical of Dr Paterson's statement of the 7th of June 2011. He described Dr Paterson's conclusion (paragraph 10) that "there was a chronic inflammatory degenerative process which had been precipitated and rendered symptomatic by the events in 2008" as a medical nonsense. This criticism was never put to Dr Paterson and he was not given the opportunity to answer that criticism.

25. Dr Paterson gave three reports and statements regarding Ms Millar. In his first report he stated the problems in 2008 were linked back to the 2005 injury. Then in his most recent statement he opined given the history of no complaints of instability between 2005 and 2008 is it more likely the tear was a result of natural degeneration of the knee joint. This was supported

by his 2009 post operative report that the appearance of the tear of the medial menicus was more consistent with a spontaneous degenerative tear not from trauma.

26. Dr Moore deferred to the expertise of Dr Paterson as an orthopaedic surgeon but could not understand his view. It was made clear that Dr Moore was not an expert in the field of orthopaedics by her suggestion that it was only possible to discount the effect of the 2005 injury on the right knee's degeneration if you have examined the left knee, neither Professor Bauze nor Dr Paterson agreed with that proposition. They agreed one knee could degenerate without the other knee degenerating or one knee could degenerate at a faster rate than the other. Dr Moore's opinion has to be given less weight than that of Professor Bauze and Dr Patterson.

27. Both Professor Bauze and Dr Paterson have been accepted as appropriately qualified to give opinions about the Ms Millar's knee. Despite Professor Bauze's comment about Dr Paterson it is clear from Dr Paterson's oral evidence that his view is while the underlying predisposition to degeneration was always present in Ms Millar's knee the 2008 tear in the medial meniscus advanced that underlying predisposition into a symptomatic condition.

28. Dr Paterson accepted as a possibility Professor Bauze's view the incident in 2008 was an insignificant incident and the present problems are more likely to be caused by the 2005 incident but he did not hold that view. His view was because Ms Millar did not report symptoms of instability before 2008 then it is unlikely the laxity of the anterior cruxciate ligament was the cause of the degeneration. The history reported by Professor Bauze and Ms Millar's evidence confirmed there were no symptoms of instability between 2005 and 2008 only pain and swelling.

29. Both Dr Paterson and Professor Bauze's opinions have some features of unreliability. Dr Paterson because of his apparent change of mind relating to the continued effect of the 2005 injury and the Professor Bauze because of

his view that the tear in the menicus in 2008 would have started in 2005 yet the objective evidence from the MRI taken at the time did not support that view. Both doctors acknowledged each other's opinion as a possibility and therefore it is not possible to prefer one doctor's opinion over the other.

30. Both experts accepted the tear to Ms Millar's medial menicus was the cause of her need for surgery and that the job with Mining and Civil created circumstances which could have precipitated the tear. Both experts agree that there is no way of really knowing when the degeneration of Ms Millar's knee had started. Professor Bauze even went as far to say that everyone starts to degenerate after the age of 22. Dr Paterson accepted that the laxity of the ACL could have contributed to the medial meniscus degeneration however his view was that it was unlikely given the circumstances. Dr Paterson also accepts that the 2005 incident could well be a contributing factor to the degenerative condition.

31. Ms Millar's counsel submitted I should prefer Professor Bauze's opinion because of his superior knowledge of Ms Millar's history and the obvious inconsistencies in Dr Paterson's opinion over time. Unfortunately Professor Bauze's knowledge of Ms Millar's is also flawed, he stated Ms Millar was "put into a real estate office" which is clearly at odds with Ms Millar's own evidence that it was her choice to try that career. He also maintained a view that 2008 incident was insignificant and the only reason it seems significant is that Ms Millar had got sick of pain and therefore sought surgical help with that pain. However when challenged on that view he accepted Ms Millar never said to him she had finally got sick of the pain that was an assumption he had made.

32. Ms Millar's evidence is that it was only after the knee got worse after the incident in 2008 that she went to the doctors. There was no evidence that the knee was constantly painful and she had finally got sick of the pain.

33. Both doctors positively asserted that everyone has degeneration in their joints over time, some people have a predisposition to that sort of problem, and there is no way to tell positively when the degenerative change in Ms Millar's knee commenced. Ms Millar could have had a degenerative change in her knee which became symptomatic in 2005 and which was accelerated by the injury in 2008 or she could have had a knee which was degenerating naturally.

34. To find there is a compensable injury from 2005 I have to be satisfied the injury continues to have a material effect on Ms Millar's knee. That proposition is supported by the reasoning by Mildren J in George Starr v NT of Australia unreported decision[23rd October 1998]where he applied the finding by King J in Australian Eagle Insurance Company Limited v Federation Insurance Ltd (1976) 15 SASR 282

> "not only must the new cause come in but the old must go out; there must no longer be any cause or connection between the injury by accident and the present incapacity".

35. His Honour referred to the Court of Appeal of the Northern Territory in Harris v South unreported decision [1998] 1 Ap 98 where they applied the reasoning of the Court of Appeal of South Australia in Wardlesworth v Green [1966] 66 SASR 421 where the Court of Appeal found where there are two or more possible causes of a worker's incapacity the court has to be satisfied whether the earlier cause continues to have a material effect on the worker's condition to decide if the worker should be compensated for by the employer at the time of the earlier injury see below *:*

> "If, at the time of the second accident, the physical consequences of the first accident have stabilized to the degree that they can fairly be regarded as spent and as leaving only a vulnerability to injury from future trauma, the incapacity flowing from the second accident cannot be regarded as the result of the first accident but must be regarded as the result of the second accident only. Such a case was La Macchia v Cockatoo Docks & Engineering Co. Pty. Ltd. If, however, the workman's condition is still unhealed or unstable and

> the incapacity would not have occurred but from that unhealed or unstable condition, the incapacity must be regarded as resulting from the first accident as well as from the second accident. Moreover, where the second accident is a mere aggravation or recurrence of the injury sustained in the first accident and is brought about by ordinary and reasonable conduct on the part of the workman, the consequent incapacity must, in my opinion, be regarded as the result of the first accident as well as the result of the second accident."

36. Applying that reasoning to this case if I can be satisfied on the balance of probabilities that the 2005 injury continues to have a causal effect on Ms Millar's knee condition then she is entitled to compensation from ABC for any loss of earning capacity caused by that knee condition notwithstanding the exacerbation or aggravation caused by the 2008 incident may also continue to have an effect. On the other hand if I can be satisfied that the effect of injury in 2005 has stabilized leaving only a vulnerability to the injury in 2008 then the present incapacity must be regarded as a result of the 2008 only.

37. What is clear is that Ms Millar's knee problems became worse since the incident in 2008 even though she was certified fit for work in November 2008. Her knee problems were initially relieved by the arthroscopy but then at some stage got worse again.

38. Her fitness for work is restricted because she cannot walk or stand for any extended period of time. Walking up and down stairs also causes her pain and swelling of the knee. All of the medical practitioners and Ms Millar agree she should not return to the employment at the sand mines or any employment which would place unnecessary stress on her already degenerative knee.

39. The concessions made by Professor Bauze and Dr Paterson in relation to each other's opinions and the factors of unreliability in the opinion of both doctors makes it difficult to prefer one doctor's opinion over the other.

Despite the differences in their opinions there is some common ground upon which I can make a finding.

40. I can be satisfied that the 2005 injury left a laxity in the ACL and made the knee more vulnerable to the injury in 2008. I can also be satisfied the 2005 injury contributed to the degenerative condition of Ms Millar's knee and continues to contribute to her degenerative knee condition because ultimately Dr Paterson accepted the 2005 injury could be a contributing factor in Ms Millar's present condition. Dr Paterson agreed in cross examination that the 2005 injury was not an insignificant contributing factor even though he considered less significant than the natural degeneration of the knee.

41. I therefore find that Ms Millar does have a continuing compensable injury arising out of her employment in 2005.

42. **Has the injury resulted in Ms Millar's partial incapacity to work?** In her present employment Ms Millar earns more than her indexed normal weekly earnings therefore her claim for weekly benefits is limited to the earlier periods 24.2.2009 – 31.12.2009, 1.1.2010 – 25.4.2010, and 30.4.2010 to 14.1.2011. There is no claim for weekly benefits for the period between 2005 and 2009.

43. Since she was cleared for work in 2009 Ms Millar has undertaken some courses in bookkeeping and did a Certificate 11 in business administration to try and give herself the skills to work in an office. She undertook some work at Coles express which required her to squat when stacking shelves as well as carry milk crates and lift large bottles of water. She ceased that employment because it was "too hard on her knee". She then was employed as a security guard at the airport for 5 months and found that employment to aggravate her knee because of the need to stand for the whole shift and walk up and downstairs as well as squat. Ms Millar then found employment with

her present employer. It can be inferred from the particulars relied upon those periods of employment were in 2010.

44. Particulars of loss were served upon ABC and filed in the court on the day of the hearing. ABC's counsel agreed that those figures showed what was earned by Ms Millar in particular periods and the difference between the those earnings and her indexed normal weekly earnings. There was no agreement that those figures represented Ms Millar's economic loss due to her incapacity.

45. ABC submitted Ms Millar suffered no incapacity to earn since she was certified fit for work in 2009. Ms Millar agreed she could have undertaken her present work duties in 2009 without further issues with her knee. ABC submitted because she could have undertaken those duties in 2009 she had the capacity to earn more than her normal weekly earnings and there was no loss of earning capacity even though that employment may not have been available to her. In that submission ABC attempted to apply section 65(2)(b)(ii) of the Act which provides after 104 weeks after an injury a worker's benefits should be reduced by the amount that could be earned by the worker in their most profitable employment even if that employment is not available to them.

46. ABC did not plead the operation of section 65(2)(b)(ii) of the Act applied to Ms Millar in the calculation of her weekly benefit. ABC is required by Rule 8.01 of the Work Health Rules to plead any statutory provision upon which they wish to rely. Ms Millar's counsel objected to ABC raising this issue and upon that objection ABC did not seek to amend its pleadings. ABC argued Ms Millar still needed to prove loss of earning capacity and on her evidence she had agreed she could have done her present duties and that must be taken into account.

47. The purpose of pleadings is to define the issues in dispute, it would be unfair to require a party to address an issue for which they have had no notice on the pleadings. ABC was provided with Ms Millar's particulars of loss of earnings some months ago and did not raise the issue of most profitable employment until the day of hearing. If the Court were to allow ABC to continue with that submission and make a finding against Ms Millar based on that submission it would be in error.

48. Of course Ms Millar still has the onus to prove that her difficulties with her knee have caused her a loss of earning capacity in the periods she has listed in her particulars.

49. I have found Ms Millar to be honest and credible and her evidence regarding her periods of unemployment is uncontested. Her evidence of what caused her periods of unemployment is however confused.

50. Ms Millar stated after she had been certified fit for work regarding her knee in late 2008 she didn't go back to work because her neck and shoulder were still a problem. Even though her knee was not one hundred percent she thought she could work if she could get office work. She stated it really was the upper body injury that was stopping her from working for some of 2009 even though she had been certified medically fit for work by Dr Cutbush in December of 2008. She also stated her knee restricted what she could do physically.

51. Ms Millar had commenced some work as a security officer in early 2009 however ceased because the hours required of her clashed with her other commitments with the physiotherapist. There is no evidence whether she was attending physiotherapy for her shoulder or her knee or both. After that she had different jobs all of which she says she could not continue because of problems with her knee. She does not mention the upper body in relation to those jobs.

52. During 2009 there was also a continuing dispute with QBE, the work health insurer for Mining and Civil services, about the upper body and the knee and that culminated in the commencement of proceedings in this court for the recommencement of weekly benefits and medical expenses. Those proceedings were resolved by Ms Millar and QBE by deed (see recitals in the deed of agreement dated 24th September 2009).

53. It is not clear on Ms Millar's evidence when her upper body injury stopped being the reason she could not work and when the knee became the reason. There may of course been an overlap however Ms Millar is clear that there was a period of time when it was her upper body that stopped her from working not her knee. Ms Millar stated it was "mostly my upper body which was causing me grief" and that is corroborated by the fact that until 24th September 2009(the date of the deed) she was pursuing a claim against QBE for weekly benefits and medical expenses relating to both injuries. It was also the submission of Ms Millar's counsel that the payment made under the Deed of Agreement related to the upper body injury and if that was the case then it is more likely her loss of earning capacity for some of 2009 was due to her upper body injury.

54. There is some evidence that her knee had started to give her more trouble sometime in 2009 and in particular she engaged her solicitors in July 2009 to contact CGU regarding medical expenses for her knee. She also stated that her knee stopped her from doing certain duties. In total Ms Millar's evidence relating to 2009 is not clear and is confused in parts.

55. Based on the evidence before the court it is not possible for me to be satisfied on the balance of probabilities that Ms Millar's loss of earning capacity from the beginning of 2009 to January 2010 was due to her knee and not her upper body complaint. It cannot be gleaned from the evidence when Ms Millar's knee started to contribute to her loss of earning capacity in 2009 after the initial 8 weeks after the injury in 2008.

56. Ms Millar has not discharged her burden of proof to prove that her loss of earning incapacity in 2009 related to her knee injury. If I could be satisfied that the incapacity to work during that period of time was a combination of both the upper body and the knee then I could find in Ms Millar's favour. I cannot be so satisfied.

57. In comparison Ms Millar's evidence of her attempts at employment with various employers in 2010 and the particulars provided of the amounts earned in 2010 satisfy me on the balance of probabilities she suffered loss of earning capacity relating to her knee as claimed in paragraph 2 and 3 of those particulars.

58. Accordingly Ms Millar's claim for weekly benefits for 2009 must fail while her claim for weekly benefits from January 2010 succeeds.

59. **Retraining, medical and travel expenses :** It is clear from Ms Millar's evidence that she underwent retraining at her own expense and I am satisfied that the retraining expenses claimed are attributable to the compensable knee injury. She undertook the MYOB course to get office skills because she had been advised she could not do physical work anymore and the National Security training course to qualify her for the job as a security guard at the airport.

60. It is not clear on the evidence the balance of the medical and travel expenses have been incurred because the knee injury.

61. There was no evidence before the court of the requirement for Ms Millar to attend a physiotherapist relating to her knee and there is no supporting documentation to indicate the purpose of those attendances therefore those claims must fail.

62. There was no evidence to support the claim for $834.85 for the Medicare Australia Notice of Charge. No evidence to establish that charge related to payments made relating to Ms Millar's knee.

63. The evidence does not support Ms Millar's attendance on Dr Baddeley and the RDH for a MRI in 2010.

64. There is no evidence to support the charges claimed for attendances on Western Pathology or Nakara Medical Clinic however I note in the particulars they relate to attendance for retraining purposes and I am satisfied they are expenses reasonably incurred and ought to be reimbursed to Ms Millar.

65. The evidence does support Ms Millar's attendances on Dr Moore in 2009 and 2010 as well as Mr Paterson relating to her knee. The evidence also supports travel expenses claimed in relation to the aviation course and those expenses ought to be reimbursed to Ms Millar.

66. **How does the court take into account the payment made under the Deed of settlement between Ms Millar and QBE?**

67. Ms Millar argued the payment made under the Deed ought not trouble the Court as it is not a payment of compensation.

68. ABC submitted the payment of $80000 pursuant to the deed of agreement of the 24th of September 2009 must be taken into account to avoid double compensation.

69. It is an accepted principle of law that a person ought not be compensated twice for the same loss even though they may have one or more avenues in which to recover that compensation.

70. Section 54 of the Workers Rehabilitation and Compensation Act recognises that principle of law. If a person is entitled to compensation under an applicable law and is paid compensation under that law for the same injury then they are not entitled to be paid compensation under the Act. An applicable law includes a law of the Territory other than the Act (see 54 (6)). A "law of the Territory" is defined in the Interpretation Act (NT) as

including the common law (see section 17 Interpretation Act). Any payment made under a Deed of Agreement is a payment made at common law and can therefore be considered under section 54.

71. Ms Millar submitted, applying Angel J's reasoning in Hopkins v Collins/Angus & Robertson [1997] 21st May 1007 Northern Territory Supreme Court, the payment made under this Deed is not compensation therefore does not need to be taken into account under section 54 or at all. She made that submission based on his honour's analysis of section 3 of the Work Health Act. His honour found that a payment made under the deed in that case was not compensation under the Work Health Act because although compensation was defined as including a settlement of a claim for compensation in that case the payment was not a settlement of a claim for compensation.

72. The Workers Rehabilitation and Compensation Act also defines "compensation" as including a settlement of compensation. Ms Millar submitted the payment she received was not a settlement of a claim for compensation and therefore is not compensation as defined under section 3.

73. To limit the application of section 54 to "compensation" as defined in section 3 would be a nonsense. Section 3 clearly applies to compensation paid under the Workers Rehabilitation and Compensation Act whereas the operation of section 54 refers to payments other than those under the Act. Section 54 refers to payments under an applicable law and "applicable law" is defined as " a law of the Territory other than this Act".

74. I find that the payment made under the Deed of Agreement is a payment not made under the Workers Rehabilitation and Compensation Act and must be considered when assessing Ms Millar's loss of earning capacity for the relevant period in light of the principles against double compensation.

75. **Who bears the burden to prove the nature of the payment made under the Deed of agreement?**

76. Ms Millar's counsel submitted the burden lies with ABC to prove the nature of the payment. In support of that proposition he referred to the authorities of Mcintyre v Tumminello Holdings No 1 [2004] NTMC 97 and Ju Ju Nominees v Carmichael [1999] 9 NTLR 1. Those authorities considered the issue of dux litis in matters where the Employer had cancelled the Worker's benefits. The court in both matters found the onus lay with the Employer to prove the circumstances supporting the cancellation even though the proceedings had been commenced by the Worker and therefore the Employer should open their case first. The reasoning behind those decisions was that the Employer was in the better position to put evidence before the court of the circumstances it relied upon to cancel the benefits and therefore ought to go first and bears the burden.

77. ABC submitted it was Ms Millar's burden to prove the nature of the payment and relied upon the authority of Napper & Anor v Bultitude [2009] 261 LSJS 62. In that matter Justice Gray found there was an evidential burden on the defendant, who was claiming a payment made in settlement of a proceeding was double compensation, to raise the real possibility there had been a payment which could constitute double compensation and after that burden has been discharged the onus changed to the plaintiff to prove the payment was not double compensation. The basis for that decision was that as the defendant was not a party to proceedings which had been settled.

78. The reasoning in McIntyre's case, Ju Ju Nominees' case and Napper's case all support the submission that Ms Millar bears the burden once ABC has produced evidence of a payment which could be the basis of a finding of double compensation. ABC was not a party to the deed between Ms Millar and QBE or the negotiations which led to that agreement. Ms Millar or her lawyers would have peculiar knowledge of the surrounding circumstances to

that agreement ABC does not. Ms Millar bears the burden to prove the payment was not compensation for the same injury.

79. The decisions in Workcover/ Royal & Sun Alliance (York Civil Pty Ltd v Tarbotton [2003] SAWCT 40 and in Workcover/ Royal & Sun Alliance (York Civil Pty Ltd v Tarbotton [2005] SAWCT 30 add something to this debate but do not clarify this issue.

80. In Workcover/Royal and Sun Alliance (York Civil Pty Ltd) v Michael Tarbotton [2005] SAWCT 34 the Workers Compensation Tribunal (SA) considered the issue of double compensation. In that matter the worker was making application to the tribunal for compensation arising out of a work injury after having settled a common law action for a subsequent motor vehicle accident.

81. The tribunal in the first instance found there was no double compensation because the Deputy President could not be persuaded one way or the other that the worker had already been already compensated for loss of earnings. The Deputy President found that he was not persuaded by the workcover insurers argument that double compensation would be given to the worker if he was compensated under the Act. That decision was appealed and the full tribunal set aside that decision and directed the Deputy President to reconsider after hearing further evidence from the parties as to the nature of the settlement.

82. After hearing detailed evidence about the negotiations leading up to the agreement the Deputy President concluded that the parties to the negotiated settlement were at pains to ensure there was not double compensation coming to the worker by attributing percentages to the second injury in their negotiations. The Deputy President found for the second time that there was no double compensation evident.

83. It was the decision of the Deputy President that the workcover insurer had not discharged the burden to prove the payment was double compensation attributing the burden to the employer because of what he believed to be a pronouncement by the Full tribunal that the insurer bore the evidential and legal burden of proving double compensation.

84. On closer examination of the Full Bench's decision it is clear the Full Bench relied on the decision of the Full Court of the Supreme Court of NSW in Transfield Pty Ltd v Mastrionni [1998] NSWSC 259. The worker that case had recovered common law damages for a dust related disease from the Employer and those damages were not reduced by the court to take into account the worker's entitlement under the relevant Workers Compensation Act. The court found it was the employer who was claiming the deduction and therefore it was employer's burden to prove what compensation was due to the worker under the Workers Compensation Act. There was a prescriptive regime as to lump sum payments under that act and the employer should have called evidence to establish that entitlement.

85. While the Full Tribunal applied that ruling in Tarbotton's case the facts were clearly distinguishable to the facts in Tarbotton's case and the present case. In Transfield's case the Employer had to prove an entitlement under an act having already run a defence to a common law claim for damages. The employer in Transfield's case had available to it evidence to establish the entitlement under the Act. In Tarbottons case and the present case if the burden lay with the employer they would be asked to produce evidence of an agreement to which they were not a party. They had no particular knowledge of those negotiations.

86. Further there is one unexplained statement in the Full tribunal's decision in Tarbotton's case which would suggest they had some concerns about the insurer bearing the burden. At page 83 of that decision the Full Bench state

"There is the issue of the onus being carried by the appellant". The Tribunal did not go further in analysing that issue.

87. The uncertainty of the Full Bench decision regarding this issue makes the Deputy President's acceptance of what he thought was a pronouncement of the burden of proof something that must be viewed with caution.

88. I am persuaded by the reasoning in the McIntyre's, Ju Ju Nominees' and Napper's cases and find the burden lay with ABC to produce cogent evidence of a possible payment which could be the basis of a ruling that Ms Millar could receive double compensation for the same loss. Following the discharge of that burden then the onus lay with Ms Millar to prove that the payment was not compensation for the same loss.

89. I find ABC has discharged its evidential burden by bringing to the court evidence that there was a payment made to Ms Millar which could be compensation for the same injury under consideration in this matter. That evidence being the Deed of Agreement between Ms Millar and QBE and Ms Millar's confirmation she received that money.

90. The burden then shifted and lay with Ms Millar to prove that the payment of $80000 was not a payment of compensation for her continuing problems with her knee.

91. In light of the above ruling Ms Millar was given the opportunity to make an application to re-open her case on this issue in particular. She declined to call further evidence.

92. **Was the payment of $80000 compensation for the injury to Ms Millar's knee?**

93. The effect of the Deed of Agreement of the 24th September 2009 on any payment of compensation made to the worker can only be considered against the following background**:**

1. Ms Millar had been certified fit for work in relation to the 2008 knee injury on 16th October 2008 and for the upper body on 5th December 2008. Actions were commenced in the Work Health court for both injuries.

2. Deed of agreement entered into on 24th September 2009.

3. The Deed clearly related to Ms Millar's claim for compensation for the injury to her knee and upper body while working for Mining and Civil Services Pty Ltd. The terms of the deed defining those injuries as "the injury".

4. The Deed did not distinguish between the dispute in relation to the knee injury and the upper body injury. The court was not provided with the pleadings of those proceedings.

5. The Deed recorded a settlement between the parties of any claims Ms Millar may have against Mining and Civil Services Pty Ltd. Ms Millar discontinued her claims and Mining and Civil Services Pty Ltd paid Ms Millar a lump sum.

6. There was no apportionment of that lump sum between the claims relating to the knee and the upper body.

7. Paragraph 2 of the Deed states the worker is to receive "an un-dissected capital sum of $80000 as a payment for her future loss of earning capacity permanent impairment and any or all future entitlement to compensation pursuant to the Act including, but not limited to sections 64,65,71,72,73,76,77,& 78 of the Act in respect of the injury and those claims" (emphasis is mine)

8. Paragraph 7 of the Deed states there is no intention to exclude the rights or entitlements under the Act relating to the injury.

94. Ms Millar's counsel submitted it was clear from the deed and the surrounding circumstances the payment was for the upper body injury and in any event because the Workers Rehabilitation and Compensation Act was beneficial legislation the characterisation of that payment should be made in the Worker's favour. Ms Millar produced no authorities to support this proposition that principles of statutory interpretation applied to contracts between parties to an action. The Deed is a contract between Ms Millar and QBE.

95. The Deed is not an agreement recorded under section 108 the Workers Rehabilitation and Compensation Act. The Deed does not have the particulars required under section 108 and Rule 15 of the Work Health Rules by which the court can establish the basis upon which the compensation has been paid. It is an agreement outside the provisions of the Act. In interpreting the Deed the court is not interpreting the provisions of the Workers Rehabilitation and Compensation Act. The principles relating to the interpretation of beneficial legislation do not apply to the interpretation of the Deed. That argument must fail

96. In the alternative Ms Millar submitted no further evidence was needed other than the deed itself to prove the $80000 was not compensation. She relied on the unreported decision of Angel J in Hopkins v Collins/Angus & Robertson [1997] 21st May 1007 Northern Territory Supreme Court. In that matter his honour was considering the validity of a deed of settlement between Hopkins and her Employer. The matter was before his honour on appeal from the decision of a magistrate in the Work Health Court to disallow the discontinuance of a Work Health proceedings as he was of the view the deed contravened section 186A of the Work Health Act. His honour found that the deed did not contravene that section on that basis that the payment did not involve a settlement of the claim for compensation. He came to that view because the deed did not seek to extinguish the Worker's rights under the Act. He also found in the circumstances of the matter including that the appeal was the employer's not the worker's that was compromised and sought to be sorted out by the deed leave ought to be granted (see page 6 of the unreported decision).

97. Hopkins case is cited by Ms Millar as authority for the proposition that the payment made under the Deed in this present case is not compensation. She relies on Judge Angel's reasoning that while compensation was defined in the Work Health Act as including an amount paid in settlement of a claim for compensation (see section 3) the payment made under the deed was not a

settlement because it did not extinguish the worker's rights for compensation under the Act and therefore not compensation. Ms Millar submitted that the same reasoning should apply in her case because the tenus of the deed between her and QBE was effectively the same as the deed in Hopkin's case.

98. Ms Millar submitted the $80000 paid under the Deed was not compensation because it did not extinguish her right to pursue QBE in the future for compensation therefore it cannot be considered as double compensation for the injury to the knee. This submission is simplistic and cannot be stand. Just because the payment may not be "compensation" as defined by the Act does not mean it is not payment for the same loss the Ms Millar is claiming from ABC.

99. The principle against double compensation is the principle against the payment of compensation twice for the same loss (see Franklin Self Service Pty Ltd v Wyber [1999] NSWCA 390)

100. Mildren J in Normandy v Simpson [2002] NTSC 43 considered the legality or otherwise of a Deed of Agreement between a worker and the employer which deed had been questioned by the magistrate at first instance as a sham to avoid the operation of section 74 of the Work Health Act. His Honour found the agreement resulted in the worker being paid more than he was entitled to under the Act and there was nothing to prohibit that payment as long as it did not contravene section 186A of the Act. His Honour suggested that the payment may not even be compensation under the Act or could be payment in respect of compensation but for a larger amount than the worker is entitled (see page 18 of that judgement). His Honour considered the character of that payment should be determined by the circumstances of the matter along with the terms of the deed.

101. In Tarbotton's case it was also clear that the particular facts and circumstances of the matter were determinative of how the payment should be characterised.

102. Whether a plaintiff or has or would recover twice for the same loss depends on the facts of the case and a plaintiff cannot recover more than he or she has lost (see Manser v Spry [1994] HCA 50).

103. The terms of the deed of agreement in this matter do not make it clear how much of the $80000 related to any loss of earning capacity due to the knee. Paragraph 2 of the deed describes the sum as;

> "an undissected capital sum of $80000.00 (eighty thousand dollars) as payment for her future loss of earning capacity, permanent impairment, and any and all future entitlements to compensation pursuant to the Act, including, but not limited to sections 64, 65,71,72,73,76,77 and 78 of the Act in respect of the injury and claims. The sum of $80000.00 (eighty thousand dollars) is inclusive of costs, disbursements, any entitlement to interest and repayment to any and all statutory authorities, including Centrelink and Medicare Australia."

104. Ms Millar gave some evidence that she had paid some of the $80000 to her lawyers and that she was concerned about the cost of knee replacement and the upper body injury at the time of the deed. There was no other evidence put to the court. The court was not even provided with the pleadings of the action Ms Millar had conducted against QBE. It is clear from paragraph 2 of the Deed that the $80000 was intended to be a payment for all possible compensation Ms Millar may be entitled to under the Act that included any future loss of earning capacity and any medical and other expenses relating to the injury to her knee.

105. It is clear from the terms of the deed that at the time of the deed there were proceedings current for both the upper body and the knee injury and the deed related to both. Without further evidence to the contrary I am satisfied on the balance of probabilities that at least some of the $80000.00 was paid

as compensation for past and future loss of earning capacity arising out of the knee injury in 2008. The payment made to Ms Millar's lawyers could also have been legal expenses relating to the knee injury.

106. For reasons I have set out before the loss of earning capacity arising from the knee injury in 2008 could overlap with the loss of earning capacity arising from the injury in 2005 and therefore any compensation paid for the 2008 injury could also cover a period for which Ms Millar could be compensated for relating to the 2005 injury. In particular any payment for loss of earning capacity for the period between 2009 and present time should be subject to scrutiny as possible payment of double compensation.

107. ABC'S counsel submitted because there is no break down of the payment in the deed the whole of the payment should be deducted from any compensation payable to the worker. They relied on the authority of Napper & Anor v Bulititude & Anor [2009] SASC 37 for this proposition. Of course that case is distinguishable from the present case because it concerned a property dispute however the reasoning does apply when considering whose burden it is to prove the nature of the payment.

108. Apart from Ms Millar's evidence that she paid some of the money to her lawyers and the unclear evidence about which of her injuries was causing her incapacity to work in 2009 there was no other evidence which assisted in the characterisation of the payment.

109. The Court cannot speculate how much of the payment related to the knee injury and as Ms Millar has not discharged her burden to prove to the Court the payment was not compensation for the knee that amount must be deducted from any award this court grants relating to Ms Millar's claim against ABC to avoid possible double compensation for the compensable knee injury and subsequent loss of earning capacity.

110. **Conclusion:**

1. Ms Millar suffered a compensable injury to her right knee on 28th June 2005 while in the employ of ABC Marketing and Sales

2. The compensable injury materially contributed to Ms Millar's loss of earning capacity from 1.1.2010 to the 14.1.2011

3. The compensable injury caused Ms Millar to retrain herself at a cost to herself.

4. Ms Millar has incurred medical and travel expenses in relation to the compensable injury.

5. The payment made to Ms Millar under the Deed of Agreement of the 24th of September 2009 could be a payment for the loss suffered by Ms Millar arising from the compensable injury.

6. Ms Millar has failed to discharge her burden to prove to the court that the whole of the payment is not compensation for loss suffered by Ms Millar arising out of the compensable injury including legal fees, medical expenses past and future and weekly benefits. Her failure to discharge this burden requires the court to deduct that amount from any compensation granted in these proceedings to avoid double compensation to Ms Millar.

111. **Orders:** Based on the above findings I order:

1. I declare Ms Millar remains entitled to receive compensation as a result of the injury sustained on 28 June 2005.

2. ABC Marketing and Sales pay weekly benefits to Ms Millar for the following periods:

   a. 1.1.2010 to 25.4.2010 $9476.00

   b. 30.4.2010 to 31.12.2010 $1995.89

   c. 1.1.2011 to 14.1.2011 $122.94

3. ABC Marketing and sales pay rehabilitation expenses to Ms Millar of $1415.00.

4. ABC Marketing and Sales pay medical expenses to Ms Millar of $140 for attendances on Dr Moore and $248.00 for attendances on Mr Paterson.

5. ABC Marketing and Sales pay travel expenses to Ms Millar for travel to the MRI in 2009, to appointments with Mr Paterson and Dr Moore, to Western Pathology and Nakara Medical Clinic, and Aviation Course a total of $526.75.

6. Total compensation payable to Ms Millar is $13924.58

7. The payment of $80000 made under the Deed of Agreement of the 24th September 2009 is to be set off against the compensation payable to Ms Millar to avoid Ms Millar receiving double compensation for her loss arising out of the compensable injury.

8. I will hear the parties on costs.

112. Dated this 2nd day of November 2011

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Tanya Fong Lim
STIPENDIARY MAGISTRATE