CITATION: *Nickolas Skopellos v Prodigy Constructions & Roofing Pty Ltd [2019] NTLC024*

PARTIES: Nickolas Skopellos

v

Prodigy Constructions & Roofing Pty Ltd

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 21826785

DELIVERED ON: 16 AUGUST 2019

DELIVERED AT: DARWIN

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JUDGMENT OF: JUDGE ARMITAGE

CATCHWORDS:

WORK HEALTH – Appeal against decision to cancel weekly payments; whether the worker had ceased to be incapacitated; total or partial incapacity; psychological sequela; onus of proof for economic loss

Return to Work Act s 53, s 65(2)(b)

Followed: *Northern Cement Pty Ltd v Ioasa* [1994] NTSC 58; *Miller v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21; *Australian Fuel Distributors Pty Ltd v Andros* [2015] NTSC 79; *HSE Mining Pty Ltd v Power* [2004] NTSC 32; *Normandy Mining Pty Ltd v Horner* [2000] NTSC 79; *McAllister v Kormilda College* [2003] NTMC 33; *Glen William Plewright v Mark Passmore trading as Passmore Roofing* Unreported decision of the Supreme Court of the Northern Territory No. 103 of 1996

Distinguished: *AAT Kings v Hughes* 4 NTLR 185; *Barbaro v Leighton Contractors Pty Ltd* (1980) 44 FLR 204; *Horne v Sedeco Forex Australia* (1992) 106 FLR 373; *Work Social Club – Katherine Inc v Rozycki* (1998) 120 NTR 9

REPRESENTATION:

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	Worker:	Mr B. O'Loughlin
	Employer:	Mr M. Crawley

Solicitors:

	Worker:	Halfpennys Lawyers
	Employer:	Minter Ellison

Judgment category classification:	B
Judgment ID number:	024
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IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21826785

BETWEEN

Nickolas Skopellos

Worker

v

Prodigy Constructions & Roofing Pty Ltd

Employer

REASONS FOR JUDGMENT

(Delivered 16 August 2019)

JUDGE ARMITAGE

1. The worker, a roof carpenter, was born on 6 June 1975 and is currently 43 years of age.

2. The worker claimed compensation following an injury to the left side of his neck, which he suffered at work when carrying heavy roof trusses on 5 December 2013 (the "neck injury"). The employer accepted the claim for compensation. However, on 2 May 2018 the employer issued a section 69 notice of its determination to cease payments of weekly benefits to the worker because the worker had ceased to be incapacitated for work. The worker appealed the section 69 cancellation of compensation. The parties agreed that where an employer cancels payments of weekly compensation, the employer bears the onus of proving a change of circumstances warranting the cancellation in weekly compensation. [1]

3. In addition, in a later amended statement of claim, the worker pleaded that he had suffered a psychological sequela injury, namely, Major Depressive Disorder (the "sequela injury") and that the employer had admitted this sequela injury. Although in its pleadings the employer initially denied the sequela injury, during the course of the hearing on 17 May 2019 the employer amended its defence and admitted that the worker had suffered the sequela injury and some period of incapacity as a result of that injury.[2] The date of the onset of the sequela injury

[1] *Lee v MacMahon* [2018] NTCAT 7 [43]; Worker's Closing Submissions [6]; Outline of Submissions of the Employer [15]
[2] Outline of Submissions of the Employer [32]

and whether or not it continued or had ended remained in dispute between the parties. The parties agreed that the worker bore the onus in relation to the sequela injury, in particular concerning proof as to the time of onset, its duration and any incapacity arising from the sequela injury.[3]

4. The employer counterclaimed asserting, in the alternative, that the worker had no incapacity or only a partial incapacity, such that the worker was either not entitled to weekly benefits or his weekly benefits should be reduced (to reflect his partial earning capacity). The parties agreed that the employer bore the onus of proving that the worker has ceased to be totally incapacitated. If the employer satisfied that burden, the onus of proving any partial incapacity passed to the worker.[4]

5. However if the worker established partial incapacity, the parties did not agree as to who bore the onus of proving any economic loss attributable to any partial incapacity.[5]

6. Accordingly, the issues for determination by the Court were:

   (a) Did the employer establish a change in circumstances, namely, that the worker ceased to be totally incapacitated by the neck injury? If so, did the worker establish partial incapacity due to his neck injury?
   (b) As the employer accepted that the sequela injury existed at some point in time, did the worker establish an onset date, and period of duration of the sequela injury?
   (c) Did the worker establish total or partial incapacity arising from the sequela injury or from the injuries in combination?
   (d) If the worker was only partially incapacitated, which party bore the onus of proving any economic loss arising from that partial incapacity? Was that burden discharged?

Did the employer establish a change in circumstances, namely, that the worker ceased to be totally incapacitated by the neck injury? If so, did the worker establish partial incapacity due to his neck injury?

7. In order to answer these questions it is necessary to understand the nature of the neck injury and how this affected the worker, because it is against this baseline that any change of circumstance must be established.

8. In his compensation claim form dated 9 January 2014 the worker described the incident giving rise to the injury as follows, "Whilst carrying heavy roof trusses I felt a sharp pain in my left shoulder. Originally I thought this to be minor muscle

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[3] *Newton v Masonic Homes Inc* [2009] NTSC 51 [24]; Outline of Submissions of the Employer [25]; Worker's Closing Submissions [6]
[4] *AAT Kings v Hughes* 4 NTLR 185, *Barbaro v Leighton Contractors Pty Ltd* (1980) 44 FLR 204
[5] Outline of Submissions of the Employer [25] ; Worker's Closing Submissions [7]

pain. However by 17 December the pain became so severe I attended RDH. Pain has not ceased in severity".[6]

9. Royal Darwin Hospital emergency department records[7] confirm that the worker attended the Emergency Department on 17 December 2013 complaining of a three week history of left shoulder pain that was radiating to his left elbow and left axilla. The pain was described as sometimes muscular in nature and sometimes sharp and shooting. The worker reported tingling and numbness in his left fingers. The worker denied any previous history of neck pain, neck trauma or previous injury. The Emergency Department report queried whether the worker might be suffering from cervical radiculopathy and referred the worker to his General Practitioner to arrange x-ray imaging and an MRI.

10. The worker attended the Arafura Medical Clinic on 18 December 2013 with the provisional diagnosis of cervical radiculopathy. The worker was referred for cervical diagnostic imaging. The worker obtained a CT scan on 19 December 2013[8] and MRIs on 3 and 12 February 2014. The worker's General Practitioner, Dr Lionel Crompton, considered that the imagining confirmed the diagnosis and he provided the First Workers Compensation Medical Certificate with a diagnosis of "cervical spine damage with nerve root irritation, complicated by radiculopathy".[9] Dr Crompton considered the worker to be totally unfit for work. The worker's claim for compensation was accepted. However, as noted above, on 2 May 2018 the section 69 notice was issued cancelling compensation.

11. During this approximately five year long period of receiving compensation, the worker participated in some attempted return to work programs, however they were not successful. In May 2014 the worker attempted a return to work on light duties and for limited hours with his employer. The worker was able to assist in tidying a shed but found travelling in the work vehicle painful. Although he was able to cut noggins he experienced pain when passing them to his colleagues on the roof and had to lie down. There was an argument at the site, the worker left and that attempted return to work ceased.

12. The worker said he was then encouraged to try doing some work around his home, which comprised a small renovation enclosing a back veranda area. The worker said he worked on his home for about 12 days. During that period of time he said he was extremely slow, was unable to complete the job, and work that would normally take a few hours to complete, instead took days. The worker said he had to stop because it was just too painful.[10] At that time the worker was seeing Dr Douglas Hardcastle, a sports medicine specialist, and was trialling the drug Meloxicam (which trial ceased due to common adverse side effects). By letter dated 31 October 2014 Dr Hardcastle said,

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[6] CB p 1
[7] Exhibit 3
[8] CB p 149
[9] Exhibit 2 p 155
[10] Tr p 23

> "Unfortunately, the worker has now had an exacerbation of his pain. His neck is quite sore and more importantly he is suffering from burning pain in his upper arm and increased tingling in the left hand."[11]

13. The worker then attempted a return to work as a shed hand at a plumbing shop. The plan was for him to work a few hours per day, three days per week, in the hope that he might secure ongoing employment. The worker said he was able to work for about 2 days and then had to take about 2 days off because of the pain. The worker said "the stuff wasn't heavy. It was more the looking up, looking where to put it, looking up and down, up and down all the time. There was nothing heavy about the job. I think it was just too much movement."[12] The placement lasted a few weeks but then stopped, likely because of the worker's inability to maintain regular attendance.

14. The worker then attended a placement with a cabinet maker. The plan was again for reduced hours, reduced days and light duties. The worker said he got through the first week "not too badly" but understood that by the third week his employer had rung the insurer worried about the worker's pain levels and capacity to cope with the hours. That placement also ceased.[13]

15. On 29 January 2018 Mr Jordan Crouch, a Vocational Rehabilitation Consultant, proposed a "slow graded work trial given (the worker's) medical restrictions" and "possibly extended beyond the usual 12 week time frame".[14] In about May 2018 the worker attempted this return to work trial at St Vincent de Paul, sorting clothing 2 hours a day, three days per week. The worker said he experienced pain and had to lie down after about 45 minutes of attempting this work. The same thing happened each time he attended and he stopped going after 3 or 4 attempts.[15] Even on limited hours and working at his own pace the worker was not able to continue with the program because of increased pain and the frequency with which he needed to take breaks and rests.

16. Concerning the pain, the worker said before the work injury he had never experienced a sharp pain down his left arm or pins and needles in his left arm or fingers. After the injury the pain was always the same. The pain would settle to a constant level of about "4 or 5 out of 10", "if I'm doing nothing, which is basically impossible". However, after about 20 - 30 minutes of commencing an activity (such as getting the children ready for school) the "pain levels have increased to a 7 or an 8". The worker said he then rested before being able to continue.[16] Concerning the attempted return to work programs, the worker said that the pain levels started rising within 45 minutes to one hour of commencing

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[11] Exhibit 9
[12] Tr p 24
[13] Tr p 25
[14] Exhibit 7 p 9
[15] Tr p 26
[16] Tr pp 14-15

an activity. The worker said he felt the pain between his shoulder blades, left armpit and shooting down his left arm.[17] The worker described sleep interruptions, a loss of motivation, depression and hopelessness because of his situation. The worker did not deny that he could do some work but claimed that he could only work very slowly, uneconomically[18] and with significant rest breaks.

17. In cross examination the worker said,

> "…My problem is the more I do, the more I hurt. And that's how it's been from the start. The more physical activity I do, the more pain I'm in. I've never, ever said I can't do anything, never.
>
> Q. Is it your evidence that sorting clothes for 2 hours a day, 3 days a week is beyond your capacity? A. Unfortunately, it was. It sounds pathetic, but unfortunately, that's the reality of it.
>
> Q. At home, whether you sort clothes for washing for your kids? A. Yep. And at home, it's the same thing, the pain level is increased….That's the kind of work capacity I have. That's my life capacity. I'm working one-hour bursts, maybe half an hour bursts. That's how my life has been for the last 5 years. I've been working 15 to 20 minute bursts and then having to rest. Sometimes I can push myself to do 45 minutes to an hour, just being stubborn, and then I have to rest.
>
> Q. And that's whether it's sorting clothes or putting sheet iron up on a wall? A. Yes. You can roll your eyes at me, mate. I'm not impressed with it either. I hate the fucking reality of it, but that is the reality of it. Come into my house, talk to my kids and my wife and asked them about life in the last 5 years."[19]

18. The worker's wife of 14 years gave evidence. She said that before the injury the worker was very healthy, muscly, fit, had a good physique and never complained of pain, "but that all changed when the injury occurred". For the first time she saw her husband "scrunched up and screaming in pain". She said her husband had "gone from being a strong, physical man to the opposite"; his posture was now slanted, previously he never cried but now he would get upset and teary, and that his sleep was unsettled.[20] Concerning the most recent work placement at St Vincent de Paul, she said her husband would "come home and lie on the ground and say he was exhausted, it was difficult".[21]

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[17] Tr p 26
[18] See Worker's Closing Submission [28]
[19] Tr pp 68; 69; 71
[20] Tr pp 172-175
[21] Tr p 182

Associate Professor Richard Williams, Consultant Orthopaedic Surgeon

19. As to the change in circumstances warranting a cancellation of compensation payments, the employer relied firstly on the opinion of Associate Professor Richard Williams. Dr Williams saw the worker on 27 September 2017. Although the worker complained that the appointment was rushed and only lasted 13 minutes[22], Dr Williams said he took a history from the worker, conducted an examination of the worker, and reviewed the records provided to him by the employer. On 29 September 2017 Dr Williams reported,

> "It is my opinion that the worker suffered a transient episode of left C6 and/or C7 radicular pain in relation to the work-based activity of 5 December 2013. In my opinion, those radicular symptoms have resolved. I consider his current symptom complex and reported incapacities to be considerably overstated. I believe this could be one reason why he has declined any form of definitive treatment for the condition. I think it unlikely that he would now benefit from spinal surgery or any other form of treatment. He requires minimal analgesia, and I believe that he now has no incapacity for any form of employment. Ongoing symptoms could well be related to pre-existing degeneration which is well demonstrated on radiological imaging."[23]

20. Dr Williams saw the worker for a second time on 11 April 2018. On 23 April 2018 he reported,

> "In my view the worker suffered a transient episode of left C6 or C7 radicular pain in relation to work-based activity on or about 5 December 2013. In my view the symptoms have resolved. His current incapacity for employment appears to be disproportionate to radiological findings and other clinical elements of the case. I believe his current incapacity to be considerably overstated. He may be suffering a depressive illness and this is to come under review by a consultant psychiatrist in the future. I think it unlikely that he will benefit from spinal surgery. He has a minimal analgesic requirement. Persisting symptoms are most likely related to age related cervical spondylosis and not related to any specific work-based activity in my opinion".[24]

21. Dr Williams considered the worker could return to work with no restrictions and could work in any vocational activity.[25]

[22] Tr p 29
[23] CB p 66
[24] CB pp 76-77
[25] CB p 79

22. In support of his opinion that the worker's claimed incapacity was considerably overstated Dr Williams relied, at least in part, on reports of Associate Professor G Stuart (dated 17 and 19 September and 20 0ctober 2014) and Dr T Steel (dated 13 January and 30 March 2015). Dr Williams said, "I note the opinions of Drs Stuart and Steel that the claimant's symptoms may well be overstated, at least by comparison to his reported incapacities compared with his abilities as determined by video surveillance".[26] However, neither of the reports of Dr Stuart or Dr Steel, nor the video surveillance, were tendered. As those doctors' observations and opinions were not disclosed in the proceedings, in my view I can give them little or no weight as providing a basis for Dr Williams's opinion. Further I note that those reports and any opinions expressed therein are now dated.

23. In addition, Dr Williams pointed to his own observations of the worker's movement and strength as compared to the radiological imaging to conclude that "the claimant has repeatedly demonstrated inconsistencies on examination with considerable evidence of inorganic pain perception".[27] However, Dr Williams's reports do not identify with any specificity what the asserted inconsistencies between his observations of capacity and the worker's complaints of pain and incapacity were.

24. In evidence Dr Williams was asked to expand on this aspect of his opinion. He said,

> "I had the impression that there were causes of pain which were reported which couldn't be accounted for on the basis of his radiological testing or clinical examination….
>
> It was gleaned through the examination of the claimant, through the movement of his neck, through his external behaviour in relation to pain, the restricted range of motion that he had in his upper limb and the distribution of his symptoms which seemed disproportionate to any given organic lesion that I could identify…
>
> I had the impression that his reported level of pain and dysfunction was disproportionate to the objective evidence available…
>
> I didn't have any reason to believe that what he told me was untrue. I simply felt that his perception of his pain was disproportionate with the clinical evidence available to me."[28]

25. I consider that Dr Williams's evidence did not take the matter much further and added little to clarify the basis for his impressions.

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[26] CB p 66
[27] CB pp 77 and 65
[28] Tr p 218

26. Under cross examination Dr Williams conceded some inaccuracies in his reports and agreed (albeit somewhat reluctantly) to some clarifications or corrections. Firstly, although he had reported there were "no findings consistent with persistence of C6 or C7 radiculopathy on the left side"[29], under cross examination he conceded that his finding of a "diminished left reflex jerk" was "at least part of a finding that is consistent with C7 radiculopathy".[30] In addition he agreed that the worker's description of pins and needles in the index and middle fingers were also consistent with C7 radiculopathy.[31] Further, concerning his diagnosis of the "work related aggravation of left C6/7 and/or C5/6 foraminal stenosis causing transient left C7 and /or C6 radiculopathy - resolved"[32], under cross examination Dr Williams agreed this also required correction. He said,

> "Radiculopathy implies a neurological deficit which is usually long lasting and would exceed six months. Radicular pain is commonly transient and resolves within 6 months in the majority of cases. So I believe that (diagnosis) would be better amended to radicular pain".[33]

27. In my view, Dr Williams's findings and opinions stood apart from those of his colleagues, who also examined the worker. I could find little or no convincing basis for Dr Williams's opinion that the worker was exaggerating his pain or symptoms. I accepted the worker's evidence that the initial appointment with Dr Williams was of brief duration. I was concerned by the inaccuracies and corrections required in Dr Williams's written reports. I did not find Dr Williams's evidence to be as convincing, well-reasoned, or robust as the evidence of the other experts, whose evidence I preferred and accepted.

Dr Peter Dohrmann, Consultant Neurosurgeon

28. Dr Dohrmann saw the worker on 24 May 2018. He took a history consistent with the histories given by the worker on other occasions and in evidence. He made an examination of the worker and considered available imaging.

29. Dr Dohrmann provided the following opinions,

> "The worker had no neck symptoms prior to 5 December 2013, but was suffering from asymptomatic cervical spondylosis at the time of the claimed injury. As a result of heavy lifting on 5 December 2013, he suffered an aggravation of the pre-existing cervical spondylosis and has had persisting symptoms consistent with chronic left C7 nerve root compression since that time.

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[29] CB p 67
[30] Tr p 221
[31] Tr p 223
[32] CB p 66
[33] Tr p 225

I consider that the aggravation of cervical spondylosis sustained in December 2013 continues to the present time.…

I consider that for practical purposes he remains totally incapacitated for employment. That incapacity is a consequence of the continuing symptoms that have arisen as a result of the work injury of December 2013.

While I consider that **the worker has no realistic capacity to obtain or retain employment on an ongoing basis** at present, I consider that his General Practitioner's certification of the worker **being fit to perform 2 hours of light tasks 3 times per week is reasonable,** at **least on a trial basis**. He is limited to very light physical tasks and should not be expected to lift weights greater than 5 kg or to engage in work which involves repeated neck movements.…

I note Prof Williams's report of 23 April 2018 and, in particular, his response to question 7. It appears that Prof Williams takes the view that any current symptoms are the result of pre-existing degenerative change and no longer relate to the physical effects of injury sustained on 5 December 2013. If one is to advance that argument, then I consider that logically one ought to be able to say when it was that employment ceased to contribute to symptoms and when it was that degenerative changes overrode any work-related effects. I do not believe it is possible to define this in any accurate way.

Noting the fact that the worker has had symptoms continuously since December 2013, has not been able to perform his pre-injury work and has needed continuing treatment, I conclude that **his employment was a significant contributing factor and continues to materially contribute to his neck condition**. I have therefore reached a different conclusion in this respect from Prof Williams.…

Prof Williams has referred to 'inconsistencies on examination with considerable evidence of inorganic influence on pain perception. These findings were observed by other authors providing independent opinions and have been now present on 2 occasions during my examinations'.

While I respect Prof Williams's observations and note I have seen the worker on only a single occasion, I did not detect any obvious inconsistencies or signs of physical overlay on physical examination. I further consider that the worker presented his symptoms in a straightforward fashion, without embellishment, notwithstanding the level of psychological distress that appears to accompany his long

period of time in which he has been out of the workplace."[34](emphasis added)

30. In evidence Dr Dohrmann said that on each examination he conducted with the worker, he did not detect any exaggeration or embellishment by the worker of his symptoms. Further, in his evidence Dr Dohrmann said that the sensory impairment that he detected pointed to "a minor but nonetheless definite residual left C7 radiculopathy, meaning an abnormality involving the left C7 nerve root".[35] I understood from that evidence that the complaints of the worker were, in the opinion of Dr Dohrmann, consistent with the neck injury.

31. Dr Dohrmann saw the worker again on 25 March 2019. He noted some minor improvements in the worker's physical presentation but also remarked on his "flat affect". Dr Dohrmann opined,

> "I consider that **the worker does not have any realistic capacity for employment at present** though this incapacity is as a result of the combined effects of the worker's neck condition and his psychological condition. If the worker was not suffering from any psychological condition, then I suspect that he would retain a partial capacity for work and would agree with Dr Hope that the worker 'is likely to have capacity for sedentary light duties and he would not be expected to complete full-time hours, given his current level of symptoms'."[36] (emphasis added)

32. Dr Dohrmann was cross-examined about the period of time around August 2014 when the worker was able to complete some minor renovations on his house. Dr Dohrmann said,

> "Well, it certainly suggests that he was improving or had improved. But, that doesn't preclude the probability of fluctuating symptoms thereafter which is my understanding of what is in fact actually happening.…
>
> So, the worker appears to have been in transition – it looked like – and one sees this a lot in clinical practice where people do seem to be getting better and everyone's starting to feel happier and more relaxed – but, then it hits a bit of a plateau and then fluctuates thereafter....
>
> … I think that fits in with what I was saying that perhaps in August or September things were looking a bit brighter and he was feeling a bit

[34] CB pp 44-46
[35] Tr p 123
[36] CB pp 51-52

more comfortable and optimistic. But, for whatever reason there was a plateau or further worsening."[37]

33. I understood from this evidence that Dr Dohrman maintained his opinion concerning the worker's injury and incapacity, even though he accepted that there might have been a period when the worker experienced some improvement in his symptoms.

Dr Matthew Hope, Consultant Orthopaedic Surgeon

34. Dr Hope provided a report and gave evidence that he had examined the worker on 13 July 2018. The worker provided a history to Dr Hope largely consistent with his accounts to others and in court. Dr Hope noted the worker had a good range of movement in the cervical spine and shoulders but also observed the worker to have "flat affect", "an asymmetrical gait leaning to the left side", "muscle wasting in the region of the left shoulder girdle", tenderness to the "lower aspect of the cervical spine midline" and "over the left supraspinatus muscle", and "reduced sensation to light touch over the volar aspect of the left thumb, index and long fingers".[38] Dr Hope considered various MRIs and concluded,

> "This 43 year old roof carpenter has investigations demonstrating multilevel degeneration in the cervical spine with disc osteophyte complexes at more than one level involving both the right and left sides.
>
> On a background of pre-existing degeneration within the cervical spine the development of left sided neck pain with radicular symptoms is consistent with a work related aggravation of a pre-existing condition.
>
> Diagnosis: **Aggravation cervical spine degeneration with left arm radicular symptoms.**
>
> In the nature of an aggravation this indicates a change to the underlying pathology that has resulted in persisting symptoms in contrast to an exacerbation where the symptoms return to baseline.
>
> In this difficult case a judgement requires to be made on whether the claimant's current symptoms relate to the expected presentation and natural history of cervical degeneration or whether the current symptoms are contributed to by the work-related incident.
>
> It is my opinion that due to the fact there is a clear history of the development of symptoms associated with a location in a dermatomal

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[37] Tr p 132

[38] CB p 34

distribution without a contributing peripheral nerve compression lesion, it is most likely that these arise from a single level from the cervical spine on a background of widespread degeneration. It is my opinion therefore that the current and ongoing symptoms relate in part to the work related aggravation and in part to the natural history of the pre-existing degeneration."[39]

35. Concerning the worker's capacity for employment, Dr Hope said,

> "It is my opinion that given the claimant's current symptoms that he would not be able to return to his pre-injury duties and if his symptoms continue in the current state he would not be able to continue to work as a carpenter.…
>
> This claimant is likely to have capacity for sedentary light duties and he would not be expected to complete full-time hours given his current level of symptoms.…
>
> I would consider that **this worker would be capable of performing short periods of light duties most likely of a sedentary nature with the opportunity for short periods of standing and walking**. He would not be able to carry out bending or lifting or work above shoulder height.…
>
> It would be anticipated that he will be able to return to some form of employment which would be anticipated to be in a role of light duties and reduced hours **in due course**."[40] (emphasis added)

36. Under cross examination Dr Hope was asked about the worker's attempted return to work at St Vincent de Paul and his claimed inability to perform that work,

> "Q. Is there any physical reason why he wouldn't have been able to perform that work? A. Well other than having pain in his arm. The nerve pain can be quite disabling…
>
> The guy, he had some limitation, well in the way he was walking, he had limitation of movement and he had some wasting of the muscles. So it would appear that he had reason to have pain in his left shoulder and arm.
>
> Q. Had some pain but to the extent where he couldn't sort clothes at his own pace, at a bench? A. Well yes, I think that's quite likely.

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[39] CB p 35

[40] CB pp 35-37

Q. Then why is it in your report, you actually say that you consider he's fit for sedentary light duties? A. Well, I think to do things and sort things out may have been – that's different to somebody who is perhaps sitting at a desk and intermittently answering the phone. There is some different levels of requirements."[41]

37. I understood that Dr Hope considered the neck injury explained the worker's inability to continue with the work at St Vincent de Paul, because the work of sorting clothes at his own pace involved movement or activity over and above what Dr Hope envisaged when he opined that the worker was likely to have some work capacity for sedentary light duties.

Dr Mirbahador Salamisaadatloo (Dr Sam), General Practitioner

38. Dr Sam was one of the worker's General Practitioners who saw him in the Arafura Medical Practice from time to time.

39. On 29 January 2018 the worker told Dr Sam that the independent specialist (presumably Dr Williams) had advised he was fit to return to work with no restrictions. However, Dr Sam was of the view that the worker should not lift more than 10 kilograms, although he also said he might remove that restriction in the future.[42]

40. On 16 May 2018 there was a case conference between the worker, Dr Sam and Dr Crompton in which it was agreed it was best for the worker to return to work gradually. It seems both General Practitioners agreed, that "we do not think he can return to full duties right now".[43]

41. Dr Sam provided a letter dated 29 May 2018 in which he opined,

"1. In my opinion, based on the history and physical examinations I have done on the worker, I think he still suffers pain in his left arm and in his back between his shoulder blades, since he had the work related injury on 5 December 2013.

2. I think the worker is still in pain since the injury on 5 December 2013. Based on my examinations I think he is partially incapacitated for employment.

3. We had a case conference with the worker along with IPAR team regarding his employment. Based on the IPAR plan and my opinion we agreed on a gradual return to work program with the aim of gradually increasing the working hours and days on a reasonable

[41] Tr p 103
[42] CB p 137
[43] CB p 135

> timeframe. Currently we have agreed on a plan of 2 hours a day and 3 days a week of work, on light duties, and to avoid lifting heavy objects."[44]

Dr Lionel Crompton General Practitioner

42. As stated earlier, Dr Crompton was another General Practitioner who saw the worker in the Arafura Medical Practice from time to time. Although Dr Crompton did not give evidence he provided a letter dated 31 May 2018[45] and notes of his consultations with the worker are in the exhibits[46]. Dr Crompton opined that while he believed the worker's acute injury had settled, he considered that the worker now suffered significant "chronic pain resulting from his work injury five years ago".[47] Dr Crompton strongly disagreed with the opinions of Dr Williams, particularly his opinion that the worker could return to unrestricted employment. Dr Crompton considered such an approach would be cavalier and "would constitute an unconscionable risk" of immediate danger or more serious injury to the worker.[48]

Conclusion

43. Save for Dr Williams, none of the other doctors were of the view that the worker was exaggerating or embellishing his account of the neck injury or his continuing symptoms. I considered that Dr Williams's basis for his opinion that the worker had overstated his condition was not well explained nor was it supported by the evidence. In contrast to Dr Williams, I found the worker's evidence in court to be largely consistent with the reports he had made over time to the many doctors he has consulted. In addition I considered that the worker's account was largely supported by the evidence of his wife. I considered that her evidence was provided in an honest, straightforward and unembellished manner. I found her observations of the changes in the worker after the neck injury to be quite compelling. All in all, I considered the worker to be credible and rejected Dr Williams's opinion that the worker was overstating his condition.

44. Further, I preferred and accepted the evidence and reasoning of Doctors Hope and Dohrmann and was not persuaded to accept Dr Williams's conclusion that any contribution from the neck injury to the worker's current condition had ceased. Both Doctors Hope and Dohrmann independently reached similar conclusions that the worker had suffered a work related injury that aggravated a pre-existing degeneration of the cervical spine. Both Doctors considered that the aggravating injury resulted in left sided neck pain with radicular symptoms which persisted to the present. In addition, both of the worker's General Practitioners reached opinions similar to those of Doctors Hope and Dohrmann.

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[44] CB p 60
[45] CB pp 57-59
[46] CB pp 130-146
[47] CB p 59
[48] CB p 58

45. Doctors Dohrmann and Hope both considered the neck injury to be an aggravation of a pre-existing condition. The Doctors considered that there was contribution to the worker's present condition from both the pre-existing condition (and its further deterioration) and the aggravation caused by the injury. Dr Hope said, "This worker is currently partially incapacitated for work partly due to the pre-existing cervical degeneration and partly due to the work-related aggravation of this condition".[49] Dr Dohrmann said,

> "The worker had no neck symptoms prior to 5 December 2013 but was suffering from asymptomatic cervical spondylosis at the time of the claimed neck injury. As a result of heavy lifting on 5 December 2013 he suffered an aggravation of the pre-existing cervical spondylosis and has persisting symptoms consistent with chronic left C7 nerve root compression since that time…
>
> Noting the fact that the worker has had symptoms continuously since December 2013, has not been able to perform his pre-injury work and has needed continuing treatment, I conclude that his employment was a significant contributing factor and continues to materially contribute to his neck condition."[50]

46. Having accepted the medical opinions of Doctors Dohrmann and Hope, and the worker's evidence of ongoing pain from the neck injury, I was satisfied that the neck injury continued to materially contribute to the worker's incapacity.[51]

47. Although Dr Williams considered the worker capable of returning to work without restriction, none of the other doctors agreed with this opinion. Doctors Hope, Dohrmann, Sam and Crompton held similar views, namely, that the worker was not capable of returning to his pre-injury duties as a carpenter. I preferred and accepted the evidence of Doctors Dohrmann, Hope, Sam and Crompton on this issue.

48. Dr Dohrmann considered that the worker had "**no realistic capacity to obtain or retain employment**" initially only because of his neck injury and later because of the combination of the neck injury and the sequela injury. Dr Hope considered the worker "**likely** to have capacity" for limited light sedentary duties on reduced hours "**in due course**". The General Practitioners agreed to a "gradual return to work program". While Doctors Hope, Crompton and Sam, appeared to support the worker's attempted participation in a limited type of "return to work program", with a view to the possibility of work hardening and employment "in due course", I was not satisfied that their support for such program amounted to or was equivalent to proof that the worker had an actual current capacity for employment. Indeed, the last such attempt, namely the

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[49] CB p 36
[50] CB pp 44-45
[51] See s53 *Return to Work Act*

placement at St Vincent de Paul, proved the opposite. The worker lacked capacity for even light, part-time, largely self-regulated, employment. Whilst I accepted there remained hope for a better outcome, on the evidence I considered it more likely that further attempts at return to work programs would again result in disappointment, namely, with the worker experiencing increasing pain levels such that he would be unable to reliably continue with the work.

49. Considering the evidence of the worker, his wife, and Doctors Dohrmann, Hope, Sam and Crompton, I was not satisfied that the employer had discharged its onus in establishing a change in circumstances warranting a cancellation in the worker's compensation payments.

50. However, if I am wrong about that, at its highest the medical evidence of Doctors Dohrman, Hope, Sam and Crompton pointed to the worker remaining partially incapacitated by the neck injury with a possible capacity for 2 hours of work, 3 days per week, on light, sedentary duties.

As the employer accepted that the sequela injury existed at some point in time, did the worker establish a date of onset and period of duration of the sequela injury?

Did the worker establish total or partial incapacity arising from the sequela injury or from the injuries in combination?

51. It is helpful to consider these issues together.

52. In her evidence, the worker's wife said she noticed changes in the worker's personality following the neck injury. He was moody, teary, angry, on a rollercoaster and reclusive. She said that she first noticed depressive symptoms when the worker was told by Dr Crompton that he needed to get used to the idea that he would never work in the building industry again.[52] According to the medical records it appears that conversation took place in about April 2014.[53] The worker's wife was concerned about the worker's mental health and over the years she encouraged him to seek help. She said "it got to a point where, in himself, he wanted to seek some help".[54]

53. Changes in the worker's mood were also noted by treating doctors and other professionals. In his letter of 31 October 2014 Dr Hardcastle commented, "His overall mental state has been greatly affected by stress regarding this claim".[55] In November 2017, the vocational assessor, Mr Jordan Crouch, noted that the worker presented at his assessment with flat affect (which improved over time) and self-reported depression-type symptoms.[56] Mr Crouch again documented a

[52] Tr p 173
[53] CB p 143 entry 3 April 2014
[54] Tr pp 174-175.
[55] Exhibit 9
[56] CB pp 92-93

very flat mood on 27 March 2018.[57] The worker first raised his wish for a referral to see a psychiatrist with his General Practitioner in March 2018 and Dr Sam noted the worker presented with symptoms of depression and anxiety on 29 March 2018.[58] In his letter of 31 May 2018, Dr Crompton considered that the worker's "emotional state is very affected, and PTSD or depression or something similar appears to be impeding his recovery."[59]

54. Dr Leonard Chin, Psychiatrist, saw the worker on 7 June 2018. During the assessment Dr Chin noted that the worker,

> "Has not been able to return into employment and has had gradual worsening mood, demoralisation, irritability, low motivation, low energy, poor appetite, insomnia and social withdrawal **over several years**. Has been reticent about talking to any health professional over the years, but realised recently that his children have become hypervigilant to his anger. Feeling remorseful and guilty that his children have become fearful of him shouting and now seeking treatment for his depression.…
>
> MSE - Cooperative, mild restlessness and needing to stand after 20 minutes, mood depressed, affect downcast, speech normal rate and volume, nihilistic thoughts without suicidal planning or intention…
>
> Impression – Major Depressive Disorder secondary to chronic pain disorder and stress from ongoing unemployment."[60] (emphasis added)

55. In a letter dated 2 July 2018 Dr Chin said,

> "I have diagnosed a Major Depressive Disorder secondary to chronic pain and occupational impairment. Treatment of the depressive disorder will likely improve his current social and occupational impairment."[61]

56. Dr Chin prescribed medication and recommended a multidisciplinary pain treatment.

57. A note of a conversation between counsel and Dr Chin dated 13 May 2019 was also admitted into evidence.[62] In the note, Dr Chin expressed the opinion that the usual recovery time for Major Depressive Disorder was 9 months. Dr Chin also considered that when the diagnosis arises from chronic pain, then pain can be a perpetuating factor which would lengthen the expected recovery time. Further,

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[57] Exhibit 7 p 20
[58] CB p 136
[59] CB p 58
[60] CB p 29
[61] CB p 28
[62] Exhibit 6

having considered the worker's history of reporting depression type symptoms to others, Dr Chin considered that the worker may have been suffering from a Major Depressive Disorder as early as 2015.

58. The worker saw Dr Ghazala Watt, Psychiatrist, on 17 September 2018. Dr Watt provided a report dated 25 September 2018. Dr Watt concluded,

> "The worker is a 43 year-old married male who has worked for almost 25 years in the capacity of a roofer and carpenter. Following the injury in 2013, he has experienced significant pain in his shoulder and neck which has not enabled him to continue with his previous trade and he has been off work for the last almost 4 years. This inability to continue employment has impacted significantly on the family finances and has resulted in his wife returning to work for 4 days a week.
>
> The worker reports grief in relation to his inability to sustain and maintain employment because of ongoing pain. He reports feeling guilty, and losing his identity as a father, a provider and as a "man".
>
> In terms of psychiatric symptoms, the worker presents with low mood that is persistent and pervasive in nature, he has presented with reduced energy, reduced motivation, social withdrawal, significant weight loss, negative automatic thoughts, and concentration difficulties. He also presents with repeated and ongoing thoughts of life not worth living however has not planned to act on these thoughts. On the history obtained, examination performed and review of documentation, the worker's presentation is consistent with Major Depressive Disorder which is currently moderate to severe and is not treated.
>
> I conclude that on the history obtained, examination performed, and review of the documentation, it is evident that the worker has suffered a secondary psychological injury that of Major Depressive Disorder with significant impact on his functioning. This injury is directly related to the accident on 5 December 2013 and there is no evidence to support pre-existing illness.…
>
> The worker presents with Major Depressive Disorder which is moderate to severe in intensity and it is my opinion that at the time of examination (17 September 2018) he is unable to return to work in any capacity because of his Major Depressive Disorder.…
>
> … In terms of Major Depressive Disorder, it is my opinion that with appropriate treatment and management he should show improvement

of his symptoms, and his inability to return to pre-injury employment in relation to mental illness can be lifted.

If offered appropriate treatment the symptom should show improvement within the next 6 to 8 months."[63]

59. In an attempt to clarify when the Major Depressive Disorder started, in evidence Dr Watt was asked when it was likely that the worker first experienced symptomology consistent with a Major Depressive Disorder. Dr Watt accepted that the worker was likely suffering from a Major Depressive Disorder when he was seen by Dr Chin on 7 June 2018 and noted that in order for such a diagnosis to be made the symptoms had to have been persistently present for at least 2 weeks. Dr Watt accepted the possibility that the worker may have been exhibiting some symptomology consistent with mental illness at an earlier point in time. However, on the information available, she could not provide an opinion as to whether or not the worker was in fact suffering from a mental illness at an earlier point in time, nor could she say whether he was suffering from a Major Depressive Disorder at an earlier point in time.

60. In a supplementary report dated 8 April 2019 Dr Watt said that Major Depressive Disorders are episodic in nature and an untreated episode usually resolves within 4 – 6 months (in the absence of additional complexities).[64] However, in her oral evidence Dr Watt clarified that persistent pain was an additional complexity and she considered that an experience of pain is "very likely to be linked with ongoing depressive symptoms".[65] Dr Watt continued,

"There were multiple complexities in his case. The main one was the pain and the impact of the pain on his social functioning, which could have been the factors that have maintained his symptomology."[66]

61. Based on an impression of the worker's presentation and demeanour when giving evidence in court, Dr Watt was asked to assume: that the worker appeared to be showing more emotion, making more eye contact, and was more responsive to questions now as compared to when Dr Watt examined him. In re-examination she was asked,

"Q. Would you be confident withdrawing your diagnosis on that hearsay evidence? A. I wouldn't say that I will withdraw my diagnosis but I would probably consider that perhaps the person has shown improvement since I saw him."[67]

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[63] CB pp 19-21
[64] CB p 26
[65] Tr p 140
[66] Tr p 150
[67] Tr p 152

62. By that answer I was satisfied that even if there had been some improvement of symptoms, Dr Watt had not concluded that the worker was no longer suffering from a Major Depressive Disorder. Or to rephrase it as per the question, Dr Watt did not withdraw or change her diagnosis of Major Depressive Disorder in spite of the possibility of some improvement in the worker's symptoms.

63. As to the level of incapacity arising from the sequela injury, in cross-examination Dr Watt was asked,

> "Q. What is it about the Major Depressive Disorder which prevents him from returning to work in any capacity? A. At the time when I examined him his symptomology was that he had persistently pervasive low mood. He presented with low energy, negative cognitions and from what I remember his concentration was off. He was having concentration difficulties. He had social withdrawal and he reported that he had weight loss. All the symptoms combined had significant impact on his functioning which made him unable to return to his employment…
>
> There is a question of doing and doing it reliably and able to maintain it. At the time when I examined him, the way he presented and with the symptomology he had, it would have made it difficult for him to maintain that employment. It would have made it difficult for him to or it could have made him very likely to make errors and feel tired and not be reliable, and things like that."[68]

64. Dr Watt was asked to specifically consider the worker's attempted return to work at St Vincent de Paul and was asked,

> "Q. 2 hours a day 3 days a week, he would not be able to maintain that with a Major Depressive Disorder, is that your opinion? A. At the time when I saw him my opinion was that he symptomology was acute, and it was moderate to severe in nature and had significant impact on his functioning. So, yes, even maintaining it for that period of time he may not be able to be reliable or have taken multiple days off and that would have led to…risk…for him."[69]

65. For the period 2-14 December 2018 Dr Sam completed a Workers Compensation Medical Certificate relying on both the worker's diagnosis of depression and his continuing pain in support of his finding he was "unfit for work".[70]

66. On the evidence I am satisfied that the worker was suffering from a Major Depressive Disorder when he was examined by Dr Chin on 7 June 2018.

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[68] Tr p 149
[69] Tr p 149
[70] Exhibit 2 p 217

According to Dr Watt, for such a diagnosis to have been made, the symptoms must have been present for at least two weeks. According to Dr Chin the symptoms may have been present since 2015. Further, I accept that the worker had been exhibiting depression-type symptoms for an extended period of time which had been observed by his wife and by professional persons with whom the worker was required to engage. Further, the worker was requesting psychiatric assessment in late March 2018. Whilst I cannot be certain when the sequela injury first arose, I am satisfied that the sequela injury arose and was manifest earlier than 2 May 2018.

67. Dr Sam relied on depression when he completed the Workers Compensation Medical Certificate dated December 2018. There was no challenge to that Certificate. I accept the Certificate is evidence that the worker was still suffering from depression when it was issued. Further, although I accepted the psychiatrists' evidence that Major Depressive Disorders are normally self-resolving, both psychiatrists pointed to pain as a complexity which could prolong the disorder. In addition, neither psychiatrist said that the worker had ceased to suffer from a Major Depressive Disorder, nor was there any expert medical evidence before me of any change in the worker's presentation or condition after the Certificate was issued.

68. However, the employer invited me to assess the worker's demeanour when he was giving evidence and draw my own finding as to improvements in his mental and physical health. In my view it would be most unsafe for me to do so. As I understand it, the worker's symptoms of both pain and depression are not static. If I he gave evidence on a "good day" I could not conclude from that that all his days were equally good. Further, the worker might have been trying his best in court, which might include him masking or ignoring symptoms of pain or distress. Indeed the worker was asked questions about his endurance and experience of pain including when giving evidence,

> "Q. How long can you stand before you find a pain? A. Maybe 15-20 minutes.
>
> Q. Do you have a restriction on your walking times? A. Maybe about the same, 20 minutes to half an hour, max.
>
> Q. What is it then that prevents you from continuing? A. You start getting that, the sensation of being stabbed in the back, the knife in between the shoulder blades, that starts throbbing and then it creeps into your armpit and it's like the original symptoms all over again and then you feel, like a pressure building up in the back of my head.
>
> Q. What's your sitting time? A. Sitting it's a lot easier for me to be in a recliner and I spend most of my time in the recliner. Sitting up is quite painful. I went home and took 3 Nurofen during the lunch break.

It's maybe 10 or 15 minutes, maybe an hour. It's always painful sitting. I sort of, wriggle around and you deal with it again.

Q. You started giving your evidence at about 10:30 this morning? A. Yes

Q. We had a break for 15 minutes at 11:30 and then continued giving evidence until one and you were sitting during the whole of that time? A. Yeah

Q. Is it your evidence that you're in pain during that time? A. Yes. I was in pain since I got here this morning. I was in pain before I got here this morning."[71]

69. Having earlier noted that I found the worker to be credible, I have no reason to question the truthfulness of his evidence concerning his experience of pain while giving evidence in court. Indeed, throughout the proceedings whilst giving evidence or sitting in court I noticed the worker regularly adjusting his position and grimacing. In my view it would be most unsafe for me to make any findings of improvement in the worker's physical, mental or emotional condition based on my observations and I decline to do so.

70. I was satisfied that the sequela injury was manifest before 2 May 2018. I was satisfied by the psychiatric evidence and Dr Sam's Workers Compensation Medical Certificate that the sequela injury persisted until December 2018. Further, I was satisfied that there being no evidence of any change in the worker after that date, there was no basis for me to conclude that the sequela injury had resolved and conversely, I was satisfied on the balance of probabilities that it continued.

71. In addition, there being no evidence to the contrary, I accepted Dr Watt's opinion that while the worker was suffering from a Major Depressive Disorder he was unable to return to work in any capacity, at least until there was evidence of a change in his condition. I was satisfied on the evidence before me that the Major Depressive Disorder continued with no evidence of any change and, hence, I was satisfied that the worker remained totally unfit for work.

72. However, if I am wrong in my findings as to the sequela injury it is prudent to consider the remaining issues.

If the worker was only partially incapacitated, which party bore the onus of proving any economic loss arising from that partial incapacity? Was that burden discharged?

73. In *Northern Cement Pty Ltd v Ioasa*[72] (*Ioasa)* Martin CJ held,

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[71] Tr p 74

"… **It is the worker who claims and must show not just that he is partially incapacitated, but also that he has lost earning capacity as a result**. Depending on the circumstances, the worker may wish to show that he is not reasonably capable of earning anything within the parameters prescribed in s65 (2) (b) or that he is capable of earning something, but less than his normal weekly earnings. **The employer, on the other hand, will often wish to minimise the amount which must be paid by showing that the worker is reasonably capable of earning, within those parameters, an amount equal to, or in excess of, his normal weekly earnings**. In this case the worker was content to base his claim for compensation upon the proposition that by reason of his incapacity he was not reasonably capable of earning anything because there was no employment reasonably available to him. Consistent with that attitude, he did not put forward any evidence which would shed light on his earning capacity in financial terms. At the close of the respondent's (worker's) case before the Work Health Court, there was evidence, as his Worship found, to support findings that he was not then totally incapacitated for work, but that because of the loss of his left eye, he suffered from a partial incapacity, in particular, in relation to occupations which might present a hazard to the sight in his remaining good eye. No evidence had been presented by the worker as to the amount which he was from time to time reasonably capable earning within s65 (2) (b). It was, after all, his case that he was totally incapacitated and the employer had to prove otherwise. It is not necessary in this case to consider what the position would have been had the appellant (employer) not gone into evidence in relation to the amount which it sought to show the worker was capable of earning. Perhaps the respondent (worker) would have been entitled to have nothing more than a declaratory order as to his incapacity to undertake paid work.

The appellant (employer), however, placed in evidence a number of industrial Awards covering the occupations of general labourer, grounds person and gardener, being amongst the occupations which it contended, and his Worship found, were reasonably available to the worker…

There is a distinction to be made between the onus resting upon the worker to show that partial incapacity for work, in the sense of suffering some inability or limited inability to undertake paid work because of an injury, and the amount which the worker is reasonably capable of earning within the parameters of s65 (2)

[72] [1994] NTSC 58

> **(b). In respect of the quantification of loss of earning capacity, it is up to the employer to point to evidence in the case minimising his liability in monetary terms.** It would be unreasonable to require the worker 'to prove an open-ended negative', such as that he was not capable of earning more than an amount which he chooses to rely upon. **Once there is evidence to demonstrate incapacity and loss of earning capacity on the part of the worker, then minimising the financial consequences of such findings rests with the employer**."[73] (emphasis added)

74. In my view, *Ioasa* identified not one but two onera. Firstly, the onus is on the worker to show that a partial incapacity has resulted in a loss of earning capacity. However, the worker is not required to go further and prove the monetary value of that loss. Once a loss of earning capacity is established in a general sense, the onus then passes to the employer to prove the amount which it says the worker is reasonably capable of earning. If the worker is reasonably capable of earning something, then that will establish a limit to the worker's financial loss.

75. In *Miller v ABC Marketing and Sales Pty Ltd*[74] Mildren J applied and followed *Ioasa.* His Honour said,

> "As was observed by Martin CJ in *Northern Cement Pty Ltd v Ioasa*, it is up to the employer to point to evidence in the case minimising (the workers) liability in monetary terms. It would be unreasonable to require the worker 'to prove an open-ended negative,' such as that he was not capable of earning more than an amount chose to rely upon. Once there is evidence to demonstrate incapacity and loss of earning capacity on the part of the worker, then minimising the financial consequences of such findings rests with the employer. To the extent that this in truth involves the respondent employer raising as an issue that the worker has not mitigated his loss, the legal as well as the evidentiary burden of proof rests with the employer."

76. *Ioasa* was also endorsed by Blokland J in *Australian Fuel Distributors Pty Ltd v Andros*[75] in which her Honour held,

> "Consistent with the approach in Northern *Cement Pty Ltd v Ioasa*, having found the respondent worker was partially incapacitated for work and that there was sufficient evidence of loss of earning capacity as a result, it was for the appellant employer to prove, in the sense of pointing to evidence that showed, the financial consequences of the loss of earning capacity. **His Honour found both partial**

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[73] Ibid pp 9-11

[74] [2012] NTSC 21 at [50]

[75] [2015] NTSC 79 at [103]

incapacity and that there was sufficient evidence to determine the respondent worker had suffered loss of earning capacity, but it was for the appellant employer to show the financial consequences of that loss. I see no error in his Honour's approach."(emphasis added)

77. Further, *Ioasa* has been approved and followed by Riley J in *HSE Mining Pty Ltd v Power*[76], by Bailey J in *Normandy Mining Pty Ltd v Horner*[77], and by Bradley CM in *McAllister v Kormilda College*[78].

78. However, the employer argued that there was another line of authority which placed the onus in respect of all aspects of partial incapacity, including establishing the value of the economic loss, on the worker. Firstly the employer pointed to *AAT Kings Tours Pty Ltd v Hughes*[79] (*Hughes*) in which the Court of Appeal, comprising Gallop ACJ, Kearney and Morling JJ, held,

> "When relief is sought from an award based on total incapacity, the onus is on the employer to show a change in the circumstances upon which the award is based. Those circumstances comprise loss of total incapacity. When it is shown that total incapacity has ceased, which normally also demonstrates a change in loss of earning capacity, the employer will discharge the onus. It has been said that it is 'logical' that the onus of proving any partial incapacity should then pass generally to the worker as the facts are necessarily known to him and not necessarily, or even probably, to the employer; see *Barbaro v Leighton Contractors Pty Ltd* (1980) 44 FLR 204 at 223 (*Barbaro*), per Smithers J."

79. I considered that while the Court of Appeal in *Hughes* was dealing with the onus in a broad sense, the Court did not specifically consider the discreet issue raised in this case, namely, the distinction between: establishing economic loss in a general sense; and limiting that loss by quantifying the monetary value of any earning capacity of the worker.

80. *Barbaro* was also followed by Mildren J in *Horne v Sedeco Forex Australia*[80] (*Horne*). Mildren J said,

> "… The onus of showing the level of partial incapacity and its money value rests with the worker: see *Barbaro v Leighton Contractors Pty Ltd* (1980) 44 FLR 204 at 220, 251-252; *J & H Timbers Pty Ltd v*

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[76] [2004] NTSC 32 at [41]
[77] [2000] NTSC 79 at [28 – 29]
[78] [2003] NTMC 033 at [34]
[79] [1994] 4 NTLR 185 at p 191
[80] (1992) 106 FLR 373

Nelson[81] at 638,641,649,650-651. The reason for this shift of onus was because as Smithers J put it in *Barbaro*, at 220:

> "It is logical enough that the onus should then pass generally to the workman, particularly in relation to his lack of capacity to earn money in business or employment. In that connection the facts are necessarily known to him and are not necessarily or even probably known to the employer."

Of note however, concerning his ruling on the onus, Mildren J specifically cautioned,

> "However, as s69 has been substantially amended after the hearing of the appeal by the *Work Health Amendment Act* (No 3) 1991 (NT) which came into effect on 1 January 1992 and as I have not heard any submissions on the effect of the amendment, I wish to make it clear that these remarks concerning the onus of proof are confined to the position as it was prior to the amending Act."

81. The employer also relied on the Court of Appeal decision *Work Social Club – Katherine Inc v Rozycki*[82] (*Rozycki*) in which Mildren J, with Gallop ACJ and Bailey J agreeing, said,

> "Mr Southwood submitted that the onus lay upon the worker to establish the level of her incapacity, both in the physical sense in the sense of the amount of compensation to which that level of incapacity entitled her. In my opinion, that submission is correct. **This was a primary application by the worker for compensation**. The worker's case was that she was totally incapacitated for a period, and thereafter partially incapacitated. It is well-established that the worker, **in such a case**, bears the legal as well as the evidentiary burden: see *Horne* and the authorities therein cited."(emphasis added)

82. In response, the worker submitted that as *Rozycki* was a disputed claim where the worker had the onus of proving all matters necessary to obtain compensation, it was different from the present case where the employer accepted the worker's claim but subsequently challenged the status quo by issuing a s69 notice of decision. The worker submitted,

> "One should be very careful about adopting statements on onus from cases where the original claim was disputed."[83]

83. In my view the authorities sought to be relied on by the employer are not directly on point and can be distinguished. In *Horne* Mildren J seemingly confined his

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[81] (1972) 126 CLR 625
[82] (1988) 120 NTR 9
[83] Worker's Reply Submissions [7]

decision on the onus of proof to an earlier iteration of the workers compensation legislation. The legislation has changed. In *Rozycki* Mildren J seemingly confined his decision on the legal and evidentiary burdens to cases involving a primary application for workers compensation. But this case is one in which, having accepted a claim for compensation, the employer now seeks to change that. Further the cases relied on by the employer do not directly grapple with the distinction identified in *Ioasa* between proving a loss of earning capacity and proving the monetary value of any remaining earning capacity. In my view, the relevant line of authority that I must apply commences with *Ioasa.*

84. Applying *Ioasa*, once a partial incapacity is established, I consider that the worker bears the onus of proving that he has suffered a loss of earning capacity flowing or arising from that partial incapacity. However, once the worker has shown that he has suffered a loss of earning capacity, the onus then passes to the employer to establish any limit to that loss. The employer will do that by establishing:

(i) that the worker is capable of undertaking work, and

(ii) the amount that he could reasonably earn from engaging in that work.

85. I have already expressed my finding that the worker was totally incapacitated, by the neck injury, by the sequela injury, and by the injuries in combination with each other. However if I am wrong about that, then as stated earlier in this decision, in my view the medical evidence at its highest, points to the possibility of the worker engaging in limited employment comprising of 2 hours a day, 3 days per week on light, sedentary duties. In my view it is axiomatic that the limited nature of the duties that the worker might be able to complete, together with the limited hours of work that he might be able to do, establishes a loss of earning capacity as compared to what his earning capacity was as an able-bodied adult in full-time employment. The worker has discharged his onus.

86. Similarly to the case in *Ioasa*, because the worker submitted he remained totally incapacitated he did not put forward evidence of earning capacity in financial terms, but the employer did produce evidence which it relied on as being work that the worker was reasonably capable of engaging in and earning from.[84]

87. In *Glen William Plewright v Mark Passmore trading as Passmore Roofing*[85] Martin CJ considered s65(2)(b) of the *Work Health Act* 1986 NT which is in similar terms to our current Act. In particular his Honour discussed the concept of "reasonably capable of earning". His Honour said,

> "The statute…speaks of reasonable capacity to earn. It is the capability of earning in work that the worker is capable of undertaking…Was he

[84] s65 (2) (b) *Return to Work Act*

[85] Unreported decision of the Supreme Court of the Northern Territory No. 103 of 1996 at [25]; see also *Jonathon Turner v Gebie Civil & Construction Pty Ltd* (2019) NTLC 010 per Neill J at [168]

reasonably capable of earning in a week, in work he was capable of undertaking, any amount? Reasonably capable is a narrower term than physically capable or even physically possible, and what the worker is reasonably capable of earning necessarily depends on the circumstances. It is a question of fact. It involves an assessment in all the circumstances, and on minds that may well differ. Reasonable capacity is a relative concept and designed to be applied with some flexibility."

88. Mr Crouch provided a report dated 27 November 2017.[86] His report outlined positions he thought might be suitable for the worker, the requirements of those positions and any re-training that the worker needed to undertake in order to qualify for the positions. In respect of each of the positions Mr Crouch noted that the worker required additional training (sometimes up to 12 months in length) to be qualified for the requirements of the position. No retraining was offered by the insurer.[87] In addition, there was no evidence led about what the physical requirements of any re-training might be, or whether the worker had the necessary physical or other capabilities (such as prerequisite educational requirements) to complete the re-training. As an example, the position of Surveillance Operator (which on its face appeared to be the most sedentary of the proposed positions) required computer literacy and the ability to compile data and information to produce in-depth reports. The worker was not computer literate and there was no evidence that he had any experience or capability in compiling data or information, or in producing in-depth reports. Without re-training it was clear that the worker possessed neither the qualifications nor the skills necessary to undertake employment in this position. That being so, in my view, the employer had not established that the worker was capable of undertaking that option, or indeed any of the proposed employment options, identified by Mr Crouch.

89. In addition, I agreed with the worker's submissions[88] that most, if not all, of the proposed positions involved physical activities, movement, and endurance beyond the very restricted sedentary light duties considered possibly within his capacity as discussed by Doctors Dohrmann and Hope. For example, the Airport Officer[89] position included baggage screening. Applying common sense, I would think that baggage screening would likely involve lifting and handling baggage which would not fall within my concept of light or sedentary duties. Another requirement of that position was the ability to work a 12 hour shift which was clearly outside the capability of the worker. An Education Aide[90] is required to "prepare indoor and outdoor areas for learning and recreational activities". Again, applying common sense I consider this might entail setting up sporting equipment, moving tables and chairs, cleaning sand pits and so on; all of those kinds of duties would fall outside what I consider to be sedentary or light duties.

[86] CB pp 88-104
[87] Exhibit 7 p 13 at entry 5 February 2018 10:59 AM
[88] Worker's Closing Submissions [145]
[89] CB p 97
[90] CB p 98

A Disability Support Worker[91] is required to assist clients with their mobility and perform housekeeping tasks such as vacuuming and cleaning. The worker gave evidence as to his very limited ability to complete cleaning tasks in his own home and I do not see how those cleaning tasks or providing mobility assistance could be said to be sedentary, light, or within the worker's capability. Mr Crouch himself acknowledged that "such a role can be quite physical".[92] A Site Inspector (Roofing Industry) is required to inspect work. Common sense dictates this must include roofs, by which I visualise ladders, crawling spaces and so on. Again this type of work does not fit within the light or sedentary framework. Work Health and Safety Officers are required, inter alia, to inspect and test machines, inspect factories and other worksites, investigate incidents and fatalities, to determine causes and collect evidence. None of that work, in my view, could be considered light and sedentary.

90. In respect of each position proposed by the employer, I was not satisfied the worker was capable of undertaking such employment. In each case I considered that the worker lacked the qualifications, experience and physical capability to undertake the work.[93] I was not satisfied that the employer had discharged its onus of proving the worker had any reasonable earning capacity.

Orders

91. In summary, I find for the worker. I find that the worker remains totally incapacitated for work as a result of the neck injury, the sequela injury and the injuries in combination. I order the employer to make the appropriate payments of compensation from the date of cessation and continuing.

92. I will hear from the parties as to any consequential orders.

Dated this 16th day of August 2019

JUDGE ELISABETH ARMITAGE

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[91] CB p 99
[92] CB p 100
[93] s65 (2)(b) and s68 *Return to Work Act*

WORK HEALTH COURT