CITATION: *Joanne Claire Catford v Laminex [2021] NTLC 004*

PARTIES:	JOANNE CLAIRE CATFORD
	V
	LAMINEX GROUP LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO:	21845287
DELIVERED ON:	28 January 2021
DELIVERED AT:	DARWIN
HEARING DATES:	5 – 9 October 2020
DECISION OF:	JUDGE JOHN NEILL

CATCHWORDS:

Validity of section 69 Notice of Decision; jurisdiction of the Work Health Court to hear and determine an initiating Application or Counterclaim by an Employer; whether the geographical location of a most profitable employment comes within the concept of "available" in section 69(2)(b) of the Return To Work Act*; operation of the principle in Jones v Dunkel where the Worker does not give evidence; the requirement to identify a real, existing job when identifying most profitable employment; the interaction after the first 104 weeks of incapacity between identifying a most profitable employment and the Employer's obligations to rehabilitate.*

Return To Work Act sections 65(2), 65(5)(b), 65B, 68, 69(1), (3) and (4), 75, 75A(1) and (6) and 76

Work Health Administration Act section 14

Interpretation Act sections 24AA(1) and 68

Evidence (National Uniform Legislation) Act subsections 144(1)(b) and (2)

Ju Ju Nominees Pty Ltd v Carmichael [1999] NTSC 20

Northern Cement v Ioasa [1994] NTSC 58

Australian Fuel Distributors Pty Ltd v Andros [2015] NTSC 79

Betty Millar v ABC Marketing and Sales Pty Ltd [2012] NTSC 21

Briginshaw v Briginshaw (1938) 60 CLR 336

Jones v Dunkel (1959) 101 CLR 298

Murwangi Community Aboriginal Corporation v Denis Martin Carroll [2002]

NTMC 25

Collins Radio Constructors Inc v Day (1998) 143 FLR 425

Dickin v NT TAB Pty Ltd [2003] NTSC 119

Newton v Masonic Homes Inc [2009] NTSC 51

Swanson v NT of A [2006] NTSC 88

Quality Plumbing & Building Contractors Pty Ltd v Schloss [2015] NTSC 56

Global Insulation Contractors (NSW) Pty Ltd v Keating [2012] NTSC 4

Roberta Barnett v NT of A - unreported Decision of Dr John Lowndes SM (as he then was) Work Health Court – delivered 24 June 2011

REPRESENTATION:

Counsel:

Worker:	Mr Michael Grove
Employer:	Mr Ben O'Loughlin

Solicitors:

Worker:	Ward Keller
Employer:	HWL Ebsworth

Judgment category classification:	A
Judgment ID number:	004
Number of paragraphs:	162

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

No. 21845287

BETWEEN

JOANNE CLAIRE CATFORD

Worker

AND

LAMINEX GROUP LTD

Employer

REASONS FOR DECISION

(Delivered 28 January 2021)

JUDGE JOHN NEILL

INTRODUCTION

1. Joanne Claire Catford ("the Worker") was born on 7 April 1969 and she is currently 51 years of age.

2. On or about 9 February 2012 when she was aged 42 years the Worker suffered an injury to her left shoulder (“the injury”) in the course of her employment with Laminex Group Ltd ("the Employer").]

3. The Worker made a claim in respect of the injury under the relevant legislation in the Northern Territory of Australia which was at that time entitled the *Workers Rehabilitation and Compensation Act* ("the Act"). The Act has since been renamed the *Return to Work Act*. The Employer accepted the claim and it commenced making payments of compensation under the Act to the Worker, including weekly benefits.

4. The Worker is left-handed and the injury to her left shoulder has caused her varying degrees of pain and incapacity over the years. She has undergone physiotherapy, injections of corticosteroids into the left shoulder joint, and over time three different surgeries to her left shoulder. She returned to some employments at different times but she has continued to report symptoms involving her left shoulder to her treating orthopaedic surgeons. She has not worked since around June 2016.

5. By a Notice of Decision and Rights of Appeal issued pursuant to section 69(1) of the Act and dated 21 September 2018 ("the Notice") the Employer cancelled payments of weekly benefits to the Worker from 14 days after the Notice was given to her. In the Notice the Employer among other things states: "*You have ceased to be incapacitated (total or partial) as a result of the left shoulder injury*". In response to this, the Worker has commenced these proceedings.

THE PLEADINGS AND ISSUES

6. The Worker's present Statement of Claim is her Amended Statement of Claim dated 16 June 2020. This is a "mere appeal" in which the Worker identifies the injury, the accepted claim and the Notice, she pleads the reasons for the cancellation are unsubstantiated, and she “appeals” the decision in the Notice. The Worker also pleads that the Notice is invalid, however this specific pleading did not change the appeal from a "mere appeal" and the Employer was still *dux litis* at this hearing.

7. The Employer bears both the legal and evidentiary onus of establishing the change of circumstances warranting the cancellation of the amount of weekly compensation by the Notice – see *Ju Ju Nominees Pty Ltd v Carmichael* [1999] NTSC 20 per Martin CJ (BF) at paragraph 15.

8. The Employer by its Further Amended Notice of Defence dated 29 June 2020 admits the Worker's pleaded relevant history of the accepted claim and the Notice, it denies her pleading that the Notice is invalid, it denies her pleading that the basis for the Notice is unsubstantiated, and it joins issue with her claim for relief. The Employer goes on by way of a Counterclaim to plead that since 21 September 2018 the Worker has been capable of work as (i) a dental practice manager; (ii) a medical practice manager; (iii) a dental receptionist; and/or (iv) a dental assistant/receptionist. It pleads that in each of these categories of employment the Worker would be capable of earning a specified weekly amount. In the alternative, the Employer pleads that since 21 September 2018 the Worker has been capable of part-time work in the identified categories of employment, of 20 hours per week.

9. It is important to note that the Employer does not plead in its Counterclaim that the Worker has ceased to be incapacitated for work as a consequence of her accepted left shoulder injury. This is the purported basis on which the Employer has cancelled payments of weekly compensation to the Worker as set out in the Notice, and it is pleaded in paragraph 5 of the Notice of Defence in respect of the basis for the Notice, but this is not repeated and pleaded by the Employer anywhere in its Counterclaim. Indeed, in paragraph 16.2 of its Counterclaim the Employer seeks a declaration that the Worker “*…has ceased to be totally incapacitated for work as a result of the injury*”, but it does not in the alternative or at all seek a declaration that the Worker has entirely ceased to be incapacitated for work as a result of the injury.

10. Accordingly, the Employer has chosen to plead its Counterclaim case on the limited basis that the Worker remains partially incapacitated for work as a result of the injury but that she nevertheless has a capacity to earn as pleaded in the Counterclaim. The effect of this is that if the Notice is not upheld then the Employer will be limited to the narrower case pleaded in its Counterclaim. The Employer will bear both the legal and the evidentiary onus on the balance of probabilities of quantifying the value of the Worker’s remaining capacity to earn – see *Northern Cement v Ioasa* (“*Ioasa*”) [1994] NTSC 58 per Martin CJ (BF) in paragraph 15 at page 6.2.

11. The Worker has filed an Amended Reply dated 3 July 2020 to the Amended Defence. This includes a Defence to the Employer's Counterclaim. In her Defence to the Employer's Counterclaim the Worker pleads that as a matter of statutory interpretation there is no jurisdiction in the Work Health Court to entertain a Counterclaim by an employer in the circumstances. If this is correct, the Counterclaim would be struck out and the Notice would be the only issue before the Court.

12. The Worker in her Defence to the Employer’s Counterclaim pleads further and separately that she suffers from specified health problems which are not related to the injury or the employment, in addition to her left shoulder problems. She pleads that pursuant to section

68 of the Act, regard must also be had to these. She pleads that when regard is had to these in addition to her left shoulder injury, she has no capacity for any work.

13. Finally, the Employer in its Counterclaim pleads the Worker's normal weekly earnings at the date of injury were $1,044.65 but the Worker in her Defence to Counterclaim pleads the figure of $1,170.84. The parties at the hearing agreed to resolve this issue and attend to any necessary calculations without the involvement of the Court. No evidence was adduced at the hearing in relation to normal weekly earnings.

14. The Employer bears both the legal and evidentiary onus of proving the matters pleaded in its Counterclaim – "*he who avers must prove*" - see also *Australian Fuel Distributors Pty Ltd v Andros* [2015] NTSC 79 per Blokland J at paragraph [41].

15. The Worker bears the evidentiary onus in respect of her additional health issues other than her left shoulder and relied on by her in her Defence to the Employer's Counterclaim for the purpose of section 68 of the Act. This is both because it is the Worker who avers these additional conditions unrelated to her work injury, and also because the nature and extent of these additional health issues and their effect upon the Worker and evidence to prove these are all matters solely or predominantly within her knowledge and/or control and not within the knowledge or control of the Employer - see *Betty Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21 per Justice Mildren in paragraphs [25] and [26].

16. The standard of proof is the balance of probabilities, subject to considerations of cogency – see generally *Briginshaw v Briginshaw* (1938) 60 CLR 336.

17. The hearing proceeded before me for five days commencing Monday, 5 October 2020 and ending Friday, 9 October 2020. In those five days I received and heard all of the evidence relevant to the entirety of the matters raised on the pleadings, other than normal weekly earnings. The parties by consent tendered a Trial Book which I received as Exhibit E1. The Trial Book contains 182 separately identified and numbered documents involving 825 pages.

18. Live evidence was heard from five medical practitioners and one occupational therapist. The Worker did not give evidence and therefore was not subjected to cross examination. No explanation for this was offered by the Worker's counsel and none emerged from the evidence. As a consequence, the principles discussed by the High Court in *Jones v Dunkel* (1959) 101 CLR 298 may be applicable in my assessment of the evidence.

19. Both parties filed written submissions in the weeks following the hearing, with the latest being received from the Worker's lawyers on 3 November 2020.

PRELIMINARY ISSUES

20. The Worker's pleadings raise two preliminary issues. These are: (i) the validity of the Notice; and (ii) the Court's jurisdiction to hear and determine the Employer's Counterclaim.

21. In the course of receiving the evidence a third issue emerged. This was that the locations of all the jobs identified in the evidence in the four categories pleaded by the Employer as being within the Worker's capacity to perform were far away from her home in Gunnedah in Western New South Wales. This raises for consideration the significance of geographical location and whether it comes within the meaning and ambit of the word "available" where it appears in subsection 65(2) of the Act.

22. If it does not, then geographical location will be relevant and it might exclude all the identified jobs from consideration. That outcome would defeat the Employer's Counterclaim because there was no evidence adduced of any other jobs, and the Employer would fail to

discharge the onus it bears to quantify the partially incapacitated Worker's remaining earning capacity. The issue of geographical location is therefore a fundamentally important issue and I deal with it as a third preliminary issue.

23. The evidence necessary for me to consider all three of these issues is included in the Trial Book and/or in Exhibit E2 and Exhibit E4.

The First Preliminary Issue – the Validity of the Notice

24. The Worker argues that the Notice is not compliant with one or more of subsections 69(1)(a) and (b), 69(3) and/or 69(4) of the Act. She argues that a finding of non-compliance with any one of these subsections will necessarily mean the Notice is invalid and, subject to the Counterclaim, the Employer would be required by force of section 69 of the Act to continue to make weekly payments of compensation.

Subsection 69(1)

25. Subsection 69(1) of the Act provides: "*Subject to this Subdivision, an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom it is payable has been given…*" and the subsection then goes on in (a) and (b) to identify what is required to be given to the worker.

Subsection 69(1)(a)

26. This requires that the worker be given: "*14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced*".

27. The first page of the Notice in this case in two sentences informs the Worker that the Insurer hereby: "*Cancels payments of weekly benefits to you pursuant to section 69 of the* Return to Work Act. *The cancellation will be effective in 14 days from your receipt of this notice*". Mr Grove for the Worker argues that this language does not comply with subsection 69(1)(a). He submits that this is so because the Employer is announcing a present cancellation of payments, not a present intention to effect a future cancellation in 14 days' time. This interpretation might be possible from the language of the first sentence considered in isolation, however the second sentence clarifies the position and in my view removes any doubt. I do not accept this submission and I find that the Notice complies with the requirements of subsection 69(1)(a).

Subsection 69(1)(b)

28. This requires that the worker be given "*a statement in the approved form*" containing specified information as identified in *placita* (i) to (vi) which must be addressed in that statement. The parties had some difficulty at first in establishing the process by which the form had become approved but eventually it was agreed by both parties that the form used in this case was indeed the approved form. I received by way of evidence Exhibits E2 and E4 and I am satisfied that these sufficiently establish that the form used was approved on 26 April 2017 by one Stephen Gelding, Executive Director of NT WorkSafe, and that on 18 July 2014 Stephen Gelding had been appointed "*to constitute the Work Health Authority on and from 16 August 2014*". I am satisfied and I find that the form used in this matter was the approved form within the meaning of subsection 69(1)(b) of the Act.

Subsection 69(1)(b)(i)

29. This requires the statement to set out "…*the reasons for the proposed cancellation or reduction*". These reasons are summarised by the Employer on page 3 of the form as follows:

> "*Based on the above, the employer has decided that:*
>
> 1. *You have ceased to be incapacitated (total or partial) as a result of the left shoulder injury.*
> 2. *You no longer suffer from a work-related injury to your left shoulder for the purposes of the* Return to Work Act.
> 3. *In light of all the above, your entitlement to compensation is cancelled pursuant to sections 65 and 69 of the* Return to Work Act".

30. The reasons taken separately or as a whole may well be subject to criticism but the quality of the reasons is not the point here. The requirement is only that reasons be set out in a statement, which statement must be located within the approved form. I am satisfied and I find that the requirement in this subsection to set out the reasons for the then intended cancellation was met.

Subsection 69(1)(b)(ii)

31. This requires a statement: "*to the effect that, if the worker wishes to dispute the decision to cancel or reduce compensation, the worker may, within 90 days after receiving the statement, apply to the Authority to have the dispute referred to mediation*".

32. Page 4 of the Notice is entitled "*Rights of Appeal – MEDIATIO*N". It informs a worker "*You may* apply *for Mediation if you wish to dispute the NOTICE OF DECISION*". It provides the address and other contact details for NT WorkSafe so that the worker might make the application to it. It informs the worker: "***NOTE:*** *You have* ***90 days*** *from receipt of this* Notice of Decision and Rights of Appeal *document to apply to NT WorkSafe for Mediation*".

33. By commencing the requirement with the words "*to the effect of…*" the legislature is making it plain that no specific form of words is required. A form of words which adequately conveys the required message will suffice. I am satisfied and I find that the form of words appearing on the approved form and quoted in the foregoing paragraph adequately conveys the required message.

Subsections 69(1)(b)(iii), (iv) and (v)

34. The first of these requires a statement: "*to the effect that, if mediation is unsuccessful in resolving the dispute, the worker may appeal to the Court against the decision to cancel or reduce compensation*". The second requires a statement: "*to the effect that, if the worker wishes to appeal, the worker must lodge the appeal with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2)*". The third requires a statement: "*to the effect that the worker may only appeal against the decision if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful*".

35. Page 4 of the Notice states: "*Mediation is a requirement before an application can be made to the Work Health Court*". Page 5 of the Notice states: "*The Mediation process will conclude in you receiving a Certificate of Mediation. Then, if you wish to contest the decision in the Work Health Court you must make an application to the* ***Court within 28 days of receiving a Certificate of Mediation***".

36. The clear point of distinction between the requirements in subsection 69(1)(b)(iii), (iv) and (v) and the statements actually set out in this Notice is the claim in the Notice that the mediation process will conclude in the Worker's receiving a Certificate of Mediation and then, and by implication only then, the Worker can make an application to the Court. This goes further than the required statements and is in any event an incorrect statement of the law.

37. The issue whether a Certificate of Mediation must issue and be received before a worker is entitled to make an application to the Court was considered by Magistrate Trigg of this Court in *Murwangi Community Aboriginal Corporation v Denis Martin Carroll* [2002] NTMC 25. The Worker in that case had made an initiating Application to the Court more than 28 days after having requested a mediation but before any mediation had been held, and before a Certificate of Mediation had issued. The Employer applied to the Court to strike out the Worker's initiating Application because no mediation had been held and because no Certificate of Mediation had issued. Magistrate Trigg ruled that the times prescribed in the Act for the holding of a mediation once the request had been received must be strictly observed and if a mediation was not held within the prescribed time then it was *ipso facto* "unsuccessful" and "*The fact that the certificate had not issued by the time the proceedings had been commenced, in my view should not be a bar to the proceedings"*.

38. Accordingly, in my view the statements required under subsections 69(1)(b)(iii), (iv) and (v) and which purport to be provided in the Notice in this case when considered together include an incorrect statement of the Worker's rights and obligations. This is not cured by prefacing the statutory requirements with the words "*to the effect that…*". I am satisfied and I find that the Notice does not comply with subsection 69(1)(b)(iii), (iv) and (v) of the Act.

Subsection 69(3)

39. Subsection 69(3) provides as follows: "*where compensation is to be cancelled for the reason that the worker to whom it is paid has ceased to be incapacitated for work, the statement under subsection (1) shall be accompanied by the statement of fitness for work of the medical practitioner certifying that the person has ceased to be incapacitated for work"*.

40. The Notice in this case has attached to it a four page report dated 28 August 2018 of orthopaedic surgeon Dr Steve Andrews. That report nowhere uses the word "certify" or any version of that word, in relation to the Worker's having ceased to be incapacitated for work. The Notice also has attached to it a medical certificate by Dr Andrews dated 13 September 2018. That certificate is in a one page NT WorkSafe Form entitled "Statement of fitness for work – Final certificate". Halfway down the page under the heading "**Medical assessment**" Dr Andrews has ticked the boxes next to two standard statements, the first saying "*The worker has ceased to be incapacitated for work*" and the second saying "*The worker's incapacity is no longer a result of the work-related injury/disease*".

41. In the following part of the certificate Dr Andrews goes on to state: "*Having examined the worker it is my opinion that as from 28 August 2018 in relation to her work-related injury, namely an aggravation of her underlying condition, that being impingement and a partial tear of her cuff and some AC joint arthritis of left shoulder injury (the injury) sustained on 9 February 2012, **I certify that*** (emphasis added)*:*

> *1. The injury, being the aggravation, has now ceased.*
>
> *2. If the worker is still incapacitated for work, then such incapacity is due to the worker's underlying condition not related to the injury.*
>
> *3. There is no reason why the worker could not return to her pre-injury role".*

42. Whilst the first of the statements which Dr Andrews has ticked complies with the wording of the requirement in subsection 69(3) of the Act, it is not in the form of a certification. The only certification appears as set out in the preceding paragraph and it does not include the words that the Worker "*has ceased to be incapacitated for work*".

43. In *Collins Radio Constructors Inc v Day* ("*Day*") (1998)143 FLR 425 at page 430.4 and following, the NT Court of Appeal said unanimously: "… *the question can be narrowed down to whether the requirement that the certificate served upon the worker should indicate that the worker has ceased to be incapacitated for work is of such importance to the object of the statute as to disclose an intention that its complete non-observance should invalidate the action of the appellant in cancelling the respondent's weekly benefits. For the reasons given by the learned Chief Justice, we think that the answer to this question must be "yes", and that it is clear beyond question that the requirements of section 69(3) as to the contents of the certificate may not be ignored"*.

44. The Court went on in *Day* as follows: "*However, we would not go so far as to say that a form of words other than those prescribed by the subsection could never amount to compliance. If, for example, Dr Awerbuch had certified that the appellant was* "capable of returning to employment full-time in all forms of employment for which she had any previous experience" *this or some other suitable words, would convey the same meaning as* "ceased to be incapacitated for work". *We do not think it was the intention of the legislature that only the precise words chosen by the legislature, and no others conveying the same meaning, would suffice. Obviously those who draft the certificates would be wise to follow the words of the statute, but they are not to be treated as possessing special magical powers which other words to like effect do not"*.

45. The question therefore is whether Dr Andrews' certification consists of words "… *conveying the same meaning…*" or which are "…*of like effect…*". I am satisfied that it does not. This is because in reason 3. Dr Andrews limits his certification to the Worker's "*pre-injury role*". In order to convey the same meaning as the words prescribed by the statute Dr Andrews needed to embrace a broader concept such as that suggested in *Day* in the preceding paragraph, of "*all forms of employment for which (s)he had any previous experience"*. I am satisfied and I find that the Notice does not comply with subsection 69(3) of the Act.

Subsection 69(4)

46. This subsection provides as follows:

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

47. In *Dickin v NT TAB Pty Ltd* [2003] NTSC 119 in paragraph [18] Justice Angel of the NT Supreme Court considered subsection 69(4) of the Act and said:

> "*If I may be pardoned for saying so, section 69(4) Work Health Act means what it says. A notice must unambiguously spell out why a current payment regime should change in clear terms that a lay reader can fully and readily understand*".

48. A differently expressed statement of the law appears in *Newton v Masonic Homes Inc* ("*Newton*") [2009] NTSC 51 where Justice Mildren of the NT Supreme Court said at paragraph [16] in respect of subsection 69(4) of the Act:

> "*In my opinion, the test is an objective one, and does not depend on the level of education or intelligence of the worker. Nor is it invalid if written in English where the worker is unable to read, either at all, or in the English language. An objective test recognises that there will be many occasions where workers will need to consult a solicitor before being able to fully understand why the compensation is being reduced or cancelled, particularly as the provisions of the Act are complex and likely to be difficult for a layman to comprehend"*.

49. Each of these rulings on the operation of subsection 69(4) of the Act is part of the *ratio decidendi* in its respective case and both are binding on this Court. I am satisfied that taken together, they establish that for the purposes of subsection 69(4) of the Act, a notice "…*must unambiguously spell out why a current payment regime should change in clear terms that an average lay person can fully and readily understand*…", but in order to achieve this the notice need not take into account any disadvantage or disability which might derogate from the capacities or comprehension of the specific worker to whom the notice is directed. The test is an objective test and therefore it is not necessary for particular workers to give evidence of their understanding of the notices in specific cases.

50. In the present case I find that the Notice consists of four documents. These are a covering letter dated 21 September 2018 from the Insurer to the Worker, the five pages of the Notice entitled "Notice of Decision and Rights of Appeal", the attached four page medical report dated 28 August 2018 of orthopaedic surgeon Dr Steve Andrews, and the attached medical certificate dated 13 September 2018 of Dr Andrews.

51. The Notice on page 1 informs the Worker that payments of weekly benefits to her will be cancelled, effective in 14 days from her receipt of the Notice. It then states:

> "*The reasons for this decision are:*
>
> *"This Notice of Decision is to advise you of a decision by the employer in relation to your claim for compensation dated 29 February 2012 (the left shoulder claim) for a left shoulder injury that you suffered on 9 February 2012 (the left shoulder injury).*
>
> ***"Background/Relevant matters***
>
> *1. On or about 9 February 2012 you suffered the left shoulder injury.*
>
> *2. On or about 29 February 2012 you submitted a claim to the employer in respect of the left shoulder injury.*
>
> *3. By written notice dated 18 April 2012 Allianz accepted the left shoulder claim on behalf of the employer.*
>
> *"4. In his report dated 28 August 2018, Dr Andrews reported as follows:*
>
> *"10. If the worker did suffer an injury to her left shoulder, was her employment with the employer a significant contributing cause of the injury? Please detail the basis of your opinion.*
>
> It would seem reasonable that Joanne has had a work-related aggravation of her underlying condition. I would consider that the aggravation has now ceased and her ongoing problems are due to the underlying condition.
>
> ***"Capacity for Work***
>
> *11. If the worker did suffer an injury to her left shoulder, has the worker ceased to be incapacitated for work in relation to that injury?*

There does not seem to be any reason why Joanne could not return to work. She would be able to resume most occupations. She may struggle with an occupation that required heavy repetitive work above shoulder height.

12. *If the worker did suffer an injury to her left shoulder, and she continues to suffer any capacity for work, do you agree that the worker's incapacity is no longer as a result of the work-related injury?*

Yes, any ongoing limitations are not due to the work-related injury.

"5. *On 13 September 2018 Dr Andrews issued a Statement of fitness for work – Final certificate in which he certified that:*

"(a) You have ceased to be incapacitated for work; and

(b) Your incapacity is no longer as a result of the injury.

"*6. Further, Dr Andrew stated in the Final certificate:*

"Having examined the worker it is my opinion that as from 28 August 2018 in relation to her work-related injury, namely an aggravation of her underlying condition, that being impingement and a partial tear of her cuff and some AC joint arthritis of the left shoulder injury (the injury) sustained on 9 February 2012, I certify that:

The worker has ceased to be incapacitated for work as a result of the injury.

1. The injury, being the aggravation, has now ceased.
2. If the worker is still incapacitated for work, then such incapacity is due to the worker's underlying condition not related to the injury.

There is no reason why the worker could not return to her pre-injury role."

"*Based on the above, the employer has decided that:*

"1. *You have ceased to be incapacitated (total or partial) as a result of the left shoulder injury.*

2. *You no longer suffer from a work-related injury to your left shoulder for the purposes of the* Return to Work Act.

3. *In light of all of the above, your entitlement to compensation is cancelled pursuant to sections 65 and 69 of the* Return to Work Act ".

52. The attached four page medical report of Dr Steve Andrews dated 28 August 2018 concludes on the fourth page under the heading "*Additional Comments*" with the following: "*I would recommend that this report should not be released directly to the patient.* ***It contains complex medical information and may be liable to misinterpretation by a lay reader*** (emphasis added). *This may cause undue stress or adverse psychological effect. If required, it would be appropriate to release this document to the patient's treating doctor for discussion"*.

53. I agree with Dr Andrews' "*Additional Comments*". Reports of this nature are familiar to a narrow class of persons, including medical practitioners and allied health workers, lawyers who work in the field of personal injuries and people who work in areas of the insurance industry. They can be difficult for and confusing to the average lay person who lacks these backgrounds. I also note and respectfully endorse the observation of Justice Mildren in the passage quoted above from *Newton* that "*…the provisions of the Act are complex and likely to be difficult for a layman to comprehend*".

54. Considering these four documents as a whole, the Notice is over-long, verbose, circular, ambiguous, garbled and confusing, and I so find. This state of affairs is not assisted by the no doubt inadvertent but still fundamental omission of the word "cancelled" from the first line of the second paragraph in the letter from the Insurer dated 21 September 2018 which forms part of the Notice. I find that the Notice is not in clear terms which an average lay person can fully and readily understand.

55. I am satisfied and I find that the Notice does not comply with the requirements of subsection 69(4) of the Act.

The Notice – Consequences of Non-Compliance

56. In summary, I have found that the Notice does not comply with the requirements of subsections 69(1)(b)(iii), (iv) and (v), subsection 69(3) and subsection 69(4) of the Act. I am satisfied and I rule that the analysis set out in *Day* above is not limited to non-compliance with subsection 69(3) but applies equally to non-compliance with the other subsections of section 69. In that regard I note the observation by Justice Mildren in *Newton* above at paragraph [18] as follows:

> "*…I cannot help but observe that there is nowhere included in the notice a statement, as required by s 69(1)(b)(vi) to the effect that, despite the requirements of the Act relating to mediation, the claimant may commence a proceeding for an interim determination under section 107 at any time after the claimant has applied to the Authority to have the dispute referred to mediation.* ***Strict compliance with this requirement is also necessary for a valid notice under section 69*** (emphasis added)***".***

57. I rule that the Notice is invalid.

The Second Preliminary Issue – the Jurisdiction of the Work Health Court to Entertain the Counterclaim

58. Mr Grove for the Worker argues that since the commencement of the *Work Health* Administration *Act* ("the Administration Act") on and from 1 January 2012 there is no longer any jurisdiction in the Work Health Court for an employer to raise its own issues separately from a worker's issues, and to have them heard. He argues that to the extent a worker's case raises matters and questions incidental to or arising out of that case which are of interest to the employer, the Work Health Court has jurisdiction to determine those in the course of the hearing. However, the Court lacks jurisdiction separately to hear other matters of interest to the employer if these are not raised in the worker's case.

59. If this argument is correct then an employer would not be able to raise its own separate issues either by way of a fresh, initiating Application to the Court which might be consolidated with a worker's proceedings, or by way of a Counterclaim in a worker's proceedings. Mr Grove's argument is not that the procedure allowing for a Counterclaim is invalid, but rather that there is no jurisdiction within which any Counterclaim procedure might operate.

60. This argument is based on the language of section 14 of the Administration Act, as follows:

> "**14 Jurisdiction of Court**
>
> *"The Court has the following jurisdiction:*
>
> *(a) under the* Return to Work Act*, to* *hear and determine* (emphasis added):
>
> *(i) claims for compensation under Part 5 of that Act; and*
>
> *(ii) all other matters required or permitted by that Act to be referred to the Court for determination;*
>
> *(b) not relevant*
>
> *(c) to* *determine* (emphasis added*) all matters and questions incidental to, or arising out of, matters before the Court;*
>
> *(d) any other jurisdiction conferred on it under any Act".*

61. Mr Grove's argument turns on the jurisdiction "*to hear and determine*" provided for in subsection 14(a) when contrasted with the more limited jurisdiction simply "*to determine*" provided for in subsection 14(c). I am satisfied however that a proper consideration of both the Act and the Administration Act disposes fully of this argument. This is because the jurisdiction of the Work Health Court to hear and determine additional issues raised by an employer by way of an initiating Application or by Counterclaim is to be found not in subsection 14(c) of the Administration Act but rather in subsection 14(a)(ii) of that Act, and I so rule.

62. I am satisfied and I rule that subsection 14(c) applies to the determination of issues which arise in the course of hearing a matter already "*before the Court*", being issues whose determination does not involve adducing any additional evidence before the Court. A consideration of additional evidence in such circumstances would involve a "hearing".

63. Subsection 14(a)(ii) of the Administration Act above establishes that the Work Health Court has jurisdiction both to hear and to determine "*all other matters required or permitted by that Act to be referred to the Court for determination"*. Here, the reference to "*that Act*" is a reference to the jurisdiction granted in subsection 14(a) above, namely: "*under the* Return to Work Act, *to hear and determine*…".

64. The *Return to Work Act* in subsection 104(1) "permits" a person to apply to the Work Health Court as follows:

> "*A person* may (emphasis added), *subject to this Act, commence proceedings before the Court for the recovery of compensation under Part 5 or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under that Part".*

65. I am satisfied that the Work Health Court's jurisdiction for an employer to commence its own proceedings under Part 5 of the *Return to Work Act* or to proceed by Counterclaim in such proceedings commenced by a worker, is to be found by this route. Subsection 14(a) of the Administration Act creates the jurisdiction both "to hear and determine" some categories of matters. Subsections 14(a)(i) and (ii) identify those categories. Subsection 14(a)(ii) identifies one such category by reference to what is permitted by the *Return to Work Act* to be referred to the Work Health Court for determination. Subsection 104(1) of the *Return to Work Act* identifies that the permission to commence proceedings before the Court is granted to "a person", which I am satisfied can refer to either a natural or a corporate person – see subsection 24AA(1) of the *Interpretation Act* – and therefore to a worker or an

employer. Subsection 104(1) goes on to include in the range of matters or questions which might be involved in those proceedings "…*or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under that Part*".

66. This phrase is disjunctive, and in addition it uses the indefinite article "a" rather than the definite article "that" before the word "claim" and so it is not referring back to the "*proceedings before the Court for the recovery of compensation*" which is the subject of the first part of subsection 104(1). I am satisfied and I rule that the meaning of the words "…*a claim for compensation under that Part*" appearing in subsection 104(1) of the Act is not limited to a worker's pleadings in any specific proceedings before the Court but is at large in respect of that worker's overall claim for compensation under Part 5 of the Act.

67. Rules 1.08 and 9.05 of the *Work Health Court Rules* establish the purely procedural mechanism enabling an employer to pursue a claim of its own by Counterclaim in a worker's proceedings. This procedure was upheld as valid by Chief Justice Brian Martin (BR) in *Swanson v NT of A* [2006] NTSC 88, starting at paragraph [36].

68. I rule that the Work Health Court has jurisdiction to hear and determine a claim by an employer in respect of a matter or question incidental to or arising out of a claim for compensation under Part 5 of the *Return to Work Act*. I rule that an employer may pursue such a claim by commencing fresh proceedings pursuant to subsection 104(1) of the Act or by filing a Counterclaim in such proceedings already commenced by a worker.

69. I am satisfied and I find that the issues raised by the Employer in its Counterclaim in the present proceedings all involve matters or questions incidental to or arising out of the Worker's overall claim for compensation under Part 5 of the Act.

<u>The Third Preliminary Issue – the Geographical Locations of the Proposed Employments</u>

The Evidence as to the Jobs

70. The Employer's Counterclaim pleads four categories of employments as candidates for the Worker's "most profitable employment" within the meaning of subsection 65(2)(b)(ii) of the Act. The evidence as to jobs within the four pleaded categories and relied on by the Employer at the hearing appears in the report dated 12 July 2019 of occupational therapist Ms Helen Coles. Ms Coles reproduced advertisements for eight jobs, presumably advertised shortly before the date of that report, as follow:

    i) Putney Dental Care – practice manager - this was an advertised position for a full-time job located in Putney, a suburb in north-west Sydney. The remuneration offered in the advertisement is a salary in the range of $60,000 to $80,000 a year.

    ii) Maven Dental Group – practice manager – this was an advertised position for a full-time job located in Mullumbimby in north-east New South Wales. It required prior experience as a practice manager. No remuneration is mentioned in the advertisement.

    Iii) AB Dental – practice manager – this was an advertised position for a full-time job located in Bexley in southern Sydney. The remuneration in the advertisement is $38 an hour.

    iv) Vicentia Bay Medical - office manager – this was an advertised position for a part-time job located in Shoalhaven on the shores of Jervis Bay south of Sydney. It required a Batchelor Degree. This advertisement offers a remuneration of $25 to $35 an hour.

v) Lakemba Medical Services – practice manager – this was an advertised position for a part-time job located in Lakemba in south-western Sydney. It required medical practice management experience. The advertisement offers a remuneration of $30 to $40 an hour.

vi) Kingsford Dental – receptionist – this was an advertised position for a full-time job located in Kingsford, in the eastern suburbs of Sydney. It "preferred" fluency in either Indonesian or Mandarin. The advertisement offers a salary of $40,000 to $50,000 a year.

vii) Blue Mountains Dental Centre – dental assistant/receptionist – this was an advertised position for a part-time job located in Springwood New South Wales in the Blue Mountains to the east of Sydney. It required one year's experience as a receptionist in a dental practice. The advertisement offers a salary of $30,000 to $40,000 a year.

viii) Totally Smiles Dental Group – dental receptionist – this was an advertised position for a full-time job located in the suburb of Ryde in north-western Sydney. The advertisement offers a salary of $30,000 to $40,000 a year.

71. Six of these jobs are located in the greater Sydney area, one is located on the coast south of Sydney and the eighth is located in Mullumbimby in northern New South Wales not far from the coast and near the Queensland border.

72. The evidence in the report of Helen Coles dated 2 November 2018 under the headings "Background" and "Personal and Domestic Independence" is that the Worker left the Northern Territory around September 2012 and thereafter, for the past eight years, has resided in Gunnedah on the north-west slopes of New South Wales. She still lives in Gunnedah, now with her second husband whom she married in 2015. She and her husband own and live on a three acre property in Gunnedah. The report of occupational physician Dr Robin Chase dated 25 November 2019 in Appendix A under the heading "Occupational History" provides evidence that the Worker was originally from the Gunnedah area and attended High School there.

73. I note the provisions of subsections 144(1)(b) and (2) of the *Evidence (National Uniform Legislation) Act* and I take judicial notice of the following: the nearest major town to Gunnedah is Tamworth, about 80 kilometres to the east by road; Gunnedah itself is approximately 440 kilometres from Sydney by road, about 545 kilometres from Mullumbimby and about 645 kilometres from Shoalhaven, by road.

74. I am satisfied that it would not be practicable for the Worker to continue her established life in Gunnedah and commute to and from any of the geographical locations where any of the eight jobs identified by Helen Coles is located. For the Worker to engage in any of those jobs, she would have to relocate. The question is whether this is a relevant consideration, after the first 104 weeks of incapacity.

Geographical Location and Availability

75. Subsection 65(2) of the Act provides as follows:

> "*For the purposes of this section, loss of earning capacity in relation to a worker is the difference between:*
>
> *(a) his or her normal weekly earnings indexed in accordance with subsection (3); and*
>
> *(b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if:*
>
> *(i) in respect of the period to the end of the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment (including self-employment), if any, reasonably available to him or her; and*
>
> *(ii) in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her,*
>
> *and having regard to the matters referred to in section 68*".

76. Because these proceedings involve the period after the first 104 weeks of total or partial incapacity, subsection 65(2)(b)(ii) of the Act applies. This subsection specifically excludes any consideration of whether any most profitable employment is "*available to him or to her* (emphasis added)". This raises for consideration whether the geographical location of a proposed most profitable employment is part of the concept of "available" as used in subsection 65(2) of the Act. If it is, then the geographical location of a proposed most profitable employment would be excluded from consideration after the first 104 weeks of total or partial incapacity.

Subsection 65(5) and Section 68

77. Subsection 65(2)(b)(ii) was introduced into what was then entitled the *Work Health Act* and came into force on 1 November 2002. Before that, any candidate for any "*most profitable employment*" had to be "*reasonably available*" to a worker both before and after 104 weeks of total or partial incapacity. This had been the position since the commencement of the *Work Health Act* on and after 1 January 1987.

78. Geographical location is directly raised in a further subsection of section 65 of the Act, namely subsection 65(5)(b), and perhaps indirectly raised by subsection 68(g) of the Act. Both these have been in existence since well prior to the introduction of subsection 65(2)(b)(ii) on 1 November 2002.

79. Subsection 65(5) of the Act provides as follows:

> "*For the purposes of subsections (2) and (6), the most profitable employment available includes:*
>
> *(a) self-employment; and*
>
> *(b) employment in a geographical location (including a place outside the Territory) away from the place where the worker normally resides where it would be reasonable to expect the worker to take up that employment*

and the person liable to pay compensation to the worker has undertaken to meet the reasonable expenses in moving him or her and his or her dependents to that location and other reasonable relocation expenses".

80. Section 68 of the Act provides:

> *"In assessing what is the most profitable employment available to a worker for the purposes of section 65 or reasonably possible for a worker for the purposes of section 75B(3), regard shall be had to:*
>
> *(a) his or her age;*
>
> *(b) his or her experience, training and other existing skills;*
>
> *(c) his or her potential for rehabilitation training;*
>
> *(d) his or her language skills;*
>
> *(e) in respect of the period referred to in section 65(2)(b)(i) – the potential availability of such employment;*
>
> *(f) the impairments suffered by the worker; and*
>
> *(g) any other relevant factor".*

81. Both subsection 65(5) and section 68 in their preambles limit their respective applications to "*the most profitable employment available* (emphasis added)". Because these proceedings relate to a period after the first 104 weeks of incapacity, only subsection 65(2)(b)(ii) is applicable. That refers to "*the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her*". Even so, subsection 65(2)(b)(ii) does not exclude having regard to the provisions of section 68, because subsection 65(2) as a whole ends with the words "*… and having regard to the matters referred to in section 68*". It does exclude having regard to subsection 65(5)(b) because, unlike section 68, subsection 65(5)(b) is not specifically retained by the language of subsection 65(2).

82. Subsection 65(5)(b) of the Act qualifies the concept of "*the most profitable employment available*" as it appeared and appears in subsection 65(2) of the Act, both before and after 1 November 2002. Without subsection 65(5)(b), any potential employment "*at a geographical location (including a place outside the Territory) away from the place where the worker normally resides…*" would appear to be excluded from consideration as not being "*available*". Subsection 65(5)(b) confirms and acknowledges this by specifically identifying and including within the concept of "*the most profitable employment available*" a limited and conditional category of geographically distant employment. Necessarily, any other geographically distant employment not captured by subsection 65(5)(b) continues not to be "*available*".

83. I am satisfied and I rule that the geographical location of a "*most profitable employment*" within the meaning of subsection 65(2)(b) of the Act is part of the concept of "*available*" in both subparagraphs (i) and (ii) of that subsection. I rule that subsection 65(2)(b)(ii) of the Act excludes from consideration the availability of any such employment, which includes its geographical location, after the first 104 weeks of total or partial incapacity.

Geographical Location outside Australia

84. I have ruled that geographical location is excluded from consideration by subsection 65(2)(b)(ii) of the Act in identifying "*most profitable employment*", after the first 104 weeks of incapacity. That does not however mean that geographical location is entirely unrestricted in such cases.

85. I am satisfied and I rule that jobs outside Australia cannot come within the meaning of "*most profitable employment*" in either subsection 65(2)(b)(i) or (ii) of the Act. This is because Part 5 of the Act includes sections 49 to 91A under the heading "*Workers compensation and rehabilitation*". It therefore includes section 65(2)(b) of the Act and it also includes section 65B of the Act. Section 65B establishes that the entitlement of a worker to receive weekly payments of compensation becomes suspended when the worker begins to reside outside Australia - there are limited exceptions to this blanket approach. A purposive approach to the statutory interpretation of Part 5 militates against the application of subsection 65(2)(b) to identified jobs outside Australia in circumstances where a partially incapacitated worker's entitlement to be paid any weekly benefits will become suspended if that worker resides outside Australia.

Subsection 68(g)

86. Section 68(g) requires that regard be had to "*any other relevant factor*" when considering a worker's "*most profitable employment*". I am satisfied and I rule that because geographical location is excluded from consideration in identifying "*most profitable employment*" after the first 104 weeks of incapacity, it is not a "*relevant factor*" in such claims for the purposes of subsection 68(g) of the Act, unless the geographical location is outside Australia.

A REAL JOB?

87. Counsel for the Employer, Mr O'Loughlin, in his *Employer's Further Submissions 19 October 2020* dealt with the issue of what is required as evidence of a worker's "*most profitable employment*" for the purposes of subsection 65(2)(b)(ii) of the Act after the first 104 weeks of incapacity. In paragraph 43. he submitted: "*The employer merely needs to identify a class of jobs (that the medical experts say the worker can do*)…". In my view, the scheme of the Act and the case law do not support this submission.

88. In *Quality Plumbing & Building Contractors Pty Ltd v Schloss* ("*Schloss*") [2015] NTSC 56 at paragraph [43] Justice Kelly quoted from the second reading speech relevant to the introduction of subsection 65(2)(b)(ii), the first line of which states: " *The bill will provide for a stronger ability* <u>*to deem*</u> (my emphasis) *injured workers to have* <u>*the potential to reduce future long term scheme costs by enabling the possible reduction or cancellation of benefits in accordance with the claimant's reasonable capacity to earn*</u> (Justice Kelly's emphasis)*"*. In paragraph [46], Justice Kelly went on to endorse a number of propositions, including the following:

> *"[46]…both parties agreed on the following –* <u>*in my view, rightly so*</u> *(my emphasis).*
>
> *"(a) For the '*<u>*deeming*</u>*' (my emphasis) provisions of s 65 to apply, the Employer must be able to identify a '*<u>*real job*</u>*' (my emphasis) that could be undertaken by the Worker – that is to say one that* <u>*actually exists*</u> *(my emphasis), whether or not there are vacancies for employment in that job at the time…".*

89. This endorsement is *obiter dictum* and as such it is not binding on the Work Health Court. I note however that it accords with the earlier approach taken by Justice Blokland in *Global Insulation Contractors (NSW) Pty Ltd v Keating* ("*Keating*") [2012] NTSC 4 at paragraphs [110] and [111] where her Honour said concerning the approach taken by the Work Health Court below:

> *"[110] Her Honour considered the issue of the work that the respondent worker could or could not do in some detail. On behalf of the employer it was*

> *submitted her Honour misapplied s 65(2)(b)(ii) of the Act. The submission is that assumed availability of suitable employment post 104 weeks under the section excludes consideration of market forces and any need to consider what many places of employment require, as distinct from the fundamental requirements of the job.*
>
> *"[111] Although her Honour described some of the duties of crane operator or forklift driver as ancillary, in the sense that they involved preparation of load and other duties in the context of arduous environments, this is not in my view beyond the scope of s 65(2)(b)(ii). While the section is concerned with the fundamental requirements of a job, this must be sensibly construed and applied. In my view, her Honour was entitled to consider the physical requirements of any position. That approach is in keeping with the purposes of the Act and the section* (my emphasis*)".*

90. Plainly, a Court can consider *"…the physical requirements of any position…"* only if there is evidence before it of those requirements, which would necessitate evidence of an actual job which has those requirements.

91. I respectfully agree with the *obiter dictum* of her Honour Justice Kelly in *Schloss* above and I proceed to determine the present matter on the basis that this persuasive authority is the correct approach to determining "*most profitable employment*" after the first 104 weeks of incapacity – that is, an employer who bears the relevant onus must identify a real job which actually exists as a candidate for any "*most profitable employment*".

THE MEDICAL EVIDENCE

The section 68 Claim

92. In paragraph 7 of her Defence to Counterclaim the Worker pleads that she suffers from six identified impairments which are not work-related, within the meaning of section 68(f) of the Act. She further pleads two circumstances relevant to her rehabilitation, within the meaning of section 68(c) and/or (g) of the Act.

93. The six impairments pleaded are: "*a. Right shoulder condition; b. Psychological condition; c. Pain; d. Wrists condition including onset of carpal tunnel syndrome; e. Lower back condition; and f. the status of her general physical and mental health*". As identified in paragraph 15. above, it is the Worker who bears the evidentiary onus in respect of these conditions and their relevance to her capacity for work.

94. The Worker did not give evidence at the hearing, and therefore she did not give any evidence and was not subjected to cross examination on any of these pleaded six impairments. No explanation was provided why the Worker did not give any evidence. Unusually, the Worker absented herself from her own proceedings and was not present in the courtroom, after the close of the Employer's case. This too was unexplained.

95. In the often cited 1959 Decision of *Jones v Dunkel* the High Court considered the significance of a party's failure to call a relevant witness. Windeyer J said at paragraph 17: "… *Unless a party's failure to give evidence be explained it may lead rationally to an inference that his evidence would not help his case*". Other members of the Court made similar observations. In the present case, the Worker is the central figure around whom the proceedings revolve. I would have expected the Worker to give evidence of her relevant symptoms from time to time and of how her subjective experiences in her day-to-day activities are impacted both by the work injury and by any coexisting medical conditions.

96. There is limited evidence before the Court concerning the right shoulder condition relevant to its impact on the Worker and therefore on her capacity for employment. The Worker's treating orthopaedic surgeon Dr Hutabarat said in cross examination that he understood the right shoulder did not have any real significance for her present capacity to work. In the absence of any evidence on this subject from the Worker, I infer that her evidence would not have helped her case. The Worker has failed to discharge her evidentiary onus in respect of the right shoulder condition relevant to her capacity for employment.

97. The Worker raised an unspecified psychological condition as part of her section 68 claim. The Employer called evidence from a psychiatrist which was to the effect that the Worker did not suffer from any psychiatric or psychological condition. The Worker did not call any evidence from a psychiatrist or a psychologist. She did not give any evidence herself. I infer that her evidence on this issue would not have helped her case. The Worker has failed to discharge her evidentiary onus in respect of any psychological condition relevant to her capacity for employment.

98. The Worker raised an unspecified condition of "Pain" as part of her section 68 claim. Various medical practitioners who gave evidence discussed the Worker's left shoulder pain in different contexts. None of these medical practitioners, including the psychiatrist, gave any evidence of any pain condition other than that arising from her use of her left shoulder. The Worker did not give any evidence herself. I infer that her evidence on this issue would not have helped her case. The Worker has failed to discharge her evidentiary onus in respect of any overall condition of pain unrelated to her left shoulder.

99. The Worker raised the condition of both her wrists, including the onset of carpal tunnel syndrome, as part of her section 68 claim. There was some evidence before the Court from medical practitioners of a history of bilateral wrist fractures and bilateral carpal tunnel syndrome, but there were no detailed descriptions and certainly no conclusions as to how these conditions presently affected the Worker. The Worker did not give any evidence herself. I infer that her evidence on this issue would not have helped her case. The Worker has failed to discharge her evidentiary onus in respect of her wrists and/or of her bilateral carpal tunnel syndrome.

100. The Worker raised a lower back condition as part of her section 68 claim. The evidence from the medical practitioners included a history of a motor vehicle accident many years before when the Worker had sustained an injury to her back. The consensus of opinion was that the Worker had made a good recovery. The Worker did not give any evidence herself. I infer that her evidence on this issue would not have helped her case. The Worker has failed to discharge her evidentiary onus in respect of her lower back condition.

101. The Worker raised the status of her general physical and mental health as part of her section 68 claim. There was no evidence from any of the medical practitioners in respect of this vague, catch-all category. The Worker did not give any evidence herself which might have assisted the Court to understand what this category was intended to encompass or how it might affect her capacity to work. I infer that her evidence on this issue would not have helped her case. The Worker has failed to discharge her evidentiary onus in respect of her general physical and mental health.

102. I conclude that the only medical evidence remaining for my consideration is that in respect of the Worker's left shoulder injury and its role in determining any present limitations on her capacity to work. As identified in paragraphs 9 and 10 above, it is the Employer who bears the legal and evidentiary onus in the Counterclaim of identifying and valuing the Worker's "*most profitable employment*" within the meaning of subsection 65(2)(b)(ii) of the Act. This means that the Worker's unexplained choice not to give evidence in the proceedings will become relevant only if and when the Employer might discharge this onus.

The Left Shoulder

103. At the hearing I received reports and heard live evidence relevant to the Worker's left shoulder injury from four medical practitioners and one occupational therapist. I received evidence from Dr Steve Andrews who was the Worker's treating orthopaedic surgeon from 2012 to 2014. I received evidence from Dr Simon Hutabarat who has been the Worker's treating orthopaedic surgeon from early 2015 to date and continuing. I received evidence from Dr Derek Lee who is an occupational physician. Dr Lee first saw the Worker on 5 August 2014 when he was the chairperson of a reassessment panel which reviewed the Worker in respect of her percentage permanent impairment of the whole person as a result of her left shoulder injury. Dr Lee saw the Worker on a second occasion on 1 December 2016 when he provided a medico-legal report to the Worker's then employer the Greater Bank Ltd. I received evidence from occupational physician Dr Robin Chase who had seen the Worker on one occasion only on 14 November 2019 for the purpose of providing a medico-legal report to the legal representatives of the Worker. Finally, I received evidence from occupational therapist Ms Helen Coles who saw the Worker on one occasion only on 28 August 2018 on behalf of the legal representatives of the Insurer. Each of these expert medical witnesses was provided with reports from the other medical experts and in some cases, commented on those reports in their own further reports.

104. Occupational physician Dr Derek Lee gave evidence at the hearing in October 2020, having seen the Worker on only two occasions, with the second being two years after the first and nearly two years before the hearing. He concluded that the Worker would benefit from a graduated return to work. However, he limited that to starting at 20 hours a week and then moving up to full-time work after only two weeks. This was in the context of assuming some physical workplace adaptations to accommodate the Worker's left shoulder restrictions, as well as an accommodation by an employer of the initial at least two weeks graduated return to work at 20 hours per week.

105. Consultant occupational physician Dr Robin Chase gave evidence at the hearing in October 2020, having seen the Worker on one occasion only in November 2019, nearly one year earlier. He also concluded that the Worker would need a graduated return to work, which he identified as starting at four hours per day four days a week. In his opinion, it might take the Worker as long as 20 weeks to graduate to full-time work. He accepted that the Worker had some left shoulder physical restrictions which might need to be accommodated depending on the precise duties of the particular job under consideration. In his experience, many employers are reasonable and might be willing to accommodate an initial graduated return to work program, and to make some workplace modifications to accommodate any specific restrictions.

106. Occupational physician Ms Helen Coles gave evidence at the hearing in October 2020, having seen the Worker on only one occasion over two years earlier. She concluded that the Worker "… *Is capable of a range of duties compatible with her education, training and experience providing they are not heavy, not requiring sustained or repetitive overhead task performance, and provided Ms Catford adopts appropriate ergonomic principles and a "commonsense" approach to her duties… Also having regard to her extensive experience in the dental industry, I am of the view that she would be optimally suited to the role of dental practice manager or practice manager of health practitioner's practice or similar. In such role, I expect she could direct others to perform tasks she is unwilling or feels she is unable to do… I expect Ms Catford could attend "normal working hours" in a role compatible with her residual issues and for which she has education, training and experience*". Ms Coles was speculating that the Worker in such an employment would be permitted by her employer to delegate or eschew duties or tasks which she might find difficult because of her left shoulder condition.

107. With respect to the occupational physicians Dr Derek Lee and Dr Robin Chase and the occupational therapist Ms Helen Coles, I conclude that none of them was well-placed at the hearing in October 2020 to offer opinions as to the condition of the Worker's left shoulder or the impact which her left shoulder condition might have upon her capacity to work. They had each seen her in a non-treating capacity on one occasion only, or in the case of Dr Lee, on two occasions but more than two years apart. I further note that even though Ms Helen Coles is a very experienced allied health professional, she does not have the expertise of the medical practitioners. One example of this is found in her signed file note dated 1 December 2019 where in paragraph 15. she states that she did not note any muscle wasting around the Worker's left shoulder girdle, presumably on the one occasion she saw her on 28 August 2018. By way of contrast, occupational physician Dr Robin Chase at page 8.7 of his report of 25 November 2019 noted "*left shoulder girdle wasting*" on the one occasion he saw the Worker on 14 November 2019. In another example, Ms Coles in her signed file note dated 1 December 2019 in paragraph numbered 3. concluded that the Worker was right-handed but used her left hand for some activities, whereas the treating orthopaedic specialist Dr Hutabarat at page 1 of his report of 26 September 2019 recorded that the Worker was left-hand dominant, and Dr Lee at page 5 of his report dated 5 August 2014 made the same observation. This of course is an important consideration in assessing the impact of a left shoulder injury.

108. I am satisfied that Dr Steve Andrews and Dr Simon Hutabarat as treating medical practitioners have an overwhelming advantage over the three purely medico-legal experts. The treating specialists were each in the position of having assessed and developed their opinions concerning the Worker over time, involving multiple consultations, physical examinations, assorted medical tests and the performance of surgical procedures.

109. I note that Dr Steve Andrews ceased to be the Worker's treating orthopaedic specialist in about May 2014 and that Dr Hutabarat became her treating orthopaedic specialist from around January 2015. On the basis of Dr Hutabarat's reports and medical certificates tendered in evidence at the hearing I can identify 23 separate occasions when he saw the Worker between 24 August 2015 and 30 June 2020. Although Dr Andrews ceased to be the Worker's treating orthopaedic specialist in May 2014, he did see her again on four occasions for medico-legal purposes, between 17 October 2016 and 28 August 2018. I am satisfied that the Worker's current treating orthopaedic specialist Dr Simon Hutabarat was in a better position than the Worker's former treating orthopaedic specialist Dr Steve Andrews at the hearing in October 2020, two years after Dr Andrews had last seen her, to provide a current opinion as to the condition of the Worker's left shoulder and how that condition might impact upon the Worker's capacity to work, but Dr Andrews was nevertheless also able to provide an opinion based on a considerable relevant history.

110. An important point of distinction between the evidence of Dr Hutabarat and that of Dr Andrews is that Dr Andrews at the hearing firmly held to the opinion that the Worker's current left shoulder condition had long since ceased to be the result of her work injury on 9 February 2012. Dr Andrews believed that the entirety of the Worker's current left shoulder symptoms were attributable to a pre-existing degenerative condition. He believed that her left shoulder would be in its present condition even if the Worker had never suffered the work injury at all.

111. Dr Hutabarat on the other hand gave evidence at the hearing that he believed the Worker's current left shoulder condition was attributable initially to the 2012 work injury and subsequently to one or more of the three surgeries she had undergone in an effort to treat that injury. In the notes of his telephone conference with lawyers Ward Keller on 10 October 2019 Dr Hutabarat is recorded as saying in numbered paragraph 12. "*It appears to have been less than optimal result from the surgeries, which happens*".

112. Dr Andrews performed surgery on the Worker on two occasions. On 9 May 2012, three months after the work injury, he performed an arthroscopic subacromial decompression and an arthroscopic repair of a partial-thickness tear of her rotator cuff. Unfortunately, there was no long-term improvement and on 13 September 2013 Dr Andrews performed an arthroscopic excision of the Worker's acromioclavicular joint. On 20 November 2015 Dr Hutabarat performed a left shoulder manipulation under anaesthetic, an arthroscopy, a bursectomy and an acromioplasty. Once again, there was no long-term improvement in the condition of the Worker's left shoulder.

113. Notwithstanding the need for these surgeries, the timing of the first surgery and the fact of the performance of these surgeries, Dr Andrews still maintained that the Worker's current symptoms in her left shoulder were attributable solely to a pre-existing shoulder condition and that they owed nothing currently to either the work injury or to the surgeries which he, and subsequently Dr Hutabarat, performed. I found Dr Andrews' position dogmatic and unpersuasive.

114. Of course, Dr Andrews' opinion that the Worker had fully recovered from the effects of the work injury is irrelevant in the context of the Employer's case pleaded in its Counterclaim, that the Worker remains partially incapacitated as a consequence of the work injury.

115. Separately from this, Dr Andrews' opinion was that irrespective of the cause of the Worker's current left shoulder symptoms, they were not such as significantly to interfere with her capacity for work.

The Opinion of Dr Hutabarat

116. Dr Hutabarat is firmly of the opinion that the work injury and the subsequent surgeries are responsible for the Worker's current left shoulder symptoms. He is of the view that these symptoms continue adversely to affect the Worker's present capacity to work.

117. In his report of 26 September 2019 addressed to Ward Keller, Dr Hutabarat concluded that the Worker had ongoing issues with her ability to undertake paid employment as a direct result of the left shoulder injury sustained on 9 February 2012. In particular, he was satisfied she had difficulties using her left arm in overhead activity and in reaching with her left arm both in front of her and out to her left side. She was limited in the weight she could manipulate with her left arm. He concluded that the Worker was capable of part-time work only, because of these limitations. In his opinion, the Worker should undertake suitable work for no more than four hours per day, three days per week.

118. In cross examination at the hearing in October 2020, Dr Hutabarat maintained these conclusions but clarified that the Worker could undertake suitable work at 12 hours a week being four hours per day, three days per week, but with a rest day between each work day. He initially agreed the Worker could at some unspecified future time move up to working for 19 or 20 hours a week. He noted that the Worker had not been engaged in employment at the time of the hearing for a period of around four years.

119. Dr Hutabarat in cross examination agreed with the proposition that many employers are reasonable and might be willing to make modifications to employment duties and/or to the employment environment to accommodate a worker with some limitations. The other medical specialists who gave evidence similarly agreed with this proposition in cross examination and/or examination in chief for the Employer. In my view, this proposition can only be speculative and cannot amount to evidence on the balance of probabilities in respect of a real job which actually exists. The Court would require evidence that an actual employer held such an attitude in respect of that actual real job.

120. Further in cross examination, Dr Hutabarat initially agreed with the proposition that provided an employer could accommodate the Worker's needs then in the long-term she might be able to go back to full-time work. However, later in the same cross examination he resiled from this position and concluded that his "gut feeling" was that the Worker would not be capable of returning to full-time work.

The Left Shoulder Condition and Incapacity

121. I conclude that I prefer the evidence and opinions of the current treating orthopaedic specialist Dr Hutabarat to that of any of the medico-legal witnesses whose evidence was before the Court.

122. In respect of the evidence and opinions of the former treating specialist Dr Andrews, Dr Hutabarat has the very significant advantage of having been and continuing to be the Worker's current treating specialist over the past six years. On this basis and on the basis of my having observed and considered the presentation and substance of the evidence of both treating specialists at the hearing as well as their reports, I conclude that I prefer Dr Hutabarat's more current and less dogmatic approach to the evidence of Dr Andrews. I prefer the expert evidence and opinion of Dr Hutabarat to that of Dr Andrews.

123. I am satisfied and I find that as a consequence of the work injury the Worker continues to experience symptoms arising in her left shoulder. I find that she experiences difficulties and pain when using her left arm in overhead activity and in reaching with her left arm both in front of her and out to her left side. I find she is limited in the weight she can manipulate with her left arm.

124. I am satisfied and I find that as a consequence of the work injury the Worker is presently limited in undertaking any suitably modified employment to working four hours a day for three days a week with a rest day between each day worked. I am satisfied and I find that the Worker may in due course be able to build up to working 19 or 20 hours in a week in such employment. On the evidence before me which I have preferred, I am not able to determine how long it might take the Worker to be able to advance from working 12 hours in a week in such employment to 19 or 20 hours in a week, if at all.

INTERACTION BETWEEN MOST PROFITABLE EMPLOYMENT AND REHABILITATION

125. In considering the operation of subsection 65(2)(b)(ii) of the Act it must not be overlooked that an employer has ongoing obligations in an accepted claim to ensure the rehabilitation of an injured worker following an injury ("the rehabilitation obligations"). The relevant parts of the rehabilitation obligations are to be found in sections 75, 75A, and 76 of the Act. These sections also come within Part 5 of the Act, in Division 4 entitled "***Rehabilitation and other compensation***". Subsection 65(2)(b) comes within Subdivision B of Division 3 of Part 5 of the Act. I set out the relevant parts of the rehabilitation provisions as follow:

> *"**75 Purpose of Division***
>
> *The Purpose of this Division is to ensure the rehabilitation of an injured worker following an injury.*
>
> *"**75A Employer to assist injured worker to find suitable employment***
>
> *(1) An employer <u>who is liable under this Part to compensate an injured worker</u>* (emphasis added) *must do the following:*
>
> *(a) take reasonable steps to ensure that suitable employment is provided to the worker in accordance with the worker's statement of fitness for work…*

"(6) For subsection (1)(a):

(a) employment is suitable for a worker if it requires the worker to perform work for which the worker is fit as specified in the worker's statement of fitness for work, taking the following matters into account:

(i) the worker's age;
(ii) the worker's experience, training and other skills;
(iii) the worker's potential for rehabilitation training;
(iv) the worker's language skills;
(v) the impairments suffered by the worker…

*"**76 Rehabilitation training and workplace modification***

(1) In addition to any other compensation under this Part, an employer shall pay the costs incurred for such rehabilitation training and workplace modification as is reasonable and necessary for the purpose of this Division for a worker who suffers or is likely to suffer a permanent or long-term incapacity.

(2) Without limiting the matters which may be taken into account in determining what is necessary and reasonable rehabilitation training and workplace modification in a particular case, there shall be taken into account:

(a) to (c)…".

126. There is nothing in Subdivision B of Division 3 of Part 5 of the Act, whether in subsection 65(2) or elsewhere, and there is nothing in Division 4 of Part 5 of the Act, whether in the parts of the sections set out above or elsewhere, to reduce or remove the rehabilitation obligations of an employer after the first 104 weeks of a particular worker's incapacity in an accepted claim. Accordingly, in an accepted claim, I conclude and I rule that in identifying any "*most profitable employment*" for a partially incapacitated worker after that worker's first 104 weeks of incapacity, where the employer remains liable to compensate the injured worker it must comply with the rehabilitation obligations in respect of that worker.

127. In this case the Employer served the Notice on the Worker on about 21 September 2018 on the basis that the Worker no longer had any work-related incapacity. This had the result that the Employer was no longer "*…liable under this Part to compensate…*" the Worker while that Notice was operative. Accordingly, the rehabilitation obligations of the Employer have not been operative. Now that I have ruled that the Notice was invalid, the Employer is once again liable to compensate the Worker in respect of her accepted claim. The rehabilitation obligations of the Employer are once again operative, pending the determination of the Employer's Counterclaim.

128. A "*statement of fitness for work*" referred to in subsection 75A(1)(a) above is defined in section 3 of the Act to mean "*… a certificate issued by a medical practitioner or another person of a class prescribed by regulation that certifies a worker's capacity for work"*. The most recent document of that description in evidence before the Court is a WorkCover NSW - certificate of capacity issued by the Worker's current treating orthopaedic specialist Dr Hutabarat and dated 30 June 2020 – just over three months before the commencement of the hearing in these proceedings on 5 October 2020. That certificate appears as item 58. in the Trial Book. It certified that the Worker had no current capacity for any employment from 15 June 2020 to 15 August 2020 and that Dr Hutabarat did not then recommend that the Worker be referred to a workplace rehabilitation provider.

129. The evidence of Dr Hutabarat at the hearing in October 2020 was different from the certification set out in that statement of fitness for work dated 30 June 2020. He was now of the view that the Worker could manage a graduated return to suitable work with some workplace modifications to reduce her reaching with her left arm. If this could be provided, the Worker could work three days a week for four hours a day.

130. Section 68 of the *Interpretation Act* provides as follows:

> "***68 Compliance with forms***
>
> *Strict compliance with the forms prescribed by or under an Act is not necessary and substantial compliance, or such compliance as the circumstances of the particular case allow, is sufficient".*

131. I am satisfied and I find in these circumstances of this particular case that a "*statement of fitness for work*" for the purposes of subsection 75A(1)(a) of the Act is to be found in the sworn evidence of Dr Hutabarat given at the hearing commencing on 5 October 2020, which I have accepted and found in paragraphs 123. and 124. above. Accordingly, I am satisfied and I rule that the Employer is obliged pursuant to that subsection to take reasonable steps to ensure that suitable employment is provided to the Worker in accordance with that *"statement of fitness for work".*

132. There is no evidence before me in this case that the Employer has taken any such steps, whether reasonable or otherwise, since 21 September 2018. Given the service of the Notice on the Worker on or about that date and the position taken in that Notice, I am satisfied and I find that the Employer has not taken any such steps since that date.

BARNETT V NT OF A

133. The Employer has sought to rely on the unreported Decision of Dr John Lowndes SM (as he then was) in the Work Health Court in *Roberta Barnett v Northern Territory of Australia* ("*Barnett*") delivered on 24 June 2011. Dr Lowndes had delivered an earlier Decision in that matter reported at [2010] NTMC 070, at the end of which he sought further submissions from the parties on some outstanding issues.

134. In *Barnett* Dr Lowndes found that a graduated return to work program, with or without a medically managed or supervised program, or rehabilitation, even if it merely constituted work-hardening, was "work" within the meaning of section 65(2)(b) of the Act.

135. Dr Lowndes then went on to find at page 16.3 as follows:

> "*In my opinion, the preponderance of the evidence establishes that the worker is capable of undertaking work as a factual investigator. The question that remains is what the worker is reasonably capable of earning in that form of employment; and whether that employment is the most profitable employment that the worker could undertake.*
>
> "*This is not a straightforward case. Given that the Court is concerned only with the application of s 65(2)(b)(ii), there is no question of determining the availability of employment as a factual investigator with the range of modifications referred to in the evidence of the expert medical witnesses* (my emphasis)*. Therefore the Court is required to engage in a somewhat hypothetical exercise, and to assess, to the best of its ability, the reasonable earning capability of the worker, having due regard to her particular circumstances*".

136. Dr Lowndes then went on to apply the evidence before him of potential earnings as a factual investigator, for a limited number of hours per week over a specific period, before arriving at full-time hours for a full week and ongoing, to arrive at numerical values to apply to Ms Barnett's "*most profitable employment*" as a factual investigator.

137. Dr Lowndes appears to have formed the view that the need for the "*range of modifications*" to work was a question of availability, and therefore it was not necessary to identify a job actually offering these modified working conditions, in determining a worker's "*most profitable employment".*

138. Dr Lowndes' Decision in *Barnett* was delivered in 2011, a year before the Decision in *Keating* in 2012 and four years before the Decision in *Schloss* in 2015. I am satisfied that these two Decisions which I have considered in paragraphs 87. to 91. above warrant a different approach in 2021 to that taken by Dr Lowndes in *Barnett* in 2011 when identifying a "*most profitable employment*". When the starting point is identifying a real job which actually exists, then working conditions such as the number of hours each day and the number of days each week to be worked by the partially incapacitated worker in question in such a job, and/or any modifications required either to the physical workplace or to the duties of that job, become fundamental. I am satisfied and I rule that such a job with such conditions must actually exist and be identified, before any question of availability can arise.

139. The hearing in *Barnett* had involved a claim for compensation which had been disputed at all times – that is, a primary application for compensation. Dr Lowndes concluded that in relation to a primary application for compensation where a worker claims total or partial incapacity, it is the worker who bears the legal as well as the evidentiary onus. He cited and quoted to this effect from NT Decisions *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 at 383-384 per Mildren J, and *Work Social Club v Rozycki* (1998) 120 NTR 9 at 7, also per Mildren J. Accordingly, in *Barnett* the worker bore the legal and evidentiary onus of proving both the extent of her partial incapacity, and its money value.

140. I respectfully agree with this position as to the onus in *Barnett*. However, this position is reversed in the case of an accepted claim, as in the present case – see *Ioasa* referred to in paragraph 10 above. This is a fundamental point of distinction between the approach and findings by Dr Lowndes in *Barnett* and the approach to be taken in this matter. In the present case, it is the Employer, not the Worker, who bears both the legal and evidentiary onus of identifying a real "*most profitable employment*" which actually exists, and that the worker in question can perform the duties of any such employment.

141. Additionally, because Ms Barnett's claim for compensation had been disputed from the outset the employer in that matter was not "… *liable under this Part to compensate the worker*…" within the meaning of subsection 75A(1) of the Act. For that reason, the employer in *Barnett* was not obliged to take steps to rehabilitate Ms Barnett by finding suitable employment for her.

142. The position is quite different in the present case. As I have ruled and found in paragraphs 126 and 127. above, the Employer in this case is obliged to take steps to rehabilitate the Worker, including taking steps to find suitable employment for her. That obligation must be taken into account when considering the Worker's "*most profitable employment*".

THE MOST PROFITABLE EMPLOYMENT

143. In *Schloss* above, Justice Kelly said at paragraph [51] as follows: "… *In my view, each case needs to be determined on its merits, taking into account all of the circumstances of the case, and full weight needs to be given to all of the words in section 65, including the words in the stem of*

section 65(2)(b) 'the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking' (my emphasis)…". I respectfully agree.

144. In identifying a "*most profitable employment*" an employer is obliged to identify a real job which actually exists. Although that job does not have to be available to a worker, the evidence must allow ascertainment of its prerequisites and duties. This means that if the worker in question does not have the requisite qualifications or experience or otherwise does not meet the specific selection criteria for the real job which actually exists then, in the absence of explanatory evidence, that worker cannot be said to be reasonably capable of earning anything in a week in that job or that he or she is capable of undertaking all the duties of the work involved in that job.

145. I have set out in paragraph 70. above the evidence the Employer has lead before the Court of the real, existing jobs as candidates for the Worker's "*most profitable employment*". Of the eight identified jobs, five are advertised as full-time jobs and three are advertised as part-time jobs. On the basis of my findings in paragraph 124. above, I conclude that I must rule out the five full-time jobs . They cannot constitute work which the Worker is "*capable of undertaking*" within the meaning of subsection 65(2)(b)(ii) of the Act.

146. Of the remaining three jobs, iv) is an advertisement for a part-time office manager at Vicentia Bay Medical. It states that the applicant is required to hold a Bachelor's Degree. The report of Ms Helen Coles of 2 November 2018 on page 9 sets out the Worker's educational history and pre-incident employment. The report shows no history of any tertiary education. It does record a history of work as a dental assistant. There is no evidence before the Court that Vicentia Bay Medical might be prepared to overlook the requirement for a Bachelor's Degree in the case of an applicant who is an experienced dental assistant. As the Employer bears the relevant onus, I cannot be satisfied that the Worker meets the requirements of the advertised job or that it involves work she is *"capable of undertaking*" or that she would be reasonably capable of earning anything in a week in that job.

147. Job v) is an advertisement for a part-time practice manager at Lakemba Medical Services. The advertisement states that any applicant must have experience as a medical practice manager. There is no record in the report of Ms Coles of 2 November 2018 that the Worker has ever worked as a medical practice manager. She appears to have substantial experience as a dental assistant but there is no record of her ever having worked in a medical practice or a doctor's surgery. There is no evidence before the Court that Lakemba Medical Services might be prepared to overlook this requirement in the case of an applicant who is an experienced dental assistant. As the Employer bears the relevant onus, I cannot be satisfied that the Worker meets the requirements of the advertised job or that it involves work she is *"capable of undertaking*", or that she would be reasonably capable of earning anything in a week in that job.

148. Job viii) is an advertisement for a part-time dental assistant/receptionist at the Blue Mountains Dental Centre. The advertisement requires that an applicant must have one year's experience as a receptionist in a dental practice. Ms Coles' report of 2 November 2018 records that the worker has worked in seven different jobs in New South Wales and in the Northern Territory as a dental assistant. It does not record that the Worker has ever worked as a receptionist. There is no evidence before the Court that the Blue Mountains Dental Centre might be prepared to overlook this requirement in the case of an applicant who is an experienced dental assistant but who has no experience as a receptionist in a dental practice. As the Employer bears the relevant onus, I cannot be satisfied that the Worker meets the requirements of the advertised job or that it involves work she is *"capable of undertaking"*, or that she would be reasonably capable of earning anything in a week in that job.

149. I conclude I must also rule out these three part-time jobs as candidates for the Worker's "*most profitable employment*".

150. In respect of each of the eight identified jobs in evidence before the Court as candidates for the Worker's "*most profitable employment*", there was no evidence before the Court, other than speculation, that any one of these eight identified jobs provided working conditions within the Worker's capacity in light of the restrictions identified by Dr Hutabarat and found by me in paragraphs 123. and 124. above. The Employer has not discharged its onus to prove that the Worker is reasonably capable of earning anything in a week in any one of those jobs, or that she is capable of undertaking the duties, or all of the duties, in any one of those jobs.

CONCLUSION

151. The Employer has not discharged its onus of proving that the Worker is presently capable of working on a full-time basis in the categories of employments pleaded in paragraphs 14 and 14A of its Counterclaim dated 29 June 2020.

152. The Employer has not discharged its onus of proving that the Worker is presently capable of working 20 hours per week in those categories of employments, as pleaded in paragraph 15 of its Counterclaim dated 29 June 2020.

153. In the absence of any evidence before the Court of any other real job which actually exists by way of any "*most profitable employment*" for the purposes of the Employer's Counterclaim, the Employer has failed to discharge its onus to identify the Worker's "most *profitable employment*" or to put a value on her partial capacity to work.

154. The Employer has been wholly unsuccessful in these proceedings. The Worker is entitled to her costs.

ORDERS

155. The Employer's Notice of Decision dated 21 September 2018 is invalid.

156. The Employer's Counterclaim dated 29 June 2020 is dismissed.

157. The Employer pay the Worker arrears of weekly benefits calculated from 14 days after service on her of the Notice of Decision to the date of these Reasons.

158. The Employer pay interest on the arrears pursuant to section 89 of the Act calculated from 21 days after service on her of the Notice of Decision to the date of the Worker's receipt of payment of the arrears.

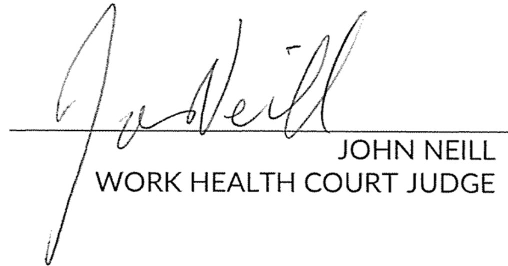
159. The Employer pay the Worker weekly benefits from the day after the date of these Reasons and continuing, in accordance with the Act.

160. The Employer pay to or on behalf of the Worker medical and like expenses pursuant to section 73 of the Act which have been incurred as a consequence of the injury between 21 September 2018 and the date of these Reasons but which have not yet been paid.

161. The Employer pay to or on behalf of the Worker medical and like expenses pursuant to section 73 of the Act which are incurred as a consequence of the injury from the day after the date of these Reasons and continuing, in accordance with the Act.

162. The Employer pay the Worker's costs of and incidental to these proceedings, including the costs of and incidental to all Directions Hearings and interlocutory applications occurring after the proceedings were listed for hearing, to be taxed in default of agreement at 100% of the Supreme Court scale, certified fit for senior junior counsel.

Dated this 28th day of January 2021



JOHN NEILL
WORK HEALTH COURT JUDGE