CITATION: ANTHONY GOLZIO V DOWNER EDI [2021] NTLC 005

PARTIES:	MR ANTHONY GOLZIO
	V
	DOWNER EDI
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(S):	21919346
DELIVERED ON:	12 FEBRUARY 2021
DELIVERED AT:	DARWIN
HEARING DATE(S):	26-30 OCTOBER 2020
JUDGMENT OF:	JUDGE ELISABETH ARMITAGE

CATCHWORDS:

Counterclaim by the Employer; onus of proof; causation or aggravation of injury; loss of earning capacity; surveillance evidence; "reasonably capable of earning"; "most profitable employment reasonably available"; "real job".

Return to Work Act sections 65(2), 65(5), 68

Evidence (National Uniform Legislation) Act section 128

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

Catford v Laminex [2021] NTLC 004

Plewright v Passmore t/as Passmore Roofing unreported Supreme Court decision delivered 4 April 1997

REPRESENTATION:

Counsel:

	Worker:	Matthew Littlejohn
	Employer:	Julian Wade Roper

Solicitors:

	Worker:	Payne Lawyers
	Employer:	Minter Ellison

Judgment category classification:	C
Judgment ID number:	005
Number of paragraphs:	70

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

No. 21919346

BETWEEN

ANTHONY GOLZIO-CASA

Worker

AND

DOWNER EDI LTD

Employer

REASONS FOR DECISION

(Delivered 12 January 2021)

JUDGE ELISABETH ARMITAGE

1. The Worker, Mr Anthony Golzio-Casa, commenced employment as an electrician with the Employer, Downer EDI, on 11 October 2018.

2. The Worker said that he injured himself on 16 October 2018 at 7:45am. The Worker said that he was lifting his tool bag with his right arm to put it diagonally across his left shoulder when he felt a sudden onset of pain. A subsequent MRI scan suggested a SLAP tear of his superior labrum. The Worker continued his employment undertaking suitable duties and receiving on-site physiotherapy until March 2019 when he was made redundant. [1]

3. On about 14 November 2018 the Worker made a claim for medical expenses only. The claim for medical expenses was accepted.[2] On about 25 February 2019 the Employer issued a *Return to Work Act 1986* (the Act) section 69 Notice of Decision cancelling payments of medical expenses.[3] The Worker responded by commencing these proceedings by Statement of Claim. The Employer filed an Amended Defence and Counterclaim, and the Worker filed a Reply and Defence to the Counterclaim.

4. At the commencement of the hearing the parties agreed that the Employer was *dux litis*. The parties provided a "Statement of Agreed Facts and Issues"[4] as follows:

> "The parties agree the following facts:

[1] Ex 1 p 151: Work Capacity Assessment Report of Ms Sanja Zeman dated 30 March 2020 at [6.3, 6.4, 6.9]
[2] Section 69 Notice of Decision dated 25 February 2019 at [2].
[3] Although on reflection the Employer considered it should have proceeded under s73 of the *Return to Work Act* – see transcript of Employer's submissions at p164
[4] Exhibit 1 p 95

1. The Worker's Normal Weekly Earnings as at the date of injury were $2,600.00.

2. The Worker has had since 25 February 2019 and continues to have an earning capacity of $1,272.00 per week.

The parties agree that the only issues in dispute between them in these proceedings are:

1. whether the Employer's Notice of Decision, issued 25 February 2019, was valid;

2. if the Notice was not valid, whether the Worker had an earning capacity post 25 February 2019 in excess of the agreed $1,272.00 per week and to what extent; and

3. costs."

5. At the close of the hearing the Employer no longer pressed its argument that its Notice of Decision was valid. The Employer submitted and closing submissions proceeded on the basis that "the Employer's counter claim [is] the only live issue." [5]

6. The Counterclaim pleaded:

> "10. If the worker sustained injury during the course of his employment on or about 17 October 2018 (which is denied) the injury does not result in or materially contribute to incapacity.
>
> 11. In the alternative to the pleading at paragraph 10, if the worker sustained injury in the course of his employment on or about 17 October 2018 (which is denied) and the injury resulted in or materially contributed to incapacity (which is denied) the Worker:
>
> (a) has not suffered a loss of earning capacity;
>
> (b) alternatively to subparagraph (a) herein, the Worker has suffered a loss of earning capacity to be determined by the Court."

7. In the Counterclaim the Employer maintained its denial that the Worker sustained the injury in the course of employment. I heard conflicting expert evidence on this issue and the parties made closing submissions on the issue. Although the Statement of Agreed Facts and Issues[6] purportedly declared that the only issues left to be determined were: whether the Worker suffered any loss of earning

[5] Employer's outline of argument dated 30 October 2020 at [4].
[6] Employer's outline of argument dated 30 October 2020 at [5].

capacity after 25 February 2019 and, if so, in what amount, and costs; I consider that the question of whether or not the injury arose out of or in the course of employment remained a live issue in the hearing on the Counterclaim.

8. The Employer conceded that, in light of the manner in which the matter had progressed, it bore both the legal and evidentiary onus of proving the matters pleaded in its Counterclaim.[7]

9. Accordingly, the questions to be resolved are:

   (i) Did the Employer discharge its onus in proving that the injury did not arise out of or during the course of employment?

   (ii) Did the Employer discharge its onus in proving that the Worker has not suffered a loss of earning capacity?

   (iii) If the Worker has suffered a loss of earning capacity, has the Employer discharged its onus in proving what the Worker can earn over and above the otherwise agreed earning capacity of $1,272.00 per week post 25 February 2019?

Did the Employer discharge its onus in proving that the injury did not arise out of or during the course of employment?

10. Both the existence of a SLAP tear and that it was likely the cause of the symptoms described by the Worker was largely not in medical dispute. There was a divergence between the experts as to whether the SLAP tear could have been caused or aggravated as claimed by the Worker, namely, by lifting his tool bag over his head while at work.

11. Two medical experts were called in the hearing. Both presented as qualified, credible and reliable. Dr Steve Andrews is a specialist in orthopaedic upper limb surgery with over 20 years of experience. Associate Prof Graham Mercer is a consultant orthopaedic surgeon with many years of experience. The medical professionals explained that many SLAP tears are asymptomatic, some asymptomatic SLAP tears may develop symptoms later in time (sometimes years later), and some SLAP tears are symptomatic. When a tear results in symptoms, the symptoms might resolve without intervention or with minimal intervention (for example, physiotherapy). If symptoms persisted over time, and did not respond to other treatment surgery was recommended. The surgery is likely to successfully resolve both the issues of the tear and the symptoms. [8]

12. Dr Andrews saw the Worker on 5 February 2019 and prepared a report on the same day.[9] Dr Andrews documented the Worker's description of how he was

[7] T p164 Employer's oral submissions; see also *Catford v Laminex* [2021] NTLC 004 per Neill J at [14]
[8] T Dr Andrew p 30, 32; Dr Mercer p 96
[9] Ex 1 pp 114-116.

injured as follows: "He was lifting his tool bag with his right arm to put it diagonally across his left shoulder to hang on the right side of his body. He reports a sudden onset of pain." In response to that purported method of causation Dr Andrews opined that while "it is likely that [the Worker] has a SLAP tear of his labrum and that this is more than likely the cause of his ongoing symptoms. It would seem highly unlikely that this is related to the injury described. It is not plausible that he would have torn his superior labrum with the simple action of lifting a tool belt over his shoulder. This is not a normal mechanism for this type of injury and it would seem highly unlikely. My impression is that [the Worker] has a SLAP tear of his labrum and that more than likely it will require surgery to repair it. I think it is unlikely to be work related and in particular, unlikely to be related to particular mechanism described." In addition Dr Andrews opined that the described cause of the injury "is not consistent with the usual mechanism of injury and it would seem somewhat implausible that it has caused the tear described." Dr Andrews further recorded that: "It would seem unlikely that the injury is related to the mechanism described."

13. Dr Andrews examined the Worker again on 17 September 2019 and reported the results of this examination on 23 September 2019.[10] Dr Andrews confirmed that the MRI scan suggested a SLAP tear. At this consultation the Worker reported intermittent pain in the shoulder and difficulties performing activities overhead and in particular lifting overhead. (I consider these reports by the Worker to be inconsistent with the video surveillance footage).

14. The alleged mechanism of injury was again discussed. The Worker, consistent with his previous explanation, said that he "was lifting a tool bag weighing approximately 17 kg and put it across his opposite shoulder for him to carry." Dr Andrews again noted "whilst this activity is not really consistent with the pathology that we are talking about, [the Worker] does seem very genuine in his complaint." Dr Andrews reported "I have had a lengthy discussion with [the Worker] about his injury and previous reports. I have explained to him that his pathology appears real and significant on the MRI scan. His symptoms are consistent with the pathology described. The incident he describes, however, is not consistent with what we would normally find with this type of pathology. This type of pathology would usually require much more significant incident than simply lifting a bag. He seemed accepting of the opinion that this is not a typical injury for this sort of pathology but did maintain that this is how he felt he had injured shoulder."

15. In a letter dated 24 October 2019[11] Dr Andrews confirmed his opinion that "based on a reasonable degree of medical certainty, I consider that the injury described is inconsistent with the pathology identified. I do not consider it possible to cause the described pathology with the simple act of lifting a bag weighing approximately 17 kg. The injury described is inconsistent with the pathology identified."

[10] Ex 1 pp 121-124
[11] Ex 1 pp 131-132

16. During cross-examination Dr Andrews maintained that the actions described by the Worker could not cause the tear, and that it was unlikely that they aggravated or extended the tear. Dr Andrews said that much more significant force was required to injure this "very strong structure."[12] In answer to the proposition that lifting the tool bag over head could have caused an aggravation or extension of the tear, Dr Andrews responded: "Highly unlikely. I've never seen one, put it that way. I've been doing this for a very long time and treated literally thousands of patients like this and I've never seen that happen. So, no, I don't think it's plausible really."[13]

17. Dr Mercer saw the Worker on 23 October 2019 and reported his findings on 30 October 2019.[14] The Worker told Dr Mercer that before 16 October 2018 he had had no problems with his right shoulder. The Worker reported that since the injury he had undertaken a catering business during the high season of 2019 but that thereafter he had not worked, because when he applied for jobs he was "honest" about his injury and they would not employ him. Dr Mercer mistakenly understood that the Worker had last worked in the crepe business in March 2019 and had not worked since, when in fact the Worker had been operating the crepe carts right through to September or October 2019. [15]

18. On examination Dr Mercer recorded some paracervical discomfort on the right, some minimal impingement discomfort in the right shoulder, and increased discomfort on posterior compression of the right shoulder. Range of movement of both arms was equal save for the abduction on the right which was 165° as compared to 180° on the left. Upper arm circumferences were equal. The left arm had a stronger grip strength than the right although the doctor conceded this was a fairly subjective test. Dr Mercer considered that the neurology in the upper limbs with respect to power, sensation and reflexes was grossly normal.

19. Dr Mercer considered that the investigations and examination confirmed that the Worker did have a SLAP 2 lesion of his shoulder.

20. Dr Mercer agreed with Dr Andrews "that the usual mechanism of injury for SLAP 2 lesion is a fall on an outstretched hand producing a longitudinal axial compression injury along the arm into the shoulder or an episode of subluxation/dislocation of the shoulder." However, in contrast to Dr Andrews, Dr Mercer considered that placing a tool bag over the left shoulder with the right arm was a probable mechanism of injury, or alternatively that it had "at least unmasked possibly previously asymptomatic SLAP lesion pathology by extending the tear." Taking into account that there was no previous specific injury, and that the Worker said that he did not have pain and discomfort before the incident and he did afterwards[16], Dr Mercer considered that there was direct cause and effect between the mechanism

[12] T pp 32-33
[13] T Dr Andrews p 33
[14] Ex 1 pp 133-141
[15] T Dr Mercer p 89
[16] T Dr Mercer p 95

described by the Worker and the injury. Dr Mercer opined that "[the Worker] has sustained if not the primary SLAP 2 lesion then an aggravation of a pre-existing SLAP 2 lesion in his shoulder by the workplace incident as described" and he believed this to be "more probable than possible." Largely consistent with this opinion, in his oral evidence Dr Mercer said that while he considered it unlikely that the described mechanism explained the entirety of the tear, he maintained it could have aggravated a pre-existing asymptomatic tear.[17]

21. I consider that both doctors were highly qualified experts who gave honest opinions based on their experience and expertise, the uncontested MRI results, and their clinical observations and assessments of the Worker, in addition to the information provided by the Worker. Although they were challenged in cross-examination, and perhaps confronted with some information which was not previously available to them, neither doctor changed his opinion. I consider that the opinions were finely balanced. As the Employer bore the onus of proof, it was for the Employer to persuade me that I should accept the evidence of Dr Andrews on the balance of probabilities over the opinion Dr Mercer. I was not so persuaded.

22. Accordingly, the Employer did not discharge its onus in proving that the injury did not arise out of or during the course of employment.

Did the Employer discharge its onus in proving that the Worker has not suffered a loss of earning capacity?

23. In evidence-in-chief the Worker said that he was a qualified and experienced electrician having undertaken work in the "commercial, domestic, industrial and probably all aspects of the electrical trade."[18] The Worker said that at the time of his injury he was working as an "instruments technician for installation of heavy machinery, heavy equipment." The Worker explained that the role required him to "install cabinets that are explosion proof… to go up the cranes, lift up things pretty much the whole day." He said that he was installing "every piece of equipment that will be explosion proof, from cable tray to switchboards." The Worker said that to carry out this work he had to use hammer drills and DynaBoard hammers and the tools weighed between 10 – 35 kilograms.[19]

24. The Position Description provided by the Employer for an Electrician listed the various types of tasks to be performed in the role and included a Physical Demands Table.[20] The Table identified that the role would require frequent lifting of 15 kilograms to overhead height by way of mechanical lifting or team lifting, and frequent working with arms overhead. Equipment connected to the role included assorted hand tools, fork lifts, light vehicles, wheel chocks, trolleys, step and

[17] T Dr Mercer p 95
[18] T Worker p 114, for example, employment with Mobile Electrics
[19] T Worker pp 98-99, T p 102 (a hammer drill weights 10-12+ kilograms)
[20] Ex 9

platform ladders and testing equipment. Physically demanding tasks included digging trenches to lay conduit and moving and lifting heavy objects.

25. The Worker claimed that due to his injury he felt pain when lifting his arms above shoulder height and lifting additional weight increased the pain.[21] He told the Occupational Therapist, Ms Sanja Zeman, that he was not able to undertake sustained overhead work or forcefully pull cables.[22] In October 2019 the Worker told Associate Professor Graham Mercer that he felt discomfort at some time every day, he was unable to hold objects for any length of time with his right arm, his strength had reduced, and he avoided activity above shoulder level.[23]

26. It was never the Worker's case that he was totally incapacitated. To the contrary it was accepted that he had a considerable capacity for work. However, the Worker claimed he could no longer work in his pre-injury role or more generally as an electrician because he could not manage sustained overhead work with tools or overhead lifting, and overhead work resulted in pain.

27. Counsel for the Employer challenged the Worker on a number of issues submitting they were relevant to my assessment of the Worker's credit and the weight that should be given to his evidence.

28. For the period 30 October 2018 – 12 March 2019 the Worker received an income protection insurance payment in the gross sum of $58,280.43.[24] For the period 12 May 2019 – 11 May 2020 the Worker received an income protection insurance payment in the gross sum of $35,221.87.[25] Counsel for the Employer submitted that as the Worker did not choose to self-fund his shoulder surgery (at the cost of approximately $12,000[26]) even though he apparently had the funds to do so, I should infer that he was no longer experiencing any incapacity. However, the Worker explained that he did not think he would be reimbursed if he paid for the surgery so he was prepared to "wait."[27] He also said that having expended money on the crepe carts "to pay 12 more…wasn't a necessity. I had to work first to get more money and then I could pay myself the surgery."[28] While I considered there might be something to the Employer's submission, I did not find it to be particularly persuasive and I did not give it any weight. Likewise I gave no weight to the fact that the Worker rode a motorbike without a licence plate attached and used a mobile phone when driving.

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[21] T Worker pp 100-101
[22] Ex 1 p 151: Work Capacity Assessment Report of Ms Sanja Zeman dated 30 March 2020 at [6.14]
[23] Ex 1 p 137: Report of Associate Professor Graham Mercer dated 30 October 2019; T Dr Mercer p 89, 90

[24] Ex 8 Downer Edi EBA Group Personal Accident and Sickness Insurance Policy, Claim Form and associated correspondence.
[25] Ex 7 Letter Australian Super to Mr Golzio-Casa dated 1 June 2020 and
[26] T Worker p 146
[27] T Worker p 146
[28] T Worker p 147

29. The Worker's Individual Tax Returns disclosed income received from employment with Darwin Argos Painting. Two pay slip were produced for the pay periods 19 June 2020- 15 June 2020 and 26 June 2020 – 2 July 2020. Each pay slip was for 38 hours at a pay rate of $23.0263 per hour.[29] Concerning any evidence relating to Darwin Argos Painting, pursuant to the *Evidence (National Uniform Legislation) Act*, a section 128 certificate was issued to protect the Worker from his answers about Darwin Argos Painting being used against him should he be prosecuted for a criminal offence. In his evidence the Worker admitted that he had never worked for Darwin Argos Painting. I understood that in about June 2020 the Worker was considering applying for a mortgage but needed evidence of additional income. An arrangement was made whereby he paid Darwin Argos Painting a sum of money and in return it was paid back to him such that it appeared to be income. Concerning this arrangement, the Worker claimed he was "given a hand, not knowing that what I was doing was right or wrong."[30] I do not accept the Worker's attempt at equivocation. I consider that the Worker was prepared to invent income to support a mortgage application (even though, as it apparently turned out, he did not apply for a mortgage). Although I did not conclude from this evidence that the Worker was necessarily without credit, I did conclude that he was capable of dishonestly if it was to his advantage. In light of this, I considered it appropriate to scrutinize his evidence with care.

30. In September 2018, shortly before his injury, the worker purchased a business, La French Crepes.[31] The business comprised three crêpe carts and two trailers which the Worker later operated from a number of sites and which were also available for private hire. During the period March to October 2019 one cart regularly operated from Mindil Beach Markets on Thursdays and Sundays and a second cart regularly operated from Malak Markets on Saturdays. The evidence established that on some occasions a cart also operated from the Victoria Arcade in Darwin, the beachfront at Cullen Bay and at Jape Homemaker Village on Bagot Road.

31. The carts were on wheels and were towed by the Worker to the various locations on a trailer, off-loaded and reloaded by hand, and pushed into place. Each cart weighed about 30 to 40 kilograms but the Worker said that they were never lifted, only pushed. The Worker said that a normal market day involved setting up the cart at about 10 am, returning home to cook and prepare, operating the cart during the markets, and packing up at about 9 pm. Although the carts had their own decorative awning, the carts were often protected from the sun by a second awning which consisted of a frame and a nylon-like shade cloth top. The Worker set up this second awning which he said was quite light, but which involved over-head arm movements to secure the canopy in place. To secure the canopy the Worker used both arms above head height, sometimes at full stretch. The Worker agreed that setting up the carts included lifting eskies which he said weighed about

[29] Ex 1 (addendum): Affidavit of Ms Kyla Parjarillo dated 22 October 2020 at Annexure J.
[30] T Worker p 144
[31] Ex 1 p 151: Work Capacity Assessment Report of Ms Sanja Zeman dated 30 March 2020 at [6.11]

5 kilos, and lifting gas bottles which weighed about 9.5 kg when full. The Worker explained that running the carts was pretty hard work and when he was not working on the carts he was organising for the weekend, doing the groceries and relaxing.

32. There was an abundance of additional evidence concerning the Worker's capacity for employment as the Employer had engaged Quantumcorp to conduct surveillance on the Worker and to prepare investigation reports. Surveillance was conducted over 7 days in August 2019, over 5 days in September 2019, for 1 day in April 2020, over 2 days in August 2020 and over 4 days in September 2020. The resultant videos, still photographs, observational and investigation reports were tendered.[32]

33. The videos and still photographs depicted the Worker setting up, operating and packing up his crepe carts on numerous days at numerous locations. They depict him driving two vans and packing and unpacking the vans, and also riding a motorbike. In addition, the investigation reports identified photographs of the Worker engaging in various activities in Darwin and when on holidays. For example:

    33.1. On 24 November 2018 there are two Instagram photos of the Worker on holidays riding on and standing open-armed with a camel.[33]

    33.2. On 6 January 2019 there is a Facebook photo of the Worker on holiday in Indonesia.[34]

    33.3. On 19 June 2019 there is an Instagram photo of the Worker on holiday apparently riding a push bike.[35]

    33.4. On Saturday 17 August 2019 (the first day of surveillance) the Worker was observed operating a crepe cart in the Victoria Arcade in the morning and setting up a crepe cart at Malak Markets in the afternoon.[36]

    33.5. On Sunday 18 August 2019 the Worker was observed setting up, operating (with others), and packing up a crepe cart at Charles Darwin University. He was observed shopping for ingredients and picking up what appeared to be a heavy crepe cooking plate that fell from his van. Later he was seen operating another crepe cart at Cullen Bay.[37]

[32] Ex 4 Quantumcorp Surveillance and Investigation Reports and Ex 5 USB with videos.
[33] Ex 4 pp 96-97
[34] Ex 4 p 89
[35] Ex 4 p 95
[36] See Ex 4 p 5 photo of the Worker wheeling the crepe cart and holding its attached awning with his right arm extended overhead; p 6 photos of the Worker putting up the large awning with overhead arm extensions, carrying a fold up table and a large esky.
[37] Ex 4 pp 7-8, photos depict the Worker engaged in his business at various locations from 9.13 – 19.04

33.6. On 14 September 2019 the Worker departed his address at 7.27am towing a crepe cart on a trailer. He set up his crepe stall at Jape Homemaker Village at 7.36 and was observed operating the stall continuously for 1 hour and 22 minutes. When wind dislodged the sun canopy the Worker reached overhead and grabbed it with his right hand, removed it and commenced to pack up at 12.20. He was observed "curling gas cylinders" as he carried them to the van. Pack up was completed at 13.50. The Worker was then observed setting up a cart at Malak Markets at 15.48. The cart was packed up and the Worker returned home at 21.30.[38] The Worker was observed in engaging in work in excess of 10 hours on this day.

33.7. On 15 September 2019 the Worker was observed to set up a cart at Mindil Beach at about 11.00. He set up a cart at Cullen Bay at about 17.00. He operated the Cullen Bay cart during the evening. He packed up the Cullen Bay cart at about 19.22. He then assisted packing up the Mindil Beach cart at 20.50.[39]

33.8. On 17 September 2019 the Worker was observed installing LED lights into alcohol cabinets at Sabine Supermarket. He was observed standing on a ladder doing above head height electrical work.[40]

33.9. On 18 November 2019 there is an Instagram photo of the Worker flexing his right arm on holidays in Bali.[41]

33.10. On 25 November 2019 there is an Instagram photo of the Worker raising both arms sideways on holidays in the Philippines.[42]

33.11. On 28 November 2019 there is an Instagram photo of the Worker buried in the sand on holidays in the Philippines.[43]

33.12. On 25 April 2020 the worker was observed carrying and loading eskies into and out of his van, and reaching overhead to close the tail gate of his van.[44]

33.13. On 13 and 26 August, and 4 and 7 September 2020 the Worker was observed riding or depicted sitting on a silver BMW motorcycle.[45]

33.14. On 3 September 2020 the Worker was observed single-handedly moving a fridge on a trolley and loading it into the rear of his van.[46]

[38] Ex 4 pp 55-56 and Ex 5
[39] Ex 4 pp 48, 49 and Ex 5
[40] Ex 4 p 52
[41] Ex 4 p 94
[42] Ex 4 p 92
[43] Ex 4 p 92, see also T Worker pp 126-127, 131
[44] Ex 4 p 108
[45] Ex 4 pp 118, 121, 122, 174

34. The descriptions of the Worker's movements contained in Exhibit 4 include the following:

    34.1. Lifting and carrying large eskies, plastic tubs, a 20 litre water bottle, gas bottles, bags of ice, heavy cook tops (crepe plates), and folding tables, all without assistance or any apparent restriction.

    34.2. Standing and cooking for extended periods (hours) using primarily his right hand.

    34.3. Collapsing and carrying a folding table primarily with his right arm.

    34.4. Hitching and unhitching the mobile food cart from the rear of a vehicle.

    34.5. Pushing and pulling the mobile food cart.

    34.6. Lifting packs of water bottles and long life milk from a shopping trolley to the rear of a vehicle.

    34.7. Setting up over-head shade cover and reaching above his head with his right arm to position and secure a shade cover in windy conditions without any apparent restriction.

    34.8. Driving vehicles, opening and closing doors (including the rear hatch door which required overhead reach), packing vehicles, bending and twisting (including crouched over in the rear space of his van), all without any apparent restriction.

    34.9. Reaching above his head for extended periods to install lighting, whilst balanced on a ladder.

    34.10. Riding a motorcycle without restriction.

    34.11. Pushing a fridge on a trolley and manoeuvring it into the rear of his van without assistance.

35. Having watched the surveillance videos, my own observations match the descriptions contained in Exhibit 4. There was no evidence to suggest that the work and activities depicted on the video footage were anything out of the ordinary, or different to days for which there was no footage. I inferred that the activities depicted on the surveillance footage were indicative and representative of the Worker's capacity on and from 17 August 2019.

36. During cross-examination the Worker maintained that in spite of all that was depicted in the videos his shoulder still caused him problems. The Worker said:

[46] Ex 4 p 120

"There is something wrong with me. I'm still limited in my motions. So I can't get a job as electrician."[47]

37. However, from 16-22 December 2019 the Worker was employed as an electrician by Katherine Solar NT, which operates a ground-level solar farm. The Worker explained that the construction of the solar plant was already finished and he was required to link switchboards and identify any faults in the operation of the solar panels. The Worker said that he worked for three and a half days and, although the days were structured as 12 hour shifts, he only worked from about 9 am to 4 pm.

38. Exhibit 3 comprises correspondence from Katherine Solar NT and a copy of the Worker's casual employment contract which had been signed by the Worker. The contract identified that the Worker was employed in the position of "qualified electrician" and noted that a non-exhaustive outline of duties indicative of the kinds of duties within the scope of the position would be provided on commencement.[48] The correspondence[49] informed the court that the Worker had been casually employed for four days. The working hours were 6:15 am to 6 pm daily, with one 30 minute break, with a total of 42 hours worked within the four day period. The duties were "installation of PV mounting structures and PV modules, installation of cable support systems and structures, AC and DC wiring and termination, installation of wiring enclosures, fault find and rectifications". The pay rate was $50 per hour. He had completed the tasks to a satisfactory standard. The Worker's pay slip also indicated that he had worked 42 hours at $50 per hour.[50]

39. Even accepting that the duties outlined in the correspondence were indicative, the duties specified were far more extensive than those claimed to have been completed by the Worker. Further, the hours identified in the contract, correspondence and payslip were much more extensive than the hours claimed to have been worked by the Worker. I am persuaded by the contract, payslip and correspondence that the Worker did work 42 hours over 4 days and completed the duties of the position as a qualified electrician, at $50 per hour. I reject the Worker's evidence to the contrary.

40. In March 2020 the Worker entered into a partnership with a friend to operate two inner city Darwin hostels.[51] The Worker said that he ran reception every second Monday and Tuesday – Thursday, and then worked the markets on the weekend. At this point in time the Worker was apparently working at least 5-6 days per week.

[47] T Worker p 155
[48] Ex 3 Casual (Award) Employment Contract dated 16 December 2019 at 4.1 and schedule.
[49] Ex 3 Email from admin@katherinesolar.com.au dated 21 October 2020.
[50] Ex 1 (addendum): Affidavit of Ms Kyla Parjarillo dated 22 October 2020 at Annexure F.
[51] Ex 4 p 153 – 155.

41. In about August 2020 the Worker bought another market stall, Mindil Beach Lemonade, which he also operated.

42. Ms Sanja Zeman, Occupational Therapist, conducted a work capacity assessment of the Worker over three hours on 3 March 2020. She conducted her assessment accepting the existence of the injury. Ms Zeman conducted a functional capacity evaluation of the Worker. The evaluation was in part subjective (based on the Worker's self-reports) but in part relied on clinical observations. Although there were some inconsistencies between observed assessments and the Worker's reported abilities[52], Ms Zeman considered that overall the results were a valid and true representation of the Worker's current function. In her opinion the results indicated that the Worker had a demonstrated functional capacity within the medium-heavy range according to the Dictionary of Occupational Titles but with: "a slight physical restriction of overhead and forward reach" [53]; a reduced endurance to loading of the upper limbs in positional tasks based on a 3 minute assessment[54]; and a "reduced tolerance for overhead work". [55] In her of oral evidence Ms Zeman explained that while the Worker could complete tasks above shoulder height she considered that his endurance for work in that range was reduced.[56]

43. Accepting that Ms Zeman assessed some reduction in functional capacity, I consider that the limitations she identified were towards the minimal end. Even with those limitations, Ms Zeman assessed the Worker as having a functional capacity in the medium to heavy range. As to the weight to be given to her opinion, I note that Ms Zeman did not have the benefit of observing the Worker in his daily and work activities as depicted on the extensive surveillance footage.

44. While both Dr Andrews and Dr Mercer accepted the Worker's claimed limitations as consistent with the observed SLAP tear, and opined that he had a partial incapacity that would be resolved with surgery, they likewise did not have the benefit of observing the Worker in his daily and work activities as depicted on the surveillance footage.

45. In summary, in September 2018, shortly before his injury, the Worker purchased the crepe cart business. Following his injury he remained employed on suitable duties and took holidays. He was made redundant in about March 2019[57] and commenced working in his crepe business which he continued to operate until about October 2019. In November 2019 he went on holidays. In December 2019 he worked at Katherine Solar and then took further holidays. In March 2020 he

[52] Ex 1 p 159: Work Capacity Assessment Report of Ms Sanja Zeman dated 30 March 2020 at [12.2.4] and [12.3.3], see also T Ms Zeman p 64
[53] Ex 1 p 187: Email from Ms Zeman to Minter Ellison dated 2 June 2020 and Ex 1 p 159: Work Capacity Assessment Report of Ms Sanja Zeman dated 30 March 2020 at [12.3.1]
[54] Ex 1 p 159: Work Capacity Assessment Report of Ms Sanja Zeman dated 30 March 2020 at [12.4]
[55] Ex 1 p 187: Email from Ms Zeman to Minter Ellison dated 2 June 2020.
[56] T Ms Zeman p 79
[57] Ex 1 p 151: Work Capacity Assessment Report of Ms Sanja Zeman dated 30 March 2020 at [6.9]

formed a partnership which ran two hostels and at the same time operated his crepe carts (Covid-19 permitting – noting there was some downscaling of market operations). In August 2020 he extended his market operations by purchasing a lemonade stall. When operating the crepe carts he loaded and unloaded two vans, towed two trailers, moved his crepe carts on and off the trailers, set up, and packed up the crepe carts and shade structures (often singlehandedly), and operated the crepe carts for extended periods of time. He never ceased driving and he rode a motorbike, a bicycle and a camel. The Worker managed all of this without exhibiting any noticeable discomfort on the surveillance footage. He appeared to move easily and comfortably in all directions. Notably he managed it all without taking medication[58] or seeking any other therapeutic interventions.

46. The overhead movements in setting up and packing up the crepe carts, setting up and packing up the sun canopy, closing the overhead tail gate of the vans, and when installing lighting at Sabine Supermarket, together amply demonstrated that, in spite of claiming otherwise, the Worker could engage in above shoulder height activities on repeated occasions throughout a given day and on repeated days, in a work environment. All of these activities were conducted with a freedom of movement which did not indicate any restriction. There was nothing in the footage that suggested the Worker was experiencing pain. The Worker's facial expressions did not alter, he did not take rests and he did not favour, touch or appear to respond to his right shoulder in any way.

47. The pulling and pushing of the crepe cart, the manoeuvring of the fridge and the manual handling of items associated with the crepe business, established that the Worker had capacity to pull and push heavy and bulky items with apparent ease, and by inference, this capacity would extend to electrical cabling.

48. The observed manual handling and extended cooking periods established that the Worker could hold and manipulate tools in his right hand over extended periods of time, without any apparent loss of strength or discomfort. He appeared to enjoy "curling" the gas cylinders with both arms.

49. Although there was no footage of the Worker working with tools above shoulder height, given his capacity to work freely above head height without tools, and his demonstrated strength and manual handling capacity at shoulder height, in conjunction with his demonstrated capacity to complete work as an electrician, I was satisfied I could comfortably infer a capacity to work above head height as required in electrical roles and rejected the Worker's evidence to the contrary.

50. Where the Worker's claimed incapacity (in evidence, to medical professionals and to Ms Zeman) differed from the evidence on the surveillance footage and from the evidence of his employment as an electrician, I preferred and accepted the evidence on the video surveillance and the documentary evidence of Katherine Solar NT. Further, I preferred and accepted what was depicted in the surveillance

[58] T Worker p 102, and as reported to Dr Mercer Ex 1 p 137 and Ms Zeman Ex 1 p 152 [9.4 and 9.5]

footage over the doctors' or Ms Zeman's opinions as to any continuing incapacity on and from 17 August 2019.

51. However, when he examined the Worker on 5 February 2019, Dr Steven Andrews identified symptoms which he considered limited the Worker's capacity to light duties.[59] Although I was persuaded by the video surveillance that the Employer had discharged its onus in proving that at least on and from 17 August 2019 the Worker no longer suffered any ongoing incapacity for employment I was not prepared to infer a similar level of functionality before the commencement of the surveillance footage. Accordingly, although I was satisfied there was no continuing incapacity that prevented the Worker from returning to his former role (or any role for which he was suitable experienced or qualified) on and from 17 August 2019, there was no evidence that persuaded me to set aside Dr Andrews's opinion that as at 5 February 2019, although the Worker was capable of working normal hours, he could only do so in a role that did not involve heavy lifting or repetitive work above shoulder height.[60] It was not possible for me to determine with any degree of certainty the point in time when the Worker recovered the breadth of capacity for employment depicted in the surveillance footage. Hence, I was not persuaded that the Worker was not partially incapacitated between 5 February 2019 and 17 August 2019. In other words, I accepted Dr Andrews's opinion as applicable for the period between 5 February 2019 and 17 August 2019.

If the Worker has suffered a loss of earning capacity, has the Employed discharged its onus in proving what the Worker can earn over and above the otherwise agreed earning capacity of $1,272.00 per week post 25 February 2019?

52. The compensation in issue was compensation payable pursuant to section 65 of the Act. It was not in issue that for the purposes of section 65(2)(b)(ii) of the Act, 104 weeks expired on 16 October 2020.[61] As I was satisfied that the Worker was no longer partially incapacitated for employment on and from 17 August 2019, the only relevant period for possible compensation fell within the first 104 weeks.

53. The Act relevantly provides as follows:

"Section 65 ***Long-term incapacity***

Subsection (2)

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

[59] Ex 1 pp 114 – 116: Report of Dr Steve Andrews dated 5 February 2019
[60] Ex 1 p 115: Report of Dr Steve Andrews dated 5 February 2019
[61] Employer's Outline of Argument dated 30 October 2019 at [27]

(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.

…

Subsection (5)

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.

…

Section 68 ***Assessment of most profitable employment***

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.

54. In the unreported Supreme Court decision of *Plewright v Passmore t/as Passmore Roofing* delivered 4 April 1997 (*Plewright v Passmore)*, Martin CJ considered the term "reasonably capable of earning". He said:

> *"The word "reasonably" is part of the phrase "reasonably capable of earning in a week in work he is capable of undertaking…". It does not govern the question of the amount which the work is from time to time capable of earning. The statute does not speak of the "reasonable amount", it speaks of reasonable capacity to earn. It is to the capability of earning in work that the worker is capable of undertaking that the question is to be directed, and that is what it appears the court did. Was he reasonably capable of earning in a week, in work he was capable of undertaking, any amount? Reasonably capable is a narrower term than physically capable or even physically possible, and what the worker is reasonably capable of earning necessarily depends on the circumstances. It is a question of fact. It involves an assessment in all the circumstances, and on that minds may well differ. Reasonable capacity is a relative concept and designed to be applied with some flexibility. Although differently expressed, it is abundantly clear that the court took the view that the worker was not reasonably capable of doing the labouring work because, although he had the physical capacity to do the work, that capacity could only be fulfilled when there were adequate rest periods available and his pain could be relieved by medication. That is, the work produced pain, and although it could be relieved in the manner found, that was not in accordance with reasonable good sense or sound judgement."*

55. In *Quality Plumbing & Building Contractors Pty Ltd v Schloss* [2015] NTSC 56[62] (*Schloss*) Kelly J considered section 65(b)(ii) of the Act and held that in order to determine the "most profitable employment" the employer must be able to identify a real job that could be undertaken by the worker – that is to say one that actually exists. In my view that finding applies equally to 65(b)(i).

56. The nature of the evidence required to discharge an employer's onus in establishing the "most profitable employment" was recently considered by Neill J in *Catford v Laminex* [2021] NTLC 004 (*Catford v Laminex).* Applying *Schloss*, and consistent with *Plewright v Passmore*, Neill J advanced that in addition to the employer satisfactorily proving that a real job actually existed; the employer also needed to provide evidence of the jobs prerequisites and duties, in order that these may be compared to the experience, qualifications and capabilities of the worker because:

[62] *Quality Plumbing & Building Contractors Pty Ltd v Schloss* [2015] NTSC 56 at [46]

> "*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.*" [63]

57. In *Catford v Laminex* Neill J further considered the phrase "reasonably available", in particular, the relevance of the geographical location of the posited job. He held:

> *"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".*
>
> *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 sub paragraphs (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."*[64]

58. Although I am not bound by Neill J's findings, I consider them persuasive and apply them.

59. For the period 25 February – 17 August 2019 the Worker was capable of working normal hours, but only in a role that did not involve heavy lifting or repetitive work above shoulder height. It was agreed that during this period he could earn $1,272.00 each week. The Employer bore the onus of identifying and quantifying the "most profitable employment reasonably available" within the Worker's "reasonable capability" during that period, which would result in an income over and above the agreed earnings of $1,272.00 each week.

60. Firstly, the Employer pointed to the Worker's actual employment with Katherine Solar NT in which he was capable of earning $2,100.00 per week. In my view,

[63] *Catford v Laminex* [2021] NTLC 004 at [144]
[64] *Catford v Laminex* [2021] NTLC 004 at [82-83]

employment in Katherine, being approximately three hours by car from Darwin, was "employment in a geographical location away from the place where the worker normally resides where it would be reasonable to expect the worker to take up that employment". Katherine employment was geographically available. Noting the breadth of the positions duties outlined in Exhibit 3, I consider that the Employer adequately identified the prerequisites and duties of the job. I note that the Worker satisfactorily engaged in the job over four days in December 2019, but that was at a point in time when I had found that he was no longer partially incapacitated for employment. However, in my view there was nothing in the duty descriptions which appeared to involve lifting or repetitive work above shoulder height (this being a ground based solar installation). Even applying the limitations identified by Dr Andrews, I was satisfied this job would have been within the Worker's expertise and capacity for the period 25 February – 16 August 2019.

61. However, where was the evidence that this job or a job with similar duties was in fact available between 25 February and 16 August 2019? It appeared from the Worker's evidence that the solar farm was under construction during 2019. However there was no evidence as to the stage of construction, the nature of the work being undertaken, the types of employees on site, or the nature of their roles during February – August 2019. Accordingly, I was not prepared to infer that a similar role would have been available, either short term or ongoing, in the first half of the 2019. The Employer did not discharge its onus in satisfying me that a similar role was available during that period.

62. Secondly, the Employer relied on the evidence of Ms Zeman and her reports[65] in an endeavour to discharge this onus. Ms Zeman's analysis of available employment was conducted on the basis that the Worker was partially incapacitated, similarly to that found by Dr Andrews. Even with that partial incapacity, although she did not think he could return to his pre-injury role, Ms Zeman considered that the Worker could work as an electrician in other roles with an approximate earning capacity of $1,780.00 per week.[66] Concerning real and available employment in such roles, Ms Zeman conducted a labour market analysis which identified that on 30 March 2020 5,418 jobs for "electricians" were advertised on the "Seek" website across Australia (including 83 positions in the Northern Territory and 68 Positions in Darwin). Three sample advertisements from March 2020 were discussed in her report. In her Supplementary Report dated 30 July 2020, Ms Zeman considered the Worker's capacity to engage in FIFO roles which paid up to $60 an hour and provided sample job advertisements from July 2020. However, Ms Zeman did not identify any "real jobs", prerequisites, duties, location or salary for the period February – August 2019.

63. On the evidence available I was not persuaded that the Employer had discharged its onus to identify a real job or earning capacity for the period February – August

[65] Ex 1 pp 133-216.
[66] Ex 1 p 147: Work Capacity Assessment Report of Ms Sanja Zeman dated 30 March 2020

2019. Accordingly I was not persuaded that the Worker was reasonably capable of earning anything greater than the agreed earning capacity of $1,272.00 per week between 25 February and 17 August 2019.

Conclusion

64. The Employer failed to discharge its onus that the injury did not arise out of or during the course of employment.

65. The Employer failed to discharge its onus that between 25 February and 17 August 2019 the Worker had an earning capacity greater than the agreed earning capacity of $1,272.00 per week.

66. The Employer discharged its onus and satisfied me that on and from 17 August 2019 the Worker suffered from no continuing incapacity causative of any loss of earning capacity and had capacity to return to his pre-injury employment or any other position for which he was suitably qualified and experienced.

Orders

67. The Notice of Decision dated 25 February 2019 is set aside.

68. Between 25 February and 17 August 2019 the Worker had an earning capacity of $1,272.00 per week and the Employer is to pay weekly or other compensation in accordance with the Act for this period.

69. On and from 17 August 2019 the Worker suffered no continuing loss of earning capacity arising out of the injury.

70. I will hear the parties as to costs and on any consequential orders.

Dated this Twelfth day of February 2021

Elisabeth Armitage
WORK HEALTH COURT JUDGE