

CITATION: Greg Reilly v H.D. Enterprises Pty Ltd trading as Humpty Doo Hardware [2016] NTMC 03

PARTIES: Greg Reilly
v
H.D. Enterprises Pty Ltd trading as Humpty Doo Hardware

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 21505800

DELIVERED ON: 9 March 2016

DELIVERED AT: Darwin

HEARING DATE(s): 7-11 September 2015
18-23 January 2016

JUDGMENT OF: Tanya Fong Lim SM

CATCHWORDS:

Jurisdiction – Practice and Procedure – Equitable Jurisdiction of Work Health Court – Estoppel by representation – detriment- reopening issue of original injury

Practice and procedure – Work Health Court – Counterclaim- mere appeal – issue of original injury

Fraud-standard of proof-sufficiency of evidence -competing positive inferences-reliance on representation

Worker’s compensation -Partial incapacity – most profitable employment

Briginshaw v Briginshaw (1938) 60 CLR 336

Bradshaw v McEwans (1951) 217 ALR 1

Paspaley Pearling Company Pty Ltd v Anderton [2009] NTSC 3

Dickin v N T TAB Pty Ltd [2003] NTSC 119

Mitsubishi Motors Australia v Harbord [1997] 69 SASR 75

Thompson v Palmer (1933) 49 CLR 507 at 547

Swanson v Northern Territory [2006] NTSC 88

Commonwealth v Verwayen (1990) 170 CLR 394,

Legione v Hanley (1983) 152 CLR 406

Giumelliv Giumelli (1999) 196 CLR 101

Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641 at 674; 11 ALJ 272 per Dixon J. See also *Singh v Singh* (2010) 242 FLR 90;

Newbon v City Mutual Life Assurance Society Ltd (1935) 52 CLR 723 at 732-5

Trenorden v Martin [1934] SASR 340

Territory Insurance Office v Adlington (1992) 2 NTLR 55; [84 NTR 7](#)

MWJ v The Queen (2005) 222 ALR 426 at 39

Disability Services of Central Australia v Regan (1998)8 NTLR 73

REPRESENTATION:

Counsel:

Worker:

Mr Alan Lindsay

Employer:

Mr Miles Crawley

Solicitors:

Worker:

Hunt & Hunt

Employer:

Minter Ellison

Judgment category classification:

C

Judgment ID number:

[2016] NTMC 003

Number of paragraphs:

248

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

No. 21505800

BETWEEN:

Gregory Paul Reilly
Worker

AND:

HD Enterprises Pty Ltd trading as Humpty Doo
Hardware.
Employer

REASONS FOR JUDGMENT

(Delivered 9 March 2016)

Ms FONG LIM SM:

- 1) Mr Reilly, the Worker, successfully claimed compensation for an injury at work in March 2011. He has been paid weekly benefits, treatment costs, ancillary costs to that treatment and a lump sum for his permanent disability. There is no doubt that the medical and diagnostic tests of the Worker show a disc prolapse at the L3/4 level with nerve compression resulting in severe neuropathic pain in the right leg. In dispute is the cause of that disc prolapse, the level of pain and symptoms and whether the pain or symptoms suffered by the Worker are such that they cause him to be totally incapacitated for work.
- 2) On the 27th of November 2014 the Employer served the Worker with a notice under section 69 of the Workers Compensation and Rehabilitation Act (the Act) supported by a report of a Dr Kapur, Dr Wyatt and Dr Ganapu. The notice reduced the Worker's benefits on the basis of his most profitable employment. The most profitable employment was stated to be full- time work as a hairdresser. The reports of those doctors represented a change in their opinion of the Worker's incapacity to work after they had viewed some video surveillance of the Worker. Previously those doctors had certified the Worker with a permanent disability and a payment was made to the Worker on that assessment. The footage shows the Worker undertaking activities which he says he cannot undertake without painful consequences.

- 3) The Worker claims he is entitled to continued weekly benefits on the basis of total incapacity to work. In answer to the Worker's claim for continuation of benefits the Employer has claimed he is not entitled to benefits relying on section 69(2)(c) of the Act.
- 4) The Worker maintains that he was injured while at work lowering heavy gas bottles from a ute to the ground. Overnight his back pain became worse requiring him to be hospitalised, subsequently have surgery and has resulted in him suffering chronic pain in his right leg with a consequential depression, anxiety and somatic symptom disorder. The Worker also claims he continues to require intensive physiotherapy and hydrotherapy to assist him in his pain management and to access those services he will continue to require the provision of accommodation in Darwin and taxi fares.
- 5) Since the onset of symptoms the Worker has undertaken spinal surgery which has mostly relieved his back pain but not the leg nerve pain. After the Worker was served with the section 69 notice he had the benefit of an interim determination for weekly payments and medical and rehabilitation expenses until July of 2015 when a further interim determination was refused by the Court.
- 6) The Employer originally accepted the Worker's claim but now applies to the Court to validate its cancellation and/ or reduction of Mr Reilly's benefits on several bases:
 - a) Mr Reilly has created a fraud on the Employer initially because he lied about the original cause of his injury and lied on his claim form;
 - b) If Mr Reilly did have a compensable work injury he has falsely claimed benefits because any disability he presently suffers is either caused by a pre-existing condition or is not as severe as he claims;
 - c) If Mr Reilly had a compensable work injury he is now capable of working full-time as a hairdresser and is therefore only eligible for reduced weekly benefits based on most profitable employment as a hairdresser;
 - d) Mr Reilly's claim for further physiotherapy, hydrotherapy and psychological treatment is not indicated on the present medical advice.
- 7) The Worker denies any fraud and claims he continues to suffer an incapacity which is permanent and requires intensive treatment. He further argues that the Employer is estopped from now denying his claim because the Worker has acted to his detriment as a result of the Employer's original acceptance of his claim.
- 8) In the Employer's case I heard evidence from Dr Wyatt an occupational physician, Dr O'Neill a neurologist, Dr Kapur a pain medicine physician,

Dr Ganapu a psychiatrist, Mr and Mrs Fenwick (directors of the Employer), Ms Kukianos who prepared the labour market survey and Ms Gardiner the Worker's immediate supervisor at the time of his claimed injury.

- 9) I also viewed the video surveillance footage provided to the medical practitioners and had the assistance of copies of the AMA guidelines, the Worker's full medical history, Dr Kenny ['s] report and the Employer's documents.
- 10) In the Worker's case I heard evidence from the Worker, Mr Sidaway, Ms Khalia Reilly, Dr Aulakh the worker's General Practitioner, Dr Darwish a neurosurgeon, Dr Lenard Chin a psychiatrist and Dr Gavin Chin a pain physician.
- 11) I also received reports from Kim Crawford and Kathryn Lange by consent.
- 12) **Matters not in dispute.**
The Worker is a qualified hairdresser and he worked in that industry for about 20 years. He also has worked as a gyprocker, stocktaker and bottle shop attendant and more recently as a shop assistant.
- 13) While in Queensland in 2007 the Worker suffered an injury to his back which required surgery. That injury was a disc prolapse at the L3/L4 level. The Worker took approximately 2 years to return to full- time work after that injury.
- 14) The Worker and his family then moved to the Northern Territory where he commenced working with Woolworths and then changed employment to working with the Employer. The Worker and his wife purchased a property in Marrakai and commenced living there. The Worker's wife worked in Darwin and the children went to school in Darwin which involved an hour long drive each way.
- 15) At about the time of the injury, the subject of these proceedings the Worker and his wife had separated leaving the Worker with the care of their two children.
- 16) The Worker now occupies the Marrakai property with his two children and two friends, Mr Peter Sidaway and Mr Jeff Barnett. There have been some improvements made on that property including the erection of a steel - framed structure with a roof.
- 17) During the time he was in the employ of the Employer the Worker suffered an increase in his back pain and a new disc prolapse in his spine.

- 18) On the 21st of March 2011 the Worker reported to his Employer back pain recorded as being from “gardening all weekend digging holes, he was bent over most of the day”. On the same day he suggested the pain may be from a virus. He then worked until Thursday the 24th of March when he had a rostered day off to take his daughter to the doctors for a kidney infection. At the same time he undertook a CT scan on his back.
- 19) The Worker then returned to work on Friday the 25th of March and worked all weekend doing his normal duties. On Sunday the 27th the Worker reported in the work incident diary that he had “crashed his bike on the way to work at 8:30am. Banged up his knee and neck Jolt and other injuries!!”
- 20) On the 28th of March Ms Gardiner, the Worker’s immediate supervisor notes in the work diary that the Worker was to do the gas bottle run and was ensuring he drank lots of water just in case the back problem was because of a virus.
- 21) The Worker did not report to Ms Gardiner anything to do with a back injury when out on gas bottle delivery that day. The Worker completed full days of work on the 29th and 30th of March 2011.
- 22) On the night of the 29th of March 2011 the Worker was taken to the hospital by his friend Mr Sidaway and left there. He attended Accident and Emergency and arrangements were made for him to travel to Adelaide for an MRI which could not be done in Darwin because the machine was not operational.
- 23) In the Darwin hospital notes there is no record of the Worker making mention of the gas bottle incident. The first time it is mentioned in hospital records is in Adelaide.
- 24) In Adelaide the Worker was given injections into his spine and was then discharged and returned to Darwin. He did not return to work because he continued to suffer pain. He became suicidal and attempted suicide in April 2011 and was admitted to the psychiatric ward in the Royal Darwin Hospital.
- 25) After discharge from the psychiatric ward he attended a GP and was supplied with a claim form to be submitted to his employer. The Worker filled in a claim form for the injury on the 12th of April 2011 in which he nominates the gas bottle incident as the cause of his back problems.
- 26) After investigation the Worker’s claim was accepted by the Employer and in July 2011 the Worker had surgery in Sydney which resolved most of his back pain.

- 27) After his return to Darwin the Worker continued to undertake treatment in the form of physiotherapy, hydrotherapy, consulting with a pain management physician, a psychiatrist and a GP. He continued to take medication for his mental health issues and for the pain in his leg.
- 28) **Burden of Proof** - In relation to the claim that the Worker has been fraudulent the Employer must satisfy this Court of that fraud on the balance of probabilities based on cogent evidence¹. It is not enough for the Employer to establish inconsistencies in the Worker's evidence and rely on inferences arising out of the evidence. The evidence must "do more than give rise to conflicting inferences of equal degrees of probability so the choice between them is more than a matter of conjecture".² On the counterclaim it is also for the Employer to prove that the injury suffered was not an injury arising out of or in the course of employment and that either the Worker's injury no longer results in the Worker having an incapacity to work and/or any entitlement to compensation. The Worker has the burden to of proving his need for continued treatment and associated costs.
- 29) **Is Estoppel available in the Work Health Court?**
- 30) On the pleadings a threshold question is whether the Work Health Court has jurisdiction to consider and rule on estoppel. In particular whether the Work Health Court has equitable jurisdiction to entertain the Worker's claim of estoppel. Of course there are different forms of estoppel- statutory estoppel, issue estoppel, estoppel by representation, estoppel by convention and equitable estoppel. The Worker pleads the Employer cannot now deny his claim for compensation as they have previously accepted it and that acceptance has caused him to act to his detriment. The detriment is pleaded as a change in the Worker's position "by receiving and expending weekly benefits, undergoing medical treatment, surgery and rehabilitation and relocating himself and his family for treatment" (see paragraph 4 of the Worker's Defence to Counterclaim).
- 31) While the pleading does not make it clear the form of estoppel relied upon the Worker asserts that the Employer having accepted the Worker's claim after a full investigation cannot now reopen the issue of whether the Worker's injury was out of or in the course of his employment. That pleading would suggest he is relying on either equitable estoppel or estoppel by representation.
- 32) There is no statutory estoppel available to the Worker, nothing in the Workers Rehabilitation and Compensation Act ("the Act") that prohibits an Employer from cancelling benefits after accepting liability. In

¹ see *Briginshaw v Briginshaw* (1938) 60 CLR 336

² *Bradshaw v McEwans* (1951) 217 ALR 1

fact the Act provides for cancellation in certain circumstances. In particular section 69(2)(c) allows for immediate cancellation on the grounds of fraud.

- 33) While issue estoppel is available in the Work Health Court, in the present case there is no issue estoppel that is where the Court has already determined the benefits available to the Worker or an agreement has been reached between the parties which create such estoppel³.
- 34) There have been no decisions of this Court or the Supreme Court of the Northern Territory in relation to the application of equitable estoppel in the Work Health Court.
- 35) In South Australia the Full Court of the Supreme Court in *Mitsubishi Motors Australia v Harbord* [1997] 69 SASR 75 considered estoppel in the context of the Workers Rehabilitation and Compensation Act 1986 (SA). Their Honours considered whether issue estoppel could arise from a determination of a review officer and ultimately found because of the existence of section 106A which states “ a payment by the Corporation or an Employer to a Worker does not constitute an admission of liability or estop a subsequent denial of liability” that issue need not be decided.
- 36) However Chief Justice Doyle gave very helpful guidance as to when estoppel may exist in the context of a statutory scheme such as the one created under by the Workers Rehabilitation and Compensation Act 1986 (SA).
- 37) The scheme in South Australia had several levels of decision making - the initial decision by the Corporation (a body created by the legislation to deal with Workers compensation claims), a review of the Corporation’s decision by a review officer (such review was a de novo review) and a right of appeal to the Tribunal and then to the District Court. The Worker argued that each decision made at each stage of the proceedings created an estoppel against the Corporation from revisiting the issue of whether the Worker had suffered a compensable injury. Their Honours predictably found that any initial decision by the Corporation did not create an estoppel because of the specific provision of section 106A and went on further to say neither did the next step in the process.

³ The Supreme Court of the Northern Territory has clearly applied the principles of issue estoppel in matters which considered memorandums of agreement which had **been** registered in the Work Health Court and by virtue of the Act were to be treated as a judgments of the Court *Paspaley Pearlring Company Pty Ltd v Anderton* [2009] NTSC 3 and *Dickin v N T TAB Pty Ltd* [2003] NTSC 119

38) His Honour Chief Justice Doyle went on to discuss the application of the doctrine of estoppel⁴ and suggested that estoppel could apply in some circumstances. However to be successful in a claim for estoppel the Worker would have to show he had acted to his detriment arising out of the Corporation's determination. The Worker must have placed himself in a position of material disadvantage⁵.

39) His Honour did not suggest what circumstances would have to exist to create such an estoppel but was clear in his reasoning that although it is preferable to have finality between the parties the scheme required decisions to be made quickly and did not specifically prohibit those decisions being revisited.

40) His Honour was also in the situation where the Worker had not identified the form of estoppel he was asking the court to apply. His Honour suggested it could only be an estoppel by convention or representation. His Honour set out what is required for each of those forms of estoppel to exist and then rejected any possible claim on the basis that the Worker had not shown any detriment. His Honour did not rule on the existence of equitable jurisdiction of the Tribunal in making its decision as there was no need to do so.

41) The facts and law considered in the *Mitsubishi* case (supra) are clearly distinguishable from those in the present case not in the least because of the existence of section 106A in the South Australian Act. Further, in the present case the decision of the claims officer for the Employer's insurer to accept liability was made after an investigation factual and medical whereas the decision in the *Mitsubishi* case to accept or deny liability was made without the time for an extensive investigation as was mandated by the relevant legislation. However the similarity in the South Australian legislation and the Northern Territory Act is that neither prohibits the revisiting of the issue of whether the injury was a work injury.

42) Adopting the reasoning of Chief Justice Doyle in the *Mitsubishi* case I find estoppel by representation could have apply in the Work Health Court. Unfortunately I am not assisted by His Honour in relation to the availability of equitable estoppel in the Work Health Court.

43) The Work Health Court is a court created by the Work Health Court Administration Act and relies on that Act for its jurisdiction and powers.

⁴ at page 87

⁵ Dixon J in *Thompson v Palmer* (1933) 49 CLR 507 at 547

- 44) Section 14 of the Work Health Administration Act sets out the jurisdiction of the Work Health Court. Section 15 grants the Court the same powers as the Local Court. There is no specific equitable jurisdiction granted to the Work Health Court. The Work Health Court is granted specific power to regulate its own procedures and it does so largely through the Work Health Rules.
- 45) Section 6 of the Local Court Act specifically gives that court concurrent jurisdiction in law and equity. Section 14 gives the Local Court specific power to grant certain types of relief and sets out the territorial jurisdictional limits of the court. The general powers of the court to make orders regarding procedure in the court, enforcement of orders and costs are scattered throughout the Local Court Act. The Local Court also has some implied powers to control its proceedings.
- 46) The Worker submits because the Work Health Court has been granted the powers of the Local Court and the Local Court has the power to grant equitable remedies then, by implication, so does the Work Health Court.
- 47) Section 14(c) of the Work Health Administration Act gives the Work Health Court the jurisdiction to :
- “determine all matters and questions incidental to, or arising out of matters before the Court”
- 48) Section 14(d) of the Work Health Administration Act gives the Court “any other jurisdiction conferred on it under any Act”
- 49) The Worker submits those two sections read together with the Local Court Act give the Work Health Court the power to grant equitable remedies to determine the dispute between the parties.
- 50) The Worker supports that argument with reference to the decision of the Supreme Court in *Swanson v Northern Territory* [2006] NTSC 88 however His Honour B.R. Martin CJ did not decide the issue of the court’s power to make a declaration based in equity there was no reference to equity in that decision. The learned magistrate at first instance found the power to make a declaration with reference to section 104 of the Work Health Act on the basis that the general power to make a “ruling” in respect of “a matter or question incidental to or arising out of a claim for compensation” is the equivalent of granting the Court the implied power to make a declaration as to issues before the Court. Section 104 has remained unchanged in subsequent forms of the Act.
- 51) The Worker submits if the Court has the implied power to make a declaration, which is an equitable remedy the Work Health Court must have general equitable jurisdiction by implication.

- 52) That submission flies in the face of the principle that an inferior court created by statute only has the jurisdiction granted to it by the Act creating it.
- 53) Section 14(d) on its ordinary meaning refers to jurisdiction conferred on the Work Health Court by another Act. The Local Court Act does not confer jurisdiction on the Work Health Act. The Local Court Act confers certain powers exercisable by the Work Health Court by virtue of section 15 of the Work Health Court Administration Act . However the exercise of those powers must be restricted to the exercise of the Court's jurisdiction For example the Local Court would clearly have the power to order specific performance of a contract however that power would not be relevant to the exercise of the jurisdiction of the Work Health Court.
- 54) I reject the argument that the Local Court Act confers equitable jurisdiction upon the Work Health Court by implication.
- 55) The Work Health Court has the jurisdiction to determine claims for compensation under the Workers Compensation and Rehabilitation Act and in exercising that jurisdiction it can make determinations regarding the Worker's normal weekly earnings, capacity to earn, causation of incapacity, treatment required and the Employer's obligation to pay for rehabilitation among other things. The Court has the jurisdiction to determine all matters which establish the right to compensation, the value of that compensation and who is responsible for paying that compensation. Section 104 allows a person to commence proceedings in the Court for "a ruling in relation to a matter or question incidental to or arising out of a claim for compensation" .
- 56) The rulings the Court makes are in the form of a declaration and while the Court does not have a express power to make a declaration, in these circumstances a declaration made by the Court is equivalent to the determination of the Court, eg the Court may determine that a person is a Worker and suffered a compensable injury and then declare that a person is a Worker and suffered a compensable injury to ensure the enforcement of that determination. That declaratory relief in this does not depend on the Work Health Court having equitable jurisdiction, it is rather a necessary consequence of the Court's determination and an exercise of the Court's] implied power.
- 57) The same argument cannot successfully be made in relation to estoppel. The availability of equitable estoppel is not necessary to determine the Worker's entitlement to compensation and other issues which arise in relation to that entitlement.
- 58) Nonetheless the Worker may have available to him an estoppel at common law - that is there exists a legal relationship between him and the

Employer where the Employer is required to pay him compensation for a work injury. He may argue that because the Employer has accepted his claim after a full investigation the Employer can no longer say that the injury was not a work injury. The estoppel claimed could be common law estoppel not based in equity and therefore possibly available to the Worker.

- 59) The law on the categories of estoppel is complicated and has been the subject of many discussions by the High Court⁶. A common theme in these discussions is that a party will be estopped from claiming a state of affairs does not exist if that party has previously accepted it did exist and the other party has consequently acted to his detriment.
- 60) Estoppel by representation operates to protect the representee from the detriment that would flow from his or her change of position if the assumption arising from the representation were not maintained⁷. The change of position may consist of a positive act or an omission to do an act that the representee would otherwise have done⁸. The detriment must be proved as a matter of fact⁹. It is not necessary to show pecuniary loss, but the prejudice must be material or real.¹⁰ In the absence of proof that the representee was induced by the representation to act to his or her detriment, there will be no estoppel.¹¹ (Halsbury's Laws of Australia)
- 61) In the present case the question must be how has the Worker acted to his detriment upon the Employer's admission of liability. Estoppel will only be available to the Worker to protect him from the detriment which would flow from his change of position if the assumption he has made is maintainable. That is he will only be protected by estoppel if allowing the Employer to now deny liability would result in some real detriment other than the loss of the benefit he has received from the acceptance of liability by the Employer.
- 62) To avail himself of the protection of estoppel the Worker must prove on the balance of probabilities that he acted to his detriment based upon the actions of the Employer. He must prove that he has changed his position and acted to his material disadvantage.

⁶ see *Commonwealth v Verwayen* (1990) 170 CLR 394, *Legione v Hanley* (1983) 152 CLR 406 and *Giumelliv Giumelli* (1999) 196 CLR 101

⁷ *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674; 11 ALJ 272 per Dixon J. See also *Singh v Singh* (2010) 242 FLR 90; [44 Fam LR 85](#); [\[2010\] FMCAfam 949](#); [BC201006935](#)

⁸ *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 732-5

⁹ *Trenorden v Martin* [1934] SASR 340

¹⁰ *Territory Insurance Office v Adlington* (1992) 2 NTLR 55; [84 NTR 7](#)

¹¹ *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 732-5; 9 ALJR 78; 29 Tas LR 133 per Rich, Dixon and Evatt JJ; *Yovich v Collyer* [1972] WAR 143 at 146 per Wickham J material detriment must be proved; loss of an apparent benefit is insufficient

- 63) The Worker has not demonstrated that he has acted to his material disadvantage on the Employer's initial acceptance of his claim.
- 64) The detriment claimed is that he has received weekly payments and treatment at the expense of the Employer and spent those weekly payments. If this Court decides those payments have been made mistakenly because of misrepresentation or fraud by the Worker then the Worker may be required to pay back those payments. However that would not be detriment arising out of the acceptance of liability rather a detriment of his own making.
- 65) Putting aside any possible finding of fraud against the Worker there is no detriment proven except for the loss of a benefit being the weekly payments and medical treatment. Of course if fraud is proven then estoppel will not be available to the Worker.
- 66) The Worker's claim that a further detriment is that he has had to move his family regularly into Darwin to attend medical appointments disrupting their lives and creating uncertainty. This may have been of some inconvenience to the Worker and his family however as the Worker claims the treatment is a necessary consequence of his condition, the need for the treatment would have existed whether or not the Employer had accepted liability. Both children still attended school and the Worker received the medical treatment he required. There is no detriment arising from the removal of that uncertainty.
- 67) The Worker's claim for estoppel at common law must fail on the failure to prove real detriment.
- 68) Having decided the issue of estoppel I must now consider the Employer's claim that the Worker has been acting fraudulently in his initial claim and in his continuing claim of incapacity.
- 69) **Has the Worker acted fraudulently?**
The Employer has to prove on the balance of probabilities that the Worker has been deliberately dishonest in his claim for benefits. The Employer should produce evidence that positively establishes that fraud and should give the Worker an opportunity to explain his behaviour. In this case the Employer must prove the Worker has dishonestly represented he has suffered a work injury and/ or he has dishonestly represented the effects of that injury on his physical and mental health. The Employer must also prove that the Worker has made that representation without honest belief or with reckless disregard to the truth of that representation and further that the Employer has relied on that misrepresentation.¹²

¹² Halsburys Laws of Australia paragraph 35.2.150

- 70) To consider whether the Employer has proved these allegations it is first necessary to consider the Worker's evidence and to come to a conclusion about his credibility.
- 71) **The Worker's Evidence** – In assessing the Worker's evidence I will not repeat that which has been set out above as matters not in dispute.
- 72) In giving his evidence in chief the Worker presented as a fairly cheerful person able to answer his counsel's questions directly and succinctly at first but the longer he was in the witness stand the more he started having difficulties sitting or standing for any more than 5 minutes at a time and answering questions. The Worker was required to give evidence for extended periods of time and his discomfort became more and more evident the longer those periods took were. He was allowed breaks of 15 – 30 minutes throughout his evidence which seemed to assist him.
- 73) He described his back as giving him mild discomfort but the sensation in his leg as being never lower than a level 6 on a TENS machine. He says he can manage that pain level by concentrating on calming thoughts but that method does not work if he allows the pain to get to beyond 8.
- 74) He gave evidence of his medications and the effect those medications have on his concentration and pain levels. He says the medication he takes at lunchtime is of a lower dose to allow him to be more alert for when his son comes home from school. He stated the Seroqual the main medication for his anxiety makes him a bit fuzzy and so it is hard for him to concentrate.
- 75) He gave a history of the injury he suffered in Townsville and his recovery from that injury. After his surgeries the Worker described a five month period where he was suffering pain enough to limit him working and having to take regular pain medication. After that he worked up to eventually working three jobs, Mondays – Thursdays as a stocktaker with Woolworths, Saturdays in a salon doing full hairdressing duties and 6 - 9pm on Sundays in a bottleshop. He said he managed all of that work because any back pain he had was alleviated by a good lie down overnight.
- 76) While working for the Employer the Worker was required to do most of the heavy lifting including lifting full gas cylinders which could weigh between 80- 120 kilos, bags of chaff of 60 kilos and bags of pellets and fertiliser of 20-40 kilos. That work made the Worker mindful of his sore back and caused some issues but that soreness was not enough to stop him from working. He also said that he had suggested to his Employer a different method of delivering the gas bottles but that idea had been rejected.

- 77) While giving his evidence the Worker clearly had moments when he was struggling for the correct word and needed to take a break in the morning session and had to finish early in the afternoon session. He also became tearful when asked about his description of wanting to “hacksaw his leg off”. He said he often thinks he would be better off without his leg - he hates his leg.
- 78) The Worker’s evidence about his work injury is that he was delivering the gas bottle and when he was lowering it to the ground from the ute he felt like “ his lower back exploded” . He really couldn’t remember what he told Ms Gardiner that day , in fact he couldn’t remember whether he actually saw her upon his return to work on that day¹³.
- 79) He described how the next night the pain had become so bad he needed to go to hospital. He says his memory is patchy about how he got to the hospital and what actually happened in the Royal Darwin Hospital there because he was in so much pain that he couldn’t stand straight and does not remember and what he told regarding treatment.
- 80) The Worker remembers the procedure in Adelaide which he describes as extremely painfu , so much so that he lied to the hospital staff about the success of the procedure because he didn’t want to have them touch him again. He returned to Darwin and then shortly after put in a claim for compensation. The Worker could not remember having a conversation with Ms Gardiner while he was in Adelaide hospital.
- 81) The Worker then recounted a period of time after he returned to Darwin during which the pain was so insufferable that even though he was on pain medication he attempted suicide and it was only after that he put in his claim.
- 82) The Worker was asked to describe how the physiotherapy, hydrotherapy and medications have helped him to regain some function.
- 83) With hydrotherapy he described the process as extremely painful at first but once his medication was adjusted he found he was able to undertake the exercises and make progress towards being able to walk up stairs, regain strength and some physical fitness. That progress is reflected in the evidence of the physiotherapists and their notes of attendances on the Worker.
- 84) In relation to land -based physiotherapy the Worker believes it has helped him to move his toes in his right foot independently and that was a major breakthrough which gave him hope about the future.

¹³ see page 272 of transcript

- 85) He also gave evidence that sessions with a psychologist have helped him be more accepting of his situation and assisted in his pain management.
- 86) In recent times the Worker has created his own exercise equipment at home to mirror the equipment he has used in hydr therapy to continue his own rehabilitation. That equipment includes a heated pool and a bike -like structure along with other portable pieces of equipment. He says he uses that equipment but believes the exercises have not been as effective since he has been unable to see the professionals in town.
- 87) In cross- examination the Worker became less open in his answers, questions were often met with “I cannot remember”.
- 88) In relation to why he did not advise Ms Gardiner of the gas bottle incident on the day, he admitted to withholding that information because he thought he would lose his job if he complained about a back injury. Yet in evidence in chief he claimed not to remember much about what he said to her on return to work just that he wanted to get home to rest.
- 89) He also admitted his conversation with Ms Gardiner on the 21st of March 2011 was not accurate regarding the gardening for the same reason¹⁴ . However a week later he records in the work diary an incident with his motor bike where he specifically notes he fell off on the way to work and not in his driveway. He could not explain why he withheld information about the incident with the gas bottle which was in his view a more serious incident yet felt the need to report the incident with the bike which he says did not cause him any significant injury.
- 90) When cross- examined on the contents of his claim form his explanation for not disclosing a previous worker’s compensation was that he accepted having made a claim in 2000 regarding his shoulder but claimed he had “no clue” as to who represented him at the time.
- 91) His explanation for answering “no” to the question “ Have you suffered a similar injury/disease before? ” and making no reference to his prior back injury and surgeries was curious. He says he thought it was different pain so he didn’t need to disclose even though the symptoms he described for that injury almost exactly mirror those he says he felt in 2011 that is a sharp pain in the lower back with pain radiating down his legs.
- 92) He could not explain why he put in his claim form that the injury happened while travelling to and from work as well as “working elsewhere”. His answer was “no clue”. In relation to the date of report of the incident he could not explain why he had put the date as the 6th of

¹⁴ page 260 transcript

April. His answer was “I just picked a date” - even when he was reminded that he was in Adelaide in hospital on that day he didn’t confirm that is when he reported his injury. He could not explain why he had originally put the 30.3.2011 as the date of injury and crossed it out or why he says he ceased work at 3:00am on the 29.3.2011.

- 93) In his evidence in chief he says he cannot remember how he gave the claim form to his Employer. It is not clear who for the Employer received the claim form and on what date, however Ms Gardiner does recall speaking to the Worker while he was in hospital in Adelaide about his injury.
- 94) The Worker was also cross- examined about his non- disclosure to Dr Talbot about his previous visits to general practitioners for back pain during 2010 and early 2011 and the CT Scan he had on his back leading up to the severe onset of pain on the 30th of March, being back pain with nerve pain radiating down both legs and later just the right leg. The Employer argues the Worker’s non- disclosure of the ongoing back pain and the CT Scan is significant in the assessment of his reliability. His explanation was that he didn’t believe those previous problems related to the same issue with his back. His explanation is again curious given the pain descriptions in the earlier doctors’ reports in 2007 are almost identical.
- 95) When asked whether it was because he was focussed on ensuring the TIO accepted his claim he answered “I’m in bulk pain so I’m not really thinking about TIO at that point”. He was not asked if he deliberately failed to tell Dr Talbot about those things because he wanted to mislead the doctor into agreeing the gas bottle incident was the cause of his back pain. Dr Talbot indicated in his report that in the CT Scan he had before him it was not clear whether the root of the Worker’s pain was scar tissue from the 2007 injury and surgeries or whether it was a fresh prolapse. Dr Talbot assumed it was a fresh prolapse because of the sudden onset of pain after the gas bottle incident and on that basis he opined that the gas bottle incident was most likely the cause of a fresh disc prolapse with a possible contribution from the 2007 injury because of a possible weakness in the L3/4 area creating a predisposition to a fresh prolapse. He specifically excluded any contribution from the motor bike accident¹⁵. Dr Talbot was not asked to provide a supplementary report once the medical records and further information became available to the Employer.
- 96) It is clear from Dr Talbot’s report that the Worker was open and honest about his previous back injury and surgeries.

¹⁵ see page 7 if his report, page 126 of the Employer’s tender bundle

- 97) The lack of any record of the gas bottle incident in the Royal Darwin Hospital notes is also curious. The Worker says he did tell them and they just didn't record it yet he also says he cannot remember much of the day of his admission. It would be very unusual for someone who has suffered a significant injury as described by the Worker as "It absolutely felt like my lower back exploded"¹⁶ to tell the hospital staff of a minor incident of falling off a motor bike and yet not report the more significant incident when attending for severe back pain. It is also unbelievable that hospital staff taking a history from a person with severe back pain would not record a significant incident such as the gas bottle incident if the Worker had in fact told them about the incident.
- 98) The admission notes for the 4th of April 2011 at the Royal Adelaide Hospital (RAH) make no mention of the gas bottle incident either. However the next day there is a note referring to the gas bottle incident in the RAH progress notes and certainly the first notification of this incident to Ms Gardiner happens about this time.
- 99) Another inconsistency is the Worker's presentation to Mr Fenwick during the period between March 2011 and July 2011. This was the period of time when the Worker says he was in such pain that he became suicidal. He presented as cheerful and seemed to Mr Fenwick to be having no trouble riding his motor bike. He did present at one stage with a walking stick when he saw Mr Fenwick but did not complain of any pain at that time.
- 100) Mr Fenwick remembers speaking to the Worker at least a couple of times after his return from Adelaide and says he always seemed to be his usual cheerful self which is in stark contrast to the Worker claiming he was in severe pain over that period of time before he was referred to have surgery in July 2011.
- 101) The Worker was also asked about his attempt to reopen his claim arising out of the 2007 injury. The Worker admitted he wrote to Queensland Workcover on the 15th of April 2011 to try and reopen his claim - he explains this as his attempt to get income from anywhere as he was desperate.
- 102) The Worker was also subject to extensive video surveillance from May through to October in 2014. The footage shows him engaging in activities such as shopping, interacting with taxi drivers transporting him, standing for significant periods of time , squatting, carrying a full backpack , walking long and short distances mostly without a walking stick, play fighting with his son, sitting on his balcony for lengthy periods of time and having a seemingly cheerful telephone conversation with

¹⁶ see page 272 of the transcript

somebody. It was that footage that caused Dr Wyatt and Dr Kapur to change their opinion of the Worker's continued disability.

- 103) The Worker's explanation for what is shown on the video is that the shopping was planned, he plans his conversations when he is going to the shops and after the day when he walked to Casuarina from Hibiscus he really suffered and whenever he undertook the activities shown in the video he needed to rest for long periods of time. He maintains that he requires all his mental energy to keep the pain in his leg at bay and if he is required to concentrate on something else his leg pain will quickly become uncontrollable even though he takes regular painkillers.
- 104) Even if it is accepted that the Worker has become forgetful and his concentration impaired because of his levels of pain, the medication and his employment of mental calming methods that does not explain all the inconsistencies in his claim form and his actions in not reporting the gas bottle incident to his supervisor at the time it occurred or to the hospital when he was first admitted.
- 105) There are so many inconsistencies in the Worker's presentation in court, to the doctors and on the video surveillance and so many inconsistencies in his evidence in explaining the details of why he filled out his claim form with clearly inaccurate information. His explanations for these inconsistencies are sometimes illogical and difficult to comprehend. Those inconsistencies along with acceptance that the Worker's memory may well be affected by the medication he takes, bring me to the conclusion that he is an unreliable witness.
- 106) Whether his unreliability is by design or, as the Worker submits because of how the pain and medication have affected his cognitive function is another matter.
- 107) In assessing the truthfulness of the Worker it is important to note that even though he made no mention of the 2007 injury in his claim form he was open and truthful about that injury when he saw Dr Talbot and made no attempt to hide that incident from the doctor.
- 108) Fortunately the Court was provided with some corroborative evidence of the Worker's account of how he has been affected by the injury and the consequential neuropathic pain. That evidence also to some extent corroborates his evidence of any physical work he may have undertaken on the property during the relevant time.
- 109) Mr Sidaway, the Worker's longtime friend and his daughter, Kharlia Reilly gave evidence. They both describe the Worker as a man who cannot hold a sensible conversation most of the time, a man who is withdrawn socially, and a man who acts differently in public than he does in private. A different man to the one they knew before the back injury in 2011 who

was cheerful and charismatic with a full social life. Both describe the Worker as forgetful, preoccupied with his leg and reacting strongly when his leg is touched unexpectedly.

- 110) **Mr Sidaway** has lived with the Worker and his wife on and off over many years. Mr Sidaway continues to live on the property at Marrakai and was living there in March 2011. He also continues to contribute to the maintenance of that property. He describes the acquisition of the property as a collective dream of his, the Worker and his wife and friend Jeff to build a tropical paradise for them all to live in on retirement. Originally the Worker and his wife were to work in paid employment while he, Mr Sidaway built the house with some assistance from the Worker.
- 111) He confirmed that he was responsible for all of the physical labour in building the house and he has done all of the construction as it presently stands (E19) mostly by himself with a little assistance from Mr Reilly in the early stages, and Jeff Barnett.
- 112) Mr Sidaway confirmed before Mr Reilly was hospitalised with this present back problem he had only physically assisted Mr Sidaway for a very short time in laying the foundations. After that Mr Sidaway had intermittent assistance from Jeff. The explanation for Mr Reilly ceasing to assist is that in Mr Sidaway's words " he became belligerent" and there were disagreements on how things should be done.
- 113) When cross- examined on how he could have undertaken the construction of the roof with little or no help Mr Sidaway was able to give a detailed account of the methods he used to lift heavy pieces of steel and put uprights into place by himself and while his methods would not pass any standard of work safety his explanation is credible.
- 114) The evidence of Mr Sidaway corroborated the Worker's evidence that he had not been working on the house construction for some time and in particular the weekend of the 19th and 20th of March 2011. and the weekend before he was admitted to hospital. His evidence also confirmed how he took the Worker to hospital on the night of the 29th of March and at that time the Worker was barely able to walk because of the pain in his back and not making a lot of sense.
- 115) Mr Sidaway also gave examples of how since hurting his back the Worker has tried to avoid anything touching his leg and recalled a time when his son had tried to sit on his father's lap and was pushed off. He has also observed a time when the Worker had forgotten to take his medication and his reaction to that was severe. The Worker sat with his head hanging down, trembling, shaking his right hand and his leg was spasming.
- 116) Mr Sidaway confirmed that he had assisted in setting up the pool and rehabilitation equipment for the Worker at home however stated he did not

think the Worker actually used the equipment a lot. In more recent times Mr Sidaway has obtained employment and is absent from the property during the day so cannot give reliable evidence of how often the equipment is used by the Worker.

- 117) **Ms Reilly**, the Worker's daughter, gave evidence that corroborated everything the Worker says about his present condition. She has observed her father go from a sociable happy man to a person who she believes is in constant pain and spends a lot of time in bed. She equates his ability to focus on tasks with that equivalent to a 3 year old unable to remember things unless he is referred to a list and then sometimes forgetting the list. He is also easily distracted off task and most of the time unable to hold a sensible conversation. She describes him as someone who sits a lot saying nothing or is in bed a lot. Her description of the sitting for periods of time certainly reflects what is shown in the video surveillance material.
- 118) Ms Reilly confirmed her parents were separating at about the time her father hurt his back. She confirmed her mother and sometimes Mr Sidaway had been responsible for transporting her and her brother to school in town during the relevant time. She explained that since her father's back and leg problems arose she has been responsible for looking after her brother and her father, cooking and cleaning for them as well as studying and working.
- 119) During 2013/14 when they were travelling into town for 3 weeks out of 4 for her father to have treatment Ms Reilly describes her father as having to lay in bed for most of the day except to see her brother off to school, meet her brother at the end of the school day and attend his appointments. She says his only domestic task was to do the shopping and that she would prepare a list for him, which he would sometimes forget.
- 120) She says she remembers the day when her father and her brother walked from Hibiscus to Casuarina because after that day he had to ask her to look after her brother for a couple of days because he was feeling so bad. Her comment about her father's presentation on the video surveillance is that she did not see anything different in his presentation on the video compared to how she sees her father act when he is in public.
- 121) When asked about her father's use of the pool at home for hydrotherapy Ms Reilly believed he used it a few times a week however given she is away from the property on weekdays since getting a full -time job it is impossible for her to give reliable evidence about what her father does during the day.
- 122) Ms Reilly presented as a young woman who has borne the burden of her father's condition since she was in Year 11 at school. She was a credible and reliable witness - she gave her evidence in a straightforward

manner. She is clearly a young woman who has maintained her positive outlook on life while coping with her father's inability to contribute in any major way to the care of her brother and their home life. I accept Ms Reilly's evidence in full.

123) While the evidence from Mr Sidaway and Ms Reilly goes some way to allaying uncertainty about the level of the Worker's disability and through that corroboration supports a finding that the Worker is not exaggerating his symptoms it does not assist in explaining the Worker's curious responses to the questions on the claim form or his failure to report the gas bottle incident immediately.

124) The Employer is asking the Court to infer from the admitted lies, the video surveillance and the inconsistencies in the Worker's evidence that he has acted fraudulently. The Employer submits the evidence shows the Worker has through misrepresentation to the Employer in March/ April 2011 tried to convince the Employer he has suffered a work injury. The pieces of evidence the Employer relies upon to reach this conclusion are:

- a) The Worker originally reported the bike accident as "on the way to work"
- b) The Worker did not report the gas bottle incident immediately or to the Darwin Hospital upon his admission
- c) The Worker had been having increasing pain in his back since January 2011 which required him to be put on strong painkillers
- d) The Worker's claim form was full of lies and inaccuracies
- e) The Worker also tried to reopen his Queensland claim 3 days after he made a claim on the Employer which is in conflict with the Worker's evidence that he didn't refer to the 2007 injury in his claim form because he thought it was different pain
- f) The video surveillance and some of the medical evidence suggest the Worker is exaggerating his level of disability.

125) The Employer did not produce material evidence of fraudulent behaviour by the Worker.

126) The Worker submits the alternative inference to be drawn from the evidence is that the Worker was at the time of the injury trying to protect his job by not complaining of the injury regarding the gas bottle and then later when the pain got worse realised he had to make a claim. He believed he did tell the hospital about the gas bottle incident but he was in so much pain that he really can't remember much about his admission to the hospital. Mr Sidaway's evidence was that the Worker was not making much sense that night.

- 127) The Worker also asks the Court to accept his presentation on the video is his public persona and must be treated cautiously because it does not show the Worker's presentation after the activities shown and as the doctors have accepted does not and cannot show what is in the mind of the Worker.
- 128) The Employer did not at any stage put to the Worker that he had deliberately mislead the Employer in the way he reported the work injury. It was established that the Worker had lied on two occasions and that the Worker's presentation on the video surveillance was seemingly inconsistent with his reported disabilities. The Worker provided an explanation for what was shown on the video and accepted he had lied about a couple of things. However it was never put to him that he deliberately mislead the Employer so he could receive benefits. This is fatal to the Employer's claim for fraud¹⁷. The Worker has given evidence of his honest belief that the 2007 injury was different and separate to the injury in 2011 and that belief was borne out by Dr Talbot's opinion.
- 129) The Employer has not reached the high standard set out in *Briginshaw's case* and *Bradshaw's case*¹⁸ - there are two sets of positive inferences which can be drawn from the evidence as set out above and the weight of the evidence does not strongly favour either. While the medical evidence has not yet been discussed in detail for the purposes of deciding whether it adds weight to either of the propositions it is enough to say that there is medical evidence of Dr O'Neill which supports the Employer's proposition that the Worker's fresh disc prolapse occurred before the 28th of March (the date of the gas bottle incident) and there is the report of Dr Talbot which places the likelihood of a fresh prolapse because of the gas bottle incident as high. Other doctors also agreed that the mechanics of the gas bottle incident are consistent with a fresh disc prolapse.
- 130) It is also important to note that the Worker did not attempt to hide the fact that he had a previous back injury in 2007 as he clearly disclosed that fact to Dr Talbot and therefore the Employer did not rely on that the representation contained in the claim form and that cannot be the basis for a fraud claim.
- 131) I therefore find I cannot be satisfied to the relevant standard that the Worker has created a fraud on the Employer to obtain benefits.
- 132) **If not fraud then is the Employer able to re –open the issue of the original injury?**
- 133) When the Worker's pleading goes beyond a mere appeal of the Employer's section 69 notice then the Employer is entitled to plead as a

¹⁷ *MWJ v The Queen* (2005) 222 ALR 426 at 39

¹⁸ *Supra* footnote 1 and 2

counterclaim the issue of the original work injury¹⁹. In the present matter the Worker has characterised his claim as mostly an appeal in relation to the service of the section 69 notice however the remedies sought by the Worker relate to the Worker's claim include a claim for the payment of treatment costs under section 73 and that clearly goes beyond a mere appeal. In particular in paragraph 22(g) of his statement of claim the Worker has requested an order relating to the cost of future treatment which has yet to be established. The Worker has widened the issues beyond a mere appeal on the section 69 notice and by doing so has allowed the Employer to raise the issue of the original injury by counterclaim. Of course the Employer does have the burden of proving the original injury was not in the course of employment or not causative of the Worker's present physical and psychiatric symptoms.

- 134) Having found that the Employer has not established fraud and is not estopped from reopening the issue of the original injury and causation I must now turn my mind to the balance of the evidence.
- 135) **Ms Fenwick** - is a director of the Employer and gave evidence of the records kept by the business in relation to gas deliveries. In reference to those records she stated in the period between the 21st and 31st of March 2011 there was only one delivery made, on the 28th of March 2011. That accords with the Worker's evidence that he did make a delivery on that day.
- 136) **Mr Fenwick** gave evidence of seeing the Worker fairly regularly after him going off work and having general discussions with him about how things were going. He observed the Worker to always be riding his motorcycle on those occasions and noted him to be fairly cheerful.
- 137) Mr Fenwick's observations of the Worker accord with Ms Reilly's evidence that her father always tries to present a brave face when in public. Mr Fenwick's evidence about the bike riding is also not inconsistent with the Worker's evidence that he continued to ride his motor bike until he saw Dr Talbot in June 2011 who advised him that it was dangerous to do so.
- 138) Mr Fenwick does remember that he was asked to look for light duties for the Worker by the insurer but could not find a job for him.
- 139) **Ms Gardiner** was the manager of the hardware store and the Worker's immediate supervisor. She gave evidence in reference to her diary notes and it was clear she used her diary as part of her management of the store. She remembers the Worker complaining of back problems on Monday the 21st after having done some gardening at work the weekend

¹⁹ *Disability Services of Central Australia v Regan* (1998)8 NTLR 73

before and also of a possible kidney issue because of bad water. She recalled advising the Worker to drink lots of water to flush out his system.

- 140) She confirmed the Worker had a planned day off the Thursday of that week when he was to take his daughter to a doctor's appointment as well as one for himself regarding a possible kidney infection.
- 141) She does not recall the Worker ever telling her about his previous back issue and has a vague recollection of a conversation with him about creating a solution for the lifting of gas bottles on and off the ute.
- 142) Ms Gardiner clearly had a practice of making notes of human resource issues in her diary. Her notes reveal the Worker had complained of a sore back on Monday the 21st of March²⁰ and that the Worker recorded in the front counter diary that he had an accident falling off his bike on the way to work on the 27th of March.
- 143) On the day of the 28th of March she remembered the Worker coming back from the gas run and saying he was feeling a bit better and standing straighter. She couldn't be sure how long she had to observe the Worker at that time but accepted it was a brief encounter.
- 144) She also had no memory of the Worker complaining to her of an incident on the gas run and confirms the first she heard of it was on the 6th of April when he called her from Adelaide while in hospital there and that is reflected in her notes²¹.
- 145) When the Worker finally reported the gas bottle incident to Ms Gardiner over the phone from Adelaide she has recorded him as having told her "it was later afternoon and he had a niggle in the back after a gas bottle".
- 146) Ms Gardiner's evidence could lead to the conclusion that the Worker was continuing to downplay the effect the gas bottle incident had on his back until he made his formal claim on the 12th of April 2011.
- 147) **Medical Evidence**
- 148) The Worker has been seen by many doctors about his back and leg pain since 2011. The first specialist involved in his assessment for the purposes of this claim was Dr Talbot who, without the benefit of investigative tests, diagnosed a likely compression of the L3/L4 nerve roots and a new disc prolapse in that area "strongly related to the gas bottle lifting incident on 28th March 2011". It is important to note that Dr Talbot's report shows the Worker had fully disclosed his prior back

²⁰ see exhibit E14

²¹ see page 10 of the Employer's tender bundle

surgery to the doctor and it was after that report the Employer accepted the Worker's claim. However Dr Talbot was not made aware of continuing back pain which had been reported to the Worker's GPs between 2010 and 2011. Dr Talbot was not available or required for cross- examination.

- 149) **Dr Wyatt** is an occupational physician- she specialises in treating patients who have suffered an injury and getting them back into an appropriate occupation. She has provided several reports dated 10th February 2014, 7th August 2014, 27th August 2014 and 24th April 2015 (E2). She was initially provided with several reports from other medical practitioners and imaging reports, saw the Worker once and based her initial opinion on that information.
- 150) Dr Wyatt was also the chairperson on the panel of doctors who assessed the permanent impairment of Mr Reilly as 41% of the whole person and her report as the chairperson of that panel of dated the 10th of February 2014 was also provided to the Court.
- 151) Dr Wyatt's opinion of Mr Reilly's condition has changed since she has been provided with new information in the form of the surveillance video and medical notes which she did not have available to her when she produced her original reports.
- 152) Her initial opinion, accepting the history given to her by the Worker of neuropathic pain, his physical presentation on the day of examination, that is that he was shaky and tremulous and her clinical examination, was that the Worker had an aggravation of his back problem being a nerve root compression with consequent chronic nerve pain. In the report as chairman of the panel assessing permanent impairment Dr Wyatt concurs with Dr Kapur that the Worker has "multilevel spinal pathology with radiculopathy" with "neuropathic pain or right chronic nerve pain".
- 153) After viewing selected portions of the video surveillance Dr Wyatt indicated that she was much more guarded about her opinion of the Worker and was firm in her view that the history he gave and how he presented in her clinical examination was vastly different to how he presented in the surveillance video. She has revised her view that Mr Reilly was incapacitated for work and opined he is capable of undertaking part- time work as a hairdresser. She was also provided with the balance of the surveillance footage just prior to giving evidence and having seen most of that footage does not change her opinion.
- 154) Dr Wyatt was extensively cross -examined. In relation to her first report it was put to her that she had not done a thorough physical examination and she accepted she did not take measurements of degrees of flexion etc in the Worker's back. The doctor accepted that she did not take those measurements because at the time she had accepted that he may have

been affected by the long journey to see her and he presented as in a bad way. She did not want to aggravate his condition.

- 155) The doctor conceded that the Worker's initial clinical presentation might have been affected by his pain levels because of the long car journey in from Marrakai.
- 156) In relation to her later report it was put to her that she had made assumptions about the Worker's activities which were not supported by the video and that she had not sought explanations from the Worker for the seeming inconsistencies in his presentations.
- 157) The doctor made the appropriate concessions that she had not had the opportunity to seek explanations from the Worker nor could she know what was in the Worker's mind during the surveillance however she was firm in her opinion that the video footage showed the Worker doing activities which were inconsistent with the history he had given her and that it was difficult to reconcile his activities on the footage with his reported level of pain. She accepted that her opinion as to the Worker's capacity for work is based on her view that the Worker is unreliable in his report of the continuing difficulties he is having. She bases her current assessment of the Worker on the medical notes she has had the opportunity of reviewing and the video footage. She says in her medical opinion the observations of other practitioners and what was reported to them by the Worker and what was shown on the video cannot be explained by the Worker employing coping techniques.
- 158) It is important to note the video surveillance took place subsequent to the Worker's consultation with Dr Wyatt - she saw him in November of 2013 while the video surveillance commenced some 6 months later in May of 2014.
- 159) Dr Wyatt also made concessions based on a set of assumptions put to her about the video footage not being representative of the Worker's ability to maintain the activities shown in the video without rest before and after but did not accept those assumptions.
- 160) She was also cross-examined about the basis of her assessment of the number of hours the Worker could work as a hairdresser and accepted that it was based on discounting the Worker's explanations of why he could be seen to do what he does on the video. The doctor went as far as to say the Worker's explanations set out in previous affidavits filed in support of his applications for interim determinations did not change her opinion.
- 161) When asked about the need for a functional assessment and a return to work program before a conclusion could be reached about capacity the doctor opined that would not be of assistance because the Worker would

not be reliable in his reporting as to how he was coping with certain duties.

- 162) While Dr Wyatt accepted that the Worker had pathology which supported a diagnosis of neuropathic and radicular pain she was of the view that the video showed the Worker was quite capable of coping with that pain, whatever the level was, enough to undertake some work, up to 20 hours a week as a hairdresser. The doctor also opined that the Worker should be guided towards self- directed exercise to help him cope with his pain levels and that continued supervised hydrotherapy and physiotherapy is not indicated for the Worker.
- 163) The doctor was steadfast in her view that the Worker was so unreliable that he could not be trusted to be honest about his physical limitations.
- 164) **Dr O'Neill** is a neurologist who provided medico- legal reports on dated 15th June 2015 and 14th August 2015. He gave a comprehensive explanation of why he came to the view that the Worker had either suffered a spontaneous aggravation of a pre-existing condition or a fresh disc prolapse before the 28th of March culminating in the difficulties the Worker is having at the present time. He quoted the full medical history which included the surgeries the Worker had on his lower spine in 2007, the resultant scarring in the L3/L4 area, the pain relief prescribed subsequent to the operations, the Worker's return to work and subsequent reports of back and leg pain up to late 2010 and early 2011. Based on that history the Worker provided the doctor accepted the Worker would be expected to have persistent nerve pain.
- 165) However Dr O'Neill opined given such nerve pain was not reported to a GP in June 2010 but was reported in January 2011 to Dr Carne, the Worker's condition must have worsened between those dates culminating in the severe pain on the 30th of March 2011 for which the Worker was hospitalised.
- 166) His view is the worsening of the condition must have been caused by a disc prolapse before the 23rd of March 2011 given the radiology reports on that day were virtually the same as on the 30th of March 2011. The doctor conceded in cross-examination that there was clearly a disc prolapse and a resultant increase in symptoms at that time and that the mechanism of lowering a heavy gas bottle could have been a cause however did not accept given the history of increasing reports of pain that the gas bottle incident was the cause of that prolapse.
- 167) He confirmed that a disc prolapse can become symptomatic over a few days, that a person could have a bit of a twinge one day and then a few days later be in such severe pain that they cannot move. The doctor

opined this is consistent with the Worker having had some pain after working on building his house over the weekend, an already scarred spine and the bike and gas bottle incidents and then the onset of severe pain. Dr O'Neill was also firm in his opinion.

- 168) Dr O'Neill did not accept the Worker's symptoms were intermittent saying that the Worker had advised him he required pain medication every day. This of course is at odds with the the basis upon which he formed his opinion- that is the Worker's failure to report pain in 2010 and then reporting pain in 2011.
- 169) He confirmed that the Worker has a bad back with permanent radiculopathy at the L3/L4 and that work capacity of someone with chronic pain depends on the ability to manage that pain.
- 170) Dr O'Neill had been provided with the surveillance video however had not viewed it. He provided a further report based on the log notes of the surveillance video and further medical records however did not change his view.
- 171) Dr O'Neill is the only doctor who has suggested a spontaneous disc prolapse before 24 March 2011 and was at odds with both Dr Darwish and Dr Talbot about the causation of the new disc prolapse. Dr O'Neill is also inconsistent in his reasoning in not accepting the pain reported by the Worker was intermittent.
- 172) **Dr Kapur** is a pain physician who had the opportunity to examine the Worker once and was one of the panel who assessed the permanent impairment of the Worker. He made appropriate concessions that diagnosis of a patient after the viewing of video is problematic. He provided three reports dated 28th November 2013, 4th August 2014 and 5th May 2015.
- 173) In his original report the doctor stated the Worker had a history of lumbar disc injury resulting in persistent nerve pain in the right leg despite having undergone surgery. He was of the opinion that given the time lapsed after the surgery the condition was likely permanent and the Worker was only likely to get some functional improvement with ongoing rehabilitative measures.
- 174) In his report of the dated 4th August 2014 having viewed some footage of the Worker Dr Kapur then modified his opinion saying the footage showed an improvement in the Worker's function compared to that he had originally observed of the Worker. Accordingly Dr Kapur was of the view given certain allowances the Worker could be fit for part -time work which did not require any heavy physical activity. Dr Kapur was guarded in his opinion given the limitation of what was actually shown in the video. He noted there was no footage showing the Worker actually doing any strenuous activity.

- 175) In cross- examination the doctor accepted that as the lumbar spine performed at near normal levels that any functional limitations were mainly from the pain in the right leg.
- 176) He did not accept that chronic pain caused problems with memory but stated severe acute pain may mean a person would be less observant of what is happening around them because they would be concentrating on the pain.
- 177) Dr Kapur confirmed his opinion that the Worker ought to move away from passive therapy and be transitioned toward independent exercise [.]
- 178) When taken through the video Dr Kapur was puzzled as to some of the things shown. He expected the Worker to have a more pronounced limp, did not expect him to be able to walk on hard surfaces without shoes on and there was no discomfort shown in walking. The video also showed postural tolerance that is an ability to stand for relatively lengthy periods of time. He thought the Workers' explanation of not having shoes on because it helped his balance was unusual and that with other patients with neuralgic pain in the legs it is usual to have them in more supportive shoes.
- 179) While puzzled as to some of the things shown on the video the doctor was not prepared to suggest that the Worker had exaggerated his symptoms. The doctor had also been provided with the balance of the surveillance video however was unable to view that footage and therefore could not make any further comment as to what it showed.
- 180) **Dr Gunapu** a psychiatrist, produced three reports to the Court dated 23rd December 2013, 13th of August 2013 and 27th August 2014. Dr Gunapu was part of the panel which assessed the Worker for his permanent impairment in 2013.
- 181) In his first report the doctor found that the Worker had a permanent stable diagnosis of depression of chronic moderate intensity. The doctor opined from a purely psychiatric perspective that because the Worker used so much of his mental energy controlling his pain he would only have the maximum capacity to work between 10-12 hours with regular breaks and that it would have to be work not of high cognitive demand. After having viewed the video footage the doctor's opinion changed - he says because of the reactivity and range of emotions he saw in the video he was no longer of the opinion the Worker suffered major depression.
- 182) The doctor believed that the presentation of the Worker in the consultation and what he observed in the video were so different that the Worker was perhaps displaying abnormal illness behaviour. He said the video did not show a person who was distracted because of the need to concentrate on keeping his pain at bay. Nor did the doctor see any

indicators of distress in the video. Distress is what the doctor would expect to see in the video when the worker stopped concentrating on the pain and started to concentrate on undertaking day to day activities like going through a supermarket checkout and paying taxi drivers.

- 183) When cross-examined on his observations the doctor accepted that you could not tell by looking at the video what the Worker was thinking and that the Worker could have rehearsed these transactions. However the doctor says he would still expect the Worker to have shown more distress when undertaking the transactions. The doctor recalled that the Worker had expressed that he suffered pain all of the time and it took a lot of his mental energy to manage that pain therefore given that scenario when the Worker took his concentration off managing his pain to undertake these activities the doctor would expect some distress and distractedness to be shown by the Worker and that was not evident in the video footage.
- 184) Dr Gunapu also pointed out that even if the Worker had rehearsed the activity of shopping and going through the supermarket checkout his interaction with the checkout staff, or reactivity to that interaction, could not be rehearsed and seemed to be spontaneous. He did concede if the activity seen on the video was preceded and followed by long periods of rest and that the Worker did not do anything else that day that would put what is seen on the video in more context. He did not concede however that context would have changed his opinion.
- 185) Dr Gunapu's opinion is that the Worker has developed abnormal illness behaviour which has been promoted by his constant access to therapies and to help the Worker to recover from the abnormal illness behaviour access to those therapies should cease.
- 186) Dr Gunapu's diagnosis of abnormal illness behaviour cannot be sustained given that all the other doctors accept a disc prolapse can result in permanent chronic pain and the Worker's reaction to that pain is not an unexpected reaction. That is a preoccupation with that pain and the cause of that pain and possible catastrophization over what will happen to him should that pain be allowed to get out of control.
- 187) **Dr Kenny** is a consultant psychiatrist who interviewed the Worker over Skype and was not available for cross examination on his report of the dated 4th September 2014. The doctor accepted the history given to him by the Worker and observed the Worker as someone who did not present as a person with a major depressive illness. The doctor was of the opinion that the Worker had a well controlled chronic adjustment disorder that did not contribute to his inability to work. Dr Kenny's assessment of chronic adjustment disorder accords with that of the Worker's treating psychiatrist.

- 188) **Dr Darwish** was the surgeon who performed the operations on the Worker in July 2011 and September 2011 and reviewed his progress regularly. Dr Darwish provided a report of dated 16th September 2015 in which he opined that the Worker's back condition was consistent with the lifting of a heavy object and the reported history of no prior leg pain. Even after the doctor was advised of the Worker's intermittent back and leg pain, by reference to GP notes and the Worker's evidence in chief the doctor confirmed his opinion. He confirmed the Worker's reported intermittent pain was consistent with scar tissue from his previous surgery and a foraminal narrowing.
- 189) Dr Darwish was referred to the Royal Darwin Hospital records for the 24th of March 2011 which noted:
"increase in sharp.... Neuralgic sounding pain shooting down the right leg to the ankle exacerbated by walking"
and asked if that changed his opinion about the cause of the Worker's disc prolapse and it did not.
- 190) Dr Darwish confirmed that about 20 per cent of patients who have a disc prolapse and subsequent surgery will end up with persistent neuropathic pain which cannot be cured and can only be managed. That opinion is consistent with Dr Kapur's original acceptance that the Worker's neuropathic pain was likely to be permanent.
- 191) **Dr Aulakh**, the Worker's present GP, gave evidence of his dealings with and observations of the Worker's progression since 2011. While the doctor did not remember the Worker's original attendances upon him in 2011 with the assistance of his notes he was of the view when the Worker saw him in January 2011 the paraesthesia he was suffering in his right leg related to sciatic pain from the L4/5 level from the knee to the shin. After some confusion in cross-examination the doctor stated that the Worker's symptoms have developed over time and in the past 2 years he has had unexplainable jerking of the leg and more extensive pain in the leg now radiating from the mid thigh down to the shin. The doctor confirmed he relied on the Worker's advice as to what he was feeling physically as well as his mood because he was unable to physically touch the Worker's leg because of the reaction he would get.
- 192) In relation to the psychological well-being of the Worker the doctor confirmed that the Worker always presented with a smile and was cheery but had reported feeling depressed and suicidal. The doctor was of the opinion that the Worker by smiling all the time was trying to put on a brave face.
- 193) Dr Aulakh was also cross-examined about the medication he had prescribed for the Worker since 2011 particularly Endone. He accepted that as an opiate Endone was an addictive drug and was usually prescribed

only for acute episodes of pain and not for long periods of time. He accepted that 5 years was a long time for Endone and that it is quite possible that the Worker would go through withdrawal if he was no longer prescribed the drug but he relied on the pain specialist as to whether he should continue to prescribe it.

- 194) **Dr Leonard Chin** is the Worker's treating psychiatrist who has been treating the Worker since 2013. His diagnosis of the Worker is that he has a chronic adjustment disorder in response to a medical condition - that medical condition being chronic neuropathic pain in his right leg. His opinion is that the Worker's condition has improved to the extent that he could be looking at returning to work through a work hardening program into a job which allows him a great deal of flexibility in relation to being able to move around and excuse himself if his physical symptoms get worse. Dr Chin comes to this conclusion because he has seen some improvement in the Worker's presentation in consultations and he says it is clear from the video footage that there are times when the Worker does not need to use all his mental energy to concentrate on controlling his leg symptoms.
- 195) The doctor's notes indicate that the Seroquel has assisted the Worker in controlling his stress and anxiety about the pain in his leg and has allowed the Worker to have better sleep patterns.
- 196) It is not the doctor's opinion that the Worker presently suffers from a major depressive disorder although he accepts that in 2011 he was clearly depressed when he was suicidal and when he originally saw him in 2013 he presented as depressed. He does say however that depression is a common consequence of chronic pain and it would not be surprising if the Worker were to have recurrent depressive episodes.
- 197) The doctor was also confident that the Worker was not deceitful or manipulative in his history or presentation. His confidence is founded on his extensive dealings with homeless people with substance misuse problems which requires him to have a degree of scepticism about what the patient's perception about themselves is and what the patient wants him to believe. Against that background he is confident that he has the skill to understand when someone is being deceitful.
- 198) Dr Chin also stated that research has established a link between chronic pain and subsequent poor concentration even though Dr Gunapu did not accept that proposition. He accepted the Worker's claim that he has to use his mental concentration at all times to down-regulate the pain in his leg and further accepted that if he was required to multitask there was a danger that the leg would become more painful and spasm.

- 199) Dr Chin also opines that from a psychiatric point of view it is the chronic pain and inability to concentrate and multitask which is the main cause of the Worker's occupational disability not a depressive condition. The doctor accepted with the benefit of the surveillance video that it seemed the Worker was no longer in the state where he had to concentrate on his leg constantly. He suggested that the pain may no longer be constant but recurrent and that the Worker seems to be more relaxed in consultations which could mean he has managed to get his pain more under control.
- 200) His explanation of the Worker's seemingly cheerful demeanour most of the time is that he is putting on a brave face and his smile is often forced. He opines the Worker always attempts to find positive things to say in an attempt to please the listener.
- 201) **Dr Gavin Chin** is the Worker's treating pain specialist and has been treating the Worker since October 2012. Dr Chin confirmed that he was of the view that the Worker would benefit from an intensive inpatient pain management program where there was an integrated approach to his rehabilitation with a goal of having the Worker as capable as he can be in managing his pain and eventually getting back to work.
- 202) Unlike other doctors who gave evidence before this Court Dr Chin had taken the time to watch and examine in full the video surveillance footage provided to him. After viewing that footage Dr Chin was of the opinion that the Worker showed some capacity to cope physically with a work hardening program to return to work. The doctor could not say how many hours the Worker may be able to undertake and was adamant that before any such assessment could be made the Worker would have to go through a graduated return to work program to ensure his tolerance to the repetitive nature of any employment.
- 203) Dr Chin agreed that the Worker did not show any outward signs of being in pain in the video footage however also confirmed that it is very difficult to observe pain in someone else as different people react to pain in different ways. He also was of the opinion that the Worker often put on a brave face by smiling a lot. Dr Chin was clearly of the opinion that the Worker should continue towards getting back into work.
- 204) **Physiotherapy.** In addition to the evidence of various doctors I have had the benefit of the written reports and notes of Kim Crawford the physiotherapist who was treating the Worker in 2013/2014 and who assessed the Worker's set- up at his home in Marrakai. Ms Crawford describes the progression of the Worker through his hydrotherapy sessions. She saw him improve in his tolerance to the time he could spend in the pool and the activities he could undertake. He was always motivated in the sessions and only missed a few due to pain. Ms Crawford approved

of the home set -up and was told by the Worker that he undertakes his own hydrotherapy every day.

- 205) **Ms Lange** is the physiotherapist who managed the Worker's land - based sessions from August 2012. She concentrated on teaching the Worker techniques to manage his pain and also how to protect his back from further injury. She found the Worker to rate high on the catastrophizing and kinesiophobia tests, that is, his fear of pain in his leg and his thought that anything could cause severe pain if it touched his leg. She was of the view that the Worker's progress was hindered by the inconsistency in his treatment. Ms Lange was of the view that the Worker was always genuine in his efforts even though he may have "amplified" what he was feeling to help people understand what he was feeling. Her attendances upon the Worker numbered 104 sessions.
- 206) **The video** - the surveillance of the Worker took place on several days over a period of 5 months - it shows the Worker shopping in several different locations, walking and conversing with his son, waiting for taxis with his son, standing for lengthy periods of time, squatting, sitting for lengthy periods of time, walking moderate to long distances, lifting large boxes into a vehicle and interacting with people in shops and taxi drivers. The video also shows the Worker having extended conversations with other people on the phone and in person. The video of course does not show the Worker inside his residence.
- 207) It is curious that the person who presents to his best friend and his daughter as a non- communicative mentally addled person who spends most of his time in bed is different to the person shown on the surveillance video and the person who is observed by his treating psychiatrist. The Worker's explanation is that he tries to present a more positive image of himself in the general public and to the doctors whereas at home he shows his real feelings. If that is the case the Worker is his own worst enemy.
- 208) **Pain Diaries** – the Worker produced pain diaries to the Court which show his record of pain levels throughout 2013, however do not record his levels in 2014 and in particular at the times he was being recorded and therefore do not assist in the assessment of his claim that he required significant rest after he had undertaken activities such as shopping. His explanation for that omission is that he only recorded his pain when asked to do so by the psychologists. I found those pain diaries to be of little assistance.
- 209) **Ms Kukianis** is the author of the Labour Market Report which was used to support the assertion by the Employer that the Worker had available to him employment as a full- time hairdresser. She approached 3 hairdressers in the general area and concluded that there was work of 10- 15 hours per week available to the Worker as a hairdresser. Ms Kukianis

did not advise the people she spoke with of the Worker's concentration limitations or discuss with the businesses the approximate 10 years gap since the Worker had last worked as a hairdresser.

210) **Conclusion**

- 211) I have found the Worker to be an unreliable witness, however his evidence as to his present condition is supported by more reliable witnesses such as his daughter, the treating physiotherapists and his doctors. Their evidence supports a finding that the Worker is a person who presents smiling in public but is otherwise non-communicative at home and therefore truthful about how his condition has affected his life.
- 212) The evidence as a whole supports a finding that the Worker is a person who has suffered an injury to his back which has resulted in continuing neuropathic pain in his right leg. That finding is supported by the medical investigations over the years and what was discovered by Dr Darwish when he operated on the Worker. The Worker is in the unfortunate 20% of patients who have been left with permanent nerve damage arising out of spinal surgery.
- 213) The balance of the medical evidence supports a finding that the injury occurred when the Worker was lowering a gas bottle at work as those qualified to do so accept that is a mechanism which could trigger a fresh disc prolapse on an already scarred spine.
- 214) I reject Dr Gunapu's opinion that the Worker is displaying abnormal illness behaviour because there is reliable cogent evidence of other medical practitioners which supports a finding that the Worker is suffering chronic pain.
- 215) I reject Dr Wyatt's opinion that the Worker is not a candidate for a return to work or work hardening program because of his unreliability as she has based that assessment on the activities shown in the video which she accepts does not show what the Worker had to do before and after each of those activities. I also accept Dr Leonard Chin's opinion over Dr Wyatt's about the Worker in that he believes the Worker not to be manipulative or deceitful. Dr Chin has been the Worker's treating psychiatrist and through his experience is well qualified to assess the Worker's honesty.
- 216) It is also clear from the treating physiotherapists and doctors, they believed the Worker to be genuine in his attempts to improve his functionality. The physiotherapists' notes over the many visits he has had with them note his effort and progress through treatment.
- 217) Even with the benefit of reviewing the surveillance video Dr Gavin Chin's opinion of the Worker has not changed and that is he suffers

chronic pain but can regain some functionality with consistent treatment. Dr Chin accepted the video showed the Worker with some functionality consistent with how he presents clinically but was of the view that functionality does not necessarily translate immediately to an ability to work. Dr Chin has always been of the view that the Worker should work towards returning to work.

- 218) It is important to note at this point that chronic pain is accepted as a condition in the American Medical Association Guides to the Evaluation of Permanent Impairment. It is not a psychiatric illness but is a factor that must be considered when assessing the behaviour of someone who has been in pain for a long time. It is an illness in its own right²² and is self-sustaining, self-reinforcing and self-regenerating.
- 219) Dr Leonard Chin opines that the Worker has a chronic adjustment disorder in response to his constant pain and his body's reaction to that pain.
- 220) Even Dr Gunapu accepted that a person with chronic pain can sometimes present with symptoms of dramatization and present with maladaptive and disproportional behaviour²³. A person in chronic pain can be expected to sometimes overdramatise their condition and be particularly vigilant about avoiding situations which they see might cause further pain.
- 221) I therefore find I am satisfied on the balance of probabilities that the Worker has suffered a work injury when lowering a gas bottle from the tray of a ute and that injury has resulted in neuralgic pain in the right leg and consequential adjustment disorder.
- 222) **Validity of section 69 Notice of Decision.**
- 223) The Employer relied on the reports of Dr Wyatt of the dated 27th August 2014, Dr Kapur of the dated 4th August 2014 and Dr Ganapur of the dated 25th August 2014 as well as the Labour Market Report of Ms Kukianis to support the reduction of the Worker's weekly benefits. The Notice of Decision states that based on those reports:
"Your employer says you are capable of performing full-time work as a hairdresser"
- 224) The Notice of decision also provides the Worker with detailed calculations of how full-time work as a hairdresser affects the Worker's loss of earning capacity as required under the Act.

²² see page 307 of the AMA guidelines

²³ see page 188 of transcript

- 225) It is incumbent on the Employer to ensure that a notice served under section 69 provides enough detail to enable the worker to fully understand how the amount of compensation has been reduced²⁴ .
- 226) The Worker had been previously assessed as having a permanent disability by the three doctors named in the Notice of Decision. The doctors were then shown the surveillance video and based on that video changed their opinions.
- 227) Both Dr Wyatt and Dr Kapur were of the view that the video showed more functionality than the Worker presented to them and were consequently sceptical about the reliability of the Worker’s description of his lack of functionality. Dr Wyatt was the strongest in her opinion that the Worker was an unreliable historian and by discounting the Worker’s history, considering the notes of GPs and viewing the video she came to the conclusion in her latest report that he was capable of working “up to 20 hours per week as a hairdresser”²⁵ .
- 228) It is important to note however that the Employer relied on the report of Dr Wyatt of the dated 27th August 2014 in support of the reduction of the Worker’s weekly benefits in which Dr Wyatt opines:
“there are good grounds to suggest Mr Reilly is capable of doing at least part time hairdressing duties, at least half time. There is a reasonable chance he is capable of working normal hours as a hairdresser but I cannot state that dogmatically”
- 229) In his report used to support the section 69 notice Dr Kapur says:
“I do believe that Mr Reilly would have the capacity for substantial part-time or even full time work in a role where physical demands are limited”
- 230) Dr Kapur also states later in that report :
“..it would be appropriate to consider work rehabilitation or work hardening program without further delay.”
- 231) Dr Gunapu opines:
“...my opinion is that he can return to full-time duties as a hairdresser from a purely psychological perspective”
- 232) Dr Gunapu is the only one of the doctors whose reports were attached to the section 69 notice who specifically opined the Worker was able to undertake full- time work as a hairdresser.
- 233) The Worker’s evidence is that he didn’t understand the notice served on him and he passed it onto his solicitor because she was there to help

²⁴ see section 69(4)

²⁵ see para 3 of her report of dated 24th April 2015

and it required him to take his concentration off his mental clamp which would have cause his leg to become painful.

234) Even if the Worker had read each of the reports relied upon it is my view that in any event he would have been confused. Those reports did not support the Employer's assertion that the Worker was able to undertake full- time work as a hairdresser. At the highest the reports of Doctors Wyatt and Kapur support a finding, based on his physical limitations at most full -time work may be indicated if the worker undertakes a work hardening program.

235) I find the section 69 notice to be invalid on the basis that the medical reports relied upon were uncertain in their conclusion about full- time work and in that case would not have assisted the worker to understand why his benefits were being reduced based on the Employer's assertion he was fit for full- time work.

236) Having found the section 69 notice to be invalid I also find the Worker continues to be entitled to weekly benefits as calculated with reference to 75% of his Normal Weekly Earnings.

237) **Required medical treatment.**

238) Having found that the Worker continues to suffer a physical and mental incapacity arising out of his work injury I must now consider whether he has established on the balance of probabilities that he requires:

- a) Supervision and review of the a home- based exercise program
- b) Regular GP appointments
- c) Taxi fares to attend medical appointments and to meet routine shopping and other domestic needs
- d) Accommodation if the Worker is required to stay away from his normal residence overnight for medical appointments
- e) Medication expenses
- f) Confirmation of payment of expenses paid on interim determinations since May 2014

239) The evidence in support of future treatment is contained in the evidence of Ms Crawford, Dr Leonard Chin and Dr Gavin Chin.

240) Ms Crawford confirmed to maintain functionality the Worker would be assisted by maintaining his hydrotherapy at home with 3 monthly reviews and continuing land-based physiotherapy where he could receive education and assistance in dealing with his chronic pain. She approved

the home set- up and confirmed that the Worker should be aiming towards self- treating.²⁶

241) Dr Leonard Chin recommended the Worker continue to have regular psychological therapy on a fortnightly basis to continue to address his adjustment disorder which seems to be improving. He also recommended a 3 monthly review by himself or sooner if there is a need for adjustment of medication²⁷.

242) None of these recommendations for treatment were challenged in the evidence and therefore having confirmed the Employer's liability for the Worker's injury I rule that those recommendations should be adopted and paid for by the Employer.

243) There is no evidence that supports the finding that the Worker cannot attend medical appointments or physiotherapy appointments by himself and therefore any accommodation or transport to those appointments should be for himself only.

244) There is no evidence of how often the worker will need to attend GP's and therefore no ruling can be made in relation to those attendances.

245) The evidence in support of regular physiotherapy and psychological is for fortnightly appointments and therefore do not support a finding that the Worker is required to be in Darwin for 3 weeks out of 4 to receive that treatment as he has received in the past.

246) I find however that the treatment and associated costs paid under the interim determinations from May 2014 were costs properly incurred under section 78 of the Act.

247) **Orders** I therefore make the following orders:

- a) Declaration that the section 69 notice of 27th November 2014 is invalid and the reduction of the Worker's weekly benefits is therefore void.
- b) Declaration that the Worker suffered an injury during or out of the course of his employment being a disc prolapse of the L3/4 level which has resulted in persistent chronic neuropathic pain and subsequent adjustment disorder.

²⁶ See Ms Crawford's oral report marked exhibit W13.

²⁷ see page 3 of report dated 18th December 2015

- c) Order the Employer to pay for the Worker's continued expense for medical treatment and associated costs arising out of the work injury including
- (i) Fortnightly land-based physiotherapy
 - (ii) Fortnightly consultations with psychologist
 - (iii) 3 monthly reviews by Dr Leonard Chin
 - (iv) Taxi fares and accommodation for the Worker to attend the appointments

248) I will hear from the parties as to further orders and reserve the question of costs.

Tanya Fong Lim
STIPENDIARY MAGISTRATE