Elliott v The Territory Insurance Office Board [2002] NTSC 31

PARTIES:	LAURENCE ELLIOTT v THE TERRITORY INSURANCE OFFICE BOARD
TITLE OF COURT:	MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM A MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL EXERCISING TERRITORY JURISDICTION
FILE NO:	M57 OF 2001
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JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Applicant:	J. Waters QC
Respondent:	J. Kelly

Solicitors:

Applicant:	Caroline Scicluna & Associates
Respondent:	Cridlands

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

Elliott v The Territory Insurance Office Board [2002] NTSC 31
No. M57 of 2001

BETWEEN:

LAURENCE ELLIOTT
Applicant

AND:

THE TERRITORY INSURANCE OFFICE BOARD
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 17 May 2002)

[1] The applicant was injured in a motor vehicle accident which occurred on 1 July 1994. At that time he was a passenger in a Toyota Landcruiser that overturned when the driver fell asleep at the wheel. The vehicle had been travelling at about 160 kilometres per hour prior to the accident and it cart-wheeled a number of times. The applicant was transferred to the Alice Springs Hospital where he was admitted. On admission he complained of pain in the lower chest, the flank, the neck, and the left and right feet. He had tenderness in the upper level of the cervical spine. He underwent a laparoscopy to repair a mesenteric tear in the spleen. His right ankle was found to be sprained. His left ankle was X-rayed and it was confirmed that

he had sustained multiple fractures of that ankle including to the lateral process of the calcaneus, the tip of the medial malleolus and to the fifth metatarsal. He also suffered fractured ribs. The applicant said in his evidence before me that "the whole bottom half of me at that time was just in complete – complete pain". It was hard to tell what was hurting because he was hurting "everywhere". He remained an inpatient in Alice Springs Hospital for seven or eight days and then transferred to his home in Alice Springs. He said he remained in bed for about six weeks. He gradually mobilised firstly on crutches, then with the aid of two walking sticks followed by one walking stick and then without support.

The Claim

[2] In July 1994 the applicant made application for benefits under the *Motor Accidents (Compensation) Act* and that claim was accepted by the respondent. The applicant gave evidence that the application form was signed by him but completed by another. He said that he may have provided some information for the form but much of it was completed prior to it being produced to him. He signed the form on 5 July 1994. The description of the injuries in that form were "broken ankle, broken ribs, torn spleen." There was no mention of any neck or back injury.

[3] On 20 June 2000 a designated person acting under the provisions of the *Motor Accidents (Compensation) Act* determined that, with effect from 30 June 2000, the applicant was no longer entitled to benefits payable under

s 13 or s 18 of the Act. Although it is not necessary to provide reasons for determination (s 27(6) of the Act), the basis of that decision was identified as being the "medical evidence provided by Dr David Elder dated 11 May 2000 (that) the applicant's capacity to earn income is no longer reduced as a result of injuries sustained in the occurrence".

The Appeal

[4] The applicant exercised his right to appeal the decision of the designated person to the Board of the Territory Insurance Office. On 1 May 2001, the Board upheld the determination. The applicant has now taken proceedings in this Tribunal pursuant to s 29 of the Act. The hearing before this Tribunal is a hearing de novo and the Tribunal is empowered to "make such determination as the Board could have made thereon as the Tribunal considers proper in the circumstances having regard to the intention of the Act, and such determination is binding on the Board."

[5] It was submitted on behalf of the applicant that a hearing de novo permits the receipt of new evidence "but it does not permit the respondent to contradict its own determination, substitute another issue in place of the determination or raise a new case entirely". In this case it was submitted that the respondent was seeking to rely upon matters not identified in the determination of the designated person or of the Board, namely that the neck injury and the back injury of which the applicant complains did not arise out of the motor vehicle accident. It was submitted that the respondent should

be limited to the ground upon which payments were ceased being that the applicant's capacity to earn income was no longer reduced as a result of the injuries sustained in the motor vehicle accident. It was the submission of the applicant that this Tribunal was not able to determine issues "which have not yet been the subject of determination and therefore cannot be appealed from".

[6] The Tribunal does not adjudicate upon the correctness or otherwise of the exercise of the powers by the Board. Rather, it determines the matter based upon the material before the Tribunal, exercising the power of the Board. The question for determination by the Tribunal is whether the decision of the Board was the correct or preferable one on the material before the Tribunal. It is for the Tribunal to pronounce anew upon the rights of the parties as disclosed by the evidence before it. The reference is essentially administrative in nature. See generally *McMillan v Territory Insurance Office* (1988) 91 FLR 436; *Ebatarinja v Territory Insurance Office* (1992) 109 FLR 65; *Pollard & Pollard v Territory Insurance Office* (1997) 6 NTLR 142.

[7] The Tribunal is not limited to considering matters raised in the notice of termination. Indeed, as I have observed, there is no requirement for the designated person or the Board to give reasons for the decisions made. As Kearney J observed in *Shannon v Territory Insurance Office* (1993) 3 NTLR 144 at 152 "the parties are free to raise before the Tribunal issues additional to or other than those raised before the Board". In my view the issues

before this Tribunal cannot be confined in the manner suggested by the applicant. In the event that the respondent seeks to introduce evidence or advance reasons for cessation of payments that are new and have not been the subject of a previous determination, the respondent may do so. The ability to do so will, of course, be subject to the requirement that appropriate notice be given to the applicant of an intention to do so. In the normal course the issues will be identified by resort to the reference and to the answer. If appropriate notice is not given then it will be a matter for the Tribunal to determine how to proceed in those circumstances. One option would be to allow an appropriate adjournment to enable the issue to be identified and for the other party to consider how best to meet the fresh material. In this case the applicant was provided with notice of the basis upon which the respondent was to present its case. The issue was clearly raised in the answer dated 24 September 2001 and filed and served on its behalf. No application for adjournment was made.

The Applicant's Work History

[8] Mr Elliott was born in 1946 and is now 56 years of age. He is married with 3 adult children. He had a disrupted education attending at least 13 schools. He left school at age 14 and took employment in a service station. Since that time he has worked almost constantly in unskilled and semi-skilled employment. When he was approximately 19 years of age he commenced driving trucks and thereafter his employment has been

predominantly as a truck and bus driver. In 1975 he moved to Alice Springs where he initially worked as a truck driver then as a bus driver with Greyhound, Bus Australia, McCafferty's and finally Landmark Tours.

[9] In 1990, whilst employed by Landmark Tours, he suffered a work related accident. At that time he fell injuring his left elbow and was off work for many months. He was compensated under the relevant workers compensation scheme and was later in receipt of unemployment benefits. As a consequence of the injury he underwent an operative procedure which involved the excision of the head of the left radius. He returned to work but was unable to cope. He was off work until he obtained driving work with a civil engineering firm named Fitton Matthew. He remained there for about 15 months. He then obtained employment at Mt Allan working for the Yeulamu Community as an essential services officer maintaining the power generation system, looking after the motor vehicle workshop and carrying out general maintenance work. He worked there for 5 months and then returned to Alice Springs where he was doing light delivery driving for Cosmos Foods in and around the Alice Springs township. He had only been in that employment for about one week when the motor vehicle accident occurred.

[10] The great majority of his working life was spent driving trucks and buses and, at times, carrying out maintenance on such vehicles. Since leaving school he has not undertaken any vocational or other educational courses. His employment skills have been acquired on the job.

The Neck and Back Complaints

[11] A significant issue between the parties is whether the problems experienced by the applicant with his neck and back are causally linked to the motor vehicle accident or whether they are each the consequence of progressive degeneration unrelated to the accident.

[12] On admission to the Alice Springs Hospital following the motor vehicle accident the applicant did not complain of pain in the lower back. He agreed that he made specific complaints regarding other areas of his body and, in relation to the lower back, said "it was hard pretty to isolate what was in pain and what wasn't at that stage". Subsequent to his discharge from hospital he visited the outpatient clinic on a couple of occasions. It was put to him that he did not complain of back pain on those occasions and he said "I complained every time I went back, and I was told each time that it was as a result of the bruising that you have, it will dissipate." The outpatient notes maintained by the hospital do not record any complaint of low back pain until September 1995.

[13] The first recorded suggestion that there may have been a back injury suffered in the motor vehicle accident was to Dr Black on 31 March 1995. At that time there was no complaint of low back pain. The first recorded complaint of low back pain was to Dr Schmidt of "mechanical type lower back pain" on 3 April 1995. The next was one of "stiffness in his lower back" made to Dr Young, his general practitioner, on 4 May 1995.

[14] In the period between his admission to Alice Springs Hospital and 3 April 1995 there is no recorded complaint of back pain despite many opportunities for that to occur. Neither back pain nor a back injury is referred to in the admission or discharge documents of the Alice Springs Hospital. During this period in hospital he was not treated for any back complaint. There was no mention of low back pain or a back injury in the claim for benefits made under the *Motor Accidents (Compensation) Act* and signed by the applicant. There was no reference to such a complaint in his attendances upon Dr Schmidt (his treating orthopaedic surgeon in Alice Springs) in July and November 1994 nor in his two attendances on his general practitioner Dr Young in February 1995. He was referred by Dr Young to the physiotherapist Ms Guscia and there was no mention in the referral documents or in the assessments of Ms Guscia of any complaint regarding the back. He attended upon Ms Guscia in February 1995. It was not until June 1995 that he was referred to a physiotherapist for treatment of low back pain.

[15] As noted above when the applicant attended upon the surgeon, Dr Black, on 31 March 1995 in relation to his workers compensation claim he gave a history of suffering a "back injury" and a "neck injury" in the motor vehicle accident. At that time Dr Black conducted a full examination in which he noted that the applicant had "a full range of movements about the head and neck without apparent restriction" and, in relation to the thoraco lumbar spine, he had "a full range of movements without apparent restriction". The

doctor recorded various complaints of pain (including abdominal pain) but none in the region of the lower back or of the neck. At that time the applicant did complain of "pins and needles in his right arm which he said seemed to be coming from his neck". When Dr Schmidt saw him on 3 April 1995 and he complained of a mechanical type lower back pain Dr Schmidt conducted a physical examination and reported as follows:

> "Both casual and specific examination of the neck revealed normal range of movement without pain at the extremes and with no radiation. There was no evidence of shoulder girdle wasting and upper extremity movement, including strength and sensation was normal. He had normal standing alignment of the lumbar spine, able to flex to 4 inches from the floor with good free movement. Extension was good without discomfort, as was lateral bending. Straight leg raising was negative for back pain and nerve root tension and he was neurologically intact."

[16] It seems the applicant had a history of neck complaint prior to the motor vehicle accident. In June 1991 he had attended the Alice Springs Hospital complaining of pains and pins and needles in his right arm especially on the radial side and to the right neck. A preliminary or provisional diagnosis of cervical spondylitis was made at that time. On admission to hospital following the motor vehicle accident he complained of pain in the neck and, on examination, there appeared to be tenderness of the upper level of the cervical spine to the left of the midline. X-rays of the neck were taken on admission on 2 July 1994 and Dr Schmidt later reported that they showed a "marked pre-existing degenerative change at C5-6 and C6-7 with large anterior osteophytes of the inferior border of C5 and matching osteophytes of the anterior borders of C6 and 7". There are no further complaints

relating to the neck recorded in the hospital records and, it seems by the time he saw Dr Black on 31 March 1995 he had a full range of movement of the head and neck without restriction. Similar observations were made by Dr Schmidt on 3 April 1995 although, on that occasion, the applicant complained of lower neck discomfort which became worse with activity.

[17] In February 1996 Dr Molloy an Adelaide based neurosurgeon first saw the applicant and examined his neck. On examination she said the cervical spine movements were minimally restricted in all directions. She reviewed an MRI scan taken on 13 January 1996 and concluded that "[r]adiological changes showed long standing severe degenerative changes at the C5-6 level and less severe changes at the C6-7 level". She did not recommend surgical intervention. She expressed the view that it was possible that the neck may have been asymptomatic prior to the motor vehicle accident and had become symptomatic since that accident. She accepted the history provided by the applicant in expressing that opinion. She could not have been aware of the 1991 admission.

[18] It is clear that low back pain was suffered by the applicant with onset at some time at or after the accident. The back pain and neck pain assumed greater importance as time went on. The applicant was again referred to Dr Molloy who noted that the applicant now complained of a right C6 radiculopathy. In March 1997 Dr Molloy recommended that there be a laminectomy at the L2-L5 level in order to improve the symptoms in his lower limb. She also recommended an anterior cervical fusion to

decompress the right C6 exit foramen to address his right upper limb pain. On 29 May 1997 an L2-L5 laminectomy was performed. On 31 July 1997 a C5-C6 anterior cervical fusion was performed. Dr Molloy reported that the surgery helped the applicant significantly with his limb pain. In her reports she noted that at that time his prognosis for a return to work was poor and that he would not be able to return to the kind of work he was previously undertaking.

[19] In his evidence the applicant said that prior to the accident he had no problems with his neck or back. He said he benefited from the operative procedures performed by Dr Molloy. The sharp electric shock like pain that he had previously experienced in his back and lower limb disappeared and he obtained some increase in his mobility. The sensation of his right arm "going to sleep" ceased. He still had stiffness and soreness of the lower back and suffered neck and shoulder pain. The pain in his back has become worse over the years.

[20] The history of the neck complaint is therefore one of an ongoing degenerative condition in relation to which there had been symptoms prior to the motor vehicle accident. As at the time of the accident there was a complaint of pain and then apparently a resolution of those symptoms. In March 1995 the applicant had a full range of head and neck movement but deterioration occurred between then and the undertaking of the operative procedure by Dr Molloy in 1997.

[21] The history of lower back pain is confused. The applicant says that he could not distinguish back pain because of all the other pain he was enduring. However he also says he complained many times of back pain to many people but was ignored or told not to worry about it. The written material found in the hospital notes and the contemporary reports of the doctors and health specialists consistently fail to mention any complaint of lower back pain until March/April 1995.

[22] In the course of cross-examination the applicant demonstrated the extent of movement of his head and back. There was quite limited movement of the head both vertically and rotationally. Similarly there was substantial limitation of movement in relation to his back. In demonstrating his ability to touch his toes his hands reached a point just above his knees. He was only able to return to the vertical by walking his hands up his thighs. He also demonstrated that he could kneel on either knee but required a desk to lean on whilst doing so. He said he was unable to squat. He said that he was experiencing pain during the course of giving evidence. The pain was in his back, his neck and across his shoulders and was at a level of intensity he described as being 5 or 6 out of 10. In addition his ankle was "throbbing all the time". He said the pain that he had described was "just a constant thing I live with".

[23] Whilst the applicant was giving evidence he sat still for a short period of time and then as the period of questioning went on he increased the amount of movement in his chair moving backwards and forwards and from one

buttock to the other. His movements as he approached the witness box were stiff and guarded. He walked with a noticeable limp. In the witness box he held his body stiffly erect and when he turned he moved the whole of his torso rather than turning his head.

[24] The applicant advised that the degree of movement in his back had remained basically the same over the whole of the time since the accident. He denied ever having consciously exaggerated the limitations of movements of his neck or back. He said the rotational movement in his neck decreased after the operation performed by Dr Molloy. However the operative procedure corrected what he described as “a terrible pain” followed by the arm, below the elbow, experiencing pins and needles and then “going to sleep”.

[25] In his evidence the applicant said that the symptoms he now experiences, in particular the sensation in his right arm, varies with the weather and he found that he obtained greater relief in less humid weather. In 2000 the applicant and his wife moved from Alice Springs to Kadina in South Australia to live near members of his family and where he found it more comfortable.

[26] The applicant said that he had not been offered any rehabilitation or employment opportunities by the respondent. He said that had they been offered he would have undertaken them and even now would be willing to do so. At present he advised that he does not have any goals. He is on a disability pension which he applied for and was granted soon after the

respondent ceased payments of compensation under the *Motor Accidents (Compensation) Act*. The pension was backdated to commence on the day payments ceased.

The Video Surveillance Evidence

[27] At all relevant times the applicant has presented to doctors and other medical and rehabilitation advisers in a consistent manner. Each of the persons who gave evidence had his or her own description of the presentation but there was a clear consistency. A similar presentation was made before this Tribunal when the applicant gave evidence. I have described that presentation in par [22 and 23] above.

[28] In November and December 1998 the respondent arranged for surveillance to be conducted of the applicant. In the course of that surveillance lengthy video footage was taken of his movements over the course of some 13 separate days between 17 November 1998 and 5 December 1998. The resulting video evidence was provided to Dr Elder, an occupational physician, who had previously seen the applicant. Dr Elder reviewed the video evidence and provided a further report to the respondent in light of the information obtained. Following the receipt of that report the decision was made to cease payments of compensation to the applicant under the terms of the *Motor Accidents (Compensation) Act*.

[29] I have viewed and reviewed the video tapes which were received into evidence. There was a marked discrepancy between the presentation

described by the doctors and demonstrated to me in the witness box when compared with what occurred in November and December 1998. Contrary to the severely limited range of movements of which the applicant complained there was revealed a relatively free range of movements of the neck and back. The applicant was able to bend from the waist and remain bent whilst undertaking tasks. He was able to lift and pull and push trailers. He was able to rotate his neck in both directions. He demonstrated repeated free movement of the back and neck without hesitancy, apparent stiffness or discomfort. He was able to walk with a normal gait and there was no sign of a limp nor of any hesitancy in relation to the use of his ankle. The video showed a full range of movements consistent with a man of the applicant's age without obvious injury or limitation.

[30] The applicant had seen the film before he gave evidence in these proceedings and he addressed it in the course of his evidence in chief. He said that some of the activities shown in the film were things that he had done from time to time but not for an extended period. Some of the activities went beyond his normal range of activities. He said that when he had completed hammering the mooring stake as shown in the film he had to lay down for a period of time because he felt nauseous. That suggestion is not borne out by anything gained from watching the film. He displayed no discomfort at all.

[31] Other than to observe that the dirt that he shovelled was light; the anchor that he pulled was "flat" and had "no weight to it"; the picket that he

hammered into the ground was being driven into "soft mud"; the trailer that he moved was a light weight trailer; the heavier trailer he moved was empty and balanced on two axles; the soil that he dug was soft; and the motor that he pulled out of the water was on a pivot and weighed only "ten pound at the most"; there was no explanation for his apparent inconsistent presentation. There was no attempt to explain or even address the free range of movements shown in the video surveillance evidence.

Dr David Elder

[32] It was upon the advice of Dr Elder that the respondent based the decision to cease payments of compensation to and on behalf of the applicant. Dr Elder is an occupational physician who saw the applicant at the request of the respondent on 19 April 2000. Prior to seeing the video tapes Dr Elder had provided a report to the respondent in which he observed that the applicant "presented as a hugely disgruntled, angry man" who eventually co-operated in the assessment. He, at first, described the applicant as having suffered injuries as a result of the motor vehicle accident which had left the applicant with significant disabilities. Even at that time he noted that the claimed level of disability was "somewhat discordant with the objective clinical findings". However he expressed no doubt that the cause of the applicant's then condition was the motor vehicle accident. Dr Elder considered that, although the applicant had been left with significant disability, he consciously exaggerated the symptomatology. He did not regard the

applicant as being totally incapacitated in terms of his ability to work. He regarded his condition as stabilised.

[33] After his initial examination Dr Elder was provided with the surveillance video tapes. Having seen those video tapes Dr Elder concluded that the applicant had been "deliberately misleading" during the earlier consultation and he observed that "there is vast discrepancy between the clinical examination of Mr Elliott which I was hardly able to carry out due to his complaints of discomfort and the objective evidence noted in the surveillance videos." This material made his earlier expressed views "redundant". Having viewed the videos Dr Elder concluded that the applicant was "much more capable of carrying out employment than he alleges". In April 2002 Dr Elder was invited to revisit his earlier expressed opinion and he provided the following advice:

> "There is significant discrepancy between his complaints of immediate and ongoing injury to his back. As can be seen, no injury was sustained to his back as detailed in the A&E notes. With regard to his neck – he did suffer injury. However he is asymptomatic and has full unrestricted mobility of cervical spine in Dr Black's report of 7/4/95. Hence my opinions would be altered that the MVA is not relevant to his back complaint nor to his ongoing neck complaint."

[34] In relation to an earlier report of abnormality of gait Dr Elder noted that the abnormality could not be explained physiologically and observed that: "[t]his type of gait is in my view functional (as is evidenced by his normal gait when seen on surveillance video)". He did not expect the ankle injury would have severely worsened as claimed by the applicant but rather he

would have expected natural healing processes to occur and the pain and disability to diminish. In the opinion of Dr Elder the applicant would be unlikely to have any difficulty in operating a clutch on a car or truck.

[35] In his evidence before me Dr Elder agreed that shortly after an accident sometimes the focus of the injured person may be on other injuries and that it may only be when those injuries settle down that a further injury, to another part of the body, may be noticed. However he observed that in circumstances such as existed in this particular matter "you would expect with that level of symptomatology for the effects to be really quite immediate".

[36] In cross-examination Dr Elder described the usual process for assessing injured people and instituting appropriate rehabilitation programs. He said that the success rate for such programs is about 40 percent and the reasons for failure can involve "a whole host of influences". A psychological assessment was not always required. An appropriate assessment can be made by a rehabilitation specialist without the need for referral. Frustration and anger experienced by the injured person and a lack of sophistication in that person are factors that would be considered in determining the need for psychological assessment. Inconsistent symptomatology would also be a factor.

[37] In relation to this applicant Dr Elder agreed that he did not explore whether the disabilities claimed were genuine or assumed disabilities. The doctor

concluded that the applicant was a poor candidate for rehabilitation and he did so on the basis of "what I saw of this man, his presentation during the consultation with me, the abnormal illness, the behaviour that he expressed and the inconsistencies that he has expressed, that have subsequently been pointed out to me, as well as the video surveillance." He thought no rehabilitation centre would take on the applicant for those reasons. Whilst he accepted that there was a level of subconscious exaggeration the information provided to him altered the balance as to how much conscious exaggeration behaviour existed in this case. He referred to the "very marked inconsistency between his presentation and the presentation on the surveillance videos". He was led to the conclusion that there was not a psychological or psychiatric aspect to the case but rather that it was functional. Whilst there was a difference of some 19 months between the time that the video was taken and the date of the examination conducted by the doctor he concluded that any progression or deterioration of the injuries in that time would not be to a level that would explain the inconsistency between the two presentations. He agreed that the applicant would not "fit easily in immediately to a job because of all the issues". That observation referred to his anger, his lack of a will to return to work and his general behaviour.

[38] There was a difference in the evidence between Dr Elder and the applicant as to the circumstances of the consultation between the two. The applicant gave evidence that the interview was short in duration, that he provided

Dr Elder with X-rays but that they were not inspected and that the presence of Mrs Elliott made Dr Elder "hostile". Mrs Elliot gave some limited support to the version of events provided by her husband. Dr Elder denied all those matters and did so by reference to the notes taken at the time and his recollection. I accept the version of events provided by Dr Elder over that of the applicant, supported as it was by the contemporaneous notes and by the unreal nature of the suggestions made by the applicant.

Dr Gordon Ormandy

[39] Dr Ormandy is a general surgeon who has, for the last 6 or 7 years, practiced as a medico-legal specialist. He was called to give evidence on behalf of the applicant. He saw the applicant on 25 July 2000. At that time he had not had access to the video surveillance evidence relating to the applicant. The history taken by Dr Ormandy included that the applicant suffered a constant throbbing pain in his left ankle, he walked with an abnormal gait, he had constant ache in the lower back and he had "some pain in the neck but if he occupies his mind … he can put the pain out of his mind." The applicant was examined and, based upon the history provided by the applicant and upon the examination, Dr Ormandy concluded that the applicant could not return to his employment as a truck driver but that he may be employed in "light unskilled work".

[40] Prior to giving evidence before me Dr Ormandy was shown the video evidence and asked whether it altered his view. Dr Ormandy had

reservations regarding the relevance of the video evidence because in the tapes a man is shown mowing a lawn and moving a trailer and winching a boat to a boat trailer and, in that regard, he said:

> "(Mr Elliott) had told me that he didn't own a motor mower so he couldn't have been videoed mowing the lawn. And I think he either told me or Dr Lewis that he didn't own a tandem boat trailer and therefore couldn't have been the man that was moving or winching the boat to the boat trailer. So I find that a bit mysterious."

It is no longer contended by the applicant that he is not the person in the video tapes and, even if there was dispute about that, I would accept that he is that person based upon my observations, his answers to questions in the course of evidence before me and the evidence of Mr Horstmann who took the film. The denials of the applicant to his doctor cast further doubt upon his credibility.

[41] Dr Ormandy said that the movements shown in the video tapes indicated increased freedom of movement over what he had seen clinically. He said that there was no history of "good periods" which would explain the increased movement. The video tapes presented a different clinical picture. He expressed the opinion that the person shown was capable of greater physical activity "perhaps still with limitations". He continued to be of the view that the person would not be able to return to work as a truck driver if that work involved long hours driving, manoeuvring loads, repairing the vehicle and moving heavy materials. If he engaged in work of a "very heavy nature", the applicant would be risking aggravating the condition of

his neck and back. Similarly activities involving repetitive bending and lifting from low areas would have the potential to aggravate the condition of the neck and back. The problems arose from the surgery to his neck and back.

[42] Dr Ormandy understood the history of the applicant to be one of immediate onset and complaint of symptoms in his neck and back with those symptoms being ongoing from the time of the accident. He said that other symptoms related to the abdominal trauma, the spleen and even the foot may mask complaints regarding the back and neck. An immobilised back may delay the onset of symptoms. However in cross-examination he agreed that where a person suffered trauma to his lower back in a motor vehicle accident he would "expect that person to be complaining of some back pain" immediately after the accident.

[43] It cannot be suggested on behalf of the applicant that his back was immobilised for a lengthy period. He said he used crutches to leave the hospital but that he then spent 6 weeks in bed "and I would have been on crutches for a good month after that." On his evidence his back would not have been immobilised for 7 weeks after the accident but, rather, a much lesser period. The hospital notes have him walking with elbow crutches and walking sticks whilst in hospital within days of the accident. Mrs Elliott said he was moving about by himself and without crutches 6 to 7 weeks after the accident. It is clear that any period of back immobility was of a short duration.

[44] Dr Ormandy said that the report of an X-ray being taken of the cervical spine on the day after the accident also suggested that some complaint was made of symptoms in the neck. His understanding was that "[t]here certainly was no evidence of him having had any symptoms in his neck prior to the motor vehicle accident". The doctor was obviously not aware of the 1991 entry in the Alice Springs Hospital notes. He was not able to agree with Dr Elder that the motor vehicle accident was not relevant to the back and neck conditions. However he did accept that each condition was best described as degenerative and there was "a progressive deterioration of this man's neck condition to the point that an experienced, respected, qualified neurosurgeon saw fit to do a cervical spinal fusion on him for symptoms of nerve irritation affecting his right arm".

[45] In cross-examination Dr Ormandy agreed that after a period of time one would expect a person with fractures of the ankle to be walking relatively normally but with possibly some pain, possibly a limp and with some insecurity. He said that such a person would never have a completely normal ankle again. By the end of 2 years the person would have reached the point of maximum medical improvement. He noted the likely development of arthritic changes at the site of the fracture but said that would be dependent upon the fracture having affected the joint. He had not himself seen the relevant CT scan. Reference to the evidence of Dr Hopkins, who did see the scans, revealed the fracture was "in a largely non-articular area."

[46] Consistent with the opinion of Dr Elder, Dr Ormandy said of a person who suffers lower back injury in a motor vehicle accident that he would expect that person to be immediately complaining of some back pain. He relied upon the history as provided to him by the applicant that complaint was in fact made.

Dr John North

[47] Dr North is a neurosurgeon. He saw the applicant on 21 October 1996 at the Alice Springs Hospital. He did so for the purposes of treatment rather than for medico-legal purposes. At that time the applicant complained of "neck pain, right arm pain, back pain, left foot pain, and pins and needles in the lower limbs". The applicant demonstrated inconsistencies on physical examination when Dr North tested movements and also inconsistencies on sensory examination. In relation to sensation Dr North advised that the applicant's lack of feeling did not correspond with any anatomical distribution. There were also inconsistencies in straight leg raising where "the resistance was voluntary and not actual". Dr North concluded that there was "embellishment of his condition".

[48] Dr North expressed the opinion that if there had been a lower back injury in the course of the motor vehicle accident then symptoms would have been obvious and complained of within the course of a week or so. In this case, on the history provided to him, there had been no complaint of back pain for a period of 9 months and on that basis he concluded that the motor vehicle

accident was unrelated to the lower back pain because of the lack of a temporal relationship. In cross-examination it was put to him that the delay in complaining of such pain was 6 weeks rather than 9 months and Dr North observed that he would not regard that period as disclosing a sufficiently close temporal relationship for the injury to be associated with the motor vehicle accident. It was further put to him that the lower back pain may be masked by pain resulting from other injuries such as "the splenectomy" (in fact it was a mesenteric tear), the broken foot, the bad neck and bruising to the trunk of the body. He responded:

> "I say again, if he had a broken ankle, he'd have pain in the ankle. If he had a ruptured spleen, he would have pain in the abdomen. If he had a back injury, he would complain of back pain."

[49] He did not accept that the pain would be masked over a period of time, even of 6 weeks. It would be too long a period to associate cause with effect. The back pain would be evident within hours or days and nothing longer than 2 weeks.

[50] Ms Kelly put a history to the doctor in relation to the neck pain, which included the evidence of a pre-existing neck condition, tentatively diagnosed as cervical spondylitis, and which appeared in the Alice Springs Hospital notes for 1991. Dr North concluded that "the neck condition antedated the July 1994 accident." He was not asked to comment upon the claim by the applicant that the neck was asymptomatic prior to the motor vehicle accident.

[51] In cross-examination Dr North agreed that he had only seen the applicant on one occasion and that he had not seen the X-rays or the scans. However he did have reports of the X-rays and scans. At the time of giving evidence he had been unaware that there were two surgical interventions to the back of the applicant performed after he had seen him. Dr North was then taken to the report of Dr Molloy, the neurosurgeon who carried out the two operations, and her reasons for recommending the operative procedures were read to him. The following observations of Dr Molloy were put to him:

> "An MRI scan of the lumbar spine performed on the 20/1/97 showed severe lumbar canal stenosis at the L2-3 level throughout the lumbar spine to the S1 level. This is partly due to a small lumbar canal and partly due to disc protrusion at the L2-3 level, L3-4 level and L4-5 level. His symptoms of his lumbar spine were consistent with a lumbar canal stenosis."

[52] Dr North expressed the opinion that back pain does not require a precipitating cause. Rather, back pain from a degenerative cause "would more frequently come on unannounced or – out of the blue". In this case, he said, the need for the operative procedure arose from matters of a degenerative nature. The need was unrelated to trauma. This, he said, appeared from the observations of Dr Molloy. This conclusion was based upon the laminectomy being performed for stenosis which is a degenerative condition and not one caused by trauma. There was no report of disc surgery. The fusion performed by Dr Molloy resulted from the operation to widen the spinal canal and was for the purposes of support. Dr Molloy was

not called to contradict the evidence of Dr North. Her medical reports, which do not address this issue, were received by consent.

Dr John Blue

[53] Dr Blue is a general practitioner based in Kadina. He has been the applicant's general practitioner for the past 3 years and would have seen the applicant on a monthly basis during that period. He described the applicant as a man who is unfit, overweight and middle aged. He moves in a "slow, ponderous fashion" and walks in a stooped but stiff manner. Occasionally he uses a walking stick. He had a consistent presentation throughout. Dr Blue did not see obvious signs of swelling of the ankle notwithstanding complaints made by the applicant. There was a "slight difference" between the range of movement in the left ankle when compared with the right. The doctor advised that the applicant is on a moderately heavy dose of Kapanol which is a long acting morphine taken for pain. He has been on that dose for about 18 months and it would seem it is likely to remain a stable dosage. The applicant is tolerant of the dosage.

[54] In a medical report which was received as an exhibit Dr Blue described the physical limitations of the applicant which included substantially reduced movement in the spine and the neck. He could bend only to his knees and then straightened up by walking his hands up his thighs. He had negligible extension of the back. Dr Blue agreed that the applicant may have

exaggerated his symptoms for the purposes of medical examinations and, in particular, when there was a medico-legal aspect to the examinations.

[55] Dr Blue saw the video surveillance tapes. He thought they showed the applicant moving in the slow, ponderous and stiff fashion that he had seen elsewhere. He noted only two examples of discrepancies in presentation, the first being when the applicant bent to clean something near his boat and the other was picking up the trailer and winching his boat. Otherwise he regarded the presentation of the applicant as "very consistent". With great respect to Dr Blue a review of the video revealed much greater freedom of movement in the back and neck than he describes. It also reveals the absence of the unusual gait described by Dr Blue and others and demonstrated before me.

[56] In the view of Dr Blue the applicant will not work again. He said that is so because he is a man in his fifties, taking narcotics on a long term basis, who has suffered multiple accidents and who has undergone a laminectomy, together with the fact that he lives in an area of high unemployment. The doctor said the applicant does not have the capability of performing light manual work on a consistent basis and he is not able to undertake any employment that involves prolonged sitting or involves lifting or heavy manual work.

Dr Vaghaiwala

[57] Dr Vaghaiwala was the applicant's general practitioner between December 1997 and June 2000. During that period he saw the applicant on many occasions and reported that on each occasion the applicant presented with complaints of constant pain, he walked with a shuffle and a slight limp, his movements were slow and rigid and he would move his body as a whole rather than bending or turning. He held his body stiffly erect. In September 1998 Dr Vaghaiwala recommended the applicant see a physiotherapist. The applicant was reluctant to do so, indicating that earlier physiotherapy and hydrotherapy had not assisted him and aggravated rather than relieved his pain. After discussion he agreed to see the physiotherapist but when an appointment was made he failed to attend.

[58] Dr Vaghaiwala also saw the applicant in December 1998 which was near to the time the video surveillance was undertaken. He was subsequently shown the surveillance videos and he noted they revealed a "marked difference" in presentation. The doctor observed that there was an "excellent range" of back movements and the physical activities undertaken were in contrast with those demonstrated throughout the period of his attendances in the surgery. He observed that the back movements revealed "the bending which he could never do in the clinic situation". The video revealed to Dr Vaghaiwala that the applicant could undertake sustained activities and he noted the inconsistent activities of pushing and pulling of

the trailers and hammering whilst, at times, “he had both his upper limbs alternating”.

Dr Mark Young

[59] Dr Young was the general practitioner who attended upon the applicant between 2 February 1995 and 1996. He said that when the applicant attended upon him on 2 February 1995 he complained of various injuries arising out of the motor vehicle accident but made no complaint of low back pain. This is contrary to the evidence of the applicant that he complained of pain in the lower back in February 1995 and was referred for physiotherapy for that condition. The physiotherapist to whom he was sent, Ms Guscia, also contradicts the applicant. By reference to her notes taken at the time she confirmed the focus of the physiotherapy was the abdomen and the feet. The first physiotherapy treatment for the lower back was in June 1995.

[60] According to Dr Young the first occasion on which the applicant made a complaint to him relating to his back was on 4 May 1995 (in excess of 10 months after the accident) when he complained of stiffness in his lower back radiating into the flank occasionally associated with tingling in his legs. On that occasion the applicant told Dr Young for the first time that the symptoms had been present since the motor vehicle accident the previous year.

[61] Dr Young suggested rehabilitation for the applicant and talked of a graded return to work program which was to be closely monitored. In a report

dated March 1995 addressed to the Territory Insurance Office Dr Young recommended that rehabilitation be considered. He expressed the view that the applicant could do part time light duties possibly including driving. He said that the applicant had been referred to Sue Watt, a rehabilitation consultant, and that he felt this was entirely appropriate. He observed that the applicant "needs to be more motivated with regard to his capability in returning to some form of work".

Laima Guscia

[62] Ms Guscia, was the physiotherapist who treated the applicant in 1995. In February 1995 he was referred to her by Dr Young for treatment of the abdomen and left and right ankles. That treatment continued through the first half of 1995. During that period there was no treatment for any back complaint. The first treatment for back complaint was performed by her fellow physiotherapist, Margo Webster, in June 1995.

Dr A. Schmidt

[63] Dr Schmidt, an orthopaedic surgeon, saw the applicant at the Alice Springs Hospital on 3 April 1995. At that time the applicant complained of a "mechanical type lower back pain" with the pain aggravated by prolonged standing and walking. Dr Schmidt conducted a physical examination and reported as I have noted in para [15] above.

[64] I note that this examination took place within a few days of an examination by Dr Black who also examined the applicant in relation to his work injury suffered with Landmark Tours. The examination performed by Dr Black revealed that the applicant had "a full range of movements about the head and neck without apparent restriction" and in relation to the thoraco lumbar spine "he had a full range of movements without apparent restriction". Each of these examinations and the observations of each of the doctors is quite inconsistent with the reports of the applicant, both to other doctors and in these proceedings, that he had extreme pain and severely restricted movement of his back and neck throughout this period.

Peter Lehmann

[65] Mr Lehmann is a rehabilitation provider and occupational therapist who was employed by CRS and attended upon the applicant during the period July 1995 to June 1996 and again in 1999. He described the applicant's presentation as demonstrating a lot of pain with movements that were not free and suggested discomfort. The applicant was very hesitant in walking and his stride was not symmetrical. His presentation was of "very guarded movement". When Mr Lehmann saw the surveillance video tapes he said they demonstrated something quite different. The applicant was moving more freely and his gait was longer. When viewing the video tapes Mr Lehmann said he only saw the hesitancy and stiffness of movement return when the applicant was filmed outside the Bath Street Medical Clinic.

[66] During his discussions with the applicant Mr Lehmann was informed that the applicant considered he did not have much capacity for work and indeed he was "useless" in that area. Mr Lehmann said that he was endeavouring to identify suitable work training or a suitable work trial for the applicant but his presentation made the task very hard. He said that if the applicant had presented to him as he presented in the videos that would have undoubtedly made a difference to his ability to place him in a work trial.

[67] By reference to the case notes Mr Lehmann confirmed that his service had substantial difficulties in contacting the applicant and that the applicant failed to respond to requests to attend and, further, on one occasion became agitated and stormed out of the office. An example of the attitude of the applicant to Mr Lehmann was recorded in a file note dated 4 August 1999 which read:

> "The last meeting was yesterday which saw Mr E very angry, irate and many other adjectives. Mostly to do with CRS performing further assessments ie FCE and vocational. He intimated that I should have the foresight to see that further assessments are not going to be beneficial and by reading the medical reports that any further intervention will not prove worthwhile."

Insofar as the evidence of the applicant conflicts with that of Mr Lehmann I prefer that of Mr Lehmann. His evidence is generally supported by contemporaneous notes.

[68] Mr Lehmann was the person who identified the work opportunities with the Alice Springs Town Council which were described as the cleaning job and

the litter job. He advised that these were in fact different parts of the one job. He conducted a work suitability assessment of the applicant for the Town Council jobs. He regarded them as a "match". Work trials and work hardening would be unnecessary. A further job description was put to Mr Lehmann being that of a driver of a semi-trailer carting grain. Mr Lehmann expressed the view that the applicant would be "functionally able to do that work". He was confident the applicant could do each of the identified jobs. He said he could not see the applicant undertaking long haul truck driving or bus driving but, based upon what he saw in the video tapes, the grain carting job would be suitable.

Mrs Elliott

[69] Mrs Elliott gave evidence that was generally supportive of her husband. She said that his health has deteriorated on a daily basis over the years since the accident and he now just potters about. She also said that his physical presentation has remained much the same over the years. Her description was similar to that provided to the doctors and to this Tribunal by the applicant.

[70] Mrs Elliott said that she was aware of the video surveillance evidence however there was no effort to reconcile what she described of her husband and his presentation and what was to be seen on the video evidence. As I have already observed the two do not fit together.

[71] An example of the willingness of Mrs Elliott to support her husband is to be found in the evidence relating to the fishing boat. The video evidence showed that in November/December 1998 the applicant was seen to winch the vessel onto a trailer. In cross-examination Mrs Elliott said that she had seen her husband winch the fishing boat onto the trailer on only one occasion and that was in November or December 1998. She said he winched the vessel "with great difficulties". When asked whether she actually saw the applicant winch the boat by himself she said "[t]hat's exactly right". A short time later in her evidence she was taken back to that incident and when asked how he appeared she said "I wasn't actually there when he done it".

[72] Mrs Elliott gave evidence that during the weeks immediately following the accident her husband complained many times about his neck and back. I note that this is different from the evidence of the applicant who says that during this period he could not distinguish between pain in his neck and his back from his other pains. Although, at one stage he also said he regularly complained, his case is that pains in those locations were masked by the pain from his other injuries. Her evidence is not supported by reference to the documents produced at the time which reveal no such complaint by the applicant to any of the various medical advisers he consulted.

[73] The evidence of Mrs Elliott, whilst supportive of her husband, does not alter the view that I have formed regarding the acceptance of his evidence.

The Applicant

[74] It is not unexpected that an injured person may seek to emphasise the extent of his or her injuries and the impact of those injuries in the course of legal proceedings. There may be unconscious exaggeration of symptoms. This may occur in the course of medico-legal examinations for the purposes of the hearing and in giving evidence in the case itself. In the present case, as is revealed by the video footage, the applicant has done much more than that. His presentation in the unguarded situations shown in the video material is quite inconsistent with his presentation at other times. The contrast cannot be explained by reference to a person endeavouring to ensure that the medical advisers and the Tribunal understand the severity of his symptoms and the impact they have upon his life. The exaggeration goes well beyond that point.

[75] There can be little doubt that the applicant has posed a difficult problem for the respondent, its advisers and some of his treating doctors. His counsel described him as "blunt, resentful and obstinate". The rehabilitation provider, Mr Lehmann, described the applicant as "hostile and aggressive to all involved with his return to some form of work". He is, said Mr Lehmann, "his own worst enemy". Those remarks were supported by the observations of others. Dr Elder described the applicant as being "hugely disgruntled" and during their interview as being "extremely aggressive verbally". In a subsequent letter the applicant described Dr Elder as "a fool, a fake or a mercenary". He accused the Territory Insurance Office of

lacking integrity and being involved in a conspiracy against him. He accused the staff of that office of being "arrogant" and one member as being an "irascible old crone". He was seen by a psychologist, Sean Ryan, who noted he was “angry and bitter” and that he “perceives himself as being totally incapacitated and too impatient to consider retraining”. Mr Ryan recommended anger management. Dr Curtis, an orthopaedic surgeon, described the applicant as being a “disgruntled, angry, negative man” and recommended psychiatric assessment. Another orthopaedic surgeon, Dr Hopkins, described him as being “angry and reactionary”. The applicant made a written complaint regarding another surgeon, Dr Schmidt, accusing him of being “irate and visibly emotionally upset to the point of rage” in the course of the interview. He refused to see Ms Watt, a rehabilitation consultant, because he “questioned her motives” and “she didn’t have an office” in Alice Springs. Correspondence sent to the applicant shows Ms Watt in fact had an office in Alice Springs and there can be little doubt about the purpose of the attendance. These observations and the extreme positions adopted by the applicant reflect what a difficult problem he posed for those seeking to assist him. They show a consistent picture of an aggressive man resisting all attempts to assist him.

[76] The applicant was asked about the suggested employment with the Alice Springs Town Council. He said he was aware of that work and that it was “the lowest job” available at the Town Council. He said in being asked to do that work he was being asked to “belittle” himself. He agreed that he

could “probably” hose out the toilets. He thought he would have trouble with working from a quad bike but he said “I could try”. He did not identify any difficulty he may have with that employment other than with the quad bike. Mr Lehmann advised that a person working from the quad bike would use a device known as an ‘Easy Reacher’ which permitted the collection of litter at ground level without leaving the quad bike or, if on foot, bending over. When asked whether he would take a truck driving job at Kadina if it had been offered he said “I don’t believe so, I’d been put on a pension”. He said that once he had been put on the pension he did not have to do any work.

[77] I do not accept the evidence of the applicant that he would have undertaken rehabilitation courses and work trials in the past if they had been offered. His attitude was reflected in his advice to Mr Ryan that he was totally incapacitated and too impatient to retrain. His only effort at looking for work was a casual enquiry to friends at his local club. In my opinion he did not intend to return to work and made no genuine effort to do anything directed to a return to work.

[78] In light of all of the evidence, including that of the applicant, I found him to be a man who reconstructs events to suit his purposes, who blames others for his problems, who shows no wish at all to return to work and a man who will do his best to avoid that end. There is no suggestion that he suffers from any psychological or psychiatric condition as a result of the motor vehicle accident. I do not accept that he complained of low back pain after

the accident. I note that the only suggestion of a connection between the motor vehicle accident and the low back condition was based upon the applicant's assertion that the onset of symptoms occurred with the accident. I find that his first complaints of back pain were made in March and April 1995. I do not accept that he is incapacitated to the extent that he suggests. I find that he has exaggerated his symptoms. In my opinion a more accurate demonstration of his capacities is that revealed in the video surveillance evidence.

Available Work

[79] The respondent submitted that, whatever may be the cause of any ongoing incapacity suffered by the applicant, he has not suffered any reduction in his capacity to earn income from personal exertion. It was further submitted that if there was any such reduction the amount he was reasonably capable of earning in employment available to him was greater than 85 per cent of average weekly earnings of wage earners in the Territory at all relevant times.

[80] The respondent led evidence of available employment both in Alice Springs and in the region of South Australia to which the applicant moved in 2000. The first of those jobs was with the Alice Springs Town Council and was the subject of evidence from Ms Langhorne who is the Human Resources Officer of that organisation. The job was an entry level position. Transfer to other suitable jobs within the Town Council was available from time to

time. That work had been assessed by Mr Lehmann as suitable for the applicant. Mr Lehmann expressed the view that he would be "very confident" in concluding that the job was a "particularly good match". The applicant would not have to be re-assessed. Ms Langhorne gave evidence that the jobs were regularly available and that she had filled 6 positions in the last 18 months, ie going back to a time shortly after compensation payments were terminated. Provided he could do the work, the age and physical characteristics of the applicant would not be a basis for discriminating against him obtaining the job. The rate of pay was $503.07 gross per week together with district allowance and an outside work allowance. That figure exceeds 85 per cent of average weekly earnings for the purpose of s 13 of the *Motor Accidents (Compensation) Act*.

[81] Dr Elder gave evidence that the applicant could undertake the cleaning aspects of the work with the Town Council but he thought he would require further information as to the weight of the bins before being able to make observations regarding other aspects of the work. The subsequent evidence was that the bins could be emptied at any time (or weight) that suited the worker. Dr Ormandy agreed that the applicant could carry out the tasks in the cleaning part of the job however he said that, if all of the tasks were undertaken in a job that occupied a 40 hour week, he would be of the view that the person he saw in his rooms would not be able to undertake that work but the person he saw on the video tapes would be "just" able to do so although there would be a potential for aggravation of his injuries.

Dr Blue thought that the applicant would be able to do that work but only for one or two hours a day. He did not believe the applicant could undertake the work on a long term basis. Dr Blue seemed concerned that the actual job would differ from the job description in that the work would be heavier at times. That fear was not supported by the evidence of Ms Langhorne. He was also concerned about the level of unemployment in the Kadina area. That is not a medical matter.

[82] The other available work identified by the respondent was with Mr Kevin Stock who runs a grain cartage business, Triad Transport, in the region where the applicant now lives. The work that he had available was as a driver of a truck transporting grain. That would sometime involve long hours but most of that time would be spent waiting rather than driving or carrying out any other activity. Mr Stock runs 15 trucks. He described the job in detail and said there had been 10 to 12 vacancies over the previous 2 years. He could think of no reason why the applicant would not be suitable for that job. He has employed people older than the applicant and people who have had back operations. Indeed he had undergone a fusion of his own spine in the lumbar region and continued to do the same work. Of course the nature and impact of back conditions varies and no conclusion as to the suitability of the work for the applicant can be drawn from that evidence. Mr Lehmann, who had experience with the nature of the work, also considered this work as being within the physical capabilities of the applicant. He said the applicant "would have the capacity to do that job".

The evidence of Mr Stock was that a driver would average $500 take home pay per week.

[83] The evidence of Ms Langhorne, Mr Stock and Mr Lehmann, considered in light of the medical evidence, leads me to conclude that there was employment reasonably available to the applicant both in Alice Springs and in Kadina throughout the relevant period. That employment would have earned him a sum not less than 85 per cent of the average earnings of wage earners in the Territory as referred to in s 13 of the *Motor Accidents (Compensation) Act.*

Causation

[84] In my view, on the balance of probabilities, neither the neck injury nor the lower back injury were caused by the motor vehicle accident and that accident had either no impact or no lasting impact upon them.

[85] In relation to the neck condition it is clear that it predated the motor vehicle accident. The X-ray taken on admission to Alice Springs Hospital in July 1994 showed marked pre-existing degenerative changes at the C5-6 and C6-7 level. The neck condition had been symptomatic in 1991. Whether it had been symptomatic in the intervening years between 1991 and 1994 it was symptomatic when the applicant entered hospital. However, whatever symptoms were then present, they disappeared. There was no further complaint recorded in the hospital records and, in March 1995, he had a full range of movement of his head and neck without restriction. It seems that

thereafter the neck became symptomatic. In 1996 Dr Molloy concluded that it did not warrant surgical intervention at that time even though the degenerative changes were longstanding and severe. She said this because there was "no hard neurological signs to support the diagnosis of a C6 radiculopathy". In 1997 when such signs appeared she agreed to surgical intervention.

[86] In the circumstances I find that the motor vehicle accident did not cause injury to the neck. It was at most responsible for a short period when the pre-existing neck condition became symptomatic. That period passed. The operation that took place in 1997 was not shown to be in any way linked to the motor vehicle accident in July 1994.

[87] In relation to the low back condition I find that there was no complaint of an injury to the low back following the motor vehicle accident until it was mentioned to Dr Black in March 1995. At that time the applicant made no complaint of low back pain and he demonstrated a full range of movement without apparent restriction. The first complaint of low back pain was to Dr Schmidt in April 1995. In my view, and for the reasons expressed by Dr North, the back pain was unrelated to the motor vehicle accident because of the lack of a temporal relationship. I do not accept that the low back pain was masked by the symptoms of other injuries. Even if there was such a masking, it would not have persisted for longer than a couple of weeks. As early as the time of his admission to hospital on the night of the motor

vehicle accident the applicant was able to identify particular areas of pain, none of those included the low back area.

[88] I find that the onset of low back pain occurred subsequent to the motor vehicle accident and was related to the ongoing degenerative condition of the lumbar region of the applicant's spine. It was not related to the motor vehicle accident.

[89] There is no ongoing complaint regarding the mesenteric tear to the spleen. The only other injuries where there is ongoing complaint are those which occurred in the left ankle. In light of the free range of movement and the unaffected gait demonstrated by the applicant in the video surveillance evidence and, also, in light of the medical evidence that the injury should have settled after a period of 2 years, I find that there is no significant ongoing disability. It is possible that there may be some mild swelling from time to time and there may be a slight reduction in movement of the ankle but those matters, if they are present at all, do not cause incapacity that would prevent the applicant from returning to full time employment.

[90] In my opinion the applicant is not a person whose capacity to earn income from personal exertion is reduced as a result of injury suffered in the motor vehicle accident.

Capacity to Earn

[91] Further, in light of the conclusions I have reached above concerning the availability of employment and the capacity of the applicant to undertake that employment, I conclude that he is reasonably capable of earning an amount which is greater than 85 per cent of the average earnings of wage earners in the Territory in employment reasonably available to him. He has been able to do so since the date upon which payments of compensation ceased being 30 June 2000.

[92] In addition to the medical advisers who were called to give evidence during the hearing I was provided with reports and notes from many others. I have reviewed those materials. I do not find it necessary to discus all of the information thus provided.

[93] The application is dismissed.

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