Collman v Territory Insurance Office [2002] NTSC 8

PARTIES:	MICHAEL ROBERT COLLMAN
	v
	TERRITORY INSURANCE OFFICE
TITLE OF COURT:	THE MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	M12 of 2000 (20013716)
DELIVERED:	18 January 2002
HEARING DATES:	11 and 12 October 2001, 11 and 16 January 2002
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Applicant:	Mr D Alderman
Respondent:	Mr M Grant

Solicitors:

Applicant:	Priestleys
Respondent:	Cridlands

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IN THE MOTOR ACCIDENTS
(COMPENSATION) APPEAL
TRIBUNAL AT DARWIN

Collman v Territory Insurance Office [2002] NTSC
No. M12 of 2000 (20013716)

BETWEEN:

MICHAEL ROBERT COLLMAN
Applicant

AND:

THE TERRITORY INSURANCE OFFICE BOARD
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 18 January 2002)

[1] The applicant was injured in a motor vehicle accident that occurred on 25 December 1996. As a consequence of that accident he suffered an avulsion fracture of the seventh cervical vertebrae and whiplash type injuries to the cervical and thoracolumbar spine.

[2] The applicant was, at all material times, a resident of the Northern Territory for the purposes of the *Motor Accidents (Compensation) Act* ("the Act") and he made application for the payment of benefits under that Act. On 24 January 1997 the respondent advised the applicant that he was entitled to benefits and payments commenced. On or about 22 December 1999, a

claims officer with the respondent advised the applicant by letter that payment of benefits pursuant to s 13 of the Act would cease and those payments in fact ceased on 14 January 2000. The applicant then requested that the "designated person" make a decision as to his entitlement to benefits under the Act. On 22 March 2000 he received a determination dated 21 March 2000 and signed by the designated person in which it was stated that medical evidence revealed that his capacity to earn income "was no longer reduced" and therefore his "entitlement to receive Section 13 benefits ceased on 14 January 2000". At the request of the applicant the matter was then referred to the Board of the Territory Insurance Office pursuant to the right contained in s 27(2) of the Act. On 14 July 2000 the Board issued a determination upholding the earlier determination of the designated person. The applicant then referred the matter to this Tribunal. The hearing before this Tribunal is a hearing de novo.

[3] The applicant maintains his capacity to earn income from personal exertion has been reduced as a consequence of the injuries suffered on 25 December 1996 and that the reduction continued past 14 January 2000 and continues to the present time. He says that he is unable to earn any amount in employment and, further, that no profitable employment has been available to him. Although in his pleadings the applicant called into question the decision of the claims officer made on 22 December 1999 I am informed by Mr Alderman, who appears for the applicant, that issue is no longer to be agitated in these proceedings. Similarly there is no longer an issue regarding

the entitlements of the applicant under s 17 of the Act. The applicant seeks a determination from this Tribunal that the applicant is entitled to compensation for loss of earning capacity pursuant to s 13 of the Act at 85% of average earnings of wage earners in the Territory from 14 January 2000 and continuing.

Section 13

[4] Section 13 of the *Motor Accidents (Compensation) Act* provides for the payment of compensation to a person who suffers a relevant injury. Sub-sections 13 (1) and 13 (2) are in the following terms:

> (1) A person who suffers an injury in or as a result of an accident that occurred in the Territory or in or from a Territory motor vehicle -
>
> (a) who was, at the time of the accident, a resident of the Territory; and
>
> (b) whose capacity to earn income from personal exertion (either physical or mental) is, in the opinion of the Board, reduced as a result of the injury,
>
> shall be paid such compensation for that loss of earning capacity as is provided in this section.
>
> (2) Subject to subsections (4) and (5) and section 14, there shall be payable by the Office to a person referred to in subsection (1), in respect of the period (excluding the day of the accident) during which he suffers a loss of earning capacity as determined by the Board, the amount by which the amount that the Board determines he is reasonably capable of earning in employment in each period of 6 months during that period if he were to engage in the most profitable employment (if any) available to him is less than 85% of the average earnings for that 6 months of wage earners in the Territory calculated on

> the basis of what, in the opinion of the Board, are the best statistics available to it, both amounts calculated net of income tax as if paid to the person.

[5] It will be seen that for compensation to be payable it is necessary for the person to have suffered a reduction in his or her "capacity to earn income from personal exertion". It was submitted by the respondent that this expression is to be distinguished from the notion of "incapacity" as found in the *Work Health Act*. Incapacity under that Act requires only that there be an inability or limited ability to undertake paid work because of an injury: see s 3(1) of the *Work Health Act* and see *Foresight v Maddick* (1991) 79 NTR 17 at 19. The submission of the respondent was as follows:

> "The respondent does not submit that the loss of earning capacity must be productive of financial loss. … Rather, the respondent submits that a finding of loss of earning capacity cannot be made unless the court is satisfied that the injury has impacted upon the applicant's capacity to earn such that, at the very least, he could have been earning at a higher rate at the relevant time."

[6] The effect of the respondent's submission is that there will be no loss of earning capacity unless the level of income the person is able to earn has been reduced. I do not accept that interpretation of s 13(1) of the Act. The submission substitutes the phrase "earning capacity" for that which appears in the section being "capacity to earn income from personal exertion". The expression "earning capacity" may suggest the capacity to earn a certain level of income whereas the expression "capacity to earn income from personal exertion" also suggests the physical or mental component of earning income. In my view there will be a reduction in the capacity of an

individual to earn income from personal exertion if an area of employment that was previously reasonably open to him or her is no longer open. This will be so whether or not the rate of earnings is reduced. Whether or not that reduction in capacity to earn income is productive of an entitlement to an actual payment of compensation is to be determined by reference to s 13(2) of the Act. This view of s 13(1) is consistent with that expressed by Gallop J in *McMillan v Territory Insurance Office* (1988) 57 NTR 24 where his Honour referred to and agreed with the decision of Nader J in *McMahon & Another v Board of Territory Insurance Office* (1984) 26 NTR 5. As was noted by Gallop J:

> "In that case, his Honour held that loss of earning capacity within the meaning of s 13(1) means loss of capacity per se, whether that capacity was being exercised or not at the date of injury, and whether or not that diminution of earning capacity is or may be productive of financial loss, as explained by the High Court in *Redding v Lee* (1983) 47 ALR 241: see also *Graham v Baker* (1961) 106 CLR 340 and *Bresatz v Przibilla* (1962) 108 CLR 541."

[7] Both of their Honours observed that whilst it may be the case that the legislature did not intend to provide compensation to a person who has suffered a loss of earning capacity where that capacity would never have been exercised, that is not what the legislation says. It would have been a simple drafting exercise to limit the right to compensation to a person whose capacity to earn income is reduced as a result of the injury only where capacity is or may be productive of financial loss.

[8] Whilst the reduction in the capacity of the person to earn income need not be productive of actual financial loss it must, however, be a reduction of a "real and demonstrated capacity to earn": *McMillan v Territory Insurance Office* (supra at 34).

[9] Once it has been determined that a person who has suffered a relevant injury has also had a reduction in his or her capacity to earn income from personal exertion then it is necessary to refer to s 13(2) of the Act to determine what, if any, compensation is payable.

[10] A consideration of s 13(2) involves determining what is "the most profitable employment (if any) available" to the applicant in a given period. The onus rests upon the respondent to establish that there was employment reasonably available to the applicant and the relevant amount the applicant is capable of earning from that employment. As was observed by Martin J (as he then was) in *Kantros v The Territory Insurance Office Board* (unreported, SCNT, 5 December 1991):

> "Taking the analogous position in an action for damages for personal injury at common law, the burden of proof is on the plaintiff to establish liability and damage, as the applicant has done here, but it is for the defendant to establish the failure of the plaintiff to mitigate, or, for the respondent to prove here the amount which the applicant is reasonably capable of earning for the purposes of the subsection."

[11] The amount that a person is capable of earning in the most profitable employment available to him is not necessarily to be assessed by the employment (if any) actually undertaken by that person. The issue is one of

capacity and that is assessed by reference to employment "available" to the person. In determining whether employment is available to the person it is necessary to consider the whole of the surrounding circumstances including factors personal to the applicant (for example any physical infirmities from which he may suffer) along with the level of availability of particular forms of employment within the relevant community. The issue is governed by the concept of reasonableness. The work must be reasonably available to the particular applicant rather than being reasonably available to anybody.

[12] The amount which the person is reasonably capable of earning in employment if he were to engage in the most profitable employment available to him is to be deducted from the figure representing "85% of the average earnings for that 6 months of wage earners in the Territory calculated on the basis of … the best statistics available." The respondent has available to it statistics relative to the Northern Territory compiled by the Australian Bureau of Statistics. Those statistics provide the average weekly earnings for various classes of wage earners. The classes are identified in the document published by the Bureau and entitled "Average Weekly Earnings." Those classes include "full-time adult ordinary time earnings", "full-time adult total earnings" and "all employees total earnings". The Board of the Territory Insurance Office, in its calculations, uses the figure for all employees total earnings.

[13] The applicant submits that "the best statistics available" to the Board should not be those for "all employees total earnings" but rather "full-time adult

ordinary time earnings". The applicant referred to the definition of "average weekly earnings" that appears in s 4 of the Act which is: "the Average Weekly Earnings for Full Time Adult Persons, Weekly Ordinary Time Earnings for the Northern Territory last published by the Australian Statistician …". In my view reference to this definition does not assist the applicant. I note that the application of the definition is confined to the expression "average weekly earnings" found in s 17, s 18 and s 18A of the Act. There is no mention made of s 13. Section 13 does not include the expression "average weekly earnings" but rather, and by way of contrast, employs the expression "the average earnings … of wage earners in the Territory." The expression "wage earners" does not suggest that any limitation or qualification should be placed upon the wage earners considered, for example by the inclusion only of adult wages or by excluding the earnings of those who work casually or part time. If it was the intention of the legislature that the applicable earnings be those for full time adult ordinary time earnings then it would have said so by reference to the definition. The use of different words in s 13 strongly suggests that the intention of the legislature was to apply some other standard: *Scott v Commercial Hotel Merbein Pty Ltd* (1930) VLR 25 at 30.

[14] In my opinion, and in the absence of any evidence that other statistics are available, the statistics used by the Board in this matter are the best statistics available for present purposes.

The Present Case

[15] The applicant was called to give evidence. Included in that evidence was a review of his education and employment history. He is now aged 25 years. He left school at the end of Year 10. He has worked in various unskilled labouring jobs. In 1993 he commenced work in the area of landscaping and lawn mowing and he continued in that employment with at least two employers until the date of his accident. After the accident he spent two days in hospital and then a period living with his sister. During that time he had to lie flat and wear a neck brace. He was unable to do any lifting. In February 1997 he was advised to return to work and in April 1997 he returned to full duties with Total Landscaping, his employer at the date of his accident. In his evidence he said:

> "I really wanted to keep working but I had difficulty because of the pain that I was still having in my neck. I tried to do different jobs at my old job but I had to have lots of breaks and my boss was not impressed. I lasted in that job until about 7 January 1999 when my neck was so bad I could not keep working. I went back on TIO benefits in about January or February 1999."

[16] Later in 1999 the applicant undertook a course of treatment with Dr Linco which he said was beneficial but he continued to have pain in the neck and headaches. The applicant said that throughout this period he consulted Dr MacDonald, his general practitioner, and was advised by Dr MacDonald not to use any vibrating machinery or equipment because it would aggravate his neck injury.

[17] He gave evidence that from January/February 2000 he "really wanted to work" but that he could not because of his bad neck pain and headaches. Dr MacDonald attributed those symptoms to the use of vibrating machinery. The applicant said he made several attempts to obtain work and he gave details of those. At the time of the hearing before me he was employed and he said that this came about in the following way:

> "In about March 2000 I approached Steve the person I know as the proprietor at Windscreens Territory, for a job. He was very cautious about my neck injury and he wanted to make sure that all my medical reports were okay before he would consider me. I gave him all my medical reports and I did not hear anything until August 2001 when my medical certificate from Dr MacDonald changed and Dr MacDonald said I could do 20 hours a week. It was then my acquaintance said I could try out for the job on 27 August 2001."

[18] He gave evidence that he now works two days a week from 7.30 am until 4.00 pm on Monday and from 8.00 am until 4.30 pm on Thursday. His job is to assist in the fitting of windscreens and to stock the vans. He said that the work made him feel tired and "I think I can do the work as long as it is only two days a week". That employment commenced on 10 September 2001.

[19] In cross-examination there was a challenge to the credibility and reliability of the applicant. It was the evidence of the applicant that he was keen to resume work but that he was prevented from doing so by his medical condition or by the lack of available and suitable employment. Those claims did not stand up to the test of cross-examination.

[20] The applicant agreed that he had been told that he could resume work as early as February 1997. He said that he did not immediately go back to his former employment because he had to undertake physiotherapy treatment. Just how that treatment interfered with his capacity to resume work was not explained. He went back to work in April 1997 and he remained in that employment until 7 January 1999, some 21 months later. He said he then left his employment because of his physical condition. It appears that in that period of 21 months he saw his general practitioner, Dr MacDonald, on a number of occasions but for substantial periods did not complain to him of any difficulties that were employment related.

[21] After he left his employment with Total Landscaping in January 1999, the applicant underwent a course of treatment with Dr Linco. During that course of treatment Dr Linco provided him with medical certificates indicating that he was unfit for work. However, in December 1999, Dr Linco gave the applicant a certificate that indicated he was fit to resume work. At that time the applicant ceased treatment with Dr Linco and returned to his original general practitioner Dr MacDonald. Dr MacDonald gave evidence that he was unaware of the certificate issued by Dr Linco. The medical certificates of Dr MacDonald issued during that period also indicated that the applicant was fit to resume work. Those certificates were for modified or alternate duties and included a statement that he was fit for rehabilitation training. The qualifications imposed by Dr MacDonald were for the applicant to avoid heavy work and vibrating machinery. At about the

same time, early in 2000, both Dr Curtis and Dr Chin advised the applicant to return to work subject to avoiding heavy lifting and vibrating machinery.

[22] In his evidence in chief, the applicant indicated that during this period he inquired about various jobs but had not been able to obtain employment. When he was cross-examined the circumstances of those applications and inquiries were revealed. Without venturing into a consideration of each of the applications it is sufficient to note that they were very casual inquiries made of people known to him or known to his mother or brother-in-law. They were not formal applications in response to any advertisement and they did not follow a suggestion that any work was available. They were casual inquiries made of people with whom he came into contact in his daily routine. They can be characterised as half-hearted and speculative attempts. It was not surprising that they did not yield any results. The only relatively serious and formal attempt to obtain employment was when the applicant placed his name on a list with Hannons Ltd. The applicant's mother gave evidence that she received a telephone call from Hannons regarding employment for her son. She told the caller that "Michael had a doctors certificate". She was informed that he should contact Hannons "when that is all sorted out". There is no evidence of the applicant making any further contact with Hannons.

[23] In support of his case that he was actively and seriously seeking employment, the applicant gave evidence that he looked in the employment columns in the local newspaper each Wednesday and Saturday. When

pressed on this issue he agreed that he did not apply for any job at any time from that source. Mr Grant, who appeared for the respondent, took him to a wide range of jobs advertised during the relevant period. The witness agreed that many of those jobs involved areas of employment in which he had expressed interest and were within his capacity. When asked to explain why he had not applied for any of those jobs he was unable to do so. The following exchange occurred:

> "What about all the other jobs we've identified that were advertised here that you would have been capable of doing? What's your excuse for not looking for them – for not applying for them? You don't have one do you?---No.
>
> Apart from the fact that you didn't want a job at that stage. That's right isn't it?---No.
>
> It's not right?---No.
>
> All right. Well, can you explain why you didn't apply for any of these positions?---No."

[24] The evidence of the applicant in relation to this matter was quite unsatisfactory. Either he did not read the newspapers as he claims, or he did so with no intention of locating or applying for jobs clearly suitable to him. In the course of cross-examination he agreed that, whilst he had read the newspapers, he had ignored advertisements for jobs he could do.

[25] During the same period a rehabilitation counsellor, Ms Louise Bilato, of the Northern Territory Rehabilitation Service Pty Ltd (NTRS) was encouraging the applicant to return to work. She provided him with advice as to developing a plan for seeking employment. She suggested interview techniques that may benefit him. She assisted him to prepare curriculum

vitae for presentation to potential employers. He did not ever use the curriculum vitae in any application for employment. She suggested agencies that may assist him in his search for work. NTRS contacted him on one occasion to alert him to an advertisement in a newspaper for a spare parts trainee and, in his evidence, he agreed that he promised to "inquire about it" but he acknowledged that he did nothing. On another occasion he agreed that he was told that an apprenticeship in carpentry was available. He made no effort to pursue that opportunity for employment. He said he did not pursue that job "because I thought the pay was very small and I was too old to be considered". In further explaining his conduct he said "an apprenticeship pays about $150 to $160 and I cannot afford to do that when I was being refused benefits". He made no relevant inquiry. In a subsequent affidavit he acknowledged that he was now aware that "an apprentice of my age in a carpentry apprenticeship now gets $433.80 gross per week". The applicant's mother gave a different reason for the failure to pursue that opportunity. She said she objected to him "having to do an apprenticeship in carpentry when he did not want to".

[26] During this period he gave various reasons to various people for not seeking employment. Some of those he acknowledges. Others he says he does not now recall and, in other cases, he does not accept that he gave the identified excuses. Notwithstanding his lack of recall and his denials I find that he did give the following excuses for failing to seek work at different times: that he had to travel to Canberra to see his father (he did not in fact go because "it

did not seem appropriate when Ms Bilato was saying it was important for me to look for jobs"); he suffered from food poisoning and headaches; he had a plaster on his hand from a broken finger; he was preoccupied with the continuation of his weekly benefits from the respondent; it was a waste of time and he was too busy house-sitting to be able to seek employment.

[27] In addition he gave evidence that he did not apply for a job as a taxi driver, a job which was within his capacity, because his step-father had told him that taxi drivers did not earn a living. In cross-examination he agreed that he made no inquiries at all in relation to taxi driving and had no proper basis for concluding that taxi drivers did not make a living. He also declined to seek an apprenticeship involving carpentry skills and gave the excuse that "carpentry doesn't interest me". This was quite contrary to his earlier advice to Ms Bilato that this was one of his areas of interest. On yet another occasion the applicant indicated that he did not apply for a job because he "did not want to be in the customer service area because I do not like working indoors".

[28] Notwithstanding any physical difficulties he may have been experiencing, the applicant, during the period of his unemployment, maintained a fairly full regime of physical activity. He spent a good deal of time at the gymnasium. He trained with weights five nights per week. At one point he was jogging. He was riding his bicycle twice per week and he was working on his car at a workshop in Coconut Grove for substantial periods of time. Ms Bilato formed the view that the extent of his physical activity was

inconsistent with his complaints at the time. Following a functional capacity evaluation she concluded that the applicant's capacity to undertake employment was largely unfettered. The only restriction was that he should avoid vibrating machinery. This view is supported by the medical evidence.

[29] The applicant agreed that the work he had conducted prior to obtaining employment with Total Landscaping involved jobs that were lowly paid. It would seem that his wage did not ever exceed the $390 gross per week that he was being paid with Total Landscaping. They were labouring jobs which he described as not involving great skill.

[30] I found the evidence of the applicant as to his attempts to obtain work and to his level of incapacity at various times to be most unsatisfactory. I have little difficulty in concluding that he was not interested in obtaining work of any kind during the period from January 2000 through to the time that he commenced his present employment on a part-time basis. Perhaps if a job of a kind that he particularly liked with a friend or acquaintance had fallen into his lap he would have taken it but otherwise he was not interested in employment. Further, I do not regard his present employment as indicative of his capacity to work. In my view, he at least has the capacity to work a full week in employment that does not involve him in heavy lifting or the operation of vibrating machinery. He has had that capacity since at least January 2000.

[31] The evidence that was led from other witnesses supports the view I have formed of the applicant and his capacity to work in suitable employment.

[32] The applicant called his general practitioner Dr MacDonald. The applicant first attended on Dr MacDonald in January 1997 and was diagnosed as having a musculo-ligamentous injury to his neck (whiplash) and a "healed C7 vertebral fracture". The doctor issued various medical certificates which became evidence in the proceedings. Those certificates indicated that the worker was fit for modified or alternative duties during the period but carried the initial qualification that he was not suitable for heavy work or the use of vibrating machinery. When he issued a certificate dated 1 November 2000, the doctor deleted reference to heavy work and the only injunction that remained on employment activity was that the applicant should not use vibrating machinery. The doctor agreed that there was a "raft of suitable employment opportunities available to the worker". He also agreed that since January 2000 the applicant could have had employment in jobs such as being a courier, a delivery driver, nursery worker, kitchen assistant, woodworker and in spare parts and various trades. Dr MacDonald was asked about taxi driving and said that there may be some limitations to sitting down for long periods of time but that he could not see any great problem with that.

[33] Dr MacDonald agreed that when the applicant recommenced work in April 1997 with Total Landscaping he, Dr MacDonald, considered the applicant was able to return to work on a full-time basis. In the following 21 months

he saw the applicant on approximately five occasions to do with difficulties the applicant had with working on the vibrating ride-on lawn mower. He agreed that there was a period of some 11 months between 1997 and 1998 when the applicant did not see him at all and he further agreed that the undertaking of the duties with Total Landscaping for that period and without complaint was inconsistent with someone who was significantly incapacitated for employment as claimed by the applicant.

[34] Dr MacDonald felt that the applicant was genuine in his complaints and that his complaints were consistent with the history provided. Given the doctor/patient relationship he enjoyed with the applicant he did not undertake any particular procedure to test the genuineness of the history or complaints of the applicant. There was no need for him to question the reliability of the applicant. He felt the pains suffered by the applicant on the left side near or within the hip were highly unlikely to be associated with the motor vehicle accident.

[35] Even with the complaints of the applicant as accepted by Dr MacDonald it was Dr MacDonald's view that the applicant was able to undertake employment in the wide range of categories identified. He suggested that a "work hardening" process should be undertaken to ensure that he was capable of working 38 hours per week. This was notwithstanding the physical activities the applicant undertook during the period of his unemployment.

[36] The applicant also called a rehabilitation specialist from the Royal Darwin Hospital, Dr Chin. Dr Chin gave evidence of having seen the applicant on a number of occasions. He expressed the view that the applicant suffered chronic neck pain and headaches following an acceleration/deceleration injury. He concluded that the injuries did not allow the applicant to perform his former duties as a landscaping labourer "totally and continuously" but that he did have the capacity to work full time in light semi-skilled and unskilled employment and also moderate unskilled employment. He referred to areas of employment including in retail, hospitality and administration. He agreed with other medical practitioners that the applicant should avoid aggravating factors and in particular operating vibrating machinery. Dr Chin thought that a gradual introduction to work was appropriate.

[37] Dr Chin agreed that the applicant was fit for employment (avoiding the aggravating factors) from at least February 2000. He did not suggest any limit on the number of hours that the applicant might work and, in February 2000, thought that he would cope with a "real work situation subject to avoiding vibrating machinery". He did not suggest that the applicant was not capable of full-time employment. In this regard he agreed that his views were the same as, or similar to, those expressed by other medical practitioners, notably Dr Curtis. He agreed that there was a "large range of other vocational activities that (the applicant) could undertake".

[38] Dr Chin expressed the view that the compensation claim being pursued by the applicant was a contributing factor to his expressed inability to work.

Elements of secondary gain were factors contributing to the lack of employment. At the time of giving his evidence the doctor considered the applicant to be fit for permanent and full-time duties subject to avoiding heavy lifting and vibrating machinery. In the reports of Dr Chin any reference to a limit on the hours that the applicant should work were simply to reflect the need to return him to full-time work in a graded fashion.

[39] The respondent to these proceedings called Dr Susanne Homolka an occupational physician. She saw the applicant at the request of his solicitors on one occasion being 22 September 2000. Dr Homolka formed the view that the significant injury suffered by the applicant was a whiplash type injury of the cervical spine and musculature. She felt that this was responsible for his ongoing neck stiffness and headaches. She described the fracture itself as "a relatively minor compression fracture". Dr Homolka was strongly of the view that the applicant suffered from a functional overlay which caused him to deliberately exaggerate his symptoms. In using the term "functional overlay" she explained that she did not intend to indicate that he was suffering from "an unconscious and genuine illness behaviour" but rather that "the non-organic effects displayed by the patient were conscious and deliberate". In relation to his employment she expressed the following opinion:

> "In occupational terms, Mr Collman is, in my opinion, considered fit for full time employment in any and all occupations he may choose to undertake, although jobs requiring repetitive heavy lifting, working in confined spaces, and remaining in one position for

> prolonged periods of time are likely to aggravate his residual symptoms and should be avoided."

[40] Dr Homolka was of the view that the condition of the applicant would not have varied greatly between the time that she saw him in September 2000 and late 1997 or early 1998 being a time 12 months after the initial injury. In reaching her conclusion that there was a conscious and deliberate exaggeration of symptoms, Dr Homolka relied upon an objective test that she performed and upon her observations of the applicant during the course of the clinical examination. Dr Homolka expressed her general agreement with the opinions of Dr Curtis regarding the earning capacity of the applicant.

[41] In cross-examination Dr Homolka agreed that the applicant suffered a significant injury to his cervical spine and expressed the view that he would "probably be experiencing some discomfort with respect to his cervical spine from time to time". She said he should avoid activities that aggravate those symptoms or at least minimise those activities. He should avoid sustained use of vibrating machinery.

[42] When it was suggested that 20 to 40 per cent of people who sustain whiplash injuries continue to complain of chronic neck pain leading to significant disability, Dr Homolka agreed. However she noted that with ongoing persistent genuine pain over a long period of time a disuse atrophy and fibrosis would become visible. She accepted that in the case of the

applicant there was some evidence of fibrosis of the muscles and early development of osteoarthritis.

[43] Dr Homolka felt that a graduated return to work was generally desirable but was not necessary in this case. The fact that the individual had been spending time at the gym and spending significant periods of time working with cars in a mechanical environment would make a difference to the need for a graduated return.

[44] The respondent also called Dr Gale Curtis who is an orthopedic surgeon. He saw the applicant in February 1999 and conducted a reassessment in February 2000. In February 2000 he expressed the view that it was time for "this young man to get back to work" and indicated a wide range of employment available to him. At that time he described, in a medical report, the applicant as presenting with "residual soft tissue symptoms .... followed by a chronic pain type syndrome, some of which persists at the present time". He regarded the applicant as being "fit for full-time duties and I would not place too many restrictions on him". However I note that in another report addressed to a different insurer, Dr Curtis indicated that the applicant should undertake lighter work where he is not reliant totally on his back and neck and where there can be flexibility with the respect to change of posture. He felt that the applicant was capable of working a forty hour week in suitable employment.

[45] Dr Curtis expressed the view that there were many inconsistencies in relation to the presentation of the applicant. He agreed that early post traumatic osteoarthritic changes would indicate support for the complaints made by the applicant. However Dr Curtis felt that he was not "as bad as he made out he was" and he determined this by the tendency of the applicant to exaggerate some matters and to avoid others. Notwithstanding that observation, Dr Curtis regarded the applicant as continuing to experience some ongoing symptoms of chronic pain syndrome. His conclusion was that the applicant was fit to return to work as early as February 2000.

[46] Dr Curtis, along with other doctors, felt that there was an element of depression involved in the presentation of the applicant. That observation did not alter the conclusions they drew.

[47] Ms Bilato encouraged the applicant to return to employment and gave him assistance and advice designed to achieve that goal. In her efforts to get him back to employment she steered him away from jobs that were unsuitable for him because they involved the use of vibrating machinery. She agreed that her service did not implement any pain management strategies, however he was sent to physiotherapy for the purposes of training relevant muscles. After a period she formed the view that the applicant was not interested in looking for work and that he was making minimal effort in that regard. Her conclusions were that the restrictions on the applicant's ability to undertake employment from October 1999 onwards were "relatively slight in terms of the range of vocations that were closed to him". He was a fit and healthy

man who undertook a regular exercise program including attendances at the gymnasium. She concluded that he was not motivated to obtain employment. She felt that he lacked some self esteem and that he was feeling down. She endeavoured to encourage him by informing him that he would regain self esteem by returning to the workforce.

[48] Ms Bilato noted that in November 1999 the applicant was "preoccupied with the continuation of his weekly benefits from the Territory Insurance Office." He was concerned that his entitlements would be reduced. Ms Bilato apparently made some inquiries of the Territory Insurance Office. There was no intention to reduce. The Territory Insurance Office was at that stage waiting for further information from Dr Linco. Ms Bilato observed that the applicant understood the benefit system applicable under the *Motor Accidents (Compensation) Act* "very well".

[49] Ms Bilato agreed that a graded return to work was a good idea although it depended upon the individual. Whether or not a graded return was required was something she intended to discuss with Dr Linco. However, the applicant did not see Dr Linco again and returned to Dr MacDonald. The final report of Ms Bilato was made in February 2000 and that was the time at which her involvement in this matter ceased.

[50] I do not accept the submission made on behalf of the applicant that he would require a graduated return to work. I accept the evidence of Dr Homolka that

a graduated return to work was not important in this case because of the physical activities undertaken by the applicant during his unemployment.

[51] The respondent called evidence as to work available to the applicant during the relevant period. I received by consent a report of a psychologist, Jennifer Cupitt of Advanced Personnel Management. Ms Cupitt, who undertook a number of tests in relation to the applicant, expressed the view that he would have been capable of performing a large variety of employment positions from February 2000. Examples of suitable employment included nursery work, retail sales, courier work, kitchen hand, theatre attendant and taxi driver. It was noted by Ms Cupitt that the applicant was at the time of assessment employed with Windscreens Territory and that he "is happy with his current employment …and that this holds a potential future for ongoing employment".

[52] I also received evidence from individual employers. Ms Bronwyn Simmonds, who is the Human Resources Officer with the Darwin City Council, gave evidence as to the availability of employment with the Parks section of the Council. She indicated that a person employed at an entry level 2 would be an unskilled labourer who has some interest in gardening or landscaping. When the circumstances of the applicant were put to her she stated that he would be a desirable employee. The physical restrictions of avoiding the use of vibrating machinery and heavy lifting would not be a problem and the various complaints made by the applicant during the relevant period would also not be a problem. She indicated that the

remuneration for a person with no dependants employed at the level 2 designation is a gross wage of $28,281 per annum with an additional weekly district allowance of $54.70 giving a gross weekly wage of $598.56. There was the opportunity for promotion for an individual if desired.

[53] Ms Simmonds informed the Tribunal that the Darwin City Council has a number of employees in the relevant teams who are either being rehabilitated or who are placed on restricted duties such as avoiding the use of chain saws and observing lifting restrictions. Allowance is made for a person's physical restrictions provided they can carry out the duties necessary for the particular job. She informed me that employment is regularly available for persons working in the horticultural teams due to a high turnover of staff.

[54] I heard from Mr Frank Bost who is the director and manager of Darwin Despatch Pty Ltd a courier company. Mr Bost gave evidence as to the work and remuneration of people employed in his company. However in cross-examination it was revealed that he had not engaged any new employees (other than on a short term part time basis) since at least January 2000. His evidence did not assist me as to a finding that employment of a suitable kind was available for the applicant during the relevant period.

[55] I received, by consent, a statement of Andrew Fry the manager of the Darwin and Casuarina Cinemas operated by Birch, Carroll and Coyle. He informed me that his company employed 65 people including some 20 new

staff members from January 2000 until the present time. Employment was available as an usher or candy bar assistant. The need to avoid heavy repetitive lifting and the use of vibrating machinery would not cause any difficulties for persons employed by his company. There is no need for previous experience and on the job training is provided. Many employees are engaged on a casual basis working 30 to 36 hours per week and being paid at a base level of $14.20 gross per hour.

[56] The respondent called Anton John Dew the Assistant Services Manager of Bridge Autos to give evidence as to the availability of employment with his organisation. Bridge Autos employs two to three new apprentice mechanics and one to two new trainee parts interpreters every year. Advertisements are placed in the local newspaper and there are usually fifteen to twenty applicants. The circumstances of the applicant including his complaints was put to Mr Dew and he expressed the view that he would be a suitable applicant for both positions. He said there is difficulty obtaining suitable applicants and from the fifteen to twenty who do apply "we are struggling sometimes to – to even get one applicant that's suitable for the position". He said the fact that someone had been out of work for a year or more would not be a problem provided they had a "track record" which indicated their willingness to work.

[57] Each of the parties presented evidence as to the employment of taxi drivers. There was no dispute that the applicant was able to work as a taxi driver subject to obtaining the appropriate licence. The evidence was that there is

always a shortage of drivers in the taxi industry and provided a person has a relevant licence he or she would be able to obtain work almost immediately. There is no suggestion that the injury suffered by the applicant and the complaints that he continues to make would in any way preclude him from working as a taxi driver.

[58] The applicant called evidence from Mr Ken Cohalan to the effect that the remuneration received by taxi drivers was extremely low. Mr Cohalan had been engaged by the Taxi Council of the Northern Territory to prepare a submission to the Northern Territory Government in relation to reform of the Northern Territory taxi industry and his calculations were made in support of the preliminary submission that he made. Unfortunately the calculations were based upon assumptions and estimates. Mr Cohalan was not provided with information regarding the actual income of drivers within the industry and he therefore had to estimate that income by reference to assumed kilometres driven and assumed reward received. I found the calculations to be based on speculation and to be unhelpful. Mr Cohalan said that he was not able to obtain direct information regarding the actual income of drivers within the time he had available.

[59] I received evidence from two drivers of taxis, David Lapsley and Gregory Palmer. They gave evidence of the fluctuating returns that drivers receive due to seasonal changes and to what is happening in Darwin at various times of the year. It is clear that the level of remuneration depends upon many factors including the skill of the driver.

[60] I also received evidence from Mr Glen Batchelor who is a self-employed taxi driver and also part of the management team of City Radio Taxis. In his managerial role he has access to information regarding the earnings of drivers associated with City Radio Taxis and he provided that information to the Tribunal. The range of incomes available for a driver working six 12 hour shifts per week was from around $500 per week in the wet season to around $700 to $800 per week in the dry season. He advised that a good driver could earn up to $1000 per week before income tax during the dry season. Given that the information provided by Mr Batchelor related to actual income as opposed to the complex and imprecise method adopted by Mr Cohalan I accept the evidence of Mr Batchelor. It is not possible to determine with accuracy the returns the applicant would have received had he undertaken this work. Relying on Mr Batchelor and bearing in mind the evidence of Mr Lapsley and Mr Palmer I find it likely that he would have been able to earn an average of around $500 per week gross over a year.

[61] The applicant submitted that because there was likely to be more than one applicant for each identified position there was no work "available" to the applicant. I reject that submission. There were numerous positions available to him over a period of time. The applicant had skills and interests that made him an attractive proposition for employment in the positions available with the Darwin City Council and with Bridge Autos. In addition there was always work available for taxi drivers.

[62] I find that the applicant suffered a reduction in his capacity to earn income from personal exertion in that his injuries prevented him from working in employment that necessarily involved the lifting of heavy weights and the use of vibrating machinery. Notwithstanding that reduction in his capacity to earn income from personal exertion the applicant had a significant continuing capacity to work and to earn income. That capacity was present throughout the relevant period and for a substantial period of time prior to the cessation of payments of compensation in January 2000.

[63] In my opinion the respondent has demonstrated that there was work available to the applicant throughout the relevant period. The applicant's failure to procure employment resulted from his own inactivity and not from any incapacity he suffered or anything to do with the unavailability of suitable employment. There was work reasonably and readily available to him, even accepting the complaints he makes, as demonstrated by the evidence of Ms Simmonds, Mr Batchelor and Mr Dew. The work available to him included taxi driving, apprentice mechanic, cinema attendant, trainee parts interpreter and level 2 employee with the Darwin City Council. The most profitable employment available to him is reflected in the evidence of those witnesses and in the awards that have been received into evidence. That evidence shows that the remuneration available to him throughout the relevant period would be in excess of eighty-five percent of average earnings of wage earners in the Territory. There is therefore no compensation payable to him under s 13 of the Act.

[64] The application is dismissed.

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