PARTIES:	SEDCO FOREX AUSTRALIA PTY LTD v DAVID BRIAN SJOBERG
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 19 of 1997
DELIVERED:	2 December 1997
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JUDGMENT OF:	GALLOP A/CJ, MILDREN and BAILEY JJ

CATCHWORDS:

Workers Compensation – Appeal – appeal on a question of law – Work Health Act 1986 (NT) – Construction of definitions of "normal weekly earnings" and "ordinary time rate of pay"

Work Health Act 1986 N.T., s49(1)

Workers Compensation – Respondent worker employed by appellant employer as a casual roustabout and later as a casual floorman – Worked two week 'hitches' (two weeks on and two weeks off duty)– Worker partially incapacitated during second hitch of employment – Respondent made successful claim for compensation – Issue before Appeal Judge and Work Health Court limited to method by which applicant's compensation was to be calculated.

Workers Compensation – Work Health Act – s49(1) – definition of normal weekly earnings – issue as to a 'purposive approach' being adopted to determine the meaning of "ordinary time rate of pay" only arises for consideration if paragraph (a) of definition of "normal weekly earnings" is applicable in this case. Paragraph (a) can only apply to workers whose weekly remuneration is fixed in whole or in part by reference to some fact or other than the number of hours worked.

AAT Kings Tours Pty Ltd v Hughes (1994) 99 NTR 33 at 40 – Considered

Workers Compensation – s49(1) Work Health Act – definition of "normal weekly earnings" – paragraph (1)(ii) of definition – Worker who is "remunerated in whole or in part other than by reference to the number of hours worked" – Respondent worker was paid in reference to the number of ***days*** *during which he performed work – Important aspect of respondent worker's case was the absence of any "normal weekly number of hours of work" which could attract the application of paragraph (a) of the definition – Appeal allowed as to manner in which respondent worker's "normal weekly earnings" are to be calculated.*

Workers Compensation – Work Health Act – s49(1) definition of "normal weekly earnings" – Calculation of "the average gross weekly remuneration which during the twelve months immediately preceding the date of the relevant injury was earned by the worker during the week that he was engaged in paid employment" – Work Health Court wrongly ordered that only the weeks in which the worker actually worked were to be counted for the purpose of working out his average weekly remuneration.

Workers Compensation – Worker's loss of earning capacity – calculation of amount worker "is reasonably capable of earning" –Work Health Act s65(2)(b) – Whether certain allowances would be excluded from the amount the worker was "reasonably capable of earning" – Confirming Appeal Judge's ruling on point, "it would be quite inequitable for relevant allowances to be excluded from the calculation of a worker's "normal weekly earnings" of "ordinary time rate of pay", but count against him in assessing the amount that he is "reasonably capable of earning" for purposes of assessing loss of earning capacity – Appeal as to how the amount which the worker is reasonably capable of earning is to be assessed is dismissed.

Work Health Act 1`986 (N.T.) s 65(2)

REPRESENTATION:

Counsel:

Appellant:	Mr T Riley QC
Respondent:	Mr I Nosworthy

Solicitors:

Appellant:	Ward Keller
Respondent:	Hunt & Hunt

Judgment category classification:	B
Judgment ID Number:	BAI97032
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BAI97032

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

No. AP 19 of 1997

ON APPEAL from the judgment of Justice Angel in proceedings No. 200 of 1995

BETWEEN:

SEDCO FOREX AUSTRALIA PTY LTD
Appellant

AND:

DAVID BRIAN SJOBERG
Respondent

CORAM: GALLOP ACJ, MILDREN and BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 2 December 1997)

GALLOP ACJ

I have read the judgment of Bailey J in draft form. I agree with his Honour's conclusions and reasons and have nothing to add.

MILDREN J

I agree with the judgment of Bailey J, a draft of which I have had the advantage of reading, and with the orders which he proposes.

BAILEY J

This appeal raises questions of construction relating to the definition of "normal weekly earnings" provided by section 49(1) of the *Work Health Act* ("the Act") and, in relation to a worker's loss of earning capacity within the meaning of section 65(2) of the Act, calculation of the amount, if any, the worker is "…reasonably capable of earning…" referred to in paragraph (b) of that sub-section.

The appellant employer appeals from the judgment of Angel J given on 4 July 1997, allowing an appeal by the respondent worker from a decision of the Work Health Court as to the respondent's "normal weekly earnings" and dismissing the appellant's cross-appeal from the decision of the Work Health Court to exclude certain allowances and benefits from the amount which the respondent was "reasonably capable of earning".

The respondent worker commenced employment with the appellant employer on 26 March 1991. He was initially employed as a casual roustabout on an off-shore oil rig. He worked a two-week "hitch" in that capacity — a "hitch" being two continuous weeks of work (seven days a week, ten hours a day) in a standard work cycle of 28 days (two weeks on and two weeks off

duty). After a week on shore, in which he did not work, the respondent worker was employed on 17 April 1991 for a second hitch as a casual floorman. On the 23 April 1991, the respondent worker suffered an injury in the course of his work which left him partially incapacitated for work.

The respondent worker made a successful claim for compensation under the Act. The issue before Angel J and the Work Health Court was limited to the method by which his compensation was to be calculated.

The Work Health Court found as a fact that the respondent worker's rate of pay was with one exception (an additional payment of 17.1%) in accordance with the Oil Drilling Rig Workers (Offshore Mobile Drilling Rigs) Award 1984 ("the Award"). In accordance with the Award, as a casual employee, the respondent worker was entitled to be paid on a daily basis at the rate of twice the daily rate fixed for "permanent" employees plus 20%. The remuneration for permanent employees was calculated by reference to an annual wage rate, with the "daily rate" relevant to the respondent worker being equal to 1/365 of the annual rate.

The precise details of wage calculation are not important for present purposes. However, it is a matter of substantial significance in the submissions of the appellant employer that as a casual floorman the respondent worker would be entitled to receive remuneration of $305.10 on a daily basis, while a "permanent" employee engaged in such work would receive wages equivalent to a daily rate of $127.12 (with various additional payments available for work

outside of ‘normal’ hours or performed during the two week ‘off’ period of a standard work cycle of two weeks on and two weeks off duty).

In allowing the respondent worker’s appeal from the Work Health Court, Angel J ruled that the “normal weekly earnings” of the respondent for the purpose of the Act is the sum of $2,135.70 (i.e. seven times the daily rate applicable to casual employees).

Mr Riley QC, for the appellant employer submits that Angel J, in reaching this conclusion, erred in interpreting and/or applying the proper meaning of “normal weekly earnings” as defined in section 49(1) of the Act.

Section 49(1) provides in so far as is relevant for present purposes:

> “‘normal weekly earnings’, in relation to a worker, means —
>
> (a) subject to paragraphs (b), (c) and (d), remuneration for the worker’s normal weekly number of hours of work calculated at his ordinary time rate of pay;
>
> (b) …
>
> (c) …
>
> (d) where
>
> (i) …
>
> (ii) subject to paragraph (b) or (c), the worker is remunerated in whole or in part other than by reference to the number of hours worked,
>
> the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he was engaged in paid employment;
>
> ‘ordinary time rate of pay’ means —
>
> (a) in the case of a worker who is remunerated in relation to an ordinary time rate of pay fixed by the terms of his employment — the time rate of pay so fixed; or
>
> (b) …
>
> the average time rate of pay, exclusive of overtime other than where the overtime is worked in accordance with a regular and established pattern, earned by him during the period actually worked by him in the service of

his employer during the period of 12 months immediately preceding the date of the relevant injury;"

On behalf of the appellant employer, Mr Riley QC's primary submission is that while, as Angel J held, paragraph (a) of the definition of "normal weekly earnings" is applicable to the respondent worker, paragraph (a) of the definition of "ordinary time rate of pay" should have been construed as referring to the daily rate of remuneration payable to a floorman employed on a permanent (or 'ordinary') basis rather than on the casual (or 'extraordinary') basis upon which the respondent worker was engaged at the time of the accident resulting in his partial incapacity.

Mr Riley QC emphasises that under clause 5(k)(ii) of the Award:

"(ii) An employee shall not be engaged as a casual employee for a continuous period of no more than two work cycles except for the relief of permanent employees taking leave in accordance with clauses 13, 14, 17 and 21 of this Award."

It is clear that aside from relief of permanent employees taking leave, the intention of this clause is to limit very substantially the period during which an employee might be employed on a casual basis. In Mr Riley QC's submission, by interpreting the respondent's "ordinary time rate of pay" as the daily rate payable to a casual floorman rather than that payable to a permanent employee, the respondent worker would receive weekly payments of compensation based upon an income some 240% greater than he could have earned if he had suffered no partial incapacity and had been offered employment on a non-casual basis. Subject to the provisions of the Act, the respondent worker would be entitled to receive weekly compensation based

upon such a figure until he attained the age of 65 years, notwithstanding that the Award limited casual employees to a continuous period of no more than eight weeks employment (two work cycles) aside from the special circumstances referred to in clause 5(k)(ii) of the Award.

In Mr Riley QC's submission, the result of this interpretation is absurd and effective to defeat the purpose of the Act which, according to the unanimous decision of this Court in *AAT King's Tours Pty Ltd v Hughes* (1994) 99 NTR 33 at 40:

> "…appears to be to provide to the worker during disability amounts by way of compensation calculated by reference to the normal weekly earnings **which he could have counted upon receiving** if there had been no disability. To that extent it reflects an 'income maintenance' approach." (emphasis added)

The appellant employer's position is that in no sense could the respondent worker have counted upon being employed on a casual basis if there had been no disability; on the contrary, the terms of the Award would have prevented him from continuing upon such a basis for any significant period, let alone until he reached the age of 65 years.

The alleged absurdity of the result produced by relying on the casual daily rate as the basis for calculating the respondent worker's continuing entitlement to weekly compensation can be illustrated by reference to an order of the Work Health Court which is not subject to challenge by either party. The Court ordered that from 4 or 5 January 1993 to date (and continuing) the respondent worker is entitled to his "normal weekly earnings" minus the weekly earnings

he would have received as a **permanent** utility attendant had he remained in employment as a permanent utility attendant.

There is no challenge to the finding that the wage of a permanent utility attendant is the appropriate figure for calculating the respondent worker's (partial) loss of earning capacity pursuant to section 65(2) of the Act — albeit the appellant employer disputes the extent to which certain allowances and benefits should be excluded from the Award wage for this position (a matter dealt with later in these reasons).

According to the Award, the annual wage rates for a 'permanent' floorman and utility attendant are $39,625 and $38,183 respectively. To these figures must be added an over-Award payment of 17.1%, resulting in figures of $46,4090 and $44,712 respectively. The difference is $1,688 p.a. — representing the gross loss of earning capacity by a person who suffers a partial incapacity which results in him being unable to continue as a floorman, but fit to be employed as a utility attendant. In contrast, by adopting the casual daily rate as the basis for calculating "normal weekly earnings", the gross loss of earning capacity for the respondent worker increases to $66,649 ($305.10 x 365 = $111,361 minus $44,712); a figure which would result in the respondent worker being entitled to receive the maximum weekly compensation payable under the Act — despite the very small loss of real earning capacity when measured against the Award rates for employment on a non-casual basis.

Mr Riley QC submits that such a result could not have been the intention of the legislature. He urges this Court to adopt a purposive approach to the

construction of the Act; and in particular to construe the "ordinary time rate of pay" of the respondent worker by reference to the permanent (or non-casual) Award rate for a floorman, rather than the 'extraordinary' rate fixed for casual employees to compensate for the insecure and short term nature of such employment.

The approach of Angel J is summarised in the following passage of his judgment (at p8):

> "The idea of worker's compensation is to compensate people for what they would have got if they had still been able to work. The evidence in this case is that the worker was to receive pay at the casual rate, and the learned magistrate found that there was no intention to become a permanent worker. Even if the magistrate had found differently, it appears that the legislation adopts a statutory formula for working out such compensation, and does not take into account prospective possibilities. The statutory scheme is different from the common law method of assessment for damages."

Mr Nosworthy for the respondent worker submits that Angel J is correct in his interpretation of the worker's "ordinary time rate of pay". In his submission, there is no ambiguity in the Act's definition of this term and, accordingly, no room for adoption of a purposive approach. The worker, according to Mr Nosworthy, is one "remunerated in relation to an ordinary time rate of pay fixed by the terms of his employment", i.e. the "ordinary" time rate of pay for **this** worker was the rate fixed for casual employees under clause 5(k)(iii) of the Award:

> "(iii) A casual employee shall be paid on a daily basis at the rate of twice the daily rate plus 20 per cent."

In such circumstances, the Act defines the "time rate of pay so fixed" as the worker's "ordinary time rate of pay" and there is simply no basis to substitute some other rate of pay fixed for workers employed, engaged upon similar work but under different terms and conditions.

The correct construction of "ordinary time rate of pay" is elusive given that section 49(1) of the Act seeks to define this concept by reference to the very words which are the subject of definition. Mr Riley QC submits that some meaning must be ascribed to the adjective "ordinary" while Mr Nosworthy suggests that the answer lies in a close examination of a particular worker's terms of employment: i.e., where the relevant terms of employment define a rate of pay by reference to the time worked, by definition this is the particular worker's "ordinary" time rate of pay, regardless of what other workers might be entitled to receive for performing similar work.

Mr Riley QC has sought to rely upon a number of authorities which have adopted a purposive approach in relation to particular provisions of the Act and in relation to the interpretation of workers compensation legislation elsewhere. None of the cases relied upon are of direct relevance to the present definition and Mr Nosworthy seeks to distinguish them on the basis of the clear words of the provision.

While I consider that there is a good deal of force in the submissions of Mr Riley QC as to the proper approach to be taken to the word "ordinary" in the Act's definition (and there is even greater force in his observation that the approach adopted in the judgment appealed from leads to an absurd result), I

do not believe that it is necessary to reach a firm conclusion in the present matter having regard to an alternative submission on behalf of the appellant employer.

The question of "ordinary time rate of pay" arises only for consideration if paragraph (a) of the definition of "normal weekly earnings" is applicable in the present circumstances. That paragraph is expressed to be subject to paragraphs (b), (c) and (d) of the definition. In Mr Riley QC's submission, paragraph (d)(ii) (which I have set out earlier in these reasons) is applicable to the respondent worker in that he is "…remunerated in whole or in part other than by reference to the number of hours worked".

In respect of this provision, Angel J said (at p8/9):

> "…I cannot agree with the submission that the worker earned his pay by reference to something other than the time he worked. I agree that the purpose of this limb is to cover circumstances where a worker's pay is according to a commission or by the number of items a worker produces. If the respondent's argument be correct almost any worker could come within this limb, because everybody's pay is determined by the type of job they have and their status, be it part time, full time or casual. This is not, in my view, what the legislature intended, or at least such intention is not evident from the language used."

Mr Riley QC submits that here the respondent worker was not remunerated by reference to the number of **hours** worked, but rather was remunerated by reference to the number of **days** worked (as to which see clause 5(k)(iii) of the Award to which I have referred). The detailed provisions of the Award dealing with extra payments for 'permanent' employees who are required to work outside of 'normal' hours or during the off period of duty during a standard four-week work cycle are inapplicable to employees engaged

on a casual basis. Casual employees under the Award are paid by the day — irrespective of whether they work more or less than a standard ten-hour shift.

In the passage from the judgment of Angel J quoted above, it is significant that his Honour referred to his lack of agreement that the worker earned his pay by reference to something other "than the **time** he worked". The issue in paragraph (d)(ii) of the Act's definition of "normal weekly earnings" is not whether the worker is remunerated other than by reference to the **time** worked, but rather the **number of hours** worked. It may be the distinction will matter little in most cases, but here I consider the difference has led the learned judge into error.

I am satisfied that the respondent worker was remunerated other than by reference to the number of hours worked. I do not consider that paragraph (d)(ii) is directed simply at workers who are rewarded by commission or the number of items a worker produces; nor do I share the concern of Angel J that almost any worker could come within paragraph (d)(ii) "…because everybody's pay is determined by the type of job they have and their status…" While it is true that everybody's pay is to some extent dependent on the nature of their work and perhaps status, I do not consider that paragraph (d)(ii) can be construed without regard to its context in the definition of "normal weekly earnings".

Paragraph (a) of that definition is directed at a worker whose remuneration can be assessed by reference to his "normal weekly number of hours of work calculated at his ordinary time rate of pay". It is implicit that

this paragraph can apply only to workers whose weekly remuneration bears a direct relationship to the number of hours actually worked by the worker. Paragraph (d)(ii) on the other hand, is applicable to a worker whose remuneration is fixed in whole or in part by reference to some factor other than the number of hours worked.

Mr Nosworthy's submission that the potential width of paragraph (d)(ii) on the basis of the appellant's submissions can be illustrated by saying that "a judge is paid for being a judge" and "a rocket scientist is paid for being a rocket scientist" is not to the point. A judge may well be paid for being a judge (and perhaps the same applies to a rocket scientist but that would depend on the terms of his employment) but in no sense is a judge paid by reference to the number of hours worked.

The reference in paragraph (d)(ii) to a worker who is remunerated in whole or "in part" by reference to matters other than hours worked necessarily means that it will not always be an easy task to decide whether a particular worker falls on one side of the line rather than the other.

In the case of the respondent worker, the terms of the relevant Award are clear; the worker was paid by reference to the number of **days** during which he performed work. He was not paid by reference to the number of **hours** worked during any particular day, week or "hitch". It may well be true that in one sense the respondent worker's remuneration was also in part determined by his status as a casual employee (rather than a permanent employee), but that is not the reason why paragraph (d)(ii) of the definition is applicable to him. An

important element in his case is the absence of any "normal weekly number of hours of work" which could attract the application of paragraph (a) of the definition.

The application of paragraph (d)(ii) of the definition of "normal weekly earnings" to the present respondent worker raises a subsidiary issue as to the calculation of:

> "…the average gross weekly remuneration which during the twelve months immediately preceding the date of the relevant injury was earned by the worker during the weeks that he was engaged in paid employment".

In the Work Health Court it was found that in the relevant twelve-month period, the respondent worker had worked on a basis of two weeks on and two weeks off for a period of 32 weeks for Odeco Drilling (UK) Ltd. In addition, he had worked for two weeks as a casual roustabout commencing on 26 March 1991 for the appellant employer and for a further week commencing 17 April 1991 as a casual floorman before the accident occurred on 23 April 1991.

The Work Health Court ordered that in calculating his average weekly remuneration, only weeks in which he actually worked were to be counted for the purpose of working out his average weekly remuneration. On this basis, the total earnings of the respondent worker at Odeco Drilling (UK) Ltd and with the appellant employer (less certain allowances) were to be divided by 19 (i.e. the number of weeks in which the worker **actually** performed work — 16 weeks with Odeco Drilling (UK) Ltd and three weeks with the appellant employer).

Mr Riley for the appellant employer submits that the Work Health Court was in error by ignoring the two-weeks on and two-weeks off nature of the respondent worker's employment with Odeco Drilling (UK) Ltd. In Mr Riley's submission, the earnings of the respondent worker should be divided by 35 (i.e. 32 weeks with Odeco Drilling (UK) Ltd plus the three weeks during which the respondent worker was engaged in paid work for the appellant employer).

This was not an issue required to be considered by Angel J in the light of his ruling that paragraph (a) of the definition of "normal weekly earnings" applied to the appellant worker.

The learned presiding magistrate, Mr Gillies, in the Work Health Court does not provide detailed reasons as to why he used a figure of 16 weeks (rather than 32 weeks) for the period of the respondent worker's employment with Odeco Drilling (UK) Ltd; presumably he focussed upon the closing words of paragraph (d) of the definition of "normal weekly earnings" that the average gross weekly remuneration was to be calculated by reference to amounts earned by the worker "during the weeks that he was engaged in paid employment". However, such an approach ignores the nature of the appellant worker's terms and conditions of employment with Odeco Drilling (UK) Ltd, i.e. that he was to work two weeks on and two weeks off. The nature of work on oil drilling rigs is for workers to work long hours; 7 days a week for periods of 14 days, followed by 14 days of inactivity. In practical terms, such a worker completes a similar number of hours of work in 14 days that a full-time shore based worker would complete in 28 days.

It would be highly artificial to ignore the nature of an oil rig worker's employment and count only the weeks that he **actually** worked on the rig. It is not suggested that such a worker has any choice to elect to work on the rig during his two-week periods of off duty. I consider that the nature of the respondent worker's employment with Odeco Drilling (UK) Ltd was such that he was engaged in paid employment during the entire 32 weeks of his engagement with that company. However, it does not follow that the same is true for the respondent worker's employment on a casual basis with the appellant employer. As I have noted, under the relevant Award the respondent worker was employed on a **daily** basis. Clause 6(a) of the Award also provides:

> "(a) Employees **other than casual employees** shall work on the basis of a duty period of two weeks followed by an off duty period of two weeks…: (emphasis added)

I also note that after the respondent worker's first (two week) hitch with the appellant employer as a casual roustabout, he stayed ashore for only one week before being employed as a floorman on a casual basis.

Accordingly, in calculating the respondent worker's gross weekly remuneration during the twelve months immediately preceding the date of the relevant injury, the worker's earnings from Odeco Drilling (UK) Ltd and the appellant employer are to be divided by 35 (weeks).

The last issue raised by this appeal concerns the calculation of the respondent worker's loss of earning capacity pursuant to section 65(2) of the Act. Section 65(2) now provides:

"For the purposes of this section, loss of earning capacity in relation to a worker is the difference between —

(a) his normal weekly earnings indexed in accordance with subsection (3); and

(b) the amount, if any, he is from time to time reasonably capable of earning in a week in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably available to him, and having regard to the matters referred to in section 68."

The provision was amended subsequent to the date of the respondent worker's injury in the present case — but the amendment is not material for present purposes.

In calculating the "most profitable employment reasonably available" to the respondent worker, the Work Health Court ordered that certain allowances (a clothing and boot allowance and a living away from home allowance) be excluded from the amount which he is reasonably capable of earning as a permanent utility attendant with the appellant employer. These exclusions were the subject of a cross-appeal by the appellant employer before Angel J.

Section 49(2) excludes certain allowances from the definitions of "normal weekly earnings" and "ordinary time rate of pay" in the following terms:

"(2) For the purposes of the definition of 'normal weekly earnings' and 'ordinary time rate of pay' in subsection (1), a worker's remuneration includes an over-award payment, climate allowance, district allowance, leading hand allowance, qualification allowance, shift allowance (where shift work is worked in accordance with a regular and established pattern) and service grant, but does not include any other allowance."

Angel J dealt with the issue raised by the cross-appeal in the following terms:

> "It was submitted that allowances which have been specifically excluded from the calculation of 'normal weekly earnings' should be included for 'earnings'. The respondent's contention would mean that the allowances would not be included in the positive figure of the 'normal weekly earnings', the starting point for compensation, but would be added to the subtracted figure of the potential earnings. This is beneficial legislation and that is not what, in my view, the legislature intended. I think the short answer to the submission is that this is not an earning at all but a payment in lieu of a disability incurred as a result of working, albeit only paid if one works."

Before this Court, Mr Riley QC has relied upon the same submissions made on behalf of the appellant employer before both the Work Health Court and Angel J (i.e. the absence of a provision equivalent to section 49(2) applying to section 65(2) suggests that the legislature's intent was that all allowances are to be included for the purpose of calculating the amount which a worker is reasonably capable of earning). I respectfully agree with the conclusions reached by Angel J and the reasons advanced in support of that conclusion in relation to the cross-appeal. Notwithstanding the absence of express reference to the question of allowances in section 65(2) of the Act, it would be quite inequitable for relevant allowances to be excluded for the calculation of a worker's "normal weekly earnings" and "ordinary time rate of pay", but count against him in assessing the amount that he is "reasonably capable of earning" for the purpose of assessing loss of earning capacity. I agree with Angel J that such allowances are not "earnings" at all, but rather are payments in lieu of a disability incurred as a result of working, albeit only paid if one works.

The appeal should be allowed to the extent indicated in these reasons, i.e. as to the manner in which the respondent worker's "normal weekly earnings" are to be calculated. The appeal as to how the amount which the worker is reasonably capable of earning is to be assessed is dismissed.

In light of the complex nature of the orders from the Work Health Court and the fact that the issues in the present appeal deal with only some aspects of such orders, the parties should draw up draft minutes of order for the Court's consideration in light of the above reasons.

As the appellant was substantially successful, the respondent should be ordered to pay the appellant's costs of the appeal, and in the Court below.
