Chairperson:	R P J Noonan	IN THE MATTER OF Appeal No. P483 of 1995 by Donald Ross **PHILLIPS** against a decision of the Commissioner of Police to refuse to classify a period of absence as being duty related.
Tribunal Members:	J Gillett D Spooner	
Date of Hearing:	17 January - 21 January 2000	

INSTRUMENT OF DECISION

The appellant, Mr Donald Ross Phillips, a former Sergeant of Police, is appealing against a decision of the delegate of the Commissioner of Police (the respondent) not to approve his absence from duty from 10 May 1995 to 17 October 1996, and then from 14 November 1996 to 4 March 1999, as "hurt on duty". The break in the period of almost four years continuous absence came about when the appellant returned to work to perform "restricted duties" for approximately four weeks commencing on 18 October 1996. The appellant claims that his absence for the relevant periods was caused by the exacerbation of a back condition which previously had been accepted by the respondent as "hurt on duty".

The appeal was heard over five days from 17 to 21 January 2000 inclusive. The appellant was represented by Mr R. A. Jenkins, solicitor. The respondent was represented by Mr E. Wasilenia, of counsel instructed by Ms K. Moye, a solicitor of the Office of the Police Service Solicitor. We received into evidence a body of documentary material, including medical reports tendered by both parties; we also heard oral testimony. The following witnesses were called on behalf of the respondent:

Ms Rae Doak, Rehabilitation Officer of the Police Service;
Mr Alan Rugless, retired Inspector of Police;
Senior Sergeant David Knowles;
Superintendent John Laycock; and
Dr Robert Smith, Consultant Surgeon.

We also heard evidence from the appellant and from his wife.

Facts

The following facts relevant to the issues before us are either not in dispute, or, where there is dispute, appear to us from the evidence to be the more likely.

The appellant, whose date of birth is 13 January 1950, joined what was then the NSW Police Force in 1975. It appears that he was also, at that time, a member of what is now the Australian Army Reserve. He carried out mainly general police duties in the Metropolitan Area, but also had periods where he carried out investigative duties, and other types of duties, such as with the Water Police. He was posted to general duties at Cootamundra Police Station in May 1982. The appellant was married, and there were two children of the marriage, both boys. His wife was employed by the Department of School Education as a Teacher.

From Cootamundra, the appellant was transferred to Port Macquarie in July 1986. He was by this time a Senior Constable. Mrs Phillips obtained a transfer to a teaching position at a school close to Port Macquarie. The appellant performed general duties at the Port Macquarie Patrol until early 1995. In addition to general duties, the appellant who was a qualified Weapons Instructor and Resuscitation Instructor, also, from time to time, undertook the training of other police in the Mid North Coast District, in the use of weapons and in resuscitation .

By the time of his transfer to Port Macquarie in 1987, the appellant's career in the Army Reserve had progressed. He had completed officer training, and was commissioned in 1977. In 1985 he was appointed a Company Commander at the rank of Temporary Captain. On 27 August 1986, he was promoted to the substantive rank of Captain. His service had included a period with a Commando Company, and thereafter periods in Infantry units. In 1990 he attended the Intermediate Staff College. Subsequently, he was promoted to the rank of Major and, on 1 January 1991, was appointed the Commander of "D" Company, 41st Battalion Royal New South Wales Regiment, at Port Macquarie.

On 11 October 1992, the appellant commenced fourteen days military leave during which he took part in an Army Reserve exercise near Grafton, and then engaged in military training at Singleton Army Camp. He returned to police duties on 26 October 1992. On 1 November 1992 he commenced recreational leave which he completed on 14 November 1992. He then undertook a Resuscitation Course, as part of his police duties, on 23 and 24 November 1992.

On 6 November 1992, while he was on recreational leave, the appellant attended Dr Ashby, his local general practitioner, complaining of lower back pain. Dr Ashby's notes show the appellant stated the pain was of one week's duration and was radiating down his right leg. The S1 area was said to be "tender". The doctor recommended physiotherapy. The appellant attended Dr Ashby again on 14 November 1992 when it was noted he was "not much better". He was prescribed anti-inflammatory medication. He then resumed his normal police duties.

The appellant again went on annual recreational leave from 29 November 1992 to 12 December

1992. On 10 December 1992, while still on leave, he attended Dr Ashby complaining of "severe pain". He was rostered to be off duty on 13 and 14 December 1992. On 14 December 1992 he was admitted to Port Macquarie Hospital where a CT scan showed "L5S1 (R) disc protrusion". He then remained off duty "on sick report".

On 31 December 1992 the appellant was transferred by Air Ambulance to Royal North Shore Hospital at Sydney where he underwent surgery on 5 January 1993. On his return to Port Macquarie, the appellant saw Dr K. McDonnell on 18 January 1993. Dr McDonnell is a general practitioner who had been in practice with Dr Ashby. However, Dr Ashby had left the practice some short time previously.

It is not clear whether the appellant remained in hospital at Port Macquarie from his admission on 14 December 1992 until he was transferred to Sydney for surgery. There is in evidence an entry 92/921 on the "occurrence pad" at Port Macquarie Police Station dated 20 December 1992 at 4.40 pm, signed (and apparently typed) by the appellant, wherein he described experiencing "a sharp pain in the lower right area of my back" while performing duty in the station on the evening of 28 October 1992 when he picked up a manual typewriter and shifted it "within the station area". He then set out in detail subsequent pain and discomfort to his back which caused him to see Dr Ashby some days later, and eventually to be hospitalised and have surgery.

On 18 January 1993 Dr McDonnell issued the appellant with a medical certificate to the effect that the appellant was unfit for work until Monday 1 March 1993 as he was "recovering from spinal surgery". On 28 January 1993, the appellant completed a Claim for Hurt on Duty Benefits for

“injured lower back - disc protrusion L5S1 which occurred on 28 October 1992 at 10.30pm “whilst positioning a manual typewriter at Port Macquarie Police Station”.
On 3 February 1993 Dr McDonnell issued a further certificate to the effect that the appellant was “unfit for any duties until 1/4/93 and then will be fit for restricted duties only”. The certificate was attached to a New South Wales Police Restricted Duty Form which was completed and signed by Dr McDonnell, and which set out the type of duties the appellant could and could not perform. However, on 10 February 1993 the appellant again saw Dr McDonnell after which the doctor issued a certificate stating that the appellant was “fit for restricted duties from 12/2/93". Dr McDonnell also completed another Restricted Duty Form.

The appellant returned to restricted duties at Port Macquarie on 13 February 1993. He then applied for recreational leave from 28 February 1993 to 13 March 1993 so that he could attend an Army Reserve Staff Operations Officer Course in Sydney. His attendance at, and the completion of, this course was necessary to qualify him for promotion to Lieutenant Colonel. He successfully completed the course and returned to his restricted duties. He was subsequently cleared to resume normal police duties in July 1993, and did so.

In the meantime, the appellant’s Hurt on Duty Claim was investigated by the respondent’s officers. The appellant’s then Patrol Commander, Inspector Kay, was extremely doubtful that the appellant’s injury to his back had occurred as claimed. The respondent engaged the services of an Insurance Adjuster to assist in the investigation. In the course of the investigation the appellant was interviewed and completed a hand-written statement. After the investigation, the claim was eventually approved by the respondent’s delegate on 27 July 1993.

The appellant continued to perform general duties at Port Macquarie. At this time he was living with his wife and their two sons in a house they had purchased at xxxxxxxxxxxxx, Port Macquarie. The house and land backed onto the Hastings River. Mrs Phillips was then the Deputy Principal of Hastings Primary School at Port Macquarie. Some time before the middle of 1994 the appellant decided to apply for promotion. He says he formed the view that because of his rank and the length of time he had been stationed at Port Macquarie he was likely to be transferred. There were no vacancies for a Sergeant at Port Macquarie. There were, however, a number of vacancies for a Sergeant, as a Shift Supervisor, Sector Supervisor, and Beat Supervisor, in both the Metropolitan and country areas. When these vacancies were advertised about the middle of 1994 the appellant applied for a large number of them, perhaps as many as sixty altogether. At some stage in 1994 he also applied for the position of District Training Co-ordinator, Mid North Coast District at Port Macquarie. This was a position for a Senior-Sergeant.

Sometime either late in September or early in October 1994 the appellant was interviewed by a selection committee for a number of positions of Shift Supervisor. On 4 October 1994 the committee issued a report that it found the appellant to be the candidate with the greatest merit for appointment to one of three vacant positions of Shift Supervisor, City of Sydney - Sergeant. The appellant's nomination to this position was duly published in the Police Service Weekly. There were no appeals. His promotion to Sergeant and his appointment to that position was subsequently confirmed to take effect on 3 January 1995.

It is not clear whether the appellant was interviewed by a selection committee in respect of his

application for the position of District Training Co-ordinator at Port Macquarie. We think it likely that he was. However, he was unsuccessful in that application, the committee deciding that Sergeant David Knowles was the candidate with the greatest merit. Upon the publication of the nomination of Sergeant Knowles for that position, the appellant lodged an appeal to this Tribunal. The appeal was heard at Sydney on 7 December 1994, when it was disallowed.
For a number of reasons the appellant did not commence duty at City of Sydney Patrol until 27 February 1995, although he visited the City of Sydney Police Station early in January 1995. At the time he took up duty, or very soon after, he secured accommodation for himself at Balmain. His wife and children remained in the home at Port Macquarie. Late in 1994 Mrs Phillips, who was then Deputy Principal of Hastings Primary School at Port Macquarie, had applied to the Department of Education for transfer to a similar position in the Metropolitan area. No such position had become available up to the end of February 1995. The appellant returned to Port Macquarie during some, but not all, of his rostered days off. He did this initially by driving his own vehicle. Later he travelled by bus.

The appellant continued to perform his duties at City of Sydney Patrol until 10 May 1995. On that day he attended the surgery of Dr R Ramrakha, a general practitioner, close to his residence in Balmain, complaining of lower back pain. Dr Ramrakha issued the appellant with a certificate that he was unfit for any duties until 10 July 1995. He also gave the appellant a letter of referral to Dr Ditton of the Pain Management Clinic at Royal Prince Alfred Hospital. The appellant took no action on this referral. Instead, he returned directly to Port Macquarie the same day, on 10 May 1995.

He thereafter submitted an application for “compassionate transfer to a Mid North Coast District

Patrol close to Port Macquarie". This application was signed and apparently typed by the appellant, and it is also dated 10 May 1995. When and where he typed it is not clear. Shortly stated, the grounds of his application for transfer were twofold. One was his "present family situation" which included the fact that his wife was unable to find a comparable teaching position in the Sydney area, and the adverse affect on his family of his being separated from them and only returning on days off. The other was that the travel back and forth from Sydney to Port Macquarie severely aggravated his "previous hurt on duty back injury sustained in 1992". The appellant's case was referred to the Rehabilitation Section on 11 May 1995. Ms Doak had the carriage of the matter. She spoke to the appellant by telephone at his home on 16 May 1995. What transpired thereafter can be ascertained from the Case Notes, (made in most cases by Ms Doak), which are in the appellant's Rehabilitation Case Management File, and also from his Medical File, and from the relevant Industrial File, all of which are in evidence. We set out the following facts as being the more relevant.

On 16 May 1995 Ms Doak requested the appellant to lodge a further Hurt on Duty claim. He eventually did so on 31 May 1995, making application that his period of absence from 10 May 1995 to 10 July 1995 be approved as an exacerbation of his back injury suffered on 28 October 1982. He set out his attendance on Dr Ramrakha and then continued:

> "The exacerbation of this back injury and associated problems of permanent nerve damage to my feet and legs, has been brought about by the necessity to frequently travel back and forth between Port Macquarie where my family resides and to Sydney where I have been transferred. The constant pain that I suffer as a result of this Hurt on Duty injury to my lower back, is severely exacerbated by lengthy travel in motor vehicles...... In support of my application that this current Sick Leave is a continuation of my hurt on Duty Injury sustained on 28 October 1992 and **that I have suffered constant pain and suffering since this date** (emphasis added), I present the following and original documents for your consideration:"

The appellant then attached to his application a number of documents which included an entry on the Port Macquarie Patrol Occurrence Pad 94/191 dated 14 February 1994, a COPS (Computerised Operational Policing System) Event Summary entered at Port Macquarie Police Station on 25 January 1995, and three letters from Dr McDonnell. The investigation of his Hurt on Duty claim was then undertaken by the Police Service Workers Compensation Section. Although Dr McDonnell continued to certify the appellant to be unfit for any police duties (and actively to support the appellant's transfer back to Port Macquarie), the Police Medical Officer, Dr Peter Heery, who reviewed the appellant in July 1995 thought he would be fit to resume restricted duties on 21 July 1995. A Consultant Neurosurgeon, who saw the appellant on 6 July 1995, expressed the opinion that the appellant should remain on restricted duties. His report concluded:

> "Overall he has made a good recovery from a lumbosacral disc lesion and I would consider the degree of permanent impairment in relation to the lumbar spine at this stage to be no more than fifteen percent...... (He) requires only conservative management with occasional anti-inflammatory medication".

On 25 July 1995 Ms Doak telephoned the appellant and informed him that arrangements had been made for him to return to work on restricted duties at City of Sydney Patrol on 31 July 1995, and that arrangements would be made to do a work place assessment. The appellant told her that he expected the travelling would cause his lower back pain to increase and that he would see the Staff Officer Personnel about his transfer back to Port Macquarie. The next day Ms Doak again telephoned the appellant, told him what the restrictions on his duties would be, and informed him that he was to start back at Sydney at 7.00am on 31 July 1995. On the same day she sent a letter to the appellant confirming his starting date and time, and setting out the restrictions to his duty which were to apply. The appellant has given evidence that he did not

receive that letter. We think it more likely than not that he did receive it.

The appellant did not resume duty on 31 July 1995 as arranged. Instead, he rang City of Sydney Police Station and said he had a certificate from Dr McDonnell that he was unfit for duty until 21 October 1995, and would be "sending it in". Action was then taken within the City of Sydney Patrol to have the appellant directed to return to work. On 5 September 1995 the Commander Sydney District, Chief Superintendent Cluff, approved a recommendation by the District Staff Officer Personnel, Inspector Clarke, that the appellant be directed to return to work. Later the same day, Inspector Kay, the Patrol Commander at Port Macquarie called on the appellant at home and gave him a direction that he return to work at Sydney on 11 September 1995. At the same time Inspector Kay gave the appellant a copy of Ms Doak's letter of 26 July 1995. The appellant told Inspector Kay that he had a medical certificate from Dr McDonnell that he was unfit for work until 10 October 1995, and that he would not comply with the direction. He said he would contact Inspector Clarke. On 9 September 1995 the appellant forwarded to the Patrol Commander at City of Sydney an application for medical discharge from the Service.

In the meantime, as part of the investigation of the appellant's Hurt on Duty claim, he had been seen by a number of medical specialists at the request of the Compensation Section. The Section had also obtained a number of reports, including reports from the Acting Patrol Commander and other officers at the City of Sydney Patrol, from the Staff Officer Personnel Mid North Coast Region at Port Macquarie, and from the Patrol Commander at Port Macquarie. On 8 November 1995 the respondent's delegate decided not to approve the appellant's application. The appellant was notified of the decision on 15 November 1995. He lodged the present appeal, pursuant to

s.186(1) of the *Police Service Act 1990*, and s.24 of the *Government and Related Employees Appeal Tribunal Act 1980* (GREAT Act), on 28 November 1995.

On 1 December 1995 the appellant went to an Army Reserve Camp. He was there until 17 December 1995, during which time he held the post of Camp Commandant. He claims that he performed "no duties"; he concedes, however, that he was paid at the rate of a Major for the whole of the period of his attendance at the Camp.

The appellant's application for medical discharge was considered by the Police Superannuation Advisory Committee (PSAC) on 26 June 1996. The Committee decided to invite the appellant to show cause why his application should not be declined. The appellant subsequently submitted further medical evidence to PSAC.

From 5 July 1996 to 21 July 1996 the appellant attended a further Army Reserve Camp. Again, he held the post of Camp Commandant. He maintains that he did no work there, but he admits that he was paid for his attendance.

Towards the end of September 1996 the appellant's ordinary sick leave entitlement had run out; an application for special sick leave had not been granted; he had used up his outstanding recreational leave entitlement; and subsequently was approaching the time when his extended leave would also run out. He had written long letters to the respondent seeking to have his transfer to Port Macquarie approved and also seeking to have his application for special sick leave reconsidered. He was offered a transfer back to Port Macquarie at his previous rank of Senior Constable. He declined the offer. When he was on the point of being without pay, because all

leave of every type was used up, he agreed to return to restricted duties at City of Sydney Patrol.

The appellant commenced duty at Sydney on 18 October 1996. His restrictions were the same as those proposed in the letter from Ms Doak dated 26 July 1995. A workplace assessment was carried out. The appellant again resided at Balmain and commuted back to Port Macquarie on his rostered days off. He continued to perform his duties, including working overtime, until 13 November 1996 when he again went off work claiming that his restricted duties had caused his lower back pain to increase to the stage where he could no longer perform any duty. The appellant returned to Port Macquarie. At some time during 1997 he carried out project work for the Army Reserve. This was performed at home and required the appellant to make telephone calls, keep records on his computer, and furnish reports to an Army authority. He was paid at the rank of Major, on an hourly basis, for work done. He himself kept record of his hours.

Over the period of two and a half years from 13 November 1996 the appellant was seen by a number of medical specialists, some at the request of the respondent, and some to whom he had been referred by Dr McDonnell. In March 1997 he was referred by Dr McDonnell to the Pain Management and Research Centre at Royal North Shore Hospital Sydney where he was admitted on 26 March 1997 and underwent "lignocaine infusion and medial branch blocks bilaterally at two levels in the lumbar spine". The treatment was not successful. However, a Consultant Rheumatologist at the Centre recommended that he be considered for a 7 weeks residential program called ADAPT. The cost of the program was $5000 excluding meals and accommodation.

On 9 April 1997, at the request of the respondent, the appellant was seen by Dr Smith. Dr Smith was asked a number of specific questions by the Workers Compensation Section. He provided a report of his examination of the appellant and the answers to the questions. Essentially he found the appellant to be fit for restricted duties, not requiring heavy lifting or using excessive force. On 28 April 1997 the appellant made a request through City of Sydney Patrol that the Police Service meet the costs of the ADAPT program. His application was considered by the Workers Compensation Section, who sought further advice from Dr Smith. Following that advice, the respondent's delegate advised the appellant that the Police service would not meet the cost of the ADAPT program. The appellant did not undertake the program.

The appellant also made complaints to the respondent about the manner in which his hurt on duty claim and his application for compassionate transfer had been handled by the Service. He also complained about the time taken to consider his application for a lump sum compensation payment. The correspondence relating to his various grievances, and the responses made, are in evidence.

On 24 February 1999 PSAC issued a certificate that the appellant was unfit for any police duty because of the infirmity of chronic pain as the result of a lumbar lesion. He was medically discharged from the Police Service, his last day of duty being 4 March 1999. On 2 May 1999 the respondent's delegate decided that the infirmity suffered by the appellant was caused by the member being hurt on duty; the date of injury being 28 October 1992.

As a result of his medical discharge "hurt on duty" the appellant became entitled to a superannuation allowance (pension) at the rate of 72.75% of his final salary as a Sergeant. He subsequently applied for an increase in pension. On 2 November 1999 his pension was increased

to 85% of his final salary payable from 6 March 1999. He is presently considering applying to have his pension increased to 100%.

The evidence

The appellant gave evidence that he was suffering pain in his lower back when he commenced duty at City of Sydney Patrol on 27 February 1995. He says his condition had been aggravated by two incidents, both of which occurred after he resumed full duties at Port Macquarie in July 1993. The first incident is recorded as 94/141 in the Occurrence Pad on 14 February 1994, and relates the involvement of the appellant in the arrest of a man named Marshall. A struggle occurred in effecting the arrest. The report continues:

> "As a result of the struggle and falling to the floor whilst attempting to affect (sic) the arrest, I suffered a strong pain to the lower back, the site of a previous HOD injury. Later I experienced pain in both feet and burning sensation in both hands. These pains continued to the end of the shift. I do not intend at this point in going off sick. The PCR (Patrol Commander's Representative) was made aware of the pain I suffered as a result of the struggle during the arrest."

The appellant did not go off duty as a result of this incident, and was sufficiently fit to perform his normal duties, which included transporting prisoners from Port Macquarie to Maitland and Sydney. On some occasions he stayed away overnight and was paid travelling allowance. There is no indication that the appellant had any difficulty performing his police duties from 14 February 1994 until early 1995. His application for promotion highlights the excellence of his Army Reserve training and the skills, relevant to the duties of a Shift Supervisor, which he had acquired as a result of his military service. There is nothing in his application to suggest that if promoted to Sergeant, he would not be able to carry out fully the duties of Shift Supervisor.

We think it unlikely that the appellant informed the selection committee prior to its decision on

4 October 1994 that he was in any way handicapped from carrying out the duties of any position he was applying for. If, as the appellant has maintained in his evidence, and as he wrote in his application for Hurt on Duty benefits on 31 May 1995 he had suffered "constant pain and suffering since 28 October 1982", he has either deliberately concealed this fact in the second half of 1994, in case it adversely affected his chances of promotion to Sergeant (or Senior Sergeant), or he has grossly exaggerated his condition during that period.

The second incident is set out as a statement of the appellant in the COPS event summary of 25 January 1995, in the following terms:

> "At approximately 2.50 pm on Wednesday the 25th January 1994 (sic), whilst alighting from my personal vehicle which I had just parked in the Police carpark at the Port Macquarie Police Station to commence duties, I experienced a severe pain in my lower back, in the vicinity of a previous HOD injury. This pain caused a fair amount of discomfort to walk and the matter was noticed by Senior Sergeant Gunn when I reported for duty. I informed him of the pain I had experienced whilst alighting from my parked car. During the shift the pain in my lower back continued causing me further discomfort and inconvenience in sitting and walking. In addition I experienced pains in both legs and feet. I am not reporting off sick at this moment and have made an appointment to see my local doctor regarding this current situation with regard to my previous HOD injury to my lower back. During the afternoon shift Sgt Bennett was made aware of this pain that I was suffering as a result of the incident."

While the clinical notes produced on summons by Dr McDonnell do not show that the appellant attended him as a result of this reported incident, it appears that the appellant saw Dr W Strain, who was in practice with Dr McDonnell. On 27 January 1995 Dr Strain provided the appellant with a medical certificate that he was unfit to resume duty until 28 January 1995 because of "aggravation of lower back injury". The appellant then continued to perform his normal duties at Port Macquarie until he took up the position at City of Sydney Patrol some four to five weeks later.

We doubt that the appellant suffered any aggravation of his lower back condition when getting out of his motor vehicle on 25 January 1995. It is clear from Dr Strain's certificate that he was relying on what the appellant told him. In the light of subsequent events, we think this reported incident was fabricated by the appellant to bolster his case for returning to Port Macquarie after he took up duty in Sydney.

In his oral evidence the appellant claimed that the performance of his duties as Shift Supervisor, as well as the travel backwards and forwards to Port Macquarie, aggravated his back condition during the period from when he commenced that duty on 27 February 1995 until he went off duty on 10 May 1995. It is clear however that in both his application for compassionate transfer dated 10 May 1995 and his claim for Hurt on Duty Benefits dated 31 May 1995, he refers only to the affect on his back of the travelling, either by his own vehicle or by bus.

Former Inspector Rugless, who was the Station Controller, City of Sydney Patrol when the appellant took up duty there, gave evidence that he first met the appellant in January 1995 when the appellant called into the Station. He was surprised that the appellant was not about to take up his new duties then. He subsequently made inquiries to ascertain when the appellant would commence duty as the Patrol was short of Shift Supervisor Sergeants. The appellant subsequently commenced duty on 27 February 1995. Mr Rugless said that the appellant gave the appearance of a very fit person and showed no sign or any pain or discomfort to his back during the period 27 February to 10 May 1995, nor did he complain of suffering problems with his back. Mr Rugless also gave evidence of a conversation he had with the appellant about a week before 10 May 1995. The appellant said to him words to the effect that the travelling up and down to Port

Macquarie was starting to drive him mad and that he was going to apply for a transfer back to Port Macquarie. He said to the appellant words to the effect "You can't do that, you just got here." The appellant said he could do it "on compassionate grounds" as his wife didn't want to leave Port Macquarie. When Mr Rugless repeated his previous statement, saying words to the effect "You've just come down here, now you're telling me you want a transfer back". The appellant said "I've also got a HOD claim I can call up." Mr Rugless told him not to "start playing with things like that" and added "You're playing with fire and you're a bigger fool for telling me."

The appellant, in his evidence, denied that such a conversation ever took place. Mr Rugless, who was cross-examined at some length, was firm in his recollection. We think it more likely than not that a conversation in those terms, or in very similar terms did take place between Mr Rugless and the appellant about the time stated. We are reinforced in our view by two letters signed by Dr McDonnell. These letters were given to the appellant by the doctor. However, the appellant now has difficulty explaining how they came to be written.

The first letter, dated 20 February 1995 (one week before the appellant took up duty in Sydney), is typewritten, and addressed to the appellant himself. It says this:

> You suffered a severe back injury at work in 1992. As a result of this injury you suffered an intervertebral disc protrusion at L5/S1. The intervertebral disc lesion required surgical correction. You still suffer bilateral sciatic pain and neuropathic pain in your left (the word "left" is crossed out and the word "RIGHT" is handwritten above it, and the alteration initialled) foot. You are no longer able to perform many of your normal work or sporting activities. I would suggest that you have at least a 50% loss of function in your back".

Dr McDonnell's clinical notes show that he saw the appellant on 21 February for "Review". The notes continue: "the patient has about a 50% disability with his back with bilateral sciatica &

neuropathic pain in the left foot.” In cross-examination the appellant was unable to say how he came to receive the letter, or why it is dated the day before he was “reviewed” by Dr McDonnell. He was further unable to give any reason why he held on to it for three months and then forwarded it with his Hurt on Duty Claim.

The second letter, dated 3 May 1995, is handwritten and is only addressed “Dear Sir”. It continues:

> “Ross Phillips injured his back in October 1992. He has subsequently had back surgery. He lives in Port Macquarie & works in Sydney. He has to drive back & forth to Sydney once per week. The driving is causing further problems with back pain. Ross Phillips should be transferred back to Port Macquarie, this would solve the problems caused by all of the extra driving.”

The clinical notes record that he saw Dr McDonnell on 3 May 1995, and show: “pt now working in Sydney, has to drive home on days off - the driving is worsening his back pain”. The appellant was unable to give a satisfactory explanation of his going to see Dr McDonnell on 3 May 1995. In cross-examination he denied that it was always his intention to apply for a transfer back to Port Macquarie. He also denied that when he accepted the promotion to Shift Supervisor Sergeant at City of Sydney Patrol, he had no intention of moving to Sydney with his family.

We note that these are the letters which were attached to the appellant’s claim for Hurt on Duty Benefits dated 31 May 1995. It is significant that they were both written before the appellant saw Dr Ramrakha on 10 May 1995, and before the appellant made out his application for compassionate transfer dated the same date. In our view the inference is almost inescapable that shortly after his promotion to Sergeant and appointment as Shift Supervisor at Sydney were confirmed, the appellant began to build a case for transfer back to Port Macquarie on the ground that the travel back and forth to Sydney was aggravating his back condition.

The appellant has said in his evidence that before applying for promotion in 1994 he discussed the matter with his wife. It was acknowledged that if he were successful in obtaining promotion, it would almost certainly mean he would have to take up a position away from Port Macquarie. He says his wife agreed to leave Port Macquarie if that happened. He also said that after he was successful she changed her mind, not wishing to leave her position as Deputy Principal. He also says that after further discussion his wife again agreed to leave Port Macquarie and to seek a transfer to a similar position in the school system in the Sydney area. Mrs Phillips gave similar evidence. Our assessment of the evidence, however, is that Mrs Phillips did change her mind about leaving Port Macquarie, and did not change it back again. Notwithstanding that she placed herself on a transfer list for a Deputy Principal's position in Sydney, we think it is quite clear that she did not wish to leave her home and her position Port Macquarie, and that she maintained that attitude during the period February to May 1995.

There is then the appellant's evidence of his Army Reserve service after 28 October 1992. He says that following his injury to his back on that date and his subsequent surgery early in 1993, he ceased to be "active" and became "inactive". He concedes, however, that for a period in 1993 and in 1994 he remained the Company Commander of "D" Company. The computer printout provided on summons addressed to the Commander Regional Training Centre, Australian Army Moorebank, shows that on 8 April 1994 the appellant was posted to an administrative position of "Major Non Corps 2 MD". On 1 December 1995 he is shown as "RSL 2 MD Awaiting Repost Major Non Corps."

The appellant says he was "invited" to attend the Camp on 1 December 1995, and to take the post

of Camp Commandant even though he informed the Army authorities that he was unfit for any military duties. He said he was "an observer" and performed "no duties", but was, nonetheless, paid for the period of the Camp. We do not accept the appellant's evidence that he performed no duties. We strongly doubt that he would be paid for doing nothing. We think it more likely than not that he undertook the normal duties of Camp Commandant, and was duly remunerated. His performance of any military duties at that time, is, of course, inconsistent with his claim that he was unable to undertake even restricted police duties during the same period.

Similarly with his attendance at the Camp between 5 and 21 July 1996; we do not accept that he was paid for performing no duties at that Camp. We think it more likely than not that he performed the normal duties of Camp Commandant, for which he was paid. In those circumstances we do not accept that for that period he was incapable of performing restricted police duties.

In respect of his project work in 1997, we think that this work was no less arduous than the restricted police duties he claims he was unable to perform at the same period.

Because of these crucial findings, and our view of the appellant's evidence, we do not find it necessary to traverse the large body of remaining evidence. Suffice to say this. Where the evidence of the appellant differs from that of the respondent's witnesses, we think the evidence of the latter to be more likely to be true. We also take the view that the appellant greatly exaggerated the effect on his family of his absence in Sydney and his travel back and forth during the period February to May 1995. His statement in his application for compassionate transfer concerning his "fractured and dysfunctional family" is completely unsupported, not only by his own evidence,

but it is also not supported by that of Mrs Phillips. That statement is but one example of the extent to which he was prepared to exaggerate his circumstances.

Discussion

The appellant bears the onus of satisfying us to the requisite degree that his absence from duty was occasioned by an incapacity to perform any police duties, and that such incapacity was brought about by his being injured in such circumstances as would, if he were a worker within the meaning of the *Workers Compensation Act 1987*, entitle him to compensation under that Act.

The standard of proof to be applied in appeals of this nature is the civil standard on the balance of probabilities; and is generally described in the manner adopted by Dixon J (as he then was) in *Briginshaw .v. Briginshaw* (1938) 60 CLR 366, where (at 361-363) His Honour stated:

> "Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether an issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect references. This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue, may, not must, be based on a ponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained."

The statement of Dixon J has been applied and followed by the courts in a number of subsequent cases. Two such cases are *Hardcastle .v. Commissioner of Australian Federal Police* (1984) 53 ALR 593 at 603, and *Samad .v. Public Service Board of NSW* (1983) 5 IR 464 at 465, 467-468.

The statement was also approved by the High Court in *Rejfek .v. McElroy* (1965) 112 CLR 517, where (at 521) the court made the following observation:

> "But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in any civil case, the mind has only to be reasonably satisfied and has not in respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge."

The successful outcome of the appellant's appeal will not affect his rate of pension. Nevertheless, it will result in significant financial benefit to him. He will be entitled to paid sick leave for the period of his absence after his sick leave entitlements run out, until his medical discharge. He will be entitled to have the recreation leave he used up re-credited, and to be paid its value. He will be entitled to have his extended leave which was used up re-credited, and to be paid its value. Given that he received no pay from 13 November 1996 until 5 March 1999, the amount of sick leave he will become entitled to should his appeal succeed, will be more than $100,000. The combined value of his recreational leave and extended leave is also an appreciable sum.

The consequences of our finding in favour of the appellant have caused us to look carefully at the evidence of his disability over the relevant periods, to see if that evidence can establish to our satisfaction that he was not fit to perform any police duties because of the condition of his lower back. The evidence as to the appellant's level of pain at any relevant time is essentially that of the appellant himself, and, to a lesser extent, that of his wife. In the case of Mrs Phillips, her assessment of her husband's level of pain is also based principally on what he told her; but she did give evidence of making a deduction of his level of pain from her own observations of his

demeanour. The evidence contained in the various medical reports is also dependant, in many respects, on the history given by the appellant to the particular medical practitioner, and on his own description of his level of pain. Against these reports, we have the report of Dr Smith, reinforced by his oral evidence to us. The weight of Dr Smith's evidence was not reduced by cross-examination. Dr Smith has expressed considerable doubt that in April 1997 the appellant was as incapacitated as he would have us believe.

There are important factors which bear on the appellant's evidence. Two in particular, are his application for a compassionate transfer from the City of Sydney Patrol back to Port Macquarie, and his relationship with Dr McDonnell. There is also a strong inference, from Dr McDonnell's actions in changing the appellant's fitness for restricted duties so as to enable him to attend the Army Reserve Course in Sydney in February 1993, that the appellant was either able to manipulate Dr McDonnell for his own purposes, or that little weight can be given to Dr McDonnell's opinion of the appellant's medical condition, either then or subsequently.

It is of significance that Dr McDonnell was not called as a witness on the appellant's behalf. No explanation has been given for the failure to call him. There are actions by Dr McDonnell for which the appellant can offer no explanation. Dr McDonnell has not been called to present an explanation. In the circumstances, we are entitled to draw the inference that Dr McDonnell's evidence would not assist the appellant's case - *Jones .v. Dunkel and Anor* [1959] 101 CLR 298.

There is also the matter of the appellant's paid service in the Australian Army Reserve during the period of his absence from duty. It was open to the appellant to provide independent evidence from military sources of his precise Army Reserve status from 1995 onwards, and of the exact

nature and extent of his duties as Camp Commandant in 1995 and 1996, and when performing project work in 1997. He has not done so. We draw the inference that more detailed and more precise evidence from military sources would not assist the appellant's case.

The only independent evidence of the appellant's incapacity, that is independent of the appellant's own statement, to perform any police duties during the relevant period, comes from the report of Dr Hopcroft. Dr Hopcroft's assessment of two CT scans of the appellant's spine, one taken on 22 February 1996, and the other taken on 19 June 1998, that there had been some significant deterioration in the condition of the appellant's spine, deserves greater weight than the appellant's mere assertion. While, in view of Dr Smith's evidence, we retain some doubt in the matter, we are prepared, in the light of Dr Hopcroft's report, to give the appellant the benefit

of that doubt, and to accept that from 19 June 1998, the condition of his spine made the appellant unfit for any police duties.

We find therefore that the appellant has not satisfied us to the requisite degree that he was incapacitated for performing police duties from duty from 10 May 1995 to 17 October 1996, nor that he was so incapacitated from 14 November 1996 to 19 June 1998. We further find, however, that from 19 June 1998 to 4 March 1999, the appellant was incapacitated from performing any police duties and that such incapacity was caused by an injury to his back contracted in such circumstances as would entitle him to compensation under the Workers Compensation Act 1989.

Decision

Pursuant to s.48(1) of the GREAT Act, the determination of the respondent which is the subject

of the appeal is set aside. The appellant is to be regarded as absent from duty "hurt on duty" for the period 19 June 1998 to 4 March 1999.

The appeal is determined accordingly.

R P J NOONAN
<u>Chairman</u>