**BEFORE THE ACCIDENT COMPENSATION APPEAL AUTHORITY**
**AT WELLINGTON**

**[2014] NZACA 9**

**ACA 08/08**
**(ACA 154/06, ACA 173/06 & 208/06)**

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| **IN THE MATTER** | of the Accident Compensation Act 1982 |
| **AND**<br>**IN THE MATTER** | of an appeal pursuant to s.107 of the Act |
| **BETWEEN** | **ALAN LANGDON**<br>Appellant |
| **AND** | **ACCIDENT COMPENSATION CORPORATION**<br>Respondent |

**HEARING**
17 February 2014 at Dunedin

**AUTHORITY**
Robyn Bedford

**APPEARANCES**
Mr Forster, advocate for the appellant
Mr Evans, counsel for the respondent

## DECISION

[1] The appeal concerns the correctness of the Corporation's three decisions made in November and December 2005 and January 2006, to fix Mr Langdon's relevant earnings under s 53 of the Accident Compensation Act 1982 at $420.00 per week.

### *Background*

[2] Mr Langdon has cover under the Accident Compensation Act 1982, for injuries sustained on 18 August 1984 and 2 February 1990. In 1984, Mr Langdon was employed as a forestry worker and some earnings related compensation ("ERC") was paid. Although the 1984 injury is nominally part of the present appeal, there is no evidence at this stage that can reliably support the contention that Mr Langdon was continuously incapacitated by this injury when he took up employment with Kawhia Fisheries ("Kawhia") in July 1989 and nor is there any decision by ACC specifically addressing this.

[3] The 1990 injuries were accepted by ACC as causing Mr Langdon ongoing incapacity from 3 March 1990. An interim assessment of his relevant earnings based on his earnings from Kawhia at the time of his accident was made on 10 March 1990, fixed at $300.00 per week and paid up to 23 March 1990. Mr Langdon suffered a second period of incapacity from 7 September 1990, and his relevant earnings were fixed at $350.41 per week and

this amount formed the basis for calculating his subsequent ERC/weekly compensation entitlement.

[4] After years of dispute and following a review of his ERC entitlements from 3 March 1990, on 24 November 2005 ACC fixed Mr Langdon's relevant earnings at $376.25 per week, but declined his request to investigate his ERC entitlements from the 1984 accident.

[5] This decision was revoked on 21 December 2005 and a new relevant earnings amount of $420.00 per week was substituted, which took Mr Langdon's proved bonus payments into account. ACC paid Mr Langdon compensation arrears pursuant to both decisions, but on 23 January 2006, ACC issued a new decision, which reduced the quantum of Mr Langdon's second compensation arrears payment and revoked the payment decision of 25 December 2005, due to an error in the arrears calculation. The decision confirmed that the $420.00 per week that the payment was based on was correct.

[6] Mr Langdon applied to review the three decisions and the reviews were held under the Accident Compensation Act 2001. The reviewer applied the provisions of the 1982 Act and dismissed all three applications on the grounds that there was no evidence that Mr Langdon was required to complete any further training as he claimed, therefore he did not qualify for an increase in his weekly compensation under s 62, and there was no evidence that the allowances he claimed were declared to Inland Revenue or had tax paid on them, and Mr Langdon was not provided with alternative accommodation while on shore. ACC was therefore unable to determine the value of any of the allowances and they could not be included in Mr Langdon's relevant earnings.

[7] The right of appeal was given to the District Court and Mr Langdon filed a number of interconnected appeals in the District Court in 2006 and 2007. In November 2007, as part of a general administrative review of the appeals when Mr Langdon had legal representation, some appeals were withdrawn, some were adjourned sine die, and the three appeals relating to the 2005/2006 relevant earnings decisions were transferred by His Honour Judge Cadenhead to the Authority to determine, and were then amalgamated under ACA 08/08.

[8] The appeal languished for a number of years when Mr Langdon was in Australia, but was resurrected through a series of directions conferences in 2012 and 2013. After Mr Forster was instructed, the issues were refined to cover the question of the correct calculation of Mr Langdon's relevant earnings in relation to the 1990 accident only, and by consent, matters pertaining to the 1984 accident and related relevant earnings calculation will need to be progressed separately. The Authority does not have jurisdiction in respect of this matter, as no primary decision has been made by ACC.

***The issues***

[9] The parties agree that the base rate relevant earnings figure of $420.00 per week is correct according to the matters ACC took into account when calculating it, so that if the appeal fails, Mr Langdon's relevant earnings remain fixed at $420.00 per week pending any other decisions that may be made.

[10] The questions for determination from Mr Forster's perspective are:

(i) Should RE be calculated to take into account the allowances Mr Langdon says he received from his employer as part of his remuneration, and if so, what is the correct RE amount if s 53(2) and (8) are applied?

(ii) Should RE instead be calculated under either s 62 or s 63 on the basis that Mr Langdon was undergoing training at the time of the accident, which he subsequently completed to enable him to skipper the fishing boat he was then working on, and if so, what is the correct RE amount?

[11] As far as ACC's position is concerned, the reasons given by ACC in the letter of 24 November 2005 to decline Mr Langdon's request to include the claimed allowances in his RE calculation were that the existence and value of the allowances were not proved to its satisfaction, and ACC could only exercise its discretion under s 59(8) to set a fair amount as the value of the allowances, if their value had already been set and tax paid on them.[1] This interpretation of s 52(2)(d) was upheld by the Reviewer and in response to my request prior to the hearing for clarification of ACC's position with respect to whether it was going to argue on appeal that the claimed benefits and allowances were statute barred because they had not formed part of Mr Langdon's taxable income, Mr Evans confirmed that ACC no longer relied on this part of the decision and that ACC's focus was on whether there is an evidential basis for any allowances to be included in the ERC calculation.

[12] Mr Evan's submissions also put in issue the question of whether the allowances should be disallowed because, following *Chalecki* and the decision of Ongley DCJ in the District Court in *Treml*[2], they should be considered as reimbursing allowances and thus properly excluded.

[13] Regarding the application of s 62 and/or s 63, given that ACC has not made a primary decision as to whether either section applies and the lack of a proper evidential basis for any referral of this issue back to ACC by the Authority, ACC reserved its position until it had the opportunity to cross examine Mr Langdon.

[14] Mr Evans accepted that evidence of Mr Langdon having obtained his Skipper's qualifications was made out, but maintained that it was speculative that Mr Langdon would have become the skipper of the boat owned by Kawhia or that his grandparents would have sold the company to him.

***The evidence: allowances and training***

[15] The C3 Form prepared by the employer does not include any reference to the allowances, but nothing can be drawn from this as the form specifically directs the employer to include only taxable allowances and benefits. Mr Langdon's wages increased on 14 January 1990 from a base rate of $300.00 per week to a base rate of $350.00 per week, and the employer paid this amount for first week's incapacity. Over 52 weeks and without bonuses, this amounts to a base remuneration of $18,200 per annum.

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1 This is contrary to *ARCIC v Lewis* HC, Auckland 194/93, April 1994, Barker J, and the decisions of the Authority in *Chalecki v ACC* [2012] NZACA 16 & *Firmin v ACC* [2013] NZACA 15

2 [2012] NZACC 55

[16] Clause 2 of the New Zealand Seaman's Maritime Industry (Sea-going) Award ("the Award") that came into force in May 1991 sets out the various Deck rating classifications and remuneration. The base remuneration for a "*Deck Boy*" is $18,533.00 per annum in all classifications and between $38,758.00 and $54,559.00 per annum depending upon classification.

[17] Clause 11 covers Meals and Accommodation Not Available On Board, and provides that where an employee is attached to a vessel that normally provides "*victualling*" and accommodation and for some reason they cannot be provided, the employer must pay set rates for each of breakfast, lunch and dinner and accommodation. The daily rate for full meals and accommodation is $129.77.

[18] Clause 14(a) provides that for Deck ratings, in lieu of being provided by the employer with protective and/or waterproof clothing and footwear, deck ratings were to be paid an allowance of $15.69 per week.

[19] The Award also provides detailed conditions for Deck ratings who are employed as night watchmen, and under General Conditions, the living quarters must be cleaned and fumigated, ventilation, heating and lighting must be provided, and specified utensils and bedding, blankets, towels, good quality soap at the employer's cost. Bedding, tablecloths and blankets are to be laundered at regular set times also at the employer's cost.

[20] The undated Maritime New Zealand guidelines document **Becoming a skipper** include the following requirements:

> **Local Launch Operator's qualification (LLO)**
> - 6 months sea service gained within the last 10 years, which is equal to 750 hours.
> - General documents and forms including a certificate of sea service, which had to be certified correct by a Justice of the Peace.
> - Commercial time could be claimed by a skipper filling out a Certificate of Sea Service or by a signed and dated letter from the employer.
> - There is no approved course and applicants can ask to be examined as soon as their application has been approved by Maritime New Zealand.
> - Candidates can choose to attend the ILM course and then sit the LLO examinations at the end of the course.
>
> **Inshore Launchmaster qualification (ILM) - the next step up from the LLO**
> - Proof of 18 months sea service, 12 months of which must be within the in last 10 years.
> - At least 6 months on commercial vessels over 6m in length, on deck under a qualified skipper.
> - At least 2 months on vessels under 30 m long.
> - General documents and forms including a certificate of sea service.
> - Attendance at a compulsory course of at least three weeks duration at one of Maritime New Zealand's approved education providers.

Mr Langdon was awarded the following certificates in 1990:

- 7/3/90: Restricted Radiotelephone Operators Certificate from the New Zealand Radio Frequency Service, Ministry of Commerce.
- 20/7/90: Standard First Aid Certificate valid for three years by the Order of St John.
- 8/8/90: Certificate of Competency as a Commercial Launchmaster, Secretary of Transport.

[21] Mr Langdon said in a letter to ACC dated 22 March 2000:

> "*At the time of my injury the time at sea I spent working was necessary in order to qualify for examination. Subsequently to injury I attended a Commercial Launchmasters course and passed the exams (luckily nothing physically strenuous) qualifying myself as a commercial launchmaster which was necessary in order to carry on my family's tradition of seafaring commercial fishing/passenger and goods transportation etc. I would imagine this qualifies me as what is defined as an "improver" undergoing training and instruction while completing a prealloted time period at sea required to further my career…*"

[22] On 11 November 2005, ACC wrote to Heather James, Kawhia's accountant, regarding the allowances. Ms Somers recorded that Ms James had said in their prior telephone conversation that:

> *"…it was likely that Mr Langdon was provided with food and wet weather gear while out on the fishing boat. You advised that no separate allowance was paid to Mr Langdon for food and clothing, nor was an allowance included in his normal wages. Can you confirm in writing that this is correct*."

[23] Ms Somers asked if Mr Langdon was provided with any accommodation while on shore, and if so, was the accommodation lost as a result of the accident; were any alternative accommodation allowances provided by the employer and if so, what was the value; could Ms James provide any information regarding the accommodation – capital value, temporary or permanent; and, was the value of the accommodation and/or allowances set and tax paid on them to IRD?

[24] On 25 November 2005 ACC wrote to Mr Langdon and said that it had contacted the accountants for Kawhia for information relating to the allowances and they had been unable to confirm the allowances he stated he received. Ms Nield recorded that Mr Langdon had asked ACC not to contact Kawhia's owners direct and asked him to provide their contact details if he wished them to do so in the future. Ms Nield said ACC would be happy to reconsider the allowances if Mr Langdon could provide some written confirmation.

[25] ACC followed up the responses to the letter of 11 November 2005 with Mr Langdon's grandparents, who were Kawhia's owners, and also obtained further information from Ms James concerning the bonus system that they operated, which resulted in the reassessment of Mr Langdon's relevant earnings to $420.00 per week and the decision letter of 21 December 2005. The information from Mr Langdon's grandparents, who owned Kawhia, was not forthcoming by the time ACC made the third decision confirming Mr Langdon's relevant earnings of $420.00 per week on 23 January 2006.

[26] On 27 March 2006, ACC received the requested information from Mrs Langdon. In answer to the questions at paragraph [16] above, Mrs Langdon confirmed that on the trawler "*Fair Dinkum*" Mr Langdon was provided with meals, overalls, gum boots and wet weather gear. No separate allowance was paid; no on shore accommodation was provided and no alternative accommodation allowances were provided. Mrs Langdon confirmed the crayfish bonus payment. In response to being asked to reconfirm whether Mr Langdon was an apprentice, improver or trainee required to undergo training or instruction to become qualified, Mrs Langdon said that Mr Langdon was a "*Trainee required to undergo training to become qualified as a Deck Hand. Which was done. We owned and operated "Fair Dinkum*".

[27] Mr Langdon wrote in his application for review of the decision of 23 January 2006, that his reasons for his application were:

> "…*My wages increase after qualifying as a Commercial Launchmaster to Skipper the boat and take over from my Grandfather… has not been included in the compensation calculation neither has the increase in bonus percentage paid after January's raise and after I became the skipper. The free laundry service and Company vehicle, meals, safety equipment i.e. clothing, Bed and bedding, Motel etc meals when delivering by road. Driving allowance all supplied by the company. Course and examination fees for all required licences and certificates*."

[28] Mr Langdon described the full range of costs and allowances paid by the company for him to attend the Commercial Launchmasters course in Auckland and listed a range of allowances that come within the General Allowances in the Award, including shift and weekend pays and allowances, holiday and bonus pays, Nightwatchman allowance and meals, which he said were all part of the generous remuneration provided by Kawhia, along with the use of a company vehicle for shopping and attending appointments and examination courses.

[29] Although ACC submitted there is no evidence before me that ACC had made a primary decision concerning the training after receiving Mrs Langdon's response of 27 March 2006, the review included this issue without any objection from ACC and the claim failed because of lack of evidence, not lack of jurisdiction.

[30] In December 2013, John Staples made an unsworn statement to the effect that he knew Mr Langdon when he was working as a fisherman for his grandparents and while he did not know exactly what Mr Langdon was earning then or what he would have earned as a skipper, he could say that skippers got paid twice as much as deckhands.

***Mr Langdon's evidence***

[31] I do not have a transcript of any evidence Mr Langdon gave at the review hearing but Mr Forster filed two briefs of evidence from Mr Langdon and he was cross-examined at the appeal hearing. The brief dated 21 December 2013 was an unsigned draft that was expanded upon in the signed brief dated 17 February 2014, which is the evidence for the appeal.

[32] Mr Langdon said that when he went to work for his grandparents' company in July 1989, his grandparents were in their seventies and his grandfather was still skippering the fishing boat. His grandmother was keen on him retiring and they wanted to employ someone they trusted who could skipper the boat for the company when they retired. He was employed as a deckhand, but as part of his employment agreement he had to be able

to skipper the boat so he could take over running it and to become a skipper had to fulfil the requirements of a commercial launchmaster.

[33] The formal classroom training included obtaining a radiotelephone operator's certificate and a first aid certificate, then a course in Auckland that involved two exams, nautical and engineering. The practical requirement was 18 months at sea. He did the year at sea after he left school and he had to complete another six months. Towards the end of 1989 he enrolled in the formal classroom training to begin in March 1990 at Manakau Polytech, and this was paid for by Kawhia. After his accident on 2 February 1990, he was off work for a few weeks and then he went to Auckland to do his course and he had to go back and sit his exams. He failed the first exam and had to resit it. Kawhia paid for his accommodation at the Seaman's Lodge while he was in Auckland.

[34] No fishing took place over the winter, because the ship was in dry dock for its five yearly survey to ensure that it was up to proper standards when he became skipper. They got back to fishing again in August 1990, but after a really good period he struggled to do the work and he had to stop on 7 September 1990. On 24 September 1990 his Commercial Launchmasters' Certificate came through, but he was by then unable to work as a skipper.

[35] Mr Langdon said that he had no other accommodation and he had lived on the boat since he started work with his grandparents, but the he had started seeing a girl in December 1989 who lived in Hamilton and sometimes if he did not have to stay on board, he would go on his motorbike to visit her, which he probably did "a handful of times that summer" because it was such a busy time. Of the seven months he lived on the boat he probably spent a week in total sleeping away from the house, partly because of problems with security.

[36] When he was onboard, his food was provided and all his meals, and he could have as much fish and crayfish as he needed. On the boat the food would be kept in the chiller and his grandfather would bring down food to stock it. All his work clothing was provided, which included overalls, socks, jerseys, hats, wet weather gear and gumboots. All the laundry was done including his bedding and his grandfather would take the bag of dirty clothes and bring his clean clothes back with the bin of food. He kept his motorcycle in the company lock up on the wharf and he had the use of a company Toyota ute.

[37] Under cross-examination Mr Langdon said he was not a member of the Seafarer's Union and that his employment conditions were settled with his grandfather on a handshake. Regarding the onboard amenities provided on the "Fair Dinkum", there was no shower and no toilet. Mr Langdon said his grandparents lived in Kawhia and had a motel approximately a kilometre from the wharf, and he showered at their place, or just washed on board and "*went over the side of the boat*" for his toilet needs.

[38] A less clear picture emerged of Mr Langdon's launchmaster training. Mr Langdon confirmed that he had no written employment agreement that could show that he was required to undergo the launchmaster training as a condition of his employment. Mr Langdon's evidence concerning the timing of this requirement was inconclusive. It appeared that the timing was arranged with his grandfather just after his accident and that it was his inability to continue with his fishing work and skipper the boat after the launchmasters training his grandparents had paid for, that caused the later difficulties between them, particularly with his grandfather. Mr Langdon said that while in Auckland for the Manakau Polytechnic course he stayed at the Seaman's Lodge and as he wasn't a union member, he believed that it was possible only because he was studying for a

skipper's certificate. He became qualified in order to take over the boat for his grandfather and he was not offered the job of skipper until after his training.

[39] The picture is further confused because of the training required to become a certified Deckhand and the certificates that are a pre-requisite for this. Mr Langdon was not questioned about his First Aid and Restricted Radiotelephone Operators Certificates, but the present requirements through the New Zealand Maritime School, Manakau Institute of Technology (the renamed Manakau Polytechnical Institute and still a Maritime New Zealand approved education provider for all certificate types) are that in addition to three months sea service, the applicant must hold a completed First Aid Certificate and a completed VHF Radio Operators Certificate, and the Deckhand Certificate is the first step in progressing to an Inshore Launchmaster.

***The skipper's qualification claims: Sections 62 and 63***

[40] In order to bring himself under s 62, Mr Langdon would, on account of his age and his employment relationship, have to qualify under s 62(1)(d) as an employee under a contract of service which expressly required him to undergo training, or become qualified, as a Commercial Launchmaster in the fishing industry.

[41] To come under s 63 as a potential earner, Mr Langdon would have to qualify under s 62(1)(c)(iii) and at the date of accident he would have to be actively studying or training for the Commercial Launchmasters Certificate, which he intended to take up on completion.

[42] Mr Forster submitted that the evidence all pointed to Mr Langdon training to be a skipper, not a deckhand, and the question was simply one of motivation – was he doing it because he wanted to, or for that particular boat with the intention of working on it as a skipper for the future? The law recognises that a person may come under both sections and s 62 applies if that would give a higher rate.

[43] Mr Evan's initial submissions were framed on the understanding that there was no proof that Mr Langdon had obtained his skipper's qualifications. He accepted that this was a mistake, but maintained ACC's objection to Mr Langdon coming within either the section. Mr Evans submitted that Mr Langdon's evidence that he was required to train to become a skipper of the boat as a condition of his employment was inconsistent with his grandmother's evidence that he was required to train as a Deckhand, and that he completed this training. Mr Langdon's evidence that the plan was for him to take over from his grandfather when he retired was speculative, as there was no guarantee that his grandparents would have sold the business to him, or intended that he become skipper of the boat.

***Discussion***

[44] Mrs Langdon's responses to ACC's questions concerning the allowances and training Mr Langdon was required to undergo by his employer provides the only extrinsic proof of his employment conditions, but the training requirement for she stated for Mr Langdon is still difficult to reconcile with the documentary evidence. For example, while Mr Langdon's First Aid and Restricted Radiotelephone Operator's Certificates are part of the requirements for a Deckhand, and his wage rise on 14 January 1990 is reasonably consistent with the three months sea service qualifying period, as he started work for Kawhia on 30 July 1989, he did not obtain the certificates until 7 March 1990 and 20 July 1990 respectively, as part of his proven training to become a Commercial Launchmaster.

[45] However, bearing in mind also that in the absence of any written terms of employment, it is the employer's requirements, not the employee's intentions that ultimately matter, on balance, I think this favours the view that insofar as any training being *an express requirement* of Mr Langdon's employment is concerned, on balance, that particular training is more likely to have been as a Deckhand, rather than as a Commercial Launchmaster, and that as he became more involved in the running of the boat, Mr Langdon decided to obtain the higher qualification.

[46] Mr Langdon was being paid the equivalent wages of a certified Deckhand at the date of his accident and the relevant earnings figure of $420.00 accepted by both parties as the appropriate figure before allowances is based on the 28 days prior to the accident. Even if Mr Langdon came within s 62, he was already being paid the amount he would have received on completion of formal Deckhand training, and there is no obvious additional benefit available to him under the section.

[47] Regarding s 63, I have no doubt that Mr Langdon undertook the Commercial Launchmaster training so as to be able to skipper his grandparents' boat when his grandfather retired, and that he obtained the necessary qualifications to do so, but the evidence suggests that the most likely scenario is that his grandparents agreed to pay for this training, rather than the required Deckhand training, after the accident, which would explain their subsequent falling out when Mr Langdon could not continue with fishing because of his injuries. Most crucially, there is no evidence before me to objectively confirm the conditions or timing of any arrangement between Mr Langdon and his grandparents for him to take over as skipper on the completion of his training, and nor is there any evidence to confirm that Mr Langdon enrolled for the Commercial Launchmasters course in late 1989, rather than the Deckhand's Certificate course as suggested by Mrs Langdon's evidence.

[48] Mr Langdon is incredibly unlucky in the timing of his accident, but there simply is no objective evidence that his grandparents agreed to pay for the skipper's qualification before, rather than after, his accident, or that he was actively engaged in studying toward that qualification as at 2 February 1990. I accept Mr Langdon's evidence that he did not formally train for obtaining a Deckhand's Certificate and that his training was for becoming a Commercial Launchmaster, (although he did have to complete the Deckhand pre-requisite First Aid and Radiotelephone Certificates to do so). However, I think the most likely scenario is that while he was required by his grandparents to obtain the Deckhand Certificate and he was probably enrolled in the appropriate course when he completed the necessary three months sea service in late 1989, at some date after he had completed the necessary six months sea service for becoming a skipper (which could be no earlier than 30 January 1990), he was so involved in the running of the boat that it was agreed that his grandparents would pay for this course instead.

[49] Mr Forster submitted that, following *Langhorne v ACC*,[3] *Tangi v ACC*[4] and *Chalecki,* if information is not available because it no longer exists or there was a delay in investigating and making proper decisions, the doubt should be decided in the claimant's favour. The situation is not quite as black and white, as all the cited decisions follow an established approach by the Authority where the evidence is clear that ACC has wrongly destroyed a claim file and then relied upon the resulting lack of evidence to deny a claim. This is not the situation here, as Mr Langdon did not make a claim based on the obtaining

[3] [2110] NZACA 4 at [156]
[4] [2012] NZACA 4 at [41]

of the skipper's qualifications until 2000, and ACC investigated the claim in a reasonably expeditious fashion, given the information that he supplied from time to time and I am not prepared to invoke the Authority's equitable jurisdiction to get over evidentiary failings that are the appellant's responsibility.

[50] For the above reasons I am satisfied that Mr Langdon cannot bring himself within either s 62 or 63, but I do not draw any adverse inferences regarding credibility on this account, and I would not expect ACC to do so either in any future dealings with Mr Langdon's claims.

***The allowances claim: Sections 52 and 59***

[51] Section 52(1) defines "*earnings*" in relation to any person as meaning all his earnings as an employee or as a self-employed person as determined in accordance with the section.

[52] The applicable part of the section now that ACC has conceded that the allowances are not excluded by virtue of not being returned as income, is subs (2)(a), which provides that for the purposes of the Act, the expression "*earnings as an employee*" includes –

> "(a) *Any wages, salary, allowances (including allowances of the kind referred to in section 72 of the Income Tax Act 1976)…or remuneration of any kind paid or payable (whether in cash or otherwise) to any person in respect of or in relation to the employment of that person as an employee* …"

[53] I will not traverse the submissions concerning the inclusion of allowances in Mr Langdon's relevant earnings calculation in any detail, as it is clear from the Award that the allowances Mr Langdon has claimed are all properly payable to him as part of his conditions of employment, and Mrs Langdon confirmed that food, work clothing and accommodation were provided to Mr Langdon as part of his employment package and that he did not have alternative offshore accommodation. As I have preferred Mrs Langdon's recollection of the training Mr Langdon was required to undergo as a condition of his employment, it would be inconsistent to then ignore her other evidence where it does corroborate Mr Langdon's claims.

[54] I also accept Mr Langdon's evidence that his personal and bedding laundry was done for him, and that his position was "*all found*" in the sense that all his normal domestic activities and related expenses were catered for on board and that when he did not stay onboard it was only because he was visiting his girlfriend, thus the continuity was not broken in terms of being part of his "*normal average weekly earnings*" for the purposes of calculating his relevant earnings under s 53. There is no evidence to support any other allowances such as a Nightwatchman's allowance or the other allowances mentioned in the Award, and these are excluded.

[55] There is no evidence to suggest that any of the accepted allowances were reimbursement allowances of the sort held ineligible in *Chalecki*, and nor are they akin to the travel allowances that were rejected in *Treml*. They amount to "*benefit allowances*" of the sort noted by Mr Evans in his discussion of *Treml* and thus qualify for assessment of their value by ACC under s 59(8).

[56] Mr Forster relied upon the Authority's decisions in *PS*[5] where the Authority referred the valuation of free board and lodgings provided in 1988 back to ACC following the decision in *Monroe*[6]. I have not read *PS*, but in *Monroe*, the Authority considered making the referral back as happened in the similar cases under the Accident Compensation Act 1972, so that the appellant could apply to IRD for an assessment of the value to him of " *a certain house or quarters allowance*" and it was to be disclosed to IRD that the assessment was for compensation purposes and the parties would be bound by the assessment. However, as the 1972 Act did not contain a provision akin to s 59(8) that allowed ACC the discretion to make the assessment, Mr Cartwright instead referred the assessment back to the Corporation to make in accordance with the procedure in the Corporation's Claims Manual Part 7, paragraph 3.1.

[57] Mr Evans has suggested that s 59(8) only applies to give ACC "*flexibility*" where taxable allowances are at issue, but I can see nothing in the wording of s 59(8) to suggest this limitation, as it simply provides –

> *"Notwithstanding Section 52 of this Act, where a person's earnings include an allowance of any of the kinds referred to in Section 72 of the Income Tax Act 1976, the Corporation may, for the purpose of assessing the award of earnings related compensation payable to that person, determine the value of that allowance at such amount as it considers would be a fair assessment of the proper worth of the allowance*."

[58] The referral back to ACC to assess the value of non-taxed allowances was also considered in *Lewis*. At page 5 of the decision Barker J said that before the enactment of s 59(8) it was the practice of the Authority to refer such "*allowances*" as a free housing benefit which had not been declared as income back to IRD for assessment, which could then be followed by ACC, but he should not have thought it an impossible burden for ACC to assess the value to an employee of the provision of a company car. I take the same view of the assessment of the value of Mr Langdon's "*all found*" accommodation allowance and I can see no reason why ACC should not be able to evaluate the worth of this allowance.

[59] The Award provides some guide in this respect, but the value of Mr Langdon's accommodation would have to be assessed in light of the very basic and somewhat Spartan nature of the accommodation provided. Clause 11 of the award values three meals a day plus accommodation (with laundry and high quality standards of amenities) at $128.77 per day. Mr Forster has, quite reasonably in light of the $901.39 per week in the Award, suggested that Mr Langdon's food and accommodation allowances should be valued at the $100.00 per week awarded by the Authority in *PS*. In the interests of a quick resolution of this issue I suggested at the hearing that a lesser figure might suit both parties, but I can indicate that if the matter were to come back to the Authority, a figure of $100.00 would be quite reasonable as a minimum value given the fact that all Mr Langdon had to pay for out of his daily living expenses, was the storage of his motorbike.

[60] The work clothing allowance is more straightforward as the award values the non-provisions of uniforms and protective clothing at $15.69 per week. I feel safe in assuming that the basic requirements would be consistent across the board for health and safety reasons, and that this is the figure that ACC should use in assessing the value of Mr Langton's clothing allowance.

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5 (15/200) & 16/2007)
6 ACA 70/90

[61] It follows that the appeal in respect of the clothing, food and accommodation allowances is successful and that the assessment of the value of the allowances will be referred back to ACC for assessment. The assessment is to take place in two phases, the first being an immediate assessment of the value of the clothing allowance and the issue of a decision with review rights under Part 9 of the 1982 Act. The arrears payment is to be made contemporaneously with the decision.

[62] The assessment of the food and accommodation allowance may take more time if ACC does not agree with my recommended figure of $100.00 per week, and indeed, it would quite possibly be to Mr Langton's benefit if the allowance was considered in more detail and properly assessed under Part 7 of the Claims Manual and paragraph 3.1.

***Decision***

[63] The appeal is successful to the extent that the Corporation's decisions declining to include the allowances claimed by Mr Langdon in his relevant earnings for the purpose of paying his earnings related compensation, are reversed.

[64] The Corporation is directed to carry out the necessary assessments of the value of the clothing allowance and the food and accommodation allowances separately, as discussed in paragraphs [61] to [64] and issue fresh decisions accepting the allowances and setting their value, which is to be added to the existing relevant earnings figure of $420.00 per week.

[65] For the sake of clarity, the Authority cannot consider the interest, ex gratia payments or other damages or payments claimed by Mr Langdon in his notices of appeal and the Authority declines jurisdiction in relation to any other of Mr Langdon's historic claims except as dealt with in the present appeal.

[66] If costs on the appeal cannot be agreed, then memoranda are to be filed promptly.

**DATED** at WELLINGTON this 9th day of April 2014

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R Bedford