

IN THE DISTRICT COURT
HELD AT AUCKLAND

Decision No. 72 (2010) NZACC

IN THE MATTER of the Injury Prevention, Rehabilitation
and Compensation Act 2001

AND

IN THE MATTER of an appeal pursuant to Section 149 of the Act

BETWEEN **THE ESTATE OF MICHAEL BARTROM**

(AI 248/09)

Appellant

AND

ACCIDENT COMPENSATION CORPORATION

Respondent

HEARD at AUCKLAND on 22 April 2010

APPEARANCES

Ms A Fisher and Ms B J Johns, Counsel for Appellant.
Mr A D Barnett, Counsel for Respondent.

RESERVED JUDGMENT OF JUDGE M J BEATTIE

[1] The issue in this appeal can best be described as being whether the respondent has correctly identified and assessed the late Mr Bartrom's weekly earnings, pre-incapacity, for the purposes of determining the quantum of his weekly compensation entitlement.

[2] The decision ultimately made by the respondent, which is now the subject of this appeal, was its decision dated 13 May 2008. It is the case that that decision had revised an earlier decision of 22 June 2006, which decision had, in turn, revised the respondent's first primary decision given on 22 February 2006. Each of the two revisions increased the amount determined as weekly earnings for the purposes of weekly compensation assessment.

[3] It is the case that the appellant (hereinafter referred to as the deceased) passed away in late 2006, some time after the original application for review was lodged in July 2006, and these proceedings have been continued to appeal stage by representatives of his estate. The determination of the issue in this appeal is important, firstly for the fact that it would encompass nearly four years of the deceased's incapacity prior to death and then after his death a continuation of weekly compensation under the statutory provisions for his dependant widow.

[4] The relevant background facts, whilst vital to the issue in this appeal, are not in fact in dispute. An outline of those background factors is now given, but it is the case that some of those facts do require further comment and explanation and where appropriate this will be forthcoming later in this decision.

- The deceased suffered an incapacitating personal injury on 4 December 2002.
- As at the date of that incapacity the deceased was a shareholder-employee of a private company, Alexander Bartrom Communications Limited (ABCL).
- The deceased could be said to be the alter ego of this company as he was the holder of 999 of the 1000 shares, his wife being the holder of one share. He and his wife were the directors and he was also the secretary.
- This company had been in existence in that structure since at least the financial year to March 1992, it having been incorporated in January 1992.
- The evidence is that the company in those early years, and even down to February 2002, may have been a sideline business for the deceased. Modest income was received in the 1993 and 1994 years, but Ms Fisher advised, in the course of submissions, that no earnings had been received by the deceased from the 1995 year onwards.
- The business of the company, down to February 2002, seems to be that of arranging insurance contracts and the income therefrom was by way of commissions in respect thereof.
- In the financial year to 31 March 2002 the deceased was, for the greater part thereof, a full-time employee of a business named Botica Conroy and Associates Limited.

- The deceased was made redundant from that employment on 21 February 2002, and in the period 1 April 2001 to 21 February 2002, he had earned a salary of \$107,604.00 from that employment.
- Following his redundancy the deceased commenced a consultancy business as a full-time operation under the structure of ABCL. This business commenced from the date of his redundancy onwards, that is from late February 2002 onwards.
- In the year-ending March 2002, ABCL derived a net profit of \$7,402.00 but no shareholder-employee earnings had been earned by the deceased in that financial year.
- ABCL made a net profit of \$50,044.00 after paying a PAYE deducted salary to the deceased of \$6,100.00 in the financial year to 31 March 2003.
- In August 2005 the deceased made application for weekly compensation and in the questionnaire accompanying that application he advised that he was a shareholder-employee of ABCL and had commenced this position in February 2002.
- After enquiries had been made by ACC as to the deceased's earnings in the 2002 financial year, it was identified that the deceased had nil earnings as a shareholder-employee in that financial year.
- ACC then established that the deceased's earnings as a shareholder-employee to 31 March 2003 amounted to PAYE deducted earnings of \$6,100.00, paid in September 2002.
- The Corporation's first decision of 22 February 2006 determined that the deceased would only be entitled to weekly compensation at the full-time minimum rate, they determining that he had no earnings as a shareholder-employee in the relevant year, namely to March 2002.
- That decision was replaced by a decision of 22 June 2006, whereby the Corporation accepted that the deceased was entitled to have any earnings as an employee earned in the 52 weeks prior to 4 December 2002 factored into the weekly compensation calculation. This meant that part of his last annual salary from Botica Conroy could be included and that salary was

assessed as being \$25,123.00, being salary earned between 4 December 2001 and the date of his redundancy on 21 February 2002.

- Subsequent to that decision, Ms Fisher, counsel for the deceased's estate, submitted to the Corporation that the deceased was entitled to have a greater sum of remuneration for the 2003 tax year acknowledged, and in that regard she provided an assessment which had been made and provided by Mr Shane Hussey, Chartered Accountant.
- Consequent upon further consideration, the Corporation issued the decision which is now the subject of this appeal. That decision letter is dated 13 May 2008 and states as follows:

At the date of Mr Bartrom's deemed date of accident, 4 December 2002, Mr Bartrom was a shareholder-employee, in Alexander Bartrom Communications Ltd ("the company"), working an average of 40 hours of work per week in this position.

Information received from Inland Revenue Department ("IRD") indicates that Mr Bartrom had shareholder-employee earnings in the 1993 and 1994 financial years. Please find enclosed IRD'S 22 April 2008 to this effect.

The legislation governing the calculation of weekly compensation for shareholder-employees is clause 39 of schedule 1 to the Injury Prevention, Rehabilitation and Compensation Act 2001 ("the Act"). ACC considers that this section applies to the late Mr Bartrom's claim in its form as amended from 1 July 2005. This is because it was not until after that date, on 23 August 2005, that Mr Bartrom applied for his weekly compensation entitlement.

... Because Mr Bartrom had earnings as a shareholder-employee in the 1993 and 1994 tax years, his weekly compensation entitlement falls to be assessed under clause 39(2)(c) i.e. based on any earnings as a shareholder-employee in the income year ended 31 March 2002 combined with any earnings as an employee in the 52 weeks prior to 4 December 2002.

Shareholder-employee earnings in the 2002 tax year.

ACC accepts Mr Hussey's advice that the company's accounts for the 2002 tax year were not competently drafted. For this reason, ACC has invoked the provisions of section 15(3) of the Act, and determined for itself the amount of Mr Bartrom's earnings as a shareholder-employee for the year ended 31 March 2002. ACC considers that the whole amount of \$7,402.38 being the company's surplus before taxation in the 2002 tax year, represents reasonable remuneration for Mr Bartrom's services in that tax year.

...

Earnings as an employee in the 52 weeks prior to incapacity

- (i) In the 52 weeks prior to 4 December 2002, Mr Bartrom earned the following amounts from Botica Conroy & Associates . . .

As redundancy payments are not earnings as an employee under ACC legislation, only the amounts of \$25,123.16 (\$19,730.77 plus \$5,392.39) can be factored into the formula at clause 39(2)(c).

- (ii) Mr Bartrom received a payment from the company of \$6,100.00 in or about the month of September 2002, which was subject to PAYE tax. As the payment was a source deducted payment, ACC has treated this amount as earnings as an employee.

This means that Mr Bartrom's total earnings as an employee in the 52 weeks prior to 4 December 2002 were \$31,223.16.

...
The resulting weekly earnings amount is \$742.80. Weekly compensation, payable at 80% of this amount is \$594.24.

Even though case law has confirmed that the July 2005 Amendment was not to apply for periods prior to 1 July 2005, because ACC considered at the time of our decision on 22 June 2006 that it could apply to Mr Bartrom's circumstances, ACC has made the decision to apply it to his case for the whole period of 11 December 2002 to 30 June 2005.

- From the deceased's perspective, Ms Fisher still contended that the sum was less than a fair entitlement and submitted that ABCL's profit for the 2003 year should have been included as being considered earnings of the deceased in that year.
- The matter went to review with the hearing being concluded on 20 April 2009, with the Reviewer's "bottom line" stating as follows:

"I have carefully considered ACC'S calculation of Mr Bartrom's entitlement to weekly compensation. I can find no error in the calculations made under clause 39, or the application of the relevant year."

- The Reviewer therefore confirmed the respondent's decision.

[5] For the purposes of the appeal to this Court, counsel for the appellant has introduced the evidence of Mr Hussey by way of affidavit and which sets out in submission and evidence the contention for the quantum of weekly earnings which are claimed ought to have been applied by the Corporation. Mr Hussey's affidavit also attaches the full financial accounts of ABCL for the years ending 31 March 2001, 2002 and 2003.

[6] As earlier noted, following his redundancy in February 2002 the deceased set up his own consulting business under the banner of ABCL and commenced working full-time as a consultant, and in the financial year to March 2003 the company reported revenue of \$70,785.00, comprising \$60,390.00 from consulting income and \$10,394.00 from

insurance contracts, the latter being in line with the level of income that had been received by the company in the 2001 and 2002 years.

[7] For the sake of comparison, revenue for the 2001 year from insurance contracts was \$14,287.00, and for the 2002 year, \$12,221.00. After deduction of operating expenses, etc., the surplus for the 2002 year was \$7,402.00 and for the 2001 year, \$3,602.00. Those surpluses are before tax and in fact the company paid tax at 33 cents on those surpluses, leaving an after-tax profit of \$4,959.00 and \$2,413.00 respectively.

[8] For both of those financial years, the company's financial accounts disclosed what expenses were incurred and there is a category in a lengthy list of expenses entitled "Salaries – PAYE Directors" and for each of those two years no sum has been attributed to that particular heading.

[9] For the financial year-ending 31 March 2003 the company accounts show the net profit and one of the listed expenses as "Salaries – PAYE Directors" \$6,100.00. Again in that financial year the company paid tax on the surplus of \$50,044.00 at 33 cents in the dollar.

[10] It is one of the principal criticisms both by Ms Fisher and Mr Hussey that the accountancy firm that prepared and signed off those accounts did a less than satisfactory job by not attributing the surplus profit as being shareholder-employee income, which would have been taxed at a much lesser rate than the company tax rate which was in fact paid.

[11] All the foregoing is background to the contention that assessment of the deceased's weekly earnings for the purposes of weekly compensation should have been done within the criteria contained in Clause 39(2)(a) of the 1st Schedule to the Act, rather than as has been done by the respondent in applying the criteria contained in Clause 39(2)(c). Counsel for the appellant submits that Section 15(3) of the Act is also applicable to allow for the inclusion of the appellant's reasonable income from ABCL for the year-ending March 2003.

[12] As has been noted from the history of this particular claim, the Corporation has had a number of submissions over time from counsel prior to the final decision being made by the respondent, which is now the subject of this appeal. Included in those submissions was input from Mr Hussey, the Accountant, and the Court has been provided with various memoranda which have passed between persons within the Corporation who had been asked to consider the whole issue, particularly Mr Joe of the respondent's Accounting Advisory Service and Mr Palmer, the respondent's Technical Claims Manager, the latter

being the person who ultimately signed the respondent's decision which is now the subject of this appeal.

[13] At the heart of the claim by the appellant, both then when the matter was in its pre-decision stage, and now today, at the stage of appeal, is the contention that the deceased was a claimant who was entitled to be considered and assessed in accordance with Clause 39(2)(a) of the Act. Counsel for the deceased has produced documents and memoranda which indicate that at some stages during the 'to and fro' which occurred between the parties it was seemingly accepted by Messrs Joe and Palmer that the circumstances of the deceased's situation did permit of an assessment under Clause 39(2)(a). It is the case, however, that all the documents which have been produced which would appear to accept that Clause 39(2)(a) did apply, only stated as such in memoranda between Messrs Joe and Palmer, and as far as the Court can ascertain, that situation was never advised to or confirmed in any correspondence with counsel for the appellant.

[14] From a legal perspective, I find that any statements or comments made in internal memoranda between the persons within the Corporation who were considering the deceased's claim, cannot be held to be binding on it and in no way can be put forward as a basis for determining that the Corporation's decision, now in question, cannot stand because of a purported acceptance of another point of view.

[15] The legal position must be whether or not, as a matter of law, based on the relevant statutory provisions, the deceased's weekly earnings should be determined by reference to the criteria of Clause 39(2)(a) or, as was determined by the Corporation in its decision, Clause 39(2)(c).

[16] The statutory provisions which are germane to this appeal are Section 15 of the Act and Clause 39 of Schedule 1. Those statutory provisions state as follows:

Section 15

- (1) Earnings as a shareholder-employee, in relation to a person who is a shareholder-employee in any tax year, means –
 - (a) The amount described in subsection (2) (the subsection (2) amount); or
 - (b) The amount described in subsection (3) (the subsection (3) amount); if the Corporation decides that the subsection (2) amount is not a reasonable representation of the person's earning as a shareholder-employee in the income year.
- (2) The subsection (2) amount is –

- (a) all source deduction payments of the person for the income year derived from a company of which the person is a shareholder-employee; and
 - (b) all income of the person that is deemed to be income derived otherwise than from source deduction payments under section OB 2(2) of the Income Tax Act 2004.
- (3) The subsection (3) amount is an amount determined by the Corporation in the following way:
- (a) first, determine each of the following amounts:
 - (i) an amount that represents reasonable remuneration for the services that the person provides to the company as an employee of the company in the tax year; and
 - (ii) an amount that represents reasonable remuneration for the services that the person provides as a director of the company in the tax year; and
 - (b) second, add the amounts described in paragraph (a) (i) and (ii), and the result is the subsection (3) amount.

Section 39

Weekly earnings if claimant had earnings as shareholder-employee immediately before incapacity commenced

- (1) The weekly earnings of a claimant who had earnings as a shareholder-employee immediately before his or her incapacity commenced are the higher of –
 - (a) the relevant amount calculated under clause 334; and
 - (b) the relevant amount calculated under subclause (2).
- (2) The amounts to be calculated under this subclause are, –
 - (a) for claimants who first commenced receiving earnings as a shareholder-employee in the tax year in which the incapacity commenced, the amount calculated using the following formula:

$$\frac{a}{b}$$

where –

- a is the total of the claimant's earnings as an employee in the 52 weeks immediately before the incapacity commenced.
 - b is the number of full or part weeks during which the claimant earned those earnings as an employee.
- (b) for claimants for whom the relevant year was the first year during which they received earnings as a shareholder-employee, the amount calculated using the following formula:

$$\frac{a + b}{c}$$

where –

- a is the claimant's total earnings as an employee in the 52 weeks immediately before his or her incapacity commenced
- b is the claimant's earnings as a shareholder-employee in the relevant year
- c is the combined number of full or part weeks during which the claimant earned those earnings as an employee and the number of weeks that the Corporation considers fairly and reasonably represents the number of weeks or part weeks during which the claimant earned those earnings as a shareholder-employee in the relevant year, up to a combined maximum of 52 weeks or the total number of weeks in the claimant's relevant year if the relevant year is more than 52 weeks:

(c) for all other claimants, the amount calculated using the following formula:

$$\frac{a}{c} + \frac{b}{d}$$

where –

- a is the claimant's total earnings as an employee in the 52 weeks immediately before his or her incapacity commenced
- b is the claimant's earnings as a shareholder-employee in the relevant year
- c is 52
- d is the number of weeks in the relevant year.

The above does not include the full statutory provisions of Section 15 and Clause 39 respectively, but it does include the relevant subsections thereof.

[17] For the sake of completeness it must be noted that Clause 30(2) of Schedule 1 defines "relevant year" as being:

...in the case of a self-employed person or a shareholder-employee, the relevant year is the most recent year ending with the balance date (whether 31 March or another date) of the self-employed person or shareholder-employee before the commencement of the period of incapacity.

[18] With the foregoing as the factual and statutory background, Ms Fisher submitted as follows:

- The deceased first commenced receiving earnings as a shareholder-employee in the tax year in which his incapacity commenced, that is the 2003 tax year.

- The deceased had not been paid a formal shareholder-employee salary in either the 2001 or 2002 years.
- It is unreasonable for ACC to take a critical approach that the deceased was a shareholder-employee well before his injury, but in particular that his earnings in the relevant year were only his earnings as an employee with Botica Conroy.
- It is unreasonable and illogical that because the deceased had received shareholder-employee earnings ten years or so earlier, his earnings as a shareholder-employee immediately before incapacity, that is from his new consultancy business, should not be taken into account. This is contrary to what Section 15(3) contemplates.
- The deceased should be considered as having commenced a new business undertaking rather than a continuation of the business that had previously existed and that the income from the new business down to the date of incapacity ought to be taken into account as shareholder-employee earnings.
- The shortcomings in the accounts for ABCL for the years 2002 and 2003 should not be prejudicial to the deceased's income and the profits before tax should be regarded as income for the purposes of Clause 39(2)(a).
- In terms of Clause 39(2)(a), the earnings by reference to that formula would be as follows:
 - (i) Earnings as a Botica Conroy employee from 5 December 2001 to 21 February 2002;
 - (ii) ABCL shareholder-employee earnings for the period 5 December 2001 to 31 March 2002 – 3.75 months at \$7,402 per annum;
 - (iii) ABCL shareholder-employee income for period 1 April to 5 December at \$5,000 per month, the amount determined by Mr Hussey.
- Even if it were to be determined that Clause 39(2)(c) applied, Section 15(3) must apply and reasonable remuneration from the deceased's employment with ABCL down to date of incapacity must be included.

[19] Mr Barnett, for the Respondent, took an entirely different approach and submitted as follows:

- Clause 39(2)(a) does not apply as it only applies for claimants who first commence receiving earnings as a shareholder-employee in the tax year in which the incapacity commenced. The deceased received shareholder-employee earnings from ABCL in the 1993 and 1994 financial years.
- It is not relevant that the deceased may have only operated ABCL on a part-time basis prior to February 2002.
- It is contradictory for Mr Hussey to assert that the profit for the 2002 year (\$7,402) be regarded as shareholder-employee earnings for the purposes of Section 15(3), and yet to contend that those earnings are not shareholder-employee earnings received in the 2002 tax year.
- The evidence identifies that the new business did in fact commence in the 2002 tax year, and therefore Clause 39(2)(a) could not be applicable.

DECISION

[20] The deceased's entitlement to weekly compensation is wholly governed by the statutory provisions of the 2001 Act, and it is the case that the respondent has, quite correctly I consider, accepted that the amendments which were made to Clause 39 as from 1 July 2005, and which are considered more beneficial to claimants, should apply in this case as the respondent took the view that the claim for weekly compensation was in fact made after 1 July 2005 and therefore allowed for that amendment to be applicable. Clause 39 is the statutory formula for determining the weekly earnings of a claimant, for weekly compensation purposes, who had earnings as a shareholder-employee immediately before his incapacity commenced.

[21] The meaning of earnings as a shareholder-employee is set out in Section 15 of the Act. There can be no dispute that the deceased did have the status of a shareholder-employee at the time of incapacity, he being fully engaged as of that date in operating a consultancy business under the company name of ABCL.

[22] It is also not in dispute that the provisions of Clause 39(2) are applicable to determining the weekly earnings, rather than Clause 39(1).

[23] To qualify under Clause 39(2)(a) it would require to be established that the deceased first commenced receiving earnings as a shareholder employee in the 2003 tax year. Indeed, that is the only qualification which is required to be established. It is the case that if that qualification cannot be met, then the formula contained in Clause 39(2)(c)

applies. That qualification does not talk of the "relevant year", that requirement comes in only where the formula in (2)(b) or (2)(c) applies.

[24] As I see the matter, the essential question which requires to be determined therefore is whether the deceased first commenced receiving earnings as a shareholder-employee in the 2003 tax year. In the case of this deceased there is no dispute, even though it became evident fairly late in the piece, that the deceased did receive shareholder-employee earnings from ABCL in the 1993 and 1994 financial years, that situation being confirmed by the IRD in a letter dated 22 April 2008.

[25] It also seems to be the case and for the purposes of this decision, I find it to be so, that the deceased did not receive any further earnings as a shareholder-employee, that is, earnings that were returned as such for taxation purposes, for any subsequent financial years down to and including the financial year-ending 31 March 2002.

[26] The company's accounts for the 2001 and 2002 years show that no shareholder-employee earnings were paid, and so it is the submission of Ms Fisher that the deceased's activities in ABCL prior to the 2003 year, should be disregarded, and which would enable him to qualify for (2)(a).

[27] If the background facts were different, it might be that such a submission could carry the day, such as if the deceased were a shareholder-employee in Company A, say 10 years ago, and received earnings therefrom, and Company A subsequently ceased to be in business and then subsequently Company B was incorporated in the year that the claimant became incapacitated and where it can be seen that there is a clear distinction by being separate legal entities between Company A and Company B, such that earnings as a shareholder-employee in Company A could not be taken as being applicable and the status of the claimant was that of a shareholder-employee of Company B at the relevant time.

[28] In the case of the deceased, of course, there has only ever been Company A, and it has carried on in business over the years, albeit as a part-time small operation, but then in the year of incapacity it reinvents itself, as it were, under the full-time activities of the deceased.

[29] Noting that the definition of earnings as a shareholder-employee is set out in Section 15, reference to "the company" must be taken to mean the company with whom the deceased had earnings immediately before incapacity. The fact that the deceased had not received earnings as a shareholder-employee from that company in the relevant year, does not mean that the earnings as a shareholder-employee received in earlier

years are not to be considered relevant to a finding on the facts that the deceased first commenced receiving earnings as a shareholder-employee from that company prior to the tax year in which incapacity commenced.

[30] In the case of the deceased, the company was at all times ABCL and in those circumstances it must be the case that he is considered a long-standing shareholder-employee, which indeed he was, and that he received earnings in that capacity in years before the year he suffered incapacity.

[31] For the foregoing reasons, therefore, I find that the submission of Ms Fisher that his full-time work in the up-rated business of ABCL prior to 31 March 2002, and the work that he must have undoubtedly have done in the 1993 and 1994 years, must count for naught and not be considered such as to affect her submission that the deceased first began receiving earnings as a shareholder-employee in ABCL in the 2003 tax year; that cannot be the case as it would be contrary to the clear and plain meaning of the words of 39(2)(a).

[32] Accordingly, I find as a fact and as a matter of law, that the deceased does not qualify to have his pre-incapacity earnings assessed in accordance with the formula of Clause 39(2)(a) but rather it must be assessed under the formula of Clause 39(2)(c), as indeed it was by the respondent when it made its decision on 13 May 2008.

[33] As earlier noted, even if Clause 39(2)(c) were to be applicable, Ms Fisher submitted that the respondent had failed to properly identify the relevant earnings for the purposes of weekly compensation assessment under the formula of 2(c), taking account of Section 15(3).

[34] The formula contained in (2)(c) requires consideration of four separate figures. In that formula a and b are the earnings and c and d are the divisors. a is the claimant's total earnings as an employee in the 52 weeks immediately before incapacity, and b is the claimant's earnings as a shareholder-employee in the relevant year.

[35] It can be readily seen that there is a distinction between earnings as an employee and earnings as a shareholder-employee, they being two separate and distinct categories of earnings.

[36] As identified by the respondent, the deceased did have earnings as an employee within 52 weeks of his incapacity, namely his earnings with Botica Conroy from 5 December 2001 through to 21 February 2002, that amount, as advised by Botica Conroy totals \$25,123.16. In addition to this sum further earnings of \$6,100 received by the

deceased in September 2002 and shown as being subject to PAYE tax in the company accounts, has been treated as earnings as an employee. Those two sums which total \$31,223.16 represent the total amount which can be said to be the a amount in the formula.

[37] The next figure of earnings in the formula is b which is the deceased's earnings as a shareholder-employee in the relevant year. It is at this point that the definition of "relevant year" must be noted, and in terms of the deceased's circumstances it is the financial year-ended 31 March 2002.

[38] It has already been identified from the financial accounts of ABCL for that financial year, that the deceased received no earnings as a shareholder-employee. However, it is the case that those same accounts identify that the company profit, before tax, was \$7,402.38 for that financial year, and the respondent has, by applying the provisions of Section 15(3) determined that that sum represents reasonable remuneration for the deceased for the services that he provided to the company as a shareholder-employee in that year. Whilst Section 15(3) only refers to "the tax year", I find that, for the purposes of b in the formula, it must be restricted to the relevant year and it is the tax year of 2002 and the amount of the net profit for that tax year which has been accepted as being earnings as a shareholder-employee within the meaning of b in the formula.

[39] The divisors c and d are both 52, which means that when the formula of Clause 39(2)(c) is translated into figures, it is as follows:

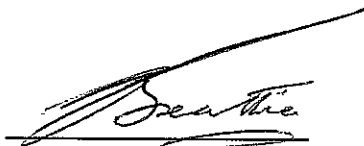
$$\begin{array}{r} \$31,223.16 \\ \hline 52 \end{array} + \begin{array}{r} \$7,402.38 \\ \hline 52 \end{array}$$

[40] From the descriptions of a and b in Clause 39(2)(c) it is the case, as a matter of law, that the deceased's income earned in the 2003 tax year, be it for the whole year or simply down to the date of incapacity, cannot feature in the formula. It does not represent earnings as an employee, and it does not represent earnings as a shareholder-employee in the relevant year.

[41] Those earnings identified by Mr Hussey as being \$5,000 per month, do not come within the definition of earnings as an employee within the meaning of Section 9 of the Act, as being earnings subject to a source deduction payment, whereas of course the respondent did acknowledge that the \$6,100 paid in September 2002 was within that definition, as it was identified as being PAYE deducted earnings.

[42] From the foregoing I find that the respondent was correct to determine that the deceased's earnings for the purposes of weekly compensation assessment were to be assessed in accordance with the formula contained in Clause 39(2)(c) of the Act, and further, it has correctly identified the sums described as a and b in that formula and has therefore correctly identified the quantum of weekly earnings of the deceased as a shareholder-employee for assessing the quantum of his weekly compensation entitlement. This appeal is therefore dismissed.

DATED this 19 day of May 2010

A handwritten signature in cursive script, appearing to read "M J Beattie", is written over a horizontal line.

M J Beattie
District Court Judge