CITATION:	*Payne v McArthur River Mining Pty Ltd [2003] NTMC 028*
PARTIES:	WILLIAM PAYNE
	v
	MCARTHUR RIVER MINING PTY LTD ACN 008 167 815
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH COURT
FILE NO(s):	20305659
DELIVERED ON:	12 June 2003
DELIVERED AT:	DARWIN
HEARING DATE(s):	26 May 2003
DECISION OF:	D LOADMAN, SM

CATCHWORDS:

APPLICATION FOR INTERIM BENEFITS ORDER – CRITERIA FOR GRANT OF INTERIM BENEFITS ORDER – SERIOUS QUESTION TO BE TRIED – BALANCE OF CONVENIENCE

Work Health Act

REPRESENTATION:

Counsel:

Worker:	Bill Priestley
Employer:	Simone Hansch-Maher

Solicitors:

Worker:	Priestley Walsh
Employer:	Cridlands

Judgment category classification:	B
Judgment ID number:	2003 NTMC 028
Number of paragraphs:	27

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20305659

BETWEEN:

WILLIAM PAYNE
Worker

AND:

MCARTHUR RIVING MINING PTY LTD ACN 008 167 815
Employer

DECISION ON APPLICATION FOR INTERIM BENEFITS

(Delivered 12 June 2003)

Mr David LOADMAN SM:

Introduction

1. An application was made to the Work Health Court by the worker, filed 14 April 2003, seeking an "order in respect of claim for compensation under part V or determination of dispute between worker and employer following mediation under part VIA:s.104".

2. Certain procedural steps were taken in relation to that application. It is asserted by the worker's solicitor in the submissions filed concerning an interim benefits order, and seems to be correct, that the disposition of the principal application would not occur until February or March 2004.

3. An interlocutory application in the proceeding was filed on 1 May 2003 and in support of that application the worker swore an affidavit 30 April 2003 ("the application for interim benefits").

4. The answer or defence in relation to the application was filed on 28 May 2003.

5. Material to which there will later be reference was filed in relation to the application for interim benefits. Both parties have lodged submissions. On 26 May 2003 the Court reserved its decision in respect of the application for interim benefits.

The Law

6. Curiously there is no dispute between the parties as to the law which applies or which governs an application for an interim benefit order.

7. After visiting decisions set out at pages 7 to 8 and of his own cited at page 10 of the decision delivered 21 June 1994 in relation to proceedings *Wormald International (Aust) Pty Ltd v Barry Leslie Aherne* [1994] NTSC 59) ("*Aherne*") , His Honour Mr Justice Mildren recites:-

> *"I am prepared to accept for the purposes of this appeal that the approach to the exercise of the discretion to award interim payments is the same as in an application for an interlocutory injunction - i.e. that the worker must establish that there is a serious question to be tried and that the balance of convenience favours the making of an interim award. However, I do not accept that this necessarily means that an interim award cannot be made in the absence of proof of hardship to the worker. There are many factors to be considered in deciding where the balance of convenience lies. In many cases, proof of hardship to the worker will no doubt be of importance. But in cases where the worker has had his payments stopped altogether by the employer exercising a right to discontinue payments under s69, there must inevitably be some hardship to the worker in the usual run of cases, even if the worker is fortunate enough to have other independent means. If the savings of a thrifty worker are to be whittled away pending the hearing of his appeal, that is a hardship to him; if he has income from investments he has made, likewise it is a hardship to him to have to use that income to live upon rather than for other uses with which it might legitimately be put. Even if the worker is a millionaire, this does not necessarily mean that the balance of convenience must be decided against him - interim payments may ultimately have to be repaid, and there is less risk of the employer not being able to recoup his money than in the case of a*

worker with little or no means. Often the balance of convenience will best be served by restoring the status quo, so that a different emphasis to questions of hardship will arise in cases where payments have been stopped than in cases where the employer has neither made voluntary payments nor been required by the provisions of the Act or by Court order to make payments. Other relevant factors might include any perception the Court forms of the strength of the worker's case: see Castlemaine Tooheys Ltd and Others v. State of South Australia (1986) 67 ALR 553 at 559; the amount of compensation at stake; any delay in making the application or in bringing on the application for substantive relief, and where the fault lies for that delay; the period of time which might elapse before the substantive application can be heard; the degree of any prejudice to the employer if the order is made, especially if the worker is outside the jurisdiction, or outside of Australia. Relief might also be refused on other discretionary grounds, for example, if the applicant has not made full disclosure of all of the relevant circumstances. These are not intended to be an exhaustive list of the factors which may well be considered; nor will all of these factors be relevant in every case; and the weight to be given to each factor will depend upon the circumstances of the case."

8. It is this Court's concluded view that section 75(A) of the Work Health Act is of no assistance in determining the outcome of the application for interim benefits.

The Evidence

9. Without dissecting the minutiae of all the allegations made in the affidavit and other material filed by or on behalf of either the worker or the employer, the following facts are common cause:-

(a) On 13 March 1997 the worker was engaged and commenced employment as a Mine Worker Level 3 with the employer. The allegation in paragraph 9 of the affidavit of Craig Thompson asserting the date of commencement of employment as "17 March 2000" must be incorrect and this decision proceeds on the basis that it is.

(b) On 13 January 2000 whilst working underground the worker alleges in paragraph 2 of his affidavit sworn 30 April 2003 that he was pulling on a

rope to shut a vent off when the rope broke and he fell and injured his neck. A diagnosis of the injury is described in the same affidavit as "an upper cervical facet joint dysfunction".

(c) The claim for compensation relating to the above injuries was lodged and accepted; the employer provided the worker with special duties which did not entail underground mine working and paid him a salary of $83000 per annum. The employer also provided bed and board. The package was analogous to the remuneration and benefits he would have derived as an underground mine worker.

(d) At the instance of the employer the worker was examined by an orthopedic surgeon retained by the employer namely Dr Mark Awerbuch. Awerbuch provided a lengthy report to the insurers of the worker and in that report, whilst not being able to locate or identify any objective evidence to suggest the continuation or existence of some traumatic injury or incapacity as claimed by the worker, said at page 7 in paragraph 5

> *"there is no objective evidence to suggest work incapacity. It is simply a matter of taking a view as to whether or not one believes what Mr Payne reports. If one does, then he would be considered unable to drive an underground vehicle which has no suspension and which requires him to constantly turn his head".*

From that statement this Court discerns that a normal aspect of an underground worker's duty is the driving of such a vehicle and such was unavoidable. It is obvious that construing the report and in particular the above quotation, Dr Awerbuch was unable to exclude the existence of the complaint made by the worker or the persistence of the symptoms which the worker attributed to the traumatic injury on 13 January 2000.

(e) Nevertheless, and somewhat surprisingly in the light of the contents of his report, Awerbuch provided a medical certificate dated 22 January 2001, pursuant to section 69(3) of the Work Health Act (NT), which certified

examination as indicated and in paragraph 2, certified "in respect of that injury, Mr William Payne has ceased to be incapacitated for work".

(f) From paragraph 14 of the worker's affidavit of 30 April, it is apparent that proceedings in the Work Health Court were commenced under case number 20105041. As is apparent from other allegations in the worker's affidavit of 30 April, the employer withdrew its Form 5 and paid his legal costs. As a consequence of that action, understandably, the solicitors for the worker, undoubtedly on his instructions, discontinued the proceedings referred to above.

(g) In paragraph 19 of the worker's affidavit of 30 April, he refers to a certificate obtained by him from his own medical practitioner, Dr Meadows, which he says was related to duties (other than underground duties) which he was at that time discharging and which, as is apparent on inspection, in relation to those duties asserts that the worker has ceased to be incapacitated for work (other than underground duties, but be understood), but as is recounted by the worker, stipulates the need for ongoing physiotherapy.

(h) In paragraph 18 of the worker's affidavit of 30 April, he asserts that upon review by the employer's occupational physician, Dr Christopher Kelly, that medical practitioner determined the worker needed "to work away from underground duties and it was then that safety officer duties were provided to me".

(i) None of the affidavit material filed in relation to the interim benefits application exhibits any report from Dr Christopher Kelly, although there is reference in the material to his involvement. Annexure C to the affidavit of Carmel Louise Torney sworn 21 May 2003, being a report by Dr John Talbot, refers to "the very carefully thought out report by Dr Christopher Kelly dated 14 April 2001". Perhaps fortuitously amongst the Index of Documents filed in the proceeding in respect of the principal application, this Court has located a report of 17 April 2001 by Dr Christopher Kelly.

Obviously there is confusion in respect of the date of the relevant report. Assuming however that report of 17 April 2001 is the only report of Dr Kelly and the relevant report, Dr Kelly states that the worker's work tasks (as an underground miner)

> *"require him to operate heavy machinery whilst sitting sideways and to remove loose rocks from the roof of the mine using a scaling bar. He works a twelve hour day, seven days on and seven days off".*

This is to be contrasted with the description of his work or at least part of it as referred to in the report of Dr Awerbuch set out above. It was the finding of Dr Kelly that the worker's presentation was straightforward in manner and with "no evidence of symptom exaggeration or pain behaviour". It was his opinion

> *"clinically Mr Payne has upper cervical fact joint dysfunction with stiffness and a loss of movement, but no evidence of any nerve root involvement. His problem seems principally to be on the left side although in my opinion both sides are involved."*

He then refers to what is not immediately relevant to this Court's decision. It was his view that ultimately the condition, being treatable, would mean there was no residual disability and at page 4 recommends a graduated return to normal duties.

(j) Suffice it to say that the opinions of Dr Kelly set out above do not amount to his determination, as alleged in paragraph 18 of the worker's affidavit of 30 April 2003, that the worker "needed to work away from underground duties". Whether or not there is some report which ought be available but is not, or whether the report was oral this Court cannot say. What is however obvious is that as at 12 November 2002, being the date of the report referred to of Dr John Talbot, and or at 17 April 2001, being the report referred to of Dr Christopher Kelly, the worker was not at either date fit to resume work <u>as an underground miner</u> and at the later date in the view of Dr Talbot he could not assess the worker's permanent impairment. He

also suggested that deferment of that issue occur for another year. Self evidently therefore until 12 November 2003.

(l) There is some support for the allegations attributed to Dr Kelly as referred to above in June/July 2002 to be gleaned from the precis or chronology filed on behalf of the employer which relevantly states "Dr Kelly recommends re-deployment" (which surely can only mean some duty other than those of an underground miner).

(m) It is surely no coincidence that in August 2002 the worker is assigned by the employer to the position of Mine Safety Officer. Self-evidently that is quite different from the duties to be performed by an underground miner and can only logically have been because the employer accepted the above recommendations made by those medical experts retained by it for advice in relation to the issue. It appears from the affidavit of Craig Thompson, Administration Manager of the employer, sworn 14 May 2003, that the position as a Mine Safety Officer, which he says occurred in July 2002, was available to the worker on a temporary basis. In paragraph 8 of the worker's affidavit of 30 April, the worker does not refer to the position as a temporary position and after reciting his inability to deal with the earlier provided alternative duties, that is alternative to underground mining duties, he says "I ... was subsequently made a safety officer".

(n) As it apparent from Annexure WP5 of the affidavit of the worker sworn 30 April 2003, being a letter from the employer dated 16 January 2003, the basis of several propositions recounted in the letter is described as an indication by the worker that he is unable to perform the requirements of those attached to the position as an underground mine worker. The phraseology of that letter in that respect smacks of subterfuge. As at the date of that letter the employer was not itself possessed of any indication that in the opinion of any specified medical practitioner the worker was in fact able to carry out such duties.

10. An objective analysis of the above matters must lead inescapably and irrefutably to the conclusion that the issue central to the question of the worker's capacity to perform his duties was whether or not he was then able to perform such duties as attached to an underground mine worker.

11. It is does not need a reversion to the above matters to be able to state with the utmost clarity that there is unquestionably "a serious question to be tried" in relation to whether the worker is or ever was fit to return to work and attend to his duties as an underground miner.

Does the balance of convenience favour the making of an interim award?

12. Again, this Court does not propose to set out all the material filed in relation to this issue but makes the following points:-

(a) The employer must have known or ought to have known that the worker's requested letter WP9 to his affidavit of 30 April 2003, being a letter from the employer dated 24 December 2002 confirming the worker's employment and rate of income, was at least likely to have been for the purposes of committing himself financially. It is beyond belief that at 24 December 2002 the employer did not at least have tentative intentions of acting as it indeed subsequently did effectively bringing the worker's employment as a Safety Officer to an end on 16 January 2003 barely 3 weeks later. There is obviously nothing in the letter to suggest the position was a temporary one.

(b) Understandably the worker acted on the strength of the letter of 24 December 2002 to incur financial commitments which undoubtedly he would not have done, but for the employer's letter dated 24 December 2002 and the belief which the employer had allowed to become validly held that there was no plan to change the status quo for the foreseeable future at that time.

(c) Whilst the categories are not closed, in the *Aherne* decision of His Honour Mr Justice Mildren referred to, some of the criteria to be considered in deciding where the balance of convenience lies comprise:-

- **Hardship**: and there is little doubt on the material filed that in respect of financial hardship the worker has and will continue unless in receipt of appropriate remuneration to lead himself into a state of financial catastrophe, possibly losing his house and his car;

- **The effect** of terminating his employment of employment as a Safety Officer, but for which the worker might have earlier resumed his claim or indeed not have withdrawn the proceedings that he already instituted, is clearly analogous to a worker in receipt of payments being subjected to a summary discontinuance under section 69 of the Work Health Act;

- as already observed, the worker's motor vehicle, the equity in it and his home are at risk;

- within the apparent ability reposing in him, he is attempting to derive as much revenue as it is possible to derive to prevent the financial catastrophes which would otherwise come his way.

- There is apparently $30000 equity in his home;

- There is no likelihood of **the matter being listed**, let alone determined, until February or April 2004;

- The **adverse consequences to the employer** of paying out monies which ultimately may be adjudged refundable by the worker are by no means obvious;

- There does not appear to be any valid evidence in possession of the employer to suggest that the worker was, in January 2003 or currently,

capable of returning to perform the duties attendant upon his position as a underground Mine Worker. Indeed the medical report of Dr John Talbot, already referred to, is to the effect that in November 2002 it was not possible to assess the worker's permanent impairment. He also said that deferment of that assessment should be until November 2004.

- **The amount of compensation** is substantial and as asserted in the submissions filed on behalf of the worker at paragraph 4.3 the loss of earning capacity is found to be only $800 a week if he is permanently disabled his total loss could amount to $626,400.

- There has been no **delay or inexcusable delay** in the work of bringing an application for relief and indeed but for the action taken by the employer in January 2003 it may never have occurred. But for the perhaps deceitful withdrawal by the employer of its contentions, the worker was not entitled to any compensation the instituted proceedings then extant by the worker might have now been resolved and perhaps in his favour. Such proceedings could only have been withdrawn because of the employer abandoning its own proceedings.

- There has not been any consequential delay.

- As has already been recounted in relation to the issue of "an arguable case", the employer has not filed in the proceeding in general or in relation to this application at all any conclusive medical material which would establish that the alleged injury, the existence of which is common ground, has resolved and that the worker has not sustained any extant or permanent continuation of the symptomology, such as to make it inappropriate for him to be able to resume his work as an underground miner.

- The perception this Court forms in relation to the matter is that the worker has **an arguable case** as set out above and indeed in this Court's perception the evidence leans more towards the worker's cause than the employer's cause.

- There is no indication that the worker is likely to remove himself from the **jurisdiction or outside of Australia**.

- There is every indication that **full disclosure** of all the relevant circumstances has been made by the worker.

13. Each of the above matters is derived from the dictum of His Honour Mr Justice Mildren in *Aherne*. Although he says that those enumerated factors are "not intended to be an exhaustive list" this Court cannot immediately conceive of any other relevant criteria which it would need to traverse.

14. In all the circumstances as must be obvious from the recitation of the above matters it is this Court's finding that in respect of the issue of the balance of convenience the Court holds that that the balance of convenience favours the making of an interim award.

The amount of the award

15. In respect of the quantum of an interim award, at paragraph 6 of the worker's submissions dated 22 May 2003, the worker sets out a claim for 10 weeks of weekly payments at $900 per week gross. He further seeks an order that from the date upon which the order is made, he be paid further interim payments "from the date of the order at $765.00 gross per week".

16. The calculations which support the arithmetic leading to the sum of $765.00 gross per week are set out in paragraph 5 of the said submissions. This Court does not understand the criteria employed because the issue is not how much he needs to balance his budget, but an amount of money calculated in accordance with a legislated formula.

17. In paragraph 21 of the employer's submissions, it is asserted that the net weekly earnings ("NWE") should be calculated on the basis of the worker's salary of $78,000.00 [sic] (which obviously should be expressed as an annual salary). That however does not sit easily with the contents of a letter of 24 December 2002 which is annexure WP-9 to the affidavit of the worker sworn 30 April 2003. That letter which as previously pointed out does not in any way express the employment as being temporary, refers to

> *"The gross annual income paid to Bill Payne for this work is $83,400.00 (this is inclusive of salary plus roster allowance $15,000 plus accommodation assistance $5200.00)".*

18. It would seem inescapably logical to this Court that on that basis the figure in relation to any calculation as to entitlement should be $83,400.00. Indeed there may be an argument that the employer is estopped from any contention to the contrary. In the event this Court will use that figure of $83,400 in order to calculate the worker's entitlements.

19. It is obvious as a consequence that the calculations by the employer based upon the remuneration rejected by the Court as the applicable basis simply cannot apply.

20. The basis of the indexation apparently applicable to the calculations necessarily to be employed by the Court is not set out in the material. However NWE as indexed on a weekly basis amounts to $1584.50, the multiplier or quotient is $82,394 when multiplied by 52 weeks. Deducting the figure alleged in paragraph 21 of the employer's submissions of $78,000 from the total of $82,394 provides a figure of $4,394 and that is a percentage of 5.3%. The Court assumes that the indexation should occur therefore at 5.3%.

21. Using the $83,400 as the appropriate starting point, 5.3% of that figure is $4,420.20 and the sum of those 2 figures is $87,820.20; which would equal an NWE of $1,688.85.

22. It is difficult to know what to deduct from that figure as a consequence of the worker's average gross income. This is due to the reason that it is asserted that the performance in the second job is due to a temporary circumstance which will reduce the income at some unknown future date.

23. It would seem to the Court that sort of contingency really can't be pedantically catered for and that in due course any error in calculations can be picked up in any final award if one is ultimately made. If no final award is made, the issue is academic.

24. The Court adopts the calculations set out in paragraph 3 of the worker's submissions. That obviously is based on fact, although indeed it may in fact decrease for the reasons already stated.

25. On the Court's calculations that represents a net figure of $841.85 and 75% of that figure is $631.38. The Court finds that is the worker's entitlement.

Order

26. The Court orders:-

1. Using the calculation "within 10 weeks before the determination is made" the worker is to be paid by way of an interim benefit the sum of $631.38 a week for 10 weeks i.e. $6313.80.

2. The employer says nothing in its submissions relating to the claim in paragraph 6 of the worker's submissions already referred to. The Court orders that for a period of 12 weeks from 12 June 2003 the worker receive by way of interim benefits further payment of $631.38 per week.

Costs

27. The Court will hear the parties in relation to the issue of costs.

Dated: 12 June 2003

DAVID LOADMAN
STIPENDIARY MAGISTRATE