

CITATION: *Ray Lewis v John Holland Group* [2004] NTMC 010

PARTIES: RAY LEWIS

v

JOHN HOLLAND GROUP

TITLE OF COURT: Work Health

JURISDICTION: Work Health

FILE NO(s): 20018624

DELIVERED ON: 18<sup>TH</sup> February 2004

DELIVERED AT: Darwin

HEARING DATE(s): 2<sup>nd</sup> February 2004,

JUDGMENT OF: Judicial Registrar Fong Lim

**CATCHWORDS:**

- Interim determination – hardship- normal weekly earnings

**REPRESENTATION:**

*Counsel:*

Worker: Priestley and Walsh  
Employer: Mr Morris

*Solicitors:*

Worker: Priestley Walsh  
Employer: Hunt & Hunt

Judgment category classification: C  
Judgment ID number: [2004] NTMC 010  
Number of paragraphs: 26

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

No. 20018624

BETWEEN:

Ray Lewis  
Worker

AND:

John Holland Group  
Employer

REASONS FOR JUDGMENT

(Delivered 18<sup>th</sup> February 2004)

Judicial Registrar Fong Lim:

1. The Worker has applied for an interim determination of benefits of \$611.00 gross per week. The Employer challenged any order for interim benefits.
2. This is not the usual application for interim benefits in that the Worker has previously had a determination of his rights by this Court as decided by Mr Wallace SM on the 25<sup>th</sup> October 2002. Mr Wallace found the Worker not to be a “worker” under the provisions of the Work Health Act and dismissed the Worker’s claim. That decision was appealed to the Supreme Court and was overturned by Justice Thomas in her decision of the 4<sup>th</sup> December 2003. The Employer has appealed Justice Thomas’s decision and that appeal is set to be heard in May of this year. This matter has also been remitted to this court by Justice Thomas and has been listed for hearing on the 7<sup>th</sup> June this year.
3. The issue to be litigated before this court is the present incapacity of the Worker, whether the incapacity is due to the work injury and what his

Normal Weekly Earnings were at the time of his injury. There is no longer an issue in this Court as to whether the Worker is a “worker” under the Work Health Act because unless or until the decision of Justice Thomas is overturned the Worker is a “worker” as defined by the Act.

4. The Worker relied on his affidavits of the 21<sup>st</sup> January 2004 and the 6<sup>th</sup> February 2004 in support of his application for interim benefits.
5. The Court must be convinced that there is a triable issue and that the balance of convenience lies with the worker. There is obviously a triable issue between the parties on the level of normal weekly earnings and the periods of incapacity of the worker.
6. The question arises as to where the balance of convenience lies.
7. The Worker relies on a medical report of Dr Millions to support his claim for incapacity for work and claims he is totally incapacitated for work. He sets out his weekly expenses as they stand and claimed in his first affidavit that the only way he has survived financially was to rely on loans from friends. The Worker’s evidence was criticized by the Employer as lacking in detail about how the Worker’s ability to survive on Centrelink benefits up to this point.
8. After an adjournment the Worker then provided evidence of a windfall of \$10000 and a Victims Assistance certificate of \$19749.90 and further information regarding his accommodation.
9. Mildren J in Wormald v Aherne [1994] NTSC 54 sets out some factors which could be considered in deciding application for interim benefits. This decision has been adopted by this Court as giving a general guideline of what should be considered. Factors which have been considered in that past are, whether the worker is suffering hardship, the status quo, the likelihood of success, the ability of worker to pay back benefits should he be unsuccessful, any delay in the application for benefits and the application

for interim benefits, the diligence of the worker in litigating his claim and whether the worker has been made full disclosure to the court.

10. **Hardship** – the worker has set out his weekly expenses and states his only income is the Newstart allowance of \$251.70 per week. The Worker suggests that he needs \$484.50 nett to survive. The Employer argues that the Worker has survived the last 3 years without benefits and therefore even though he may be in hardship that is not a hardship for which the Employer should be responsible.
11. The Worker first stated that he has managed to survive with help from his friends but does not provide details of the level of assistance he has received from his friends. In his later affidavit he admits to having had the windfall and his Crimes Victims Assistance payout.
12. The Worker does not provide the court with his bank statements and makes no statement about his level of savings. He is asking the court to assume that he has no savings and that he has now used up the extra funds he has come into over the past couple of years.
13. The Employer argues that given that the worker was unemployed for a period of 6 -12 months before his 5 days of employment with the subcontractor then the Worker is not in any worse position than the week before he started his job.
14. **Status Quo** - the Employer argues that the worker has existed on the Centrelink benefits up to now nearly 4 years later and there is no good reason to disturb the status quo, the worker has not explained why he now applies for benefits. The Worker does make some suggestion why the status quo should be disturbed and that is because he no longer can rely on friends to assist and presumably the windfall and the Assistance monies have now been dissipated.

15. **Delay** - the Employer argues that the Worker has waited almost 4 years to make an application for interim benefits and hasn't explained that delay. In fact an explanation has been provided in that the Worker states that his previous solicitor had advised him not to apply for interim benefits. He also states that as he was applying for legal aid one of the conditions of legal aid was to take the solicitor's advice and that is why he had not made the application for interim benefits until now. The Worker also states that with the windfall, the Crimes Victims Assistance, and help from his friends he had not needed to apply for interim benefits until now.
16. **Likelihood of success** – the worker has provided a medical report of Dr Millions which supports his claim and encourages the Employer to look at retraining the worker if possible. The Employer has not accepted that the incapacity suffered by the worker is an injury arising out of the course of employment however with no other evidence to the contrary and with the present ruling that the Worker is a “worker” it is my view that the worker will more than likely be successful in his claim and the real issue will be a matter of the level of benefits to be paid.
17. **Full disclosure** - the Worker has failed to make full disclosure in a couple of matters. He failed to provide details of his bank accounts and only provided details of his windfall and Victim's Assistance certificate after an adjournment before which I had indicated that I was of the view that the Worker's evidence was somewhat lacking.
18. The Employer made much of some inconsistencies of the worker's evidence in his affidavit and the evidence he gave in the hearing before Mr Wallace. In particular the Worker's evidence in paragraph 6 of his affidavit of the 6<sup>th</sup> of February 2004 is not ad idem with the evidence he gave in to the Court in the hearing. It is clear that the worker has been careless in his evidence before this court in this application.

19. **Possibility of recovery** – there is no real evidence of the assets the Worker may have or any savings he may have. It is more likely than not however that the Worker will be unable to pay back any interim benefits paid to him.
20. Given all of the above it is my view that the balance of convenience tips slightly in favour of the Worker receiving interim benefits. The next question is at what level the benefits ought to be paid.
21. Generally speaking it has been the practice of this Court to assess the level of need of the Worker to set the level of the interim benefits. The Worker has provided details of his weekly expenses and suggests he requires the sum of \$611.00 gross per week.
22. It is important at this point to look at the Normal Weekly Earnings of the worker as the interim benefits granted cannot be more than his alleged entitlement under the Act. The issue of the level of Normal Weekly Earnings was fully litigated in hearing before Mr Wallace and in whose decision he made it clear that he thought the \$525.00 paid to the Worker was a cash payment which had not had tax taken out nor was it intended that tax was to be taken out.
23. The Worker relies on the claim form which states that the Worker's normal weekly earnings were \$798.00 being \$21 per hour for a 38 hour week. However that figure is in dispute.
24. It is my view that the worker should not be given interim benefits which could be more than his entitlement and therefore the level of interim benefits should not be more than the \$525 gross per week that the worker actually received. It is also my view that given the passing of time from the date of injury the interim benefits ought to be set at no more than 75% of the nominal normal weekly earnings which is \$393.75 gross.
25. Considering the worker's weekly expenses are \$484.50 then I am prepared to grant the worker in this interim benefits of \$393.75 gross per week.

26. My orders will be:

26.1 The Employer pay to the worker interim benefits at the level of \$393.75 gross per week for 12 weeks from today.

26.2 The costs of this application be costs in the cause.

Dated this 18<sup>th</sup> day of January 2004

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Tanya Fong Lim  
JUDICIAL REGISTRAR