

CITATION: *David Lauricella v Ausbowl (Darwin) Pty Ltd* [2004] NTMC 071

PARTIES: DAVID LAURICELLA
v
AUSBOWL (DARWIN) PTY LTD

TITLE OF COURT: Work Health Court
JURISDICTION: Work Health
FILE NO(s): 2040465
DELIVERED ON: 20th September 2004
DELIVERED AT: Darwin
HEARING DATE(s): 15th September 2004
JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Interim Determination of Benefits

REPRESENTATION:

Counsel:

Worker: Mr Johnson
Employer: Ms Lennie

Solicitors:

Worker: Priestleys
Employer: Morgan Buckley

Judgment category classification: C
Judgment ID number: [2004] NTMC 071
Number of paragraphs: 33

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

No. 20404065

BETWEEN:

David Lauricella
Worker

AND:

Ausbowl (Darwin) Pty Ltd
Employer

REASONS FOR JUDGMENT

(Delivered 20th September 2004)

Judicial Registrar Fong Lim:

1. The Worker has applied for an interim determination of benefits. The Worker suffered a back injury at work in 1994 and has not worked since. The Worker was assessed as having a permanent impairment of 15% of the whole body arising out of his back injury. Over the years the worker has attended pain management clinics and has been able to avail himself of some psychological counselling. The Worker's benefits were ceased in January of this year on the basis of the medical opinion of Drs Jackson, Erlich and Brown.
2. The Worker must prove to the Court that there is a triable issue and that the balance of convenience lies with him (see Barry Leslie Aherne v Wormald (Australia) Pty Ltd [1994] NTSC 54).
3. The Worker relied upon his affidavit of the 31st of August 2004 and referred to the medical reports of Drs Jackson, Erlich, Brown and Yellowlees to

support his application. The Employer relied on the reports of Drs Jackson, Erlich and Brown to argued there was no triable issue.

4. This is a matter which in the final determination will rely on the court's interpretation of the medical reports. Mr Johnson for the Worker made a valiant effort to show that the reports available and relied on by the Employer to cease payments supported his client. I cannot agree with Mr Johnson. All of the doctors accept that the Worker has a permanent vulnerable back with degenerative changes which will mean that he is advised not to return to his pre injury employment however they do not accept he is unable to work at all. I will refer directly to the reports later in this decision.
5. I accept that there may be a triable issue about the level of incapacity of the worker and whether the injury is causing his incapacity to work and therefore I must look at the balance of convenience.
6. The factors to consider in the balance of convenience are well known. In this matter there are three main factors which I considered decide the balance of convenience, the likelihood of success, hardship, and ability of recovery should the Worker be unsuccessful.
7. **Likelihood of success.-** The legislature makes it very clear that a finding in an application for interim determination of benefits is not to be a finding of liability. See section 107

107. Interim determination

(1) Subject to this section, the Court may make, vary or revoke an interim determination of a party's entitlement to compensation.

(2) The making or refusal to make an interim determination is not to be taken to be a finding in respect of a party's entitlement to or liability for compensation.

8. It is equally clear that legislature contemplated there would be a need for the court to consider the strength of a worker's case prior to making an interim determination.
9. The Worker was examined by Dr Jackson in June of 2003. Dr Jackson is an orthopaedic surgeon. While Dr Jackson accepts that the Worker has a physical problem with his back he places the major problem on non – organic factors, at page 5 of his report Dr Jackson opines:

“ The diagnosis is that he has disc degenerative disease in his lumbar spine.....However I believe that this man's major problem is of a non organic type.”

10. Dr Jackson goes on to suggest that he thought the Worker had a “chronic pain syndrome” and that he may suffer from a “depressive condition” however Dr Jackson is not qualified to make that diagnoses.
11. In the Worker's favour Dr Jackson does state at page 5 of his report that:

“Whatever his current condition is does relate to the work injury of October 1994. The current situation is a result of that injury and subsequent events whatever his current situation might be.”

12. Later in his report Dr Jackson shows that he cannot really give an accurate assessment of the Worker's physical condition because of the non – organic factors. See point 3 on page 6

“It is very difficult to know the exact degree of physical symptomatology he has”

At point 5 of page 6

“I am uncertain as to the true degree of physical disability the man has. It is simply impossible to assess it in the circumstances because of the marked non organic factors which are operative.”

At point 7 of page 6

“ My opinion is Mr Lauricella's failure to return to work is to a very significant extent affected by non organic factors.”

And finally at page 7

“.....his reported levels of disability are not as great as he indicates.”

13. Dr Jackson obviously accepts that there is some physical disability arising out of the original injury but indicates that the worker is exaggerating his symptoms.
14. Professor Erlich who is an orthopaedic rehabilitation specialist is less supportive of the Worker. Professor Erlich gave a series of reports on the Worker. In his first report of the 24th November 2003 the Professor states:

“ The only consistent physical abnormality today was a depressed right ankle jerk, presumably the aftermath of some right nerve root compression by a prolapsed disc.

The rest of his examination findings are clearly inconsistent.

The overwhelming impression is of a man with a highly dramatic display of agony for which there is no adequate physical explanation.

He must be regarded as unemployable whilst he continues to be in his present state of grossly abnormal illness behaviour”

The Professor summarises :

“This gentleman had a disectomy for lumbar disc protrusion but insists that he has severe ongoing symptoms. These are described in rather dramatic terms and accompanied by highly histrionic conduct in the presence of inconsistent physical signs.

His return to the workforce does not depend on changes in his physical condition”

15. In his report of the 18th of December 2003 Professor Erlich states:

“His future depends on his changing his behaviour his present conduct is not to be considered to be the effect of his physical injury which has long ago reached stability”

16. Then in his report of 4th February 2004 having been asked if the worker's behaviour is a subconscious presentation or behaviour, the Professor responds:

“ His behaviour is carried out quite consciously.”

“This man's clinical presentation is not explicable in terms of the consequence of physical injury to his spine and the subsequent treatment of it.”

17. Finally in his report of the 13th February 2004, after having read the report of Dr Brown Professor Erlich concludes:

“ The clinical presentation is marked by his histrionic behaviour with marked inconsistencies in the physical findings. It was my view that this presentation is not explicable in organic terms and both Dr Brown and I seem to have agreed that his conduct is voluntarily contrived.

In view of the bizarre nature of his behaviour he must be considered to be unemployable until he chooses to change the way he behaves.”

18. Dr Brown, a consultant psychiatrist and psychologist examined the Worker on the 24th November 2003. In his report of the 24th November 2004 Dr Brown sets out extensive history, lists all of the medication the Worker uses to alleviate the pain and the symptoms he suffers. Dr Brown then describes how the Worker presented in the examination and that the conclusion of that:

“I considered this presentation to be grossly exaggerated and not the direct manifestation of any psychological or physical condition.”

And later:

“I would place little reliability on this presentation of his physical condition. The problem was to decide the extent to which there was ongoing underlying organic pain devoid of exaggeration.”

19. Dr Brown then goes on to discuss the possible alternative diagnoses for the Worker's symptoms. Dr Brown identifies the issues as:

“(1) how much of his usual pain is due to actual underlying organic pathology and how much to exaggeration? and (2) of the exaggerated pain how much is psychogenic (unconsciously generated) and how much is malingered.”

20. After a detailing the alternative diagnoses Dr Brown comes to the following conclusion:

“ Thus in my opinion Mr Lauricella in addition to Malingering his presentation is also likely to have a Chronic pain Disorder Associated with Psychological Factors.”

21. Dr Brown defers to physical specialists to advise on the ongoing cause of any organic back pain but in relation to non – organic pain he concludes:

“ Thus in my opinion his psychological symptoms including psychogenic pain arise from his failure to alter this motivation. In my opinion his employment is no longer the substantial contributory factor to his psychological symptoms and psychogenic pain and has not been so for some time.”

22. It is Dr Brown’s conclusion that he accepts the Worker from being unfit for work only because the Worker will not accept anything less than perfect recovery which will not be the case. He says that because the Worker is motivated only by a full recovery he deliberately exaggerates his pain and until he accepts that he will be left with a vulnerable back which means he is only suited to sedentary work then he will not progress at all.

23. In a later report of the 22nd January 2004 Dr Brown proffers a further opinion having been referred to Professor Erlich’s reports. At page 7 of 8 Dr Brown answers the following question:

“Is the Adjustment disorder such that if would not cause any incapacity for work?”

.....It is reasonable to conclude, on the balance of probabilities that the degree of frustration , excluding any exaggeration or conscious variation is so minimal that there is no adjustment disorder and if there was, it would be so negligible that is would not cause

any incapacity for work for Mr Lauricella's pre – injury employment.”

24. Dr Brown is strongly of the view that the Worker is consciously exaggerating his pain. See page 7 of 8:

“There would be no explanation of the behaviour he demonstrated at my interview other than a gross display of intent and so of purposively malingering severity.”

25. It is clear from the strength of opinion from both Drs Jackson, Brown and Erlich that even though the Worker may have a slight level of organic pain that should not stop him from returning to work of a sedentary nature and the only thing that is stopping him from doing so is the conscious choice to exaggerate his pain levels.
26. Given the strength of those opinions I would have to find that the likelihood of success of the Worker's claim is very slight. There is very little medical evidence to support the contrary view.
27. The Worker has stated in paragraphs 10 and 11 of his affidavit that he had been referred to be assessed by a Dr Zakas, an orthopaedic surgeon, who told him that his pain was caused by scar tissue from the surgery in 1995 causing nerve irritation. However as there is no report from Dr Zakas to be considered and given the assessment of the Worker by Drs Brown and Erlich I can place very little weight on that statement. The only other evidence is a letter from Dr Cherry of the pain management unit at Flinders University to Dr Lam, the Worker's general practitioner. In that letter Dr Cherry advises that he had sent the Worker to get an MRI and that the MRI showed:

“No evidence of recurrent disc protrusion of gross epidural fibrosis at the L4/5 level. Slight enhancement of the right L5 nerve root in the lateral recess may indicate nerve root irritation. L5/S1 annular tear.”

28. Dr Cherry does not give any opinion as to the relationship between what is shown on the MRI and the level of pain suffered by the Worker.

29. It would be interesting and possibly helpful to hear from Drs Erlich and Jackson as to whether their opinions would change if they were given the MRI to refer to.
30. **Hardship** – the Worker has given some evidence of his financial circumstances which shows him as having expenses over and above the level of assistance he gets from Centrelink. The Employer has challenged some of the expenses claimed and has provided the court with their calculation of the Worker’s true financial position. It is clear that should the Worker not be paid interim benefits he would continue to suffer financial hardship and would have to adjust his lifestyle to accommodate his lower income.
31. I note that the Respondent was to provide me with their calculations as to what level of income would address the Applicant’s needs those calculations were not received at the time of these reasons being handed down.
32. **Worker’s ability to repay if he is unsuccessful** – The worker has a property which has a mortgage over it or approximately \$33000.00 the unimproved capital value of that property is \$37500.00 according to the SA Water rates notice. The equity held in the property is about \$4500.00 not taking into account any improvements. Clearly the Worker has no other assets and would be unable to repay any benefits paid to him should he be unsuccessful.
33. **Conclusion** - given the above it is my view that in this matter the balance of convenience lies with the Employer and the Worker’s application for an interim determination should be dismissed.

Dated this 20th day of September 2004

Tanya Fong Lim
JUDICIAL REGISTRAR