

CITATION: *Laqui Papalli v Forstaff* [2005] NTMC 002

PARTIES: LAQUI PAPALLI

v

FORSTAFF

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20421119

DELIVERED ON: 24th January 2005

DELIVERED AT: Darwin

HEARING DATE(s): 17th January 2005

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Interim determination – Section 107 Work Health Act

Barry Leslie Aherne v Wormald Security Australia [1994] NTSC

REPRESENTATION:

Counsel:

Worker: Ms Maley

Employer: Mr Wild

Solicitors:

Worker: Withnall Maley

Employer: Cridlands

Judgment category classification: C

Judgment ID number: [2005] NTMC 002

Number of paragraphs: 21

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

No. 20421119

BETWEEN:

Laquii Papalii
Worker

AND:

Forstaff
Employer

REASONS FOR JUDGMENT

(Delivered 24th January 2005)

Judicial Registrar Fong Lim:

1. The Worker has applied for an interim determination of benefits pursuant to section 107 of the Work Health Act. It has long been the law that to be granted an interim determination of benefits (commonly referred to as “interim benefits”) the Worker has to prove that there is a serious issue to be tried and that if there is that the balance of convenience lies with him. The Worker relies on his affidavits of the 21st December 2004 and the 12th January 2005. The Employer relied on affidavits of Graham Willoughby and Rachael Cassar both sworn on the 14th January 2005.
2. The court has an unfettered discretion in determining whether interim benefits ought to be granted however the accepted authority of Barry Leslie Aherne v Wormald Security Australia Ltd [1994] NTSC Mildren J gives some guidance as to what matters the court may considered when determining the balance of convenience in the Worker’s application.

3. **Serious issue to be tried** – The Worker was a recruitment officer with the Employer. The Worker was injured when leaving the premises of REPCO having run to his car attempting to avoid getting wet in the pouring rain and slipping jarring his left knee. The purpose of the Worker’s visit to REPCO is in dispute between the parties. The Worker says he was at REPCO for the purpose of touting for business and the Employer argues that the Worker was there for personal reasons and therefore the injury was not incurred during or out of the course of employment. There is also some dispute about the Worker’s continuing incapacity to work and the cause of that incapacity.
4. The Worker also argues that there is a serious issue to be tried in relation to the Employer’s confusing course of action during the early stages of the Worker’s statement of claim. Upon receiving the Worker’s claim form the Employer wrote to the Worker accepting liability for medical expenses only, then the Worker was advised that he should disregard the previous advice and that the Employer was deferring liability. The next advice the Worker receives is that liability had been deemed to be accepted by the Employer and benefits are a commenced. About a month later the Worker is served with a notice purporting to cancel his benefits pursuant to section 69 of the Work Health Act the first form does not have an accompanying medical certificate. A second notice was served attaching the appropriate medical certificate.
5. The evidence of whether the Worker was injured out of or in the course of employment will be supported by oral evidence from both parties and will depend on the Court’s interpretation of the facts and therefore it is my view there is a serious issue to be tried on this aspect of the Worker’s claim as well.
6. **Balance of Convenience** – matters usually taken into account when considering the balance of convenience in applications for interim benefits are:

- (a) hardship the Worker may suffer
- (b) status quo
- (c) likelihood of success
- (d) delay in making the application for benefits and / or application for interim benefits
- (e) whether the Worker has been full and frank in his disclosure to the court in his evidence to the court
- (f) Worker's present capacity to earn
- (g) Worker's diligence in pursuing his claim
- (h) the Worker's ability to repay the interim benefits should he be unsuccessful in his substantive application
- (i) any prejudice to the Employer

7. It is accepted by the Employer that the Worker has suffered hardship since the cancellation of his benefits and the Worker has established that fact in his affidavit evidence.
8. The Worker argues the appropriate status quo to consider is the situation prior to the cancellation of benefits and that he should be returned to that status quo if the balance of convenience lies with him.
9. The Worker's likelihood of success is a more controversial issue between the parties. The Worker argues that on the evidence presently before the court he would have to be found to be a liar to be unsuccessful and that is a matter for the court to decide on credibility. The Employer argues that all of their investigations show that the Worker is not telling the truth and therefore he will not be successful. The Employer contracted an investigator to interview all relevant people as to the circumstances of the accident and the reasons for Worker to be at the REPCO premises. The investigator spoke with a work colleague of the Worker, a client of the Employer, the manager responsible for the Worker and people who worked at REPCO. The investigator also spoke with the Worker.

10. The Employer argues that the evidence of other witnesses shows that the Worker's evidence cannot be trusted. The Worker states that after the injury he went straight back to work where he told Ms Zunker, a work colleague, what had happened. He continued to work even though his knee was becoming more and more painful and eventually (about two weeks later) he reported the injury to his manager Cathy Bottrell who required him to complete an incident report.
11. The statements taken from Ms Zunker indicate she doesn't remember the Worker mentioning his injury on the day it happened and the members of staff at REPCO were of no real assistance because none of them can recall whether the Worker spoke with them or management about recruitment. The Employer argues that this is enough to impugn the credibility of the Worker. I do not agree.
12. The Employer also questions whether the Worker was at REPCO for the work purposes or for personal reasons. REPCO's records do not indicate that the Worker signed the visitors book to get into see the manager at the time however the REPCO people admit that system is not strictly adhered to. The manager at the time accepted that REPCO did use employment agencies sometimes to fill positions but he couldn't recall having personally dealt with them himself. He could not remember having spoken with the Worker or the Employer during the relevant period. The Worker admits to having bought a radiator cap while at REPCO however claims his purpose of being there was to "cold call" to see if he could get some business.
13. The Employer argues that even if the court were to accept that the Worker was at REPCO for work purposes then the effect of the injury has ceased and the Worker's present symptoms are caused by a previous injury and degenerative condition of the Worker's knee. The Employer relied on the report of Dr Hardcastle to cancel the benefits of the Worker and argues that the worker's medical reports do not support his claim and therefore the court

must find that there is little likelihood of success of the Worker's claim on medical grounds. I agree that the medical certificate provided by the Worker's general practitioner is of little value establishing the Worker's condition it has no specific ailment mentioned nor does it specify a term of incapacity. The report of Dr Burrows does however support the Worker's claim that his present symptoms may be caused by the incident a REPCO but further investigations needed to be done as well as a surgical procedure. The medical issue is therefore a matter that is in the balance.

14. It is my view that there has not been any significant delay in making this application that needs to be explained and that the Worker has made full and frank disclosure to the Court in his application.
15. The Worker's present capacity to earn is a medical issue and I refer to my reference to those issues earlier.
16. The Worker has in my view been diligent thus far in pursuing his claim.
17. It is clear that the Worker does not have the ability to repay any interim benefits paid to pending the resolution of the claim and that would be a prejudice to the Employer.
18. The Employer has not pointed to any other prejudice it may suffer should the Worker be granted interim benefits.
19. Given all of the above I cannot agree with the Employer that the Worker's application for interim benefits ought to be dismissed.
20. The Worker has requested that he be returned to the status quo of receiving his full benefits based on the normal weekly earnings however it has long been the practice of this court to assess the Worker's needs in terms of income and expenses. The Worker states in his affidavit that taking into account his wife's income and their household expenses they are \$172.64 short each week to maintain their present level of spending without any

ability to cope with any unexpected expenses. My assessment of the Worker's expenditure is that it is conservative for a family with three teenage children.

21. My orders are:

21.1 The Employer pay the Worker interim benefits of \$400.00 per week gross for 12 weeks

21.2 Costs of this application be costs in the cause

Dated this 24th day of January 2005

Tanya Fong Lim
JUDICIAL REGISTRAR