

CITATION: *David Gutte v No 718 Pty Ltd Trading as Austral Contracting* [2005]
NTMC 008

PARTIES: DAVID GUTTE

v

NO. 718 PTY LTD TRADING AS AUSTRAL
CONTRACTING

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20425759

DELIVERED ON: 14th February 2005

DELIVERED AT: Darwin

HEARING DATE(s): 24th January & 2nd February 2005

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Interim determination of benefits – section 107 – factors to consider – full and frank disclosure

Barry Leslie Aherne v Wormald (Australia) Ltd [1994] NTSC Mildren J

REPRESENTATION:

Counsel:

Worker: Mr Johnson
Employer: Ms Cheong

Solicitors:

Worker: Priestleys
Employer: Hunt & Hunt

Judgment category classification: C
Judgment ID number: [2005] NTMC 008
Number of paragraphs: 18

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

No. 20425759

BETWEEN:

David Gutte
Worker

AND:

No 718 Pty Ltd trading as Austral
Contracting
Employer

REASONS FOR JUDGMENT

(Delivered 14th February 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.
2. It is accepted law that the decision of Justice Mildren in *Barry Leslie Aherne v Wormald (Australia) Pty Ltd [1994] NTSC* provides guidance to the factors considered in an application for an interim determination of benefits.
3. The worker relied on his affidavits of the 13th of January 2005 and the 31st of January 2005. The Employer relies on the affidavits of Peggy Cheong of the 24th of January 2005 with the attached video surveillance report and medical report of Dr Lewis.
4. The Worker injured himself while working as a mechanical services plumber and his claim was originally accepted. The Worker claims that he continues to be partially incapacitated for work being restricted in the hours he can work and in any heavy work requiring lifting and bending. The worker also

advised the Court that he had attempted to get himself another job however he had been unsuccessful to date.

5. The Employer has cancelled the Worker's benefits on the basis of medical certificates which state that the Worker is now fully fit for work.
6. The video surveillance of the worker shows him running the bar at the Katherine Show and undertaking the full duties of that job including bending and lifting without restriction. It should be noted that I did not view the video tape (apparently some 9 hours long) and only had the benefit of the report from the investigators. It should also be noted however that the doctors and the worker and his solicitors were given access to the surveillance tape. It is after viewing that tape that Dr Lewis and Professor Burns issued certificates certifying the Worker fit to return to his normal duties.
7. The medical certificates of Dr Lewis and Professor Burns were not originally supported by a report explaining their change of mind. However upon request Dr Lewis gave a supplementary report setting out that he had been shown video surveillance tape and the activities undertaken by the worker recorded on that tape caused him to change his mind. At page 2 of his supplementary report Dr Lewis states:

“The main feature on the video evidence that caused me to change my opinion in relation to Mr Gutte's incapacity was his physical activity, including lifting, and carrying cartons of beer, bending much further than he had demonstrated in the physical examination and helping to carry eskies as well as helping to lift trestle tables.

Basically, the physical activity demonstrated on the video was markedly more than was demonstrated during the physical examination.

Further more as a part of the history. I was advised that he avoided bending and lifting if possible and was always careful how he lifted; this was not borne out by the video surveillance.”

8. The Employer argues that the Worker gave an edited history to Dr Lewis and Professor Burns by not telling them he had worked at the Katherine Show doing the duties as shown in the video. The doctors accepted the history as explained by the Worker and came to the conclusion that the Worker was continuing to suffer the effects of his injury. The doctors' conclusions were proved to be based on incomplete information and when shown the video they came to a conclusion different to their initial opinion. It is clear that Dr Lewis at least is of the opinion that the Worker had not been truthful in his recount of his symptoms and that he was capable of more than was demonstrated in the examination.
9. It is important to note at this point that the Worker had worked at the Katherine show (subject of the video) just two weeks prior to being examined by Dr Lewis and Professor Burns.
10. The Applicant's counsel argued that his client did not tell Dr Lewis about the work at the show because he was not asked. Dr Lewis' report of the 3rd of August 2004, which relates to an examination on the 28th July 2004, refers to "Current Work Status" and counsel would have the court believe that the Worker was only asked about what he what work he was undertaking at that point in time not what he did two weeks prior to that date. I find this argument difficult to accept, if the worker was being open and honest with the doctors he should have disclosed to the doctors about the time spent working at the show and how that affected him, there seems to have been no mention of it. I would also expect the Worker to have mentioned the effects of that work to demonstrate his continuing disability to undertake those sort of lifting duties.
11. The Worker swore a further affidavit accepting that he had worked the Katherine Show and explaining the effect that work had on his symptoms. The Worker explains that he ensured he had enough staff on to assist him in the lifting and heavy work, that he had to take pain killers to get through the

day and that every night he would have to treat his back with heat and cold. The Worker also claims that because the work aggravated his condition he had to stay in bed until at least 11:00 the each day after a day worked at the show. In paragraph 13 of his affidavit he states:

“I survived the show on painkillers. Every night after I had closed up I would go home and alternate ice an heat packs on the injury and would stay in bed until at least 11am the next day.”

12. On the face of it this would seem a good explanation of how he coped with this work however the Worker does not explain why he didn't mention this to the doctors who examined him some two weeks after the show.
13. Further the report from the investigator on his surveillance directly contradicts the Worker's claim that he stayed in bed until 11am on the next day. The report states that on Friday 16th July, Saturday 17th July and Sunday the 18th July the Worker worked at the Katherine show it also shows that on Saturday the 17th and Sunday 18th the Worker was up and had left his home by 8:30am and on Monday the 19th left his home to drive to Darwin at 6:48am. The Worker does not address that contradiction even though he has had the opportunity to do so.
14. Given this contradiction in the evidence, the fact that the Worker did not explain why he did not mention his work at the Katherine show to the doctors, and that Dr Lewis has indicated that the video evidence has caused him to certify the Worker fit for normal duties, it is my view that the worker has been less than frank with the Court.
15. Applications for interim determination of benefits are decided on affidavit evidence and that evidence must be relied upon by the court as truthful and telling the whole story. When it is clear that the Worker has not been full and frank in his disclosure then Court cannot prefer his evidence over that of others. In Wormald v Aherne [1994]NTSC Mildren J in his discussion of the factors to consider at page 10 of his judgement states:

“Relief might also be refused on other discretionary grounds, for example, if the applicant has not made full disclosure of all the relevant circumstances.”

16. This Worker failed to disclose in his original affidavit that he had done 3 days work at the Katherine Show and then when faced with the video evidence of the work and given the opportunity to explain has failed to adequately explain why he didn't mention this work to the doctors. Further it seems the Worker has told the Court untruths about the effect that work had on him swearing that he had to stay in bed until 11:00 after each day of the Katherine show where in fact he was up and left home each day by 8:30am.
17. It is my view that the worker has not been full and frank with the Court about a significant issue in this matter and that is his present capacity to work. In these circumstances I cannot grant the Worker his application for and interim determination of benefits.
18. My orders are
 - 18.1 The Worker's application is dismissed
 - 18.2 The Worker pay the Employer's costs of and incidental to this application fixed at 100% of the Supreme court composite scale fee for a contested interlocutory application.

Dated this 7th day of February 2005

Tanya Fong Lim
JUDICIAL REGISTRAR