

CITATION: *Jarick v Night Watch Security (Darwin) Pty Ltd* [2006] NTMC 006

PARTIES: BRAD LESLIE JARICK

v

NIGHT WATCH SECURITY (DARWIN) PTY LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health Act

FILE NO(s): 20531759

DELIVERED ON: 23 January 2006

DELIVERED AT: Darwin

HEARING DATE(s): 11 January 2006

JUDGMENT OF: Mr V M Luppino SM

CATCHWORDS:

Interim determination – Matters to be taken into account – Likelihood of success – Hardship.

Work Health Act, s107

Aherne v Wormald International (Aust) Pty Ltd [1994] NTSC 54

REPRESENTATION:

Counsel:

Plaintiff: Ms Oldfield
Defendant: Ms Osborne

Solicitors:

Plaintiff: Ward Keller
Defendant: Hunt & Hunt

Judgment category classification: C

Judgment ID number: 2006 NTMC 006

Number of paragraphs: 24

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

No. 20531759

BETWEEN:

BRAD LESLIE JARICK
Plaintiff

AND:

**NIGHT WATCH SECURITY
(DARWIN) PTY LTD**
Defendant

REASONS FOR DECISION

(Delivered 23 January 2006)

Mr V.M. LUPPINO SM:

1. This is an application for interim benefits under section 107 of the Work Health Act (“the Act”). A claim for compensation was submitted by the Worker and filed contemporaneously with the application for interim benefits on 29 December 2005.
2. *Aherne v Wormald International (Aust) Pty Ltd* [1994] NTSC 54 sets out the matters to be taken into account in applications for interim benefits. It involves determination of the balance of convenience after consideration of a number of issues such as hardship, the likelihood of the success and the ability to repay benefits in the event of an unsuccessful claim.
3. The primary issue in this case involves section 65(2)(b) of the Act. It turns on whether the Worker has been provided with work within that subsection

that he is capable of undertaking. The Worker alleges that the work he was given produced pain consequent upon his primary injury and accordingly, in accordance with the authority of *Plewright v Passmore* (Supreme Court, Martin CJ delivered 4 April 1997), he was not reasonably capable of performing that work.

4. The background facts are that the Worker initially injured his ankle in July 2003. A claim was made and that was accepted by the Employer. The Worker received treatment which also involved surgery. As part of a rehabilitation program devised for the Worker, he engaged in a return to work programme which involved in part full time work with Shadetech. The return to work programme involved the worker in a sales position and earning less than in his initial employment. Therefore the Employer paid the Worker top up benefits. At the end of the return to work programme Shadetech employed the Worker on a full time basis and the Employer continued paying him top up benefits. On 28 November 2005 the Worker resigned his employment with Shadetech. The circumstances of that resignation are in issue. The Worker claims that he did so in part because of restrictions in his ability to perform the work consequent upon his ankle injury. Since the date of the resignation the Employer has paid top up benefits only. The Worker's claim for compensation is in relation to the difference between his normal weekly earnings and the top up benefits currently paid by the Employer.
5. For the reasons set out hereunder I am of the view that the application for interim benefits should be declined. In my view the Worker's likelihood of success is slight. When this is coupled with the absence of acceptable evidence indicating a capacity to repay benefits in the event that his claim is ultimately unsuccessful, in my view the balance of convenience favours the Employer. I also remain unconvinced that hardship has been sufficiently established. There was some dispute also as to the proper quantum of

interim benefits however in light of my findings it is not necessary for me to resolve that part of the dispute.

6. The evidence before me for the purposes of the application comprises:-
 1. Affidavits of the Worker sworn 23 December 2005, 10 January 2006 and 17 January 2006 and the annexures thereto.
 2. Affidavit of John Michael Neill sworn 29 December 2005 and the annexures thereto.
 3. Affidavit of Catherine Therese Oldfield sworn 10 January 2006 and the annexures thereto.
 4. Affidavit of Warren Poole sworn 11 January 2006 and the annexures thereto.
 5. Affidavit of Leah Williams sworn 11 January 2006 and the annexures thereto.
 6. Affidavit of Chris Osborne sworn 11 January 2006 and the annexures thereto.
7. The Worker says that for a period of approximately three months until he resigned, his duties at Shadetech involved taking orders, computer data entry, driving to sites to quote jobs and the like. He says that over that period he found the pain levels in his left ankle steadily increase and he took a gradually increasing dose of panadeine forte on a daily basis to alleviate the pain. He says that he could reduce the dose on weekends when he was not at work. He alleges that his pain was severe with swelling of the ankle at night after work. He asserts that despite his increasing dose of panadeine forte his sleep patterns were broken and that he consequently became increasingly depressed and anxious. He also alleges that he had difficulty in

coping with the computer work for which he claims he had not received adequate training.

8. The Employer has provided evidence which casts doubt on the veracity of the Worker's claimed symptoms and upon the contribution of those symptoms to his decision to resign from work.
9. The medical evidence consists firstly of medical reports of Dr Flavell and Mr Baddeley. They are for background purposes only as those reports are not contemporaneous with the relevant events. The available contemporaneous medical evidence consists of the report of Dr Horsten, the Worker's General Practitioner, a report from Lyndal Finch (physiotherapist) addressed to Dr Horsten and a report of Dr Rowe, a specialist occupational physician who examined the Worker at the request of the Employer on 5 December 2005. Dr Horsten's report was specifically sought for the purposes of the interim benefits application.
10. Dr Rowe reports that the Worker "*...felt there was too much pressure on him at the job, but it was not the physical requirements which caused him to leave.*" It should be recalled that this consultation was within one week of the Worker's resignation and in the course of a medical review specifically for the purposes of his ongoing entitlements.
11. Lyndal Finch reported to Dr Horsten on her consultation with the Worker on 1 December 2005. She reports that the Worker "*...reported that his work for Shadetech involved standing on roofs with variable pitch thereby necessitating a lot of inversion and eversion. He had required Panadeine Forte in order to get through his work day.*" This is the first reported reference to these symptoms and contrasts markedly with the description of the duties that the Worker gave in his evidence (paragraph 7 of his affidavit sworn 23 December 2005) where he fails to make any specific mention of that particular aspect of his employment at Shadetech.

12. Dr Horsten's report sets out the consultations she had with the Worker in the lead up to both his work at Shadetech and his resignation. She provides extracts of her notes in relation to those consultations. Those consultations occurred 24 August 2005, 7 September 2005 and 15 November 2005.
13. In relation to the first of those consultations, Dr Horsten has recorded that the Worker commenced a new job on "*Monday*", no doubt referring to the employment at Shadetech. She records that the work is mostly office based but with some field work for short periods. She records that the Worker complained of increased pain in the left foot "*a little*". She also notes that the Worker played two ten minute halves of touch football and records "*dupytrens hurt after the running, foot also swelled*".
14. The notes of the consultation on Wednesday 7 September 2005 record a history that the Worker played touch football "*last Thursday*" and that his foot hurt until Saturday.
15. The last consultation on 15 December 2005 is less than two weeks after his resignation. This records that the Worker's left foot is worse if he sits with the foot down for too long. It records that the Worker experiences pain with walking around. It records difficulty when his ankle is at an angle and an example is noted i.e. "*on the roof with work – can't stand it even for only a few minutes*". This seems to coincide with what he reported to Lyndal Finch some two weeks earlier but is the first mention he has apparently made of this rather significant matter to Dr Horsten and it comes after he has resigned. A note is also made that there is some stress with the insurer not paying at times and it is noted that the worker "*would really like to finish up so it will reduce his stress*".
16. Dr Horsten's report and notes need to be viewed also in light of the fact that she gave ongoing certificates of incapacity after each consultation and did not add any further restrictions.

17. The affidavits of Leah Williams and Warren Poole are relevant to the events occurring during the Worker's employment at Shadetech. The former is particularly telling. Ms Williams has made contemporaneous notes (Annexure C to her affidavit). An entry on 22 November 2005 indicates that the Worker rang at 8:00am to say that following his doctor's appointment, he had been advised to rest his ankle for 24 hours. This suggests an appointment after he finished work the preceding day i.e. Monday 21 November 2005. Of the evidence before me, the closest medical appointment to that date was that with Dr Horsten on 15 November 2005. Clearly that cannot be the doctor's appointment referred to as Dr Horsten's notes of that appointment do not coincide with what the Worker is reported to have told Shadetech.
18. Ms Williams notes for the following days are as follows:-

"23/11/2005

During the review, we offered him the job, Brad said he would give 2 weeks notice and get all the customers up to date. He said he had just got the news today, that his mother had six months to live as she has breast cancer; his father in-law only has a short time to live also and he is torn between staying here or going to Perth. He was very upset and in tears so we said how about we have another chat tomorrow, he said he would definitely let us know tomorrow.

24/11/2005

He has not mentioned any decision so we are giving him a couple of days to emotionally stabilise and will talk with him on Saturday.

26/11/2005

Brad received a phone call from his wife this morning. He came and told me that his mother in law had fallen over on top of the baby and he had to go home straight away

28/11/2005

Brad came into the office first thing and asked to speak with Warren & myself. He said that the baby had concussion from his mother in law falling on top of her and that his wife had just been diagnosed with post natal depression, he had a police warning for attacking someone in the hospital who yelled at the baby (the police said that under the stress full (sic) circumstances they wouldn't press charges). So, he now has to stay at home to look after the baby, he said he had planned to give us two weeks notice but due to the circumstances, he could only give us 1 day notice (today)".

19. The affidavit of Warren Poole confirms the matters noted by Leah Williams. Particularly Mr Poole, having now been advised that the Worker claims increased pain levels as one of his reasons for resigning, states that at no time during the employment did the Worker complain to him about any increased pain in the ankle due to his work.
20. The foregoing does not favour the Worker's credibility and the finding of facts in support of his claim. The absence of contemporaneous complaints of pain, that he only gave personal reasons for resigning and the unchanged status of the Worker's ongoing certificates of incapacity throughout his period of employment at Shadetech all cast serious doubts on the Worker's claim that the work at Shadetech was outside his capacity. Since the 2002 amendments to the Act, after two years of incapacity the Employer no longer has to prove that the work is available or to even find the employment. The Employer only has to establish a capacity for work. The history of his employment at Shadetech is very relevant. The views of Dr Rowe are prima facie further evidence supporting the Employer's contention. There are significant credibility issues in relation to the Worker's evidence. At this preliminary stage, in my view the evidence in this regard favours the Employer and points to a successful defence of the Worker's claim by the Employer.
21. The affidavit of the Worker sworn 17 January 2006 inter alia addresses hardship issues, the Worker's financial resources and the Worker's capacity

to repay any interim benefits were the need to arise. I accept the evidence of the Worker that he has no financial resources that he could presently utilise to alleviate his financial predicament. However, that likewise establishes that that he has no resources that he could utilise to repay interim benefits. The Worker states that he could repay interim benefits if that were to be necessary from his wife's wages when she returns to work. He deposes that his wife is currently on maternity leave and that she expects to return to work in May of this year with nett weekly wages of \$450.00. There is of course no obligation on the Worker's wife to apply any part of her income to the repayment of interim benefits and, absent some commitment from her in a legally enforceable way, the Worker's unsupported contention to the contrary is of little significance.

22. Moreover, noting that the Worker's baby child is now 6 months of age, the absence of any evidence as to why the Worker's wife could not resume work earlier than that is relevant to the hardship issue. As the Worker will be at home anyway, it would appear that he could attend to the child care functions. The nett amount that the Worker's wife would earn would appear sufficient to neutralise his family's financial plight. There is the suggestion that the Worker's wife suffers from post natal depression (Annexure C to the affidavit of Leah Williams), but that has arisen in the context of the Worker's dubious credibility and no other supporting evidence of either the existence of that condition or its extent or the effect on her working capacity has been produced. The onus of doing that is on the Worker and I am unconvinced that the financial hardship is made out on the available evidence.
23. Accordingly, I am of the view that the Worker does not have a strong possibility of ultimate success and in my view the balance of convenience dictates that the Worker's claim for interim benefits should be refused.

24. The appropriate costs order is that the costs of this application should be costs in the cause and I will hear the parties as to any ancillary matters.

Dated this 23rd day of January 2006.

V M LUPPINO
STIPENDIARY MAGISTRATE