

CITATION: *Scott v Coles Myer Ltd* [2006] NTMC 031

PARTIES: GEORGE JEFFREY SCOTT

v

COLES MYER LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20608793

DELIVERED ON: 11<sup>th</sup> April 2006

DELIVERED AT: Darwin

HEARING DATE(s): 5<sup>th</sup> April 2006

JUDGMENT OF: Judicial Registrar

**CATCHWORDS:**

Extension of time – request for mediation – reasonable cause – sections 103D(4) and 103D(5) of the Work Health Act

*Van Dongen v Northern Territory of Australia* [2005] NTCA 6

*Tracy Village Sports and Social Club v Pamela Mavis Walker* [1992] 111 FLR 32

**REPRESENTATION:**

*Counsel:*

Worker: Mr Johnson

Employer: Mr Smith

*Solicitors:*

Worker: Priestleys

Employer: Hunt & Hunt

Judgment category classification: A

Judgment ID number: [2006] NTMC 031

Number of paragraphs: 44

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

No. 20608793

BETWEEN:

**GEORGE JEFFREY SCOTT**  
Worker

AND:

**COLES MYER LTD**  
Employer

REASONS FOR JUDGMENT

(Delivered 11 April 2006)

Judicial Registrar Fong Lim:

1. The Worker makes an application for an extension of time pursuant to section 103D(5) of the *Work Health Act*.
2. The Worker has a current work health claim for an injury to his cervical spine. The Worker's claim has been accepted and the Employer has paid the worker weekly benefits and medical expenses until recently. The Employer has attempted to get the Worker to return to work on restricted duties and had been partially successful. In December of 2005 the Employer was advised by two medical specialists that the Worker was able to return to full time duties and the Employer acted on that advice by advising the Worker to return to full time duties. The Employer submits that the return to full time duties was certified orally by Dr Marchant however the doctor then changed his mind. The Worker refused to attend the return to work program on advice from his general practitioner Dr Marchant. The refusal was the basis of a Form 5 being served on the Worker cancelling his weekly benefits for failure to participate in reasonable return to work program.

3. Section 103D of the *Work Health Act* provides:

103D. Application for and conduct of mediation

(1) A claimant may apply to the Authority to have a dispute referred to mediation.

(1A) If the dispute relates to a decision specified in section 103B(a) or (b), the claimant must apply under subsection (1) within 90 days of receiving the statement referred to in section 85(8) or 69(1)(b) respectively.

.....

(4) A claimant who fails to apply for mediation within the period referred to in subsection (1A) may apply to the Court under section 104(1) for an extension of the period.

(5) The Court may extend the period if it is satisfied the failure to apply within the period was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause

4. The Worker's dispute with the Employer arises out of section 103B(b) and therefore the Worker had 90 days in which to lodge his request for a mediation to the Work Health Authority. The Worker in the present case failed to request a mediation within the 90 period and hence makes his application for an extension of time pursuant to section 103D(5). He has yet to make the request for a mediation.
5. It is accepted that if the Worker is unsuccessful in his application for an extension of time then he will be excluded from making an application to the Work Health Court appealing the decision of the Employer to cease his weekly payments ( see section 103J of the Work Health Act).
6. The Worker submits that the court should exercise its discretion in his favour and grant him an extension of time on the basis that there was a "reasonable cause" which caused him to be out of time in his application for a mediation of his dispute with the Employer.

7. The phrase “reasonable cause” has not been tested in relation to the application of section 103D however it has been considered in relation to section 182(3) of the *Work Health Act*.
8. The most recent authority considering this issue is Van Dongen v Northern Territory of Australia [2005] NTCA 6. The Court of Appeal , Martin(BR) CJ, Mildren J and Riley J presiding, considered an appeal by the worker to set aside the Magistrate’s decision at first instance to refuse an extension of time pursuant to section 182(3) of the Act. The Worker suffered a mental injury during his employment but did not make a claim regarding that injury until after the expiry of the 6 months time limit. The worker claimed that he had reasonable cause for the delay and that is he did not have any loss of earning capacity until later and that he was waiting to see if he got better before he made the claim. The evidence was that the worker did in fact have a partial incapacity to work he just didn’t notify the Employer.
9. The Court of Appeal found that when considering the relevant period it must consider the 6 months subsequent to the injury, see Tracy Village Sports and Social Club v Walker [1992] 111 FLR 32 and that to assess the reasonableness of the cause of delay the court must consider all of the circumstances of the case. The worker’s appeal was disallowed. Riley J summarised the analysis succinctly as follows:

“It is clear that each case must be assessed on upon its own facts and circumstances. Contrary to the submission of the appellant the whole of the circumstances of the case as they impact upon the reasonableness or otherwise of the conduct of the worker must be considered in order to determine whether reasonable cause is established. It would be an artificial exercise to do otherwise.”
10. In the present case the relevant period is the 90 days from the Worker’s receipt of the Form 5 cancelling his benefits.

11. **Reasonable cause** – the test of reasonableness is an objective test. Milden J in Tracy Villiage Sports and Social Club v Walker [1992] 111 FLR 32 refers to Commonwealth of Australia v Connors [1989] 86 ALR 247 as follows:

“as was said be the court in Blacks’ case (at 38) , when considering ‘reasonable cause’: the inquiry here appears to be of a much wider kind justifying a more liberal attitude, act or omission which operated to prevent the giving of notice and which was an act or omission which was in the circumstances reasonable. In Quinlivan v Portland Harbour Trust 919630 VR 25 at 28, Sholl J used these worked :”the sub- section mean to refer to a cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct the kind of thing which might be expected to delay the giving of notice by a reasonable man.”

12. The worker has the onus to prove he has a reasonable cause of delay. The worker relies on his affidavit of the 23<sup>rd</sup> of March 2006 and the annexures thereto.
13. It is not the Worker’s case that he was unaware of the 90 day time limit rather that he knew of the time limit but it was his mental state which caused him not to request the mediation.
14. The worker is not certain how he received the Notice of Decision cancelling his benefits. In paragraph 3 of his affidavit he states:

“I do not recall exactly when I received it but I think it was by mail and that I would have received it on or about 5 December 2005.”

15. The evidence of Mr Carter is that he personally handed the notice to Mr Scott on the 1<sup>st</sup> of December 2005 and he refers to the annexure to his affidavit as the documents passed to the Worker on that day. The annexure to Mr Carter’s affidavit is the letter and the form 5 served on the Worker on the 14<sup>th</sup> of September 2005. So it seems that both parties are confused as to what notice was served when.
16. It should be noted however that the notice is dated the 1<sup>st</sup> of December 2005 and if it is accepted that the Worker has received the notice by mail then

applying the postal rule he should have received it by the 3<sup>rd</sup> of December 2005. In any event it is clear from the objective evidence of the facsimile letter from Collier and Deane to Coles dated the 6<sup>th</sup> of December, that the worker had received his notice before that date.

17. Prior to that date on about the 14<sup>th</sup> September 2005 the worker had received a notice of Decision reducing his benefits. He consulted with Collier and Deane about that reduction and they corresponded with the Employer's solicitors regarding that decision and the subsequent cancellation. The solicitors then advised the Worker on the 12<sup>th</sup> December 2005 that :

“I suggest that if we have had no response from Coles Myer by mid next week that we seek mediation and think about an application for interim benefits.”

18. That letter went on to explain the costs of making an application for interim benefits.
19. The Worker states that when he received that letter he went into a panic because he did not have the money as indicated was required by his solicitors.
20. The Worker also states that by the time he received the notice dated the 1<sup>st</sup> December 2005 his “mental state had really started to deteriorate”. In support of the claim about his mental state the Worker relied on the report of Dr McLaren who states that after having commenced treating the Worker in March of this year;

“I accept that he was seriously mentally disturbed during the latter part of last year and have no difficulty reconciling his claim that he could not handle his Work Health claim properly. He appears to have no trust in any medical or other health staff in Alice Springs, believing them to be complicit in that he sees as a far reaching conspiracy to deny him his rights. These types of symptoms are sufficient to prevent people leaving their homes. Combined with panic attacks and social phobia, I accept that he would not have been able to manage his affairs properly for the three months after the cessation of his benefits.”

21. The report of Dr McLaren must be considered in the light of the fact that he was not treating the Worker at the time and relies on the Worker's history given to him what is more relevant is any medical evidence of the Worker's state of mind by people who dealt with him in the 90 day period.
22. The Worker has produced several medical certificates from his general practitioner covering the period 22<sup>nd</sup> December 2005 – 12<sup>th</sup> January 2006. The first certificate relates to an examination of the Worker on the 22<sup>nd</sup> December 2005 ( after the cancellation of benefits) Dr Marchant notes that:

“Recent weeks has experienced a lot of stressors brought on by current injury. These stressors are not helping to improve his injury. Being told that he had to return to full duties despite myself arranging otherwise has made George resent K-mart more.

George has a long list of grievances that he is ruminating on. If these could be resolved then improvement may be seen.....

.....

Is going to see Mike Tyrell for counselling.”

23. It is clear from this certificate that Dr Marchant is of the opinion that Worker's grievances may be one of the reasons there is no improvement in the Worker's condition and that the Worker feels resentment toward the Employer.
24. A further certificate based on an examination of the 5<sup>th</sup> January 2006 shows the medical assessment as “ongoing neck pain” there is no mention of further mental or emotional problems except that there is a note under the “Medical Management Plan” which suggests that the Worker was seeing Mike Tyrell psychologist and Dr Abusah psychiatrist.
25. The next certificate based on an examination of the 12<sup>th</sup> January 2006 is clearer in the description of the Worker's condition. In that certificate Dr Marchant states:

“ Has been experiencing depression, anxiety and frustration at current situation. Made no better by K-mart management. Currently requiring diazepam for anxiety symptoms. This has reduced since he has taken 1 week off.”

26. Dr Marchant diagnoses:

“1. soft tissue neck injury – ?segmental dysfunction ?facet joint  
2. Depression or adjustment disorder as a result of the injury”

27. The doctor also notes:

“Still waiting approval to see psychologist Mike Tyrell. Also referred to Dr Abusah at community mental health. As pain is still persisting I feel that referral to a musculoskeletal specialist would be useful in view of trying either facet joint injection or segmental nerve block”

28. This certificate shows that the Worker’s mental health has deteriorated requiring him to be prescribed medication for his condition. The certificate also shows that the worker had not in fact been to counselling up to that time because he was waiting “approval”. It is not clear from whom that approval was sought. Given that the Worker has a work health claim one might assume that the approval has been sought from the case manager of his claim. However the evidence of Stephanie Anning the injury services manager of the Employer does not indicate any request for such counselling from the Worker or his general practitioner.

29. Ms Anning’s affidavit evidence sets out a detailed history of how the Worker’s claim was dealt with from the date of his claim, it annexes correspondence between Ms Anning ,the relevant store manager, rehabilitation service, the worker’s general practitioner, the worker and the specialist Drs Dare and Knuckey. The evidence shows that the employer was prompt in its dealings with the Worker and followed up any recommended treatment. Ms Anning requested confirmation from Drs Dare and Knuckey regarding the suggested musculoskeletal scan and did not approve that treatment on their advice. What is missing from the



documentation is any reference to any claim for counselling which would seem to suggest that no request was made.

30. There is an email from the rehabilitation service, APM, a Ms Atkinson, in June of 2005 which mentions a possible psychiatric intervention but nothing since that date. Ms Atkinson writes:

“Dr Marchant agrees that Mr Scott catastrophes his injury which is of concern. He concurs my opinion that psych intervention at this stage may only inflame the situation and introduce a variable that may not be required.”

31. After that email there is no further mention of psychiatric treatment in Ms Anning’s affidavit.
32. This email is the only evidence that the worker may have had psychological problems prior to the cancellation of his benefits.
33. It is clear from Dr Marchant’s certificates that the worker’s mental health deteriorated quickly after the Notice to Cancel weekly benefits was served upon him.
34. The Worker submits that his deteriorating mental health was the reason, and reasonable cause, for the delay in his requesting the mediation.
35. The Employer submits that clearly the Worker was aware of the 90 day time limit, he had legal representation at the time he received the notice of cancellation, he was able to attend his doctor to seek medical help and to attend work during the 90 days therefore it is unbelievable that he was unable to fill in a simple form to request a mediation because of his mental health. The Employer also points out that the worker had the presence of mind on the advice of his doctor to get himself out of Alice Springs and back to Darwin yet he still did not make the simple request for mediation.
36. The Worker submits that his mental health was such that he couldn’t deal with his Work Health claim. The Employer argues that the Worker dealt

with everything to do with his work health claim except for the requirement to request the mediation. He continued to get medical certificates certifying him unfit for work and continued to liaise with the management regarding his work health claim.

37. It is curious that the worker didn't request a mediation from either one of the Form 5s served upon him. He was clearly aware of the time limit and had legal representation at the time. The Employer submits that the evidence shows that the worker has deliberately chosen not request the mediation when a reasonable man would have made the request and therefore has no reasonable cause upon which the court can allow an extension of time.
38. The medical certificates of Dr Marchant show that he had been concerned about the worker's mental health after the service of the notices but not prior to the service of the second notice dated the 1<sup>st</sup> of December 2005. It is my view that there is enough evidence to support the view that the worker's mental health was deteriorating in the 90 days subsequent to the notice being served.
39. The deterioration of the mental health in itself may not be reasonable cause to explain the delay unless there is further evidence to show that the deterioration of mental health was such that it would have caused the Worker not to put his request for a mediation into the Work Health Authority. The Worker's evidence is that February of this year his mental health deteriorated so badly that there was a time that he locked himself in his room and refused to come out. The Worker's general practitioner saw him on the 22<sup>nd</sup> of February 2006 and reports him as:

“George has extremely low mood with suicidal ideation. He has generalised anxiety with mind racing. ? the time and breaking into a sweat and tremor of hand. He has poor sleep. He has poor appetite. He has lost interest in life and has socially withdrawn.

George has been housebound for 3 days. He has not showered or dressed for 3 days.

George has ruminations and negative self image. He has paranoid ideations of being watched by K mart and Worker's compensation.

He has features of social anxiety"

40. The doctor goes on to say:

"History of current condition: Deterioration of mood over the last few weeks. Low mood generalised, anxiety, social anxiety, increasing over the last weeks. Persecutory beliefs and paranoid ideation. George has shown poor self care over the last weeks as a result of his mental state."

41. While not accepting that the Worker's mental health issues are part of his work injury it is in my view conceivable that a reasonable man in the same mental health condition as the Worker may not have had the capacity to think straight enough to put in his request for mediation. The Worker states that it was his mother who arranged for him to see Dr Marchant in late February and subsequently arranged for him to be sent to Darwin to be looked after by his sister. Although there is no evidence from the Worker's mother to confirm this there is nothing to suggest I should not accept this evidence.
42. The Employer did not produce any evidence to the contrary regarding the Worker's mental health issues. What the Employer did produce was evidence (annexure GG to the affidavit of Stephanie Anning) which set out the hours worked by the Worker in the period from 1 December 2005 – February 2006. Those figures indicate that the worker managed to continue to work 22.5 hours per week up until Christmas and from then on his working hours were sporadic being from as little as zero hours per week to 25 hours per week. The Employer argued that these figures showed the worker was able to work for at least a month of the 90 day period and therefore should have been able to put in his request for mediation. In my view the hours support the argument that the Worker's mental health

deteriorated quickly after receipt of the notice of cancellation and continued to decline.

43. I am satisfied considering all of the circumstances that the Worker has reasonable cause for his delay in requesting a mediation. It is my view that the worker deliberately did not make his application for a mediation but his failing mental health before and during the period subsequent to the cancellation of his benefits caused him to not make reasonable choices regarding his claim. Had the Worker been in good mental health he may have made a better choice and made the application for mediation in time.

44. I therefore order:

44.1 The Worker's application for extension of time to apply for a mediation is extended to close of business 19<sup>th</sup> April 2005.

44.2 Cost of this application are reserved.

Dated this 11th day of April 2006

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**Tanya Fong Lim**  
JUDICIAL REGISTRAR