

CITATION: *Paul Mole v Thiess Pty Ltd* [2006] NTMC 040

PARTIES: PAUL MOLE

v

THIESS PTY LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20608521

DELIVERED ON: 3rd May 2006

DELIVERED AT: Darwin

HEARING DATE(s): 7th April 2006 & 24th April 2006

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Interim determination – section 107 Work Health Act – Full and frank disclosure

McGuiness v Chubb Security Holding Australia Pty Ltd 24th March 2006 unreported decision Dr Lowndes Work Health Court of Northern Territory.
Wormald International (Aust) Ltd v Barry Leslie Aherne [1994] NTSC 54

REPRESENTATION:

Counsel:

Worker:	Mr Johnson
Respondent:	Mr Stewart

Solicitors:

Worker:	Priestleys
Respondent:	Ward Keller

Judgment category classification:	C
Judgment ID number:	[2006] NTMC 040
Number of paragraphs:	36

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

No. 20608521

BETWEEN:

PAUL JOHN MOLE
Worker

AND:

THIESS PTY LTD
Respondent

REASONS FOR JUDGMENT

(Delivered 3 May 2006)

Judicial Registrar Fong Lim:

1. The Worker has an accepted Work Health claim for an injury to his shoulder whilst at work. The Worker was paid benefits up until he was certified fit to work by Dr Lewis. The Worker has applied for an interim determination pursuant to section 107 of the *Work Health Act*.
2. It has long been settled law that the principles to be applied in the determination of these applications are contained in the judgement of Justice Mildren in *Wormald International (Aust) Ltd v Barry Leslie Aherne* [1994] NTSC 54. The worker must prove that there is a serious issue to be tried and that the balance of convenience lies with him.
3. The Employer conceded that there was a serious issue to be tried and argument was then concentrated on the balance of convenience.
4. The common factors considered in assessing the balance of convenience are:
 - (a) hardship

- (b) prejudice to the employer
- (c) Full and frank disclosure by the worker
- (d) Worker's ability to repay the benefits should he be ultimately unsuccessful
- (e) the worker's likelihood of success in his substantive claim

5. The Worker relies on two affidavits of himself sworn the 20th March 2006 and 18th of April 2006. The Respondent relied on the affidavit of Jodie Woodward of 29th March 2006.
6. **Likelihood of Success:** The Worker's claim is that he still suffers constant pain in his shoulder which is aggravated by certain actions. Unfortunately the Worker has been captured on video surveillance helping his wife load some furniture onto a truck. When that video was shown to Dr Lewis and the Applicant's general practitioner both of those doctors reached the opinion that the Applicant had been exaggerating his symptoms. Dr Tracey states:

“Careful observation of the video footage does not show any abduction movement of his left shoulder above horizontal or any significant external rotation. However he is obviously capable of performing some form of work and he has overstated the disability that he is experiencing.”

7. Dr Lewis certified the Worker as having ceased to be incapacitated for work as a result of the work injury and states in his report of the 10th October 2005 that:

“In view of other material available, it is obvious that Mr Mole is not as incapacitated as he maintains.

Mr Mole is still suffering some effects from the work injury of 19 November 2003, but not as significant as he maintains as is obvious from the further information available.

He would be able to commence a return to work program which is done on a graduated basis.”

8. The Applicant produced reports from Dr Saies and Dr Sharland who both support the Applicant's claim of continued difficulties with his arm however neither of these doctors have been referred to the video surveillance tape.
9. It is difficult for the Court to assess the medical evidence as it stands because Drs Saies and Sharland have not been referred to the video surveillance which changed the minds of Drs Lewis and Tracy. It is difficult to accept one report over the other. In my view Dr Tracey's view as the treating GP should be considered seriously as he is the one who has treated the Worker for years and he had no hesitation in suggesting the worker was exaggerating his incapacity.
10. In any event even Dr Lewis, who certifies the worker fit for work, states that the worker requires a graduated return to work yet the graduated return to work was not offered to the worker the employer merely ceased benefits.
11. The Worker's explanation of what is shown in the video evidence is plausible. He says that after months of feeling useless he helped his wife to put the furniture on the vehicle because he wanted to feel of use. He says that he was in pain at the time but he worked through however the end result was that he was in bed for two days after that with swollen neck and left hand and severe pain. Dr's Lewis and Tracey have not been asked to comment on the possible aggravation of the worker's condition arising out of the activity revealed in the video so it is possible that they might accept the activity would have resulted in a flare up of the worker's symptoms.
12. The Worker also argues that the certificate signed by Dr Lewis was 2 months after his examination of the Worker and therefore there is an argument that the Form 5 served upon the Worker ceasing his benefits will not be upheld. It is clear from the authorities that the validity of a form 5 will be scrutinised very closely by the courts given that it represents a unilateral termination of the worker's benefits. It has been found that the certificate must be served in strict compliance with the act (see *Collins*

Radio Constructors Inc v Day [1998] 143 FLR 425). In this matter the Notice does not show that the worker that the doctor had assessed him fit for return to work based on what he had seen in the video at that changed his mind.

13. The Employer has not made comment on the claim that the Worker's incapacity to work is also affected by the Worker's psychological condition. The Worker has produced reports of Dianne Knox which clearly show that the Worker's psychological condition is poor and that there is a causal link between the pain suffered from the physical injury to his mental condition.
14. In light of the above it is my view that the Worker has a chance of success in his substantial application on both the physical injury and the possible psychological sequelae.
15. **Worker's ability to repay interim benefits should he be unsuccessful -** The Worker has indicates in his affidavit that he has a property at Darwin River and a termination payout of approximately \$10000.00 which could be used for the repayment of any benefits. However the documentation shows that the land has as mortgage for approximately \$116000.00 and there is no indication of the equity held in the property. Unless there are other assets available the Worker is unlikely to have the ability to repay any interim benefits paid to him.
16. **Full and Frank Disclosure** – the worker was given two ad
17. The Worker produced a second affidavit attaching primary documentation establishing some of his expenses. The Employer submits that even with the opportunity given him to do so worker did not fully disclose his financial circumstances.
18. The worker failed to disclose that he was the recipient of a payment for permanent impairment for approximately \$30000 and nowhere in his documentation does he disclose that to the court.

19. It is of some concern that the Worker chose not to include a reference to the \$30000 pay out in any of his documentation. The Worker in fact states that he is close to bankruptcy and if that is the case he should have explained that how the \$30000 was spent if it is not available to pay his debts.
20. The Worker's bank statements as produced to the court do not disclose what happened to those funds. If the funds were invested the Worker should have provided documentation to show the level of investment he holds in his name.
21. The Worker states in his affidavit that he would dearly love to get back to some sort of employment but given his education and work skills make it difficult. The Worker does not disclose what sort of work he thinks he can undertake and whether he has attempted to find work in Queensland. In paragraph 9 of his affidavit the Worker states:

“it was the recommendation of my treating psychologist that I be allowed to move to my wife's sister's property at Floro Downs in Queensland where I would have family support and, hopefully be able to do at least some productive work consistent with my injury.”
22. The Employer submits that it is clear that the Worker thinks he is capable of doing some work but he has not disclosed what that might be.
23. In both these aspects the Worker has not offered to the court full and frank disclosure. The worker's evidence about his weekly expenses also seems inaccurate as described below.
24. **Hardship** – the Worker has produced some evidence of the economic hardship the Employer argues that the evidence provided is inadequate. The Worker claims certain weekly expenses and supports those claims with some primary documentation. Some of documents produced do not support the worker's estimate of that costs eg the Worker claims that he pays approximately \$25.00 per week for medication yet the documents provided

to support that claim show that he has only spent a total of \$685.40 in the last 12 months the equivalent of \$1.87 per week.

25. The credit card repayment of \$20.00 per week is not supported by a statement for that card.
26. The Worker's estimate of the electricity costs in his original affidavit must be adjusted because he now resides on his property at Darwin River Dam. The Worker has produced an electricity account for that property for the quarter beginning the 17th of October 2006. The account shows three meter readings for that property. The Worker instructed his solicitor that the lower of the readings was for the bore and the other two for the house. The Worker could not explain why there were two meters for the one house. The daily rate on that account was \$5.55 and therefore the weekly electricity charge for that property for that period was \$38.85.
27. It is not clear from the Worker's evidence whether he was in occupation of the property for the whole of that time or why the electricity bill was so high for that quarter. I cannot accept that one person could reasonably use that much electricity in one quarter and I will adjust the weekly figure accordingly.
28. The Worker also apparently pays \$300 per week to his wife to assist in her expenses and those associated with the caring for their children. The \$300 is broken down into \$110.00 for part of the Governess' wages and \$190.00 for other expenses. It is evident from the Worker's affidavit that his wife and children receive free board and lodging at her sister's station. It would seem that an extra \$110 per week for unexplained incidental expenses is high.
29. The worker clearly suffers some economic hardship from having no income but his circumstances are not as dire as he would have the court believe.
30. Groceries of \$180 per week also seems a little high for one person. I am prepared to allow \$100 per week for groceries. I also note that the phone

account provided to the court only supports a cost of approximately \$23.00 per week.

31. It is clear that the Worker suffers some financial hardship however some of that is caused by the worker living beyond his means. The worker claims that is because he is forced to live apart from his family. The extra costs of running two households usually manifest itself in two lots of rent, electricity etc. This is not the case here the Worker's family do not have extra costs such as that because they are living free of charge at the wife's sister's station in fact the only extra cost is the payment for the governess.
32. Even if that cost of \$110 per week is taken out of the equation, or reduced then the worker's expenses would still have been over and above his normal weekly earnings of \$1453.67 gross per week.
33. Given the above the worker's financial circumstances are not necessarily totally due to the cessation of his benefits some of his misfortune is caused by the fact that he was spending more than he'd earned. In any event the lack of income at all has obviously made a bad situation worse. Given all of the above it is my view that should the balance of convenience lie with the Worker he should be granted \$800.00 net per week net or \$1162.93 gross whichever is the lesser.
34. **Balance of convenience** – it is my view that even though the worker may by exaggerating his symptoms it is more than likely that he has a restriction to the movement of his shoulder which would restrict the sort of work he does. The Respondent has not convinced me that the Applicant is malingering nor has it convinced me that the Applicant's evidence is so flawed that it should not be relied upon.
35. The Applicant's failure to disclose the \$30000 permanent impairment payout weighs against him but in my view the Applicant is more likely to be successful in his claim than not and the hardship he is presently suffering

including the separation from his wife and children outweighs the effect of that non disclosure.

36. My orders shall be as follows:

36.1 Employer pay to the worker interim benefits of \$800.00 net per week or \$1162.93 gross per week whichever is the lesser for 12 weeks from today.

36.2 The costs of this application are reserved.

Dated this 3rd day of May 2006.

Tanya Fong Lim
JUDICIAL REGISTRAR