

CITATION: *Hook v Hook Industries Pty Ltd* [2006] NTMC 047

PARTIES: ANDREW ROBERT HOOK  
v  
HOOK INDUSTRIES PTY LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20609745

DELIVERED ON: 22 May 2006

DELIVERED AT: Darwin

HEARING DATE(s): 15 of May 2006

JUDGMENT OF: Judicial Registrar Fong Lim

**CATCHWORDS:**

Interim determination – section 107 Work Health Act – factors to consider – full and frank disclosure.

Wormald Security (International) Pty Ltd v Barry Leslie Aherne [1994]NTSC 54  
Mcguniess v Chubb Securities Pty Ltd [2006] unreported decision Dr Lowndes 24<sup>th</sup>  
March 2006.

**REPRESENTATION:**

*Counsel:*

Worker: Ms Spurr  
Employer: Mr McConnell

*Solicitors:*

Worker: Halfpennys  
Employer: Morgan Buckley

Judgment category classification: C  
Judgment ID number: [2006] NTMC 047  
Number of paragraphs: 58

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

No. 20609745

BETWEEN:

**ANDREW ROBERT HOOK**  
Worker

AND:

**HOOK INDUSTRIES PTY LTD**  
Employer

REASONS FOR JUDGMENT

(Delivered 22 May 2006)

Judicial Registrar Fong Lim:

1. The Worker had applied for an interim determination of his weekly benefits (“interim benefits”) pursuant to section 107 of the *Work Health Act*. The Worker is entitled to make application at any time in proceedings.
2. The factors to consider in determining an application for interim benefits are set out in the judgement of Justice Mildren in Wormald Security (Internation) Pty Ltd v Barry Leslie Aherne [1994]NTSC 54. The court must consider whether there is a serious issue to be tried and if so does the balance of convenience lie with the Worker.
3. The Employer conceded that there was a serious issue to be tried between the parties therefore the submissions concentrated on the balance of convenience.
4. The Worker suffered an injury at work on the 11th December 2000 at that time the Worker was an employee of his own panel beating business. The Worker was involved in a car accident and suffered injuries to his left and

right knees, the upper right part of his back and he right shoulder and neck. The Worker's claim was accepted and he was unable to work for about a month.

5. The Worker returned to restricted duties on the 8<sup>th</sup> January 2001 and continued to work until early 2002 when he states that he sold the business because he couldn't effectively run his business with the restrictions that he had due to his injury. There is no medical evidence to support the worker's claim that for the whole of 2001/2002 he was unable to do his normal duties. However it is safe to assume that the work health insurer paid the appropriate benefits at the time. Certainly there is not complaint from the Worker regarding the period leading up to his sale of his business.
6. The worker produces medical certificates from Centrelink which show him to be totally incapacitated for work between 20<sup>th</sup> June 2002 to 16<sup>th</sup> October 2002. The first certificate diagnoses "right shoulder laxity – depressed shoulder, range of movement. Evaluation to be continued."
7. The second certificate diagnoses "rotator cuff laxity. Posterior dislocation right shoulder." Mr Hook states that he returned to light duties with Coober Pedy paint and panel but was unable to do full duties and he eventually stopped work in July or August of 2004.
8. In June of 2002 the worker asked his then GP in Coober Pedy, Dr Duah to contact the TIO for and "assessment of worker's compensation". In September of 2002 the TIO wrote to Dr Hussein in the Coober Pedy implicitly acknowledging the request and requiring further information about the Worker's current circumstances. A report was obtained from Dr Hussein and Dr Jackson later in 2002.
9. In answer to the question "Do you believe that Mr Hook's current condition arose out of or during the court of employment" Dr Jackson gives the following answer:

“In my opinion Mr Hook’s current condition reflects the injury to his right shoulder as sustained on 11 December 2000. Although he experienced some problems with his shoulder prior to that date, it is apparent that these were of a relatively minor degree.”

10. Dr Jackson also believes it is possible that the injury in 2000 could have possibly aggravated a pre-existing condition but states that nothing can be concluded about pathology or treatment until a MRI was obtained.
11. The MRI and CT scan were obtained and referred to Dr Jackson in September 2002 and he produced a further report in October 2002. Dr Jackson states that there are no abnormalities in the CT scan or the MRI but there is a degree of instability in the shoulder which would not necessarily appear in the investigations.
12. In relation to his work health claim the worker does not maintain contact with the insurance company. The Worker says he was told that the TIO had closed his file however it is clear that the TIO was investigating the worker’s further claim. There was no further correspondence between the worker and the TIO between late in 2002 to mid 2005.
13. **Likelihood of success** – the delay between the original injury and the worker’s present claim and the paucity of information about what the worker was doing between 2002 and 2005 makes it very difficult to decide the likelihood of success of the worker’s claim.
14. The worker’s solicitor submits that the worker is entitled to benefits as he has an accepted work injury which is continuing to effect the worker’s capacity to earn.
15. The Employer’s solicitor argued that the Worker’s delay between 2002 and 2004 has not been adequately explained nor has the Worker produced medical evidence which supports his claim that he has suffered at least partial incapacity for work since the original injury. Given the delay and the fact that the worker has had a job since the injury there is the possibility that

the worker has suffered some sort of injury in his work with Coober Pedy Panel and Paint to aggravate his shoulder. If there was a such an injury then his present incapacity may not be compensable by this Employer.

16. The Worker has also clearly been working since the injury yet there is no evidence of his income from that work. There is a suspicion that the Worker in fact earned more than his normal weekly earnings in his employment with Coober Pedy. There is some evidence that the Worker owned the business in Coober Pedy. See Dr McEvoy's notes showing his letter to Dr Tomlinson on the 13<sup>th</sup> October 2005 in which the doctor states:

“You will indeed see that his physical profile is a little asymmetrical. The man vacillates between wanting his other shoulder shaved to match, to hoping you can assure him that no harm to function has occurred. To this end he seems remarkably underimpressed with his ability to have run a successful, multi employee panel bearing business in Coober Pedy after the recent vehicle accident.

17. This is the clearest indication that the worker was able to work in 2002 and did so successfully this also is a indicator that the worker could have suffered and a new injury in that employment an injury not compensable by this Employer.
18. The Employer was at pains to analyse the medical evidence available which they say show the worker having the same symptoms in 2001 after the injury as he did when he saw Dr Draper in 2000 seven months before the work incident. In his history to Dr Draper in 2000 and to Dr Jackson in 2001 the Worker describes a problem with his right shoulder as a looseness and weakness in his shoulder but no pain. Then in 2002 after his consults with Dr Hussain the doctor's notes indicate that the Worker was having pain in his right hand when making a fist and that he was referred to investigate a possible “posterior dislocation” of the right shoulder.
19. The Employer would argue that this indicates that the pathology had changed in the shoulder from the time of the original injury to 2002 and as

during that time the Worker had worked at the Coober Pedy Panel and Paint it is reasonable to suspect that there has been some intervening injury which has caused the Worker's symptoms to worsen.

20. On the evidence presently available it is my view that the worker is going to find it difficult to establish that his present condition is caused by the work accident in 2000 and without further evidence it is more than likely that he will fail in his application for benefits based on total incapacity.
21. **Full and frank disclosure** – the Employer suggests that the Worker has not been full and frank with the court in his evidence. The Employer points out that the worker originally told the TIO that he had not worked between the time he sold his business in 2001 however it turns out that he did work at the Coober Pedy Panel and Paint. There is also a distinct possibility that he even ran the business himself (see Dr McEvoy's letter to Dr Tomlinson of the 13<sup>th</sup> October 2005).
22. The worker does not disclose in his affidavit the type of work he was doing at the Panel works nor does he disclose the wages he received during that period of time which will be relevant when assessing the Worker's most profitable employment.
23. The Worker has also failed to include in his affidavit primary documentation supporting his claim that his savings have decreased from \$25000 to \$500 over the last couple of years.
24. There is no documentary evidence to support the claim that the Worker receives only \$407.72 gross per fortnight since late 2004.
25. The Employer argues that based on Dr Lowndes reasoning in McGuinness v Chubb Security (unreported decision ) [2006] 24<sup>th</sup> March 2006 the Worker should fail in his application for interim benefits because he has left too much in doubt for the Court by failing to fully disclose his financial situation. Dr Lowndes at page 6 of his judgment states:

“The Court is reliant on the worker to make full and frank disclosure of his or her financial situation so that the Court can be placed in a position to accurately and reliably assess the workers needs both present and future.”

26. The Court is being asked to accept the Worker’s level of income without documentation, the Court is being asked to accept that the Worker’s savings have decreased dramatically over the years since late in 2004 without documentation, the Court is also been asked to accept the Worker assertion that he has had to sell some of his assets to cover his expenses, yet there is no documentation to support that claim.
27. Throughout his judgment in McGuinness’s case Dr Lowndes stressed the point of view that the Worker must produce documentation to support the claims for expenses as well as the income of the whole household. Dr Lowndes conducted a detailed analysis of the documentation annexed to the affidavits of the Worker in that matter and was not satisfied with the evidence before the Court in relation to certain items of expense.
28. In the present case I agree with the Employer that the worker has failed to be full and frank in his disclosure to the court in relation to his financial situation.
29. The documentation supporting the worker’s claims regarding his level of income and expenditure is somewhat lacking in the present case and there has been less than full disclosure. Of course the expenses such as petrol and groceries do are expenses which the court can take notice are expenses of any household and given the present household is a single person household the expenses claimed for those items seem reasonable.
30. **Financial Hardship** – it is clear that the worker is presently without income except his Centrelink benefits and that may be seen to be a hardship in itself however the hardship to be considered by the court in applications for

interim benefits is that which is caused by either the cancellation of benefits or the failure to award benefits.

31. In the present case the Worker was not paid benefits after he returned to work in 2001. He now claims benefits on the basis that he was made totally incapacitated for work by the original work injury from about August 2004 through to present. It is not clear from what date the worker claims he is entitled to benefits.
32. The Worker left the Territory having sold his business in 2001 as he says he could not cope with running the panel beating business.
33. The weekly expenses the Worker says he pays seem to be reasonable except the telephone and cigarette costs.
34. However it is clear that any financial hardship suffered by the worker was in existence well before he made a further claim for benefits from the Employer.
35. Further financial distress has been caused by the cost of the operation undertaken by the Worker earlier this year. It seems that in 2002 the Worker was asking for medical assistance from the TIO in relation to his shoulder which was not forthcoming.
36. The Worker has had the operation on his shoulder and is now unable to work at all until he has healed from that operation. Arising out of that operation the Worker has incurred some lump sum costs which has added to his indebtedness.
37. The Employer submits that the surgery undertaken was elective surgery and does not accept that it was made necessary by the work injury.
38. **Status Quo** – the Employer submits that as the present case is not one where benefits have been ceased rather one where they have not been reinstated



after a period of 5 years then the status quo is an important factor to consider.

39. The Worker has managed until now without further assistance from the Employer and has only been placed in a worse situation by his undertaking elective surgery which the Employer was not given the opportunity to properly investigate as to the cause of the need for that surgery.
40. It is my view that the status quo favours the Employer.
41. **Worker's ability to repay the interim benefits:** it is clear that the worker has no ability to repay any interim benefits if they were to be paid to him his only assets being some old vehicles and a Harley Davidson.
42. **Delay** - the Employer also complains of the delay of the Worker in putting in a further claims for benefits until 2004 which delay they submit denied the Employer to properly investigate the Worker's condition between 2002 – 2004. It is my view disingenuous of the Employer to make this submission as it is clear from the evidence that the Worker had in fact approached the TIO with his claim for more medical investigation and treatment in 2002. The TIO failed to follow through with its investigations at the time and seemingly failed to advise the Worker of his options ( never formally refusing his claim). The Employer is relying on the Worker's clear lack of understanding of his options under the Work Health Act to argue prejudice.
43. The Worker did make a further approach to TIO for benefits in late 2004 however when sent the letter of the 11<sup>th</sup> July 2005 requesting further information before they could consider his claim the worker chose not to respond to that letter. Part of the delay lies at the worker's feet but equally the work health insurer didn't assist by not providing the worker with the appropriate notice which would have explained to the worker his options.
44. **Other factors** – the Worker's solicitor made much of the fact that the TIO's way of dealing with the Worker's claim for further assistance in 2002 was

not appropriate. The Worker submitted that the only response he received from the TIO was that he his file was closed and that he had to make a formal request to reopen the file. In the meantime the TIO did some investigations as to the Worker's medical condition at the time.

45. The Employer argues that as there had been a request for further medical assistance after 5 years it was perfectly reasonable to for the TIO to conduct further inquires before agreeing to pay for the further treatment.
46. The parties produced to the court a series of correspondence commencing in 2002 as follows:

20.6.2002	Letter from Dr Hussain to TIO re assessment of the Worker for worker's compensation
31.7.02	Report of Dr Jackson to TIO regarding reassessment of Worker with a request for MRI and CT Scan
3.9.02	Letter from TIO to Hussain enclosing Jackson's report of 31.7.02 and requesting he arrange the investigations
16.9.02	Letter from Hussain to Jackson enclosing MRI and CT Scan and request for a further assessment of Worker`
17.9.02	Request from TIO to Worker for information about what work he had done since he had moved to Coober Pedy
17.9.02	Letter to Hussain from TIO re current diagnoses of Worker's condition and any comments on Jackson's report`
24.9.02	Letter Hussain in answer to request of the 17.9.02

27.9.02	Letter from Worker to TIO in answer to request of the 17.9.02
8.10.02	Letter from TIO requesting further report from Dr Jackson in reference to MRI and CT Scan.

47. It is clear from this correspondence that from the time Dr Hussain made the request for a reassessment of the Worker's claim the TIO undertook investigations and was in contact with the Worker and Dr Hussain over a period of 3 months. The Worker underwent a further examination with Dr Jackson in July of 2002 and Dr Jackson recommended a MRI and CT scan to allow a more accurate diagnosis. The MRI and CT scan were finally obtained and referred to Dr Jackson who then provided a further report suggesting no abnormalities were found in the CT Scan and the MRI showed only minor changes and a deformity which Dr Jackson attributed to the previous surgery.
48. It is not clear whether the final report of Dr Jackson was referred to the worker or what was communicated to the worker about his claim at that stage. There is no correspondence advising the worker that his claim had been refused nor was there any further contact by the Worker with the TIO chasing up his claim. The worker does not address this issue in either of his affidavits. The Worker does not fully explain his work situation and symptoms suffered in the period between 2002 and 2004 or why he did not pursue his claim in 2002.
49. I do not accept that the insurer the TIO acted improperly how they dealt with the worker's claim up to the final report of Dr Jackson however if the TIO was relying on the report of Dr Jackson to deny any further payments to the worker then they should have advised the worker. However it was also up to the worker to follow up his claim at the time and it seems there was no

further contact with the TIO until 2004 when he again gets a doctor to make the approach to TIO on his behalf.

50. The Worker also did not tell the truth to the TIO about his work situation in the Coober Pedy in his letter of the 27<sup>th</sup> September 2002. In answer to the question of whether he had taken part in any work since he had moved to Coober Pedy the Worker says:

“No Employment has been performed since arriving in Coober Pedy”

51. The Worker’s solicitor submits that the statement was true at the time he made it on 27<sup>th</sup> of September 2002 however that cannot be correct because the in his report of the 31<sup>st</sup> July 2002 Dr Jackson reports:

“He has subsequently relocated to Coober Pedy and his shoulder remains symptomatic. He has states that he has undertaken some work in area apparently with mine machinery and he has been undertaking some welding activities. He said that he only undertakes very light jobs which even cause an aggravation of shoulder symptoms”

52. From the history given to Dr Jackson it is clear that the worker had undertaken some work prior to September 2002.
53. **Conclusion** – It is my view that the Worker has not been full and frank with the Employer or the court in relation to his ability to work and his financial circumstances. I accept that the Worker has now undergone an operation which has rendered him unfit for work for the period of rehabilitation although it is not clear whether this was an operation made necessary by the work injury or whether it was reasonable to undertake at this point in time.
54. It is not possible for this court to assess the level of his financial hardship with the lack of documentary evidence to support his claim regarding his income and level of savings and some of his expenses.
55. The Court cannot assess whether the financial hardship is caused by a denial by the TIO to pay the medical expenses because the financial information is

not sufficient and the medical evidence is equivocal about whether the surgery undertaken was caused by the original work injury or a possible aggravation of that injury in the period between 2002 -2004 when the Worker was clearly employed.

56. Given all of the above it is my view that the balance of convenience lies with the Employer.
57. The Workers application for interim benefits is refused.
58. The Costs of the application are reserved

Dated this 22<sup>nd</sup> day of May 2006

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Tanya Fong Lim  
JUDICIAL REGISTRAR