CITATION:	*Devlin v Darwin Phoenix Hotel* [2006] 049
PARTIES:	ANDREW JOHN DEVLIN v DARWIN PHOENIX MOTEL
TITLE OF COURT:	WORK HEALTH
JURISDICTION:	Work Health
FILE NO(s):	20509204
DELIVERED ON:	26th May 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	15th May 2006
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Interim determination –– factors to consider – Limitations bar to application – extension of time required before application-sections 103J, 104, and 107 *Work Health Act*

Wormald Security (International) Pty Ltd v Barry Leslie Aherne [1994]NTSC 54

Mcguiness v Chubb Securities Pty Ltd [2006] unreported decision Dr Lowndes 24th March 2006.

Australian Iron & Steel Ltd v Hoogland [1961] 108 CLR_471

REPRESENTATION:

Counsel:

Worker:	Ms Spurr
Employer:	Mr Oliver

Solicitors:

Worker:	Halfpennys
Employer:	Minter Ellison

Judgment category classification:	C
Judgment ID number:	[2006] NTMC 049
Number of paragraphs:	44

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

No. 20529204

BETWEEN:

ANDREW DEVLIN
Worker

AND:

DARWIN PHOENIX MOTEL
Employer

REASONS FOR JUDGMENT

(Delivered 26th 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 a proceeding and even prior to a proceeding commencing (see section 103J(3)).

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. **Serious issue to be tried -** The Employer argues that there is no serious issue to be tried because the Application was not filed in accordance with the Act. The Employer argues that the application filed on the 30th of November 2006 was not in compliance with section 103J(1) of the Work Health Act. That is the Worker has not filed and application for benefits

within the 28 days of mediation certificate being issued. The Employer argues that as this has not occurred then the court cannot grant any interim benefits until such time that an extension of time is granted to the worker to file and serve the application for benefits.

4. The Worker submits that the application filed on the 30th of November 2006 was clearly an application for "reinstatement of benefits" just not in the correct form. The Worker's solicitor sought to hand up an application in the correct form which was accepted by the court as a document to be filed however it should be noted that the court's acceptance of that document should not be read as a granting of extension of time by default.

5. The chronology of events is a follows:

4.11.2005	Worker's benefits are cancelled by the service of a Form 5
11.11.2005	Worker requests mediation
30.11.2005	Worker makes application to court for "reinstatement of benefits". Application listed for 4.1.2005
6.12.05	Mediation is held and no change recorded
3.1.06	Consent adjournment of application with orders that worker file and serve and further affidavits
6.2.06	Application for interim determination is adjourned by consent
20.2.06	Application adjourned again by consent
27.2.06	Application adjourned again by consent
13.3.06	Application adjourned again by consent
3.4.06	Application adjourned again by consent

10.4.06	Worker changes solicitors and Application adjourned by consent
3.5.06	Application adjourned by consent
11.5.06	Worker files another application for interim benefits
15.5.06	Application for interim benefits heard

6. The original application for "reinstatement of benefits" was filed by the Worker himself prior to the mediation being held. The application was made pursuant to section 107 (see reference to section 107 on the application) and therefore must only have been an application for interim determination pursuant to section 107. A substantive application for benefits pursuant to section 104 of the Act cannot be filed until such time that a mediation has been held (section 103J).

7. The Worker's argument that the original application was an application pursuant to section 104 which was simply on the wrong form cannot succeed. It is clear from the document itself that the Worker was making the application pursuant to section 107 of the Act. The Worker's present solicitor's attempt to remedy the application on the "wrong form" by filing an application in the right form must fail.

8. The Worker's case has not been assisted by the fact that he then employed a solicitor in NSW who clearly had no experience in the Work Health Court and was not aware of the processes available to his client. That solicitor has apparently failed to advise the worker to commence his substantive proceedings within the 28 days of the mediation certificate issuing.

9. The only application before the court at present is the worker's application for an interim determination pursuant to section 107 & as allowed by 103J(3) of the Act.

10. The Employer's argument is that while the Worker needs an extension of time in which to commence his proceedings for benefits he cannot make an application for interim determination. Essentially the Employer is arguing that the limitation period provided for by section 103J(3) is a limitation period which goes to the substance of the cause of action and therefore failure to comply with that limitation period extinguishes the right to sue. If there is no substantive right to sue then there cannot be an interim determination of that right.

11. The Worker does not argue that the limitation period contained in section 103J(3) is merely procedural however he does not accept that he requires an extension of time or if he does argues that is a matter for the hearing.

12. The nature of a limitation provision was aptly described by Windeyer J in the High Court decision of Australian Iron & Steel Ltd v Hoogland [1961] 108 CLR 471 at 488-489 when he said:

> "Statutory provisions imposing time limits on actions take various forms and have different purposes. Some are for preventing stale claims, some for establishing possessory titles, some for the protection of public authorities, some in aid of executors and administrators. Some are incidents of rights created by statutes. Some prevent actions being brought after, some before as lapse of time. It may be that there is a distinction between Statutes of Limitations, properly so called, which operate to prevent the enforcement of rights of action independently existing and limitation provisions annexes by a statute to a right newly created by it. In the latter case the limitation does not bar and existing cause of action. It imposes a condition which is of the essence of a new right……………………………………………………………………
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> And, even when a time limit is imposed by a statute that creates a new cause of action or right, it may be so expressed that it is regarded as having a purely procedural character, as a condition of the remedy rather than an element in the right."

13. I do not accept that the limitation period provided for by section 103J(3) is a limitation period of substance. Section 103J(3) is not an "essence" of the cause of action it is merely a procedural provision which the Worker must

comply with to enforce the cause of action. The cause of action is not extinguished when the limitation period expires only the right to enforce. The cause of action for benefits is created by other provisions of the Work Health Act such as sections 53 and 53A. The process through which the worker has to go through enforce that cause of action is to serve a claim form, request a mediation, get a mediation certificate issued and file his application in the court within 28 days of the issue of the mediation certificate.

14. This means that in practice the Worker can commence proceedings without an extension of time first being granted to him. He can his application for benefits with an application for extension of time as part of the remedies claimed.

15. I do not accept the argument that an extension of time has to be granted before an interim determination can be made as that would make a nonsense of and defeat the purpose of section 103J and 107 of the Act.

16. If a worker is successful in his application for interim benefits and then does not commence his substantive application for benefits then it is always open to the employer to apply pursuant to section 107(1) for the revocation of the order.

17. However if prior to the time that an application by the Employer for cancellation of benefits is made, the worker files an application for benefits with an application for extension of time then the order may not be cancelled. It is accepted that if an application for benefits is made out of time that the Worker is able to apply for an extension of time at the same time that he files his application for benefits. The application for extension of time will be dealt with at the beginning of the substantive hearing of the matter. In my view the fact that the worker may need an extension of time is just one of the matters which will be considered when considering the balance of convenience on an application for interim determination.

18. It is obviously the clear intention of the worker in this matter to make application to the Court pursuant to section 104 and that is confirmed by his present solicitor's attempt to file an application in the "correct form".

19. It is my view that the Applicant will have to make an application for an extension of time to file his application for benefits and file an application for benefits if he wants to pursue his claim.

20. Section 103J(3) specifically allows an application for interim determination to be made before a mediation has occurred. The purpose of that section is to allow a worker, who has the balance of convenience on his side, the financial relief of interim benefits. A worker who has to make an application for extension of time should not be excluded from the operation of that section. I have no doubt however that the legislature did not contemplate a situation where there were the lengthy delays in the finalisation of an application for interim determination as there have been in this worker's case.

21. The aim of interim determinations is to give the worker fast relief from the financial hardship they may suffer because of a refusal or cancellation of benefits should the balance of convenience be with them.

22. While it is clear that the Worker intends to make his application for benefits he has not done so to this date. I have no doubt that his present solicitor will rectify that problem immediately.

23. It is my view that the Worker's there are clearly triable issues between the parties and that the extension of time to file an application is one issue that will have to be decided upon by this court before the other substantive issues are dealt with. The fact that the Worker requires an extension of time in which to file his application for benefits is one of the factors to consider when determining where the balance of convenience lies.

24. **Balance of convenience** – there a many factors to consider in this application which apply to the balance of convenience.

25. Hardship - the worker produced evidence of the household income by way of affidavit stating that he received $408.00 per fortnight from Centrelink and his partner receives $411.00 per fortnight as a carer for the worker. He does not produce any documentary evidence to support that claim. Dr Lowndes in the unreported decision of Mcguiness v Chubb Security [2006] required the worker to support any statements in relation to income with documentation. In this case it is clear from annexure "AJD-1" of the worker's affidavit of the 8th of May 2006 that the Worker was certified for Centrelink purposes as unfit for work for the period 22.12.05 – 22.2.06 and therefore qualifying him for a Disability benefits. No documentation has been produced to confirm the level of benefits for either the Worker nor his wife.

26. The Employer queried the telephone, water and petrol expenses claimed and I accept that the claim for $25.00 per week for water is an overstatement however the complaints made about the telephone account and the petrol I do not accept. The Worker's household weekly expenses should be calculated at $545.00 per week.

27. Further hardship attested to by the Worker is that as his wife has recently had a miscarriage they are finding it more difficult to deal with there lack of finances.

28. Likelihood of success - the Employer produced the medical reports of Drs Elder and Nye who have certified the Worker fit to return to his pre injury duties. Dr Elder is a Consultant Occupational Physician who originally certified the worker as having continuing symptoms from his work injury and being unfit for duties however after viewing some video footage of the Worker playing baseball Dr Elder changed his mind. Dr Nye is a Neurosurgeon who in his first report certified the worker fit for work with a

suggestion that the Worker may have developed an abnormal illness behaviour. After being shown the video evidence Dr Nye confirms his view that he worker should be able to return to his normal duties. Dr Nye states of the video material that:

> "The observations *(of the worker's actions in the video)* are considered inconsistent with the claimed restricted range of movement encountered at the time of my examination."

29. A report from Dr Long was also produced by the Employer, a report arranged by the Worker's solicitor, and that report stated:

> "Your client sustained an aggravation of pre – existing asymptomatic degenerative lumbar disc disease in an injury sustained at work on 25 August 2003. This caused ongoing pain however it appeared thereafter that he was fit to resume some form of sedentary occupation. The claimant, however, sustained a progression of the naturally occurring degenerative changes of his lumbar disc in a non work related incident approximately six weeks ago, causing right – sided spinal nerve root compression (S1). Because of this his now completely disabled from returning to any form of work."

30. The only medical evidence the worker had put before the court is a letter from his previous treating GP Dr Dyson-Berry who states that:

> "In terms of prognosis I would be very guarded with his prognosis as some of his disabilities were difficult to explain in particular medical or physiological terms. He is difficult to engage to look forward to a more positive future. I do believe he has a certain amount of degenerative changes in his lower back but this may have been prior to the injury and in terms of hobby or sporting activities, not engage in many prior to the injury but he was interested in sightseeing, walking around and perhaps the occasional fishing."

31. The worker has not produced to the court any current medical certificates nor had the worker produced the report of a Dr Long which apparently was obtained for him by his previous solicitors he left it to the Employer to produce that report,

32. Dr Long's report certifies the worker totally unfit for work however states that there is a degenerative condition that is presently causing his present (at the time of the examination) problems.

33. On the basis of the evidence presently before the court it is my view the worker is unlikely to be successful in his claim.

34. Full and Frank disclosure – I have already touched on this subject above. The worker has not provided the court with any primary evidence of his and his wife's level of benefits from Centrelink and while this court can take judicial notice of the fact that Centrelink income benefits are usually in the range a stated by the Worker it should not have to take that notice especially it would not be difficult for the worker to produce his Centrelink statement of benefits to the court.

35. The worker has not disclosed the report of Dr Long when it was clearly sent to his former solicitors and there is no explanation for that non – disclosure. The Employer did present that report to the court.

36. The worker has not sought to explain to the court the video surveillance of himself practicing baseball when he clearly was aware of that tape having received a copy of the later reports of Drs Nye and Elder.

37. The worker has not been full and frank in his disclosure to the court.

38. Ability to repay - The worker clearly has a limited ability repay any interim benefits paid to him. The worker does not have any assets of any significance and is not presently employed.

39. Other factors - the worker is out of time in which to lodge his application for benefits and will have to apply for an extension of time but given the circumstances, the fact that he was originally representing himself and then represented by a solicitor who clearly had no experience with the Work

Health act and the procedures under that Act it is more than likely that he would succeed in that application.

40. The Applicant has also delayed this application for quite a length of time without any real explanation although I suspect again that was because his former solicitor had no experience in the Work Health Court.

41. The Applicant has not yet filed his substantive application for benefits.

42. **Conclusion:** It is my view that in this case the balance of convenience lies with the Employer. While I accept that worker is in financial difficulties the strength of his case and the state of his evidence before this court tips the balance in favour of the Employer.

43. The worker's application for interim determination is dismissed.

44. The costs of this application be reserved.

Dated this 25th day of May 2006

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Tanya Fong Lim
JUDICIAL REGISTRAR