

CITATION: *Reid v Energy Resources of Australia Ltd* [2006] NTMC 064

PARTIES: STEPHEN JAMES REID

v

ENERGY RESOURCES OF AUSTRALIA LTD

TITLE OF COURT: Work Health

JURISDICTION: Work Health

FILE NO(s): 20609463

DELIVERED ON: 31st July 2006

DELIVERED AT: Darwin

HEARING DATE(s): 24th July 2006

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Interim Determination – arguable case – real, proximate and effective cause – worker’s duty of full and frank disclosure.

Wormald Security (International) Pty Ltd v Barry Leslie Aherne [1994]NTSC 54
Mcguinness v Chubb Securities Pty Ltd [2006] unreported decision Dr Lowndes
24th March 2006

REPRESENTATION:

Counsel:

Worker: Mr Morris
Employer: Ms Ross

Solicitors:

Worker: Priestleys
Employer: Minter Ellison

Judgment category classification:

Judgment ID number: [2006] NTMC064

Number of paragraphs:

41

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

No. 20609463

BETWEEN:

Stephen James Reid
Worker

AND:

Energy Resources of Australia Ltd
Employer

REASONS FOR JUDGMENT

(Delivered 31st July 2006)

Judicial Registrar Fong Lim:

1. The worker has applied for an interim determination of benefits (“interim benefits”) pursuant to section 107 of the Work Health Act.
2. The Worker must convince the court that he has an arguable case and that the balance of convenience lies in his favour. The Worker relied on his affidavits of the 30th March 2006, 11th April 2006, 9th May 2006 and 24th July 2006. The Employer relied upon the affidavit of William Oliver of the 19th April 2006 and Heather Ross of 10th May 2006.
3. The Worker was employed with the Employer as a blast co – ordinator in the employer’s mine at Jabiru. The Worker suffered severe kidney pain on the 22nd of March 2004 having been in the Employer’s employ for approximately on month. The chronology of the Worker’s case is influenced by another incident that was occurring at that mine site at the time. During

the next two weeks the mine was closed because a problem with contaminated water having been pumped through to the drinking and washing water on site.

4. Originally the worker thought that his problems were caused by his drinking of the contaminated water. He consulted with a urologist who advised him that he had kidney stones but they were not the reason for the pain he was experiencing.
5. The Worker had approximately 3 weeks off work and returned to work after that. Upon return to work the Worker didn't have any more problems until July – August 2004. The Worker took time off work and submitted himself to a myriad of medical investigations to try and work out what was causing his symptoms. It seems that the doctors were not sure of the diagnosis for the Worker. Kidney stones were identified but were not believed to be the cause of his pain. It was only when the Worker consulted with Dr Davies in January of 2005 that the connection was made between the dehydrating work conditions and the worker's medical condition.
6. In February 2005 the Worker recommenced work but fell ill again after 3 months work and was hospitalised. Further attempts were made by the worker to return to work in August/ September 2005 and October / November 2005 but both times he was hospitalised.
7. The Worker put a claim form in with his Employer on the 1st March 2006 and the Employer denied liability for his claim on the basis that there was insufficient evidence of an injury.
8. The Employer argues that while it accepts that dehydration can cause the Worker to develop stones he is able to work in his old job as long as he maintains his hydration. The Employer has confirmed that the Worker's position remains open and available to him should he wish to return.

9. The Employer also argues that given the worker has not worked in the mine since November 2005 and the Worker's last hospital admission was in February of this year it is clear that any continued problems cannot be caused by his work environment.
10. For the worker to be successful on an application for interim benefits he must prove that he has an arguable case and that the balance of convenience lies with him (see *Wormald Security (International) Pty Ltd v Barry Leslie Aherne* [1994]NTSC 54).
11. **Arguable Case** : the Worker has produced medical reports of Davies, and Ashan. Davies diagnoses a pre-existing condition in the Worker which makes him more likely to develop kidney stones. Dr Davies also states that the worker is fit for his old employment as long as he does get dehydrated (see his report of the 2nd May 2006 annexure "SJR1" annexed to the affidavit of the 24th July 2006). In his earlier report of the February 2006 Dr Davies stated:

"This patient clearly has an intrinsic predisposition to forming urinary tract stones. This has been corrected to a certain extent by commencement of long term Allopurinol therapy which will serve to reduce his serum uric acid level. Nevertheless, work in dehydrating and humid environments will likely predispose him to further stone formation and he should certainly avoid dehydration in his work environment and maintain a high fluid intake."

12. In his later report of the 2nd of May 2006 Dr Davies is more specific in his diagnosis:

" .. there was a causal connection between the onset of Mr Reid's initial symptoms on 22nd March 2004 and his work environment. He was intrinsically predisposed to developing kidney stonesbut it is likely that his dehydrating work environment was the precipitating factor for the development of his bilateral renal calculi.

..... I consider that Mr Reid's intermittent periods of return to work at the Ranger Mine with presumed further episodes of dehydration likely to contribute to progression of his renal stone load and consequent acceleration of his disease."

13. The doctor refers to an acceleration of the Worker's disease but doesn't actually specify the disease. The court can only assume the doctor is referring to the condition of developing kidney stones.
14. The Employer argues that even with Dr Davies reports in hand the court should find that there is no arguable case for continuing weekly benefits to be paid to the Worker as it is clear that while the Worker is away from the work conditions he can still develop stones (as he has recently done so needing a further operation see Dr Aslan's report of the 18th July 2006).
15. The medical evidence is clear that the work conditions causing dehydration is the most likely cause of the development of stones in the Worker in March 2004 and each time after that when the Worker returned to work after that. It does not follow however that his continuing incapacity to work is presently caused by that work injury. What the medical reports do not say is that without the dehydrating work conditions the Worker would never have developed kidney stones although Dr Davies in his most recent report alludes to that by suggesting that "the dehydrating work environment was the precipitating factor for the development of his bilateral renal calculi."
16. The Employer argues that if the worker were successful he would only be successful for perhaps a couple of closed period claims for each time that he returned to work and developed more stones. The Employer also submits that Dr Davies has given the opinion that the Worker could return to work in his old job as long as he maintains hydration then the Worker does not have any incapacity to work.
17. Based on the reports of Dr Davies there is an arguable case that the Worker's pre disposition to develop kidney stones has been exacerbated by the work environment. The Employer has not produced any medical evidence to the contrary.

18. If the court accepts that Dr Davies is saying that the work environment caused the worker's present propensity to develop kidney stones then it is arguable that the worker has a claim for continuing benefits. For the purposes of this application I accept that is what Dr Davies is saying and therefore in the absence of contrary medical evidence I accept that medically there is an arguable case that the work environment was a real, proximate and effective cause of the Worker's condition.
19. Having established an arguable case on the medical evidence the Worker went on to address the issue of his application for benefits being out of time. The Worker's initial injury was arguably in March 2004 and he served his claim form in March of 2006 the Worker clearly has not made his application within the 6 month period allowed by the Act. To be successful on his claim the Worker would have to convince the court that he had reasonable cause for the delay.
20. In this application the court just has to be satisfied that there is an arguable case that he had a reasonable cause for the delay. The Worker has, in his affidavit of the 24th July 2006 explained that he had notified the Employer of his injury in March 2004 even though he had got the cause wrong (he assumed at the time it was from ingesting contaminated water). The Worker then goes on to explain that it wasn't until February 2005 that the he was made aware by Dr Davies that the dehydration caused by his work condition had caused the kidney stones and that he may have a claim under the Work Health Act.
21. There is no explanation by the worker as to why the Worker waited for a full year after finding out from Dr Davies that the work environment had contributed to his medical condition to make his application although he does state that he was actively discouraged by the employer from putting in a Work Health claim (see paragraph 9 of his affidavit of the 24th July 2006). The counsel for the Worker also argued that the 6 months time limit should

run from the date that the cause of the incapacity became known to the worker and when the incapacity manifested itself. The difficulty is that the Worker's incapacity has manifested itself several times over the past 3 years and his medical advice has varied over the last 3 years and therefore the 6 months could run from any one of those periods of time.

22. Given all of the above it is arguable that the Worker will be able to convince the court that he had reasonable cause for the delay in that he wasn't aware of the cause of his disease for sometime and he had been actively discouraged by his employer from putting in a claim.
23. The worker presently has a clear incapacity to work as certified by Dr Aslan however that incapacity is only limited to working "outdoors in the heat and working heavy machinery". The worker would seem to be only partially incapacitated to work even on his best case scenario however that capacity has not been quantified yet.
24. In my view there is an arguable case in favour of the worker.
25. **Balance of convenience** – the matters put before the court in relation to the balance of convenience in this matter are, hardship suffered by the worker, the likelihood of success of the worker's application, and the ability of the worker to repay any interim payments should the worker be unsuccessful.
26. Likelihood of success – Even though the evidence supports an arguable case for the worker for some periods of incapacity I am not convinced that the Worker will be successful in convincing the court that his continuing total incapacity for work is caused by the work environment considering he has not been at work for almost 10 months. Even if the worker is successful in proving the causal link of the work environment to his propensity to continually develop of kidney stones it is clear that he has a present capacity to work just not in the heat or driving heavy machinery (the worker's best case). Given the medical advice available it is my view that the Worker will

not be successful in proving total incapacity to work. In my view, on the evidence as it presently stands the worker will likely be successful in obtaining weekly benefits for some periods of total incapacity over time from 2003 and perhaps some for partial incapacity presently and into the future. The situation as it presently stands is that the Worker has been denied any benefits at all and in my view he will be successful in obtaining a judgment for some benefits should the matter be adjudicated on by the court.

27. Hardship – the worker has put before the court the usual list of weekly expenses in his first affidavit and then in a later affidavit supported those claims with some primary documentation. In Mcguiness v Chubb Security His Honour Dr Lowndes made a particular point of requiring the worker to make full and frank disclosure of his financial circumstances. His Honour stated that without primary documentation to establish lump sum expenditures and other less usual expenses the court is unable to make a decision on what the financial circumstances are of the Worker. The Employer argues that the Worker has not produced to the court any evidence as to his level of savings or primary documentation to establish his obligation to make payments such as his credit card debt. The worker has not stated what his level of savings are nor has he produced any statement from the credit card company to establish what is his monthly payment.
28. The worker also maintains two residences and there does not seem to be any real necessity for the place in Jabiru to be maintained except that the worker has his furniture in it and not enough money to transport it up to Darwin. It seems that the Worker does not need to maintain the house in Jabiru because he doesn't work on the mine site and even though the rent on the place has been waived by his employer it is curious why there would be a need to have electricity running in that house

29. Nevertheless it is clear that the Worker is still clearly suffering the financial burden of having no income even if he has not been full and frank in his disclosure to the court.
30. Ability to repay: the worker has not provided the court with any evidence as to his ability to repay any benefits should they be paid to him. The court can safely assume that the worker does not own any real estate as he is paying rent on two properties and there is no evidence of any mortgage repayments on another property. There is no evidence of any savings and therefore it is unlikely that the worker has any ability to pay back any interim benefits paid to him should he be ultimately unsuccessful.
31. Given all of the above the balance of convenience in this matter lies with the Worker. However on the evidence available the worker is only likely to be compensated for periods of incapacity in the past and found to be only partially incapacitated presently. If the worker were to be granted interim benefits on the basis of total incapacity then he has not shown any ability to be able to repay benefits should he be found only partially incapacitated. This will be taken into account in the level of interim benefits allowed
32. Level of benefits – In considering that level of interim benefits to be paid to a worker this court considers the level of weekly expenses the worker may have and uses that as a basis to decide what benefits should be paid. This court considers that the level of interim benefits should not necessarily be the level of normal weekly earnings of the worker the court takes into account the level of income required to maintain a reasonable standard of living considering the worker's circumstances. The court should not award the worker interim benefits above the maximum level of weekly benefits the worker may receive should he be successful in his application to the court.
33. The Worker has presented to the court his list of weekly expenses and some primary documentation supporting that expenditure. The Employer submits that there is no evidence the support the weekly payment for the credit card

at \$50 per week (there should be a statement from the credit card company) and the claim for running two households is unreasonable. The Employer also submits that the claim for \$100 per week for fuel is unreasonable even with the cost of petrol if the worker were living and working in Darwin. The Worker does not say where he lives whether it is in Darwin or Jabiru. There is no reason for him to continue living in Jabiru as he does not attend work there anymore and it is implied he lives in Darwin now because he refers to moving his furniture from Jabiru to Darwin (or Perth).

34. In relation to the credit card payment I note that the worker does not disclose to the court the level of his overall debt on his credit card without that information or a statement from the credit card company it is not possible for the court to assess whether in fact the worker does have an obligation to pay \$50 per week. (which would translate to approximately \$200 monthly payment).
35. I do not accept that it is reasonable for the worker to run two households and assume that the worker is now living in Darwin. I note that the rent on the Jabiru property has been waived (as advised by the Employer's representative at the hearing) however there is no indication in the worker's affidavit evidence as to what part of the electricity expenses relates to the Jabiru property. If the worker is not living in the Jabiru property then there is no need for electricity charges for the property. I also note that \$50 per week equates to approximately \$650 per quarter which is in my view excessive for a single person household.
36. The Employer also challenges that cost of \$200 per week for groceries for a single person household (apart from the times the Worker has his son living with him) and I agree that seems a little excessive.
37. The Worker claims that his weekly expenses are in excess of \$1400 per week. The Worker also claims that his normal weekly earnings were \$1572.00 gross prior to his injury. The Worker was clearly living beyond his

means before the injury. The maximum the Worker could be awarded if he were to be found totally incapacitated is \$1304.82 gross per week.

38. It is my view that the more reasonable level of weekly expenses for the worker would be approximately \$900.00 per week. This would still be barely covered by the Worker's entitlement if he were to be found totally incapacitated.
39. In light of the above and my view that the Worker will not be found to be totally incapacitated for work I order that the Employer pay the worker interim benefits of \$1150.00 gross per week.
40. The Worker has applied for interim benefits to be applied retrospectively on the basis that he made his application as soon as possible and that there were just some unfortunate delays in getting the matter before the court. Unfortunately for the Worker it is my view that those delays have been caused by the need for him to file further affidavits as his solicitors were obviously aware that he would most likely be unsuccessful without further evidence. The application for the payment of benefits retrospective to this order is refused.
41. My orders are as follows:
 - 41.1 The Employer pay the Worker interim benefits of \$1150.00 gross per week for 12 weeks.
 - 41.2 The costs of this application be costs in the cause

Dated this 27th day of July 2006

Tanya Fong Lim
JUDICIAL REGISTRAR