CITATION: *Atkins v A & B Welding* [2007] NTMC 035

PARTIES:	LEO ANTHONY ATKINS
	v
	A & B WELDING
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20706800 / 20712159
DELIVERED ON:	13 June 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	6 June 2007
JUDGMENT OF:	Acting Judicial Registrar Ganley

CATCHWORDS:

Interim Determination - Application for further determination of interim benefits – undue hardship – whether misconstruction of section of Act constitutes "exceptional circumstances" – sections 65 (2)(b)(ii) and 107(5) and (6) of the Work Health Act

REPRESENTATION:

Counsel:

Worker:	Ms Dunn
Employer:	Mr Van Lingen

Solicitors:

Worker:	Priestleys
Employer:	Cridlands

Judgment category classification:	C
Judgment ID number:	[2007] NTMC 035
Number of paragraphs:	38

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

No. 20706800 / 20712159

[2007] NTMC 035

BETWEEN:

LEO ANTHONY ATKINS
Worker

AND:

A & B WELDING
Employer

REASONS FOR DECISION

(Delivered 13 June 2007)

JUDICIAL REGISTRAR GANLEY:

1. The Worker makes application for a further determination of interim benefits, pursuant to section 107(5) and (6) of the *Work Health Act* ("the Act").

Background

2. It is common ground that the Worker sustained an injury to his right heel at work on 15 August 2002 and whilst his claim was initially accepted the Employer issued a Form 5 notice on 20 February 2007 cancelling the Worker's benefits. The Employer gave the following reasons:

> "On 23 January 2007 you were examined by Dr Graham Lewis, Consultant Orthopaedic Surgeon. Dr Lewis' opinion was that any incapacity for work you now have is not related to your original right foot injury ("your work injury").
>
> On this basis, pursuant to s.53 of the Work Health Act, you have no entitlement to compensation as you no longer have any incapacity for work that results from your work injury, nor any incapacity that is materially contributed to by your work injury.

> In the alternative, if you do have any remaining incapacity for work as a result to of your work injury, (which is denied) then your earning capacity in the most profitable employment you could undertake exceeds your indexed normal weekly earnings, and you are therefore not entitled to further weekly compensation".

3. On 7 March 2007 the Worker filed an application for interim benefits. On 23 March 2007 her Honour Ms Fong Lim RSM granted the application in the sum of $516.90 gross per week, commencing 23 March 2007 for a period of 9 weeks.

4. Ms Fong Lim RSM found, inter alia, that whilst the scales were "evenly balanced" in terms of the likelihood of success the balance of convenience lay with the Worker due to the Worker's dependence on the benefits for survival; his ability to repay (due to his unencumbered property); the status quo that the Worker had been receiving benefits; and the Worker had not delayed in making the application. However, her Honour found that the Worker had "not taken any steps toward the resolution of his substantial claim for benefits" as he had not taken any action since receipt of the Form 5 notice.

THE APPLICATION

5. The authority of *Wormald International (Australia) Pty Ltd v Barry Leslie Aherne* [1994] NTSC 54) provides that in order for the Court to exercise its discretion to award interim payments the Worker must establish that there is a serious question to be tried and that the balance of convenience favours the making of an interim award.

6. As this is a second application by the Worker guidance must also be gained from subsections 107(5) and (6) of the Act, which state:

> *'(5) The Court may make more than one interim determination of a party's entitlement to compensation.*

> *(6) The Court may only make a further determination under subsection (5) if satisfied that –*
>
> *(a) the party would suffer undue hardship if the further determination were not made; or*
>
> *(b) the circumstances are otherwise exceptional'.*

7. The provisions were considered by Ms Fong Lim RSM in *Tanya Maree Baker v National Jet Systems*, Unreported, delivered 4 April 2006. Her Honour found that:

> "… unless the Employer can prove that circumstances have changed since the last application it is not necessary for the court to reassess the balance of convenience. What the court must decide is whether the worker overcomes either of the thresholds set by section 107(6)" (paragraph 9, page 3).

8. In support of this application the Worker relies on his Affidavits sworn 6 March 2007, 20 March 2007 and 22 May 2007 and the Affidavits of his solicitor, Melissa Dunn, sworn 19 March 2007, 5 June 2007 and 6 June 2007.

9. At the commencement of her submissions the Worker's solicitor respectfully disagreed with her Honour Ms Fong Lim's findings of 23 March 2007 that her client had not pursued his substantive claim. Ms Dunn referred the Court to evidence that following receipt of the Form 5 notice her client had caused a letter to be written to WorkSafe requesting mediation. A mediation certificate was subsequently issued on 8 March 2007 and the original application for interim benefits filed on 7 March 2007.

10. In support of the Worker's substantive claim the Worker's solicitor referred the Court to a medical certificate dated 29 May 2007 and medical report dated 30 April 2007 of the Worker's General Practitioner, Dr Tilakaratne, along with the medical report of Dr Matthew Sharland, Orthopaedic Surgeon, dated 25 May 2007. Dr Tilakaratne certifies that the Worker is

capable of working 15 hours a week (Annexure 2 of Affidavit Melissa Dunn of 6 June 2007) but indicates that the Worker is still incapacitated as he still reports pain and he expects no improvement (Annexure 2 of Affidavit of Melissa Dunn of 5 June 2007). Mr Sharland's report of 25 May 2007, unsigned, also supports the Workers claim that he continues to be incapacitated.

11. In seeking a further order for interim benefits the Worker's solicitor submitted that it is not necessary for the Court to consider the balance of convenience factors, per *Baker v National Jet Systems*, and the issue is whether the Worker would suffer undue hardship if the determination is not made. Further, that the Worker's Affidavits of 6 March 2007 and 22 May 2007 support his claim of undue hardship.

Undue Hardship

12. "Undue Hardship" in the context of subsection 107(6) of the Act was also considered by Ms Fong Lim RSM, in *Baker v National Jet Systems*. Upon considering his Honour Justice Mildren's decision in *Wormald v Ahern,* and various definitions, her Honour stated:

> "It is my view that the obvious purpose of section 107(6) is to require the Worker to prove to the Court that the hardship she suffers without an interim determination of benefits would be more than just hardship caused by having less income but something in excess of that taking into account all of the circumstances of her case. In previous cases before this court the Worker has been found to suffer undue hardship when the worker would not be able to pay for the necessities of life without benefits" (paragraph 14, page 4).

13. The Worker's Affidavit of 22 May 2007 swears to the Worker receiving no assistance or income other than weekly benefits (paragraph 11) and that without the weekly benefit it would be "very difficult, if not impossible for me to make ends meet financially". The Worker claims he is "extremely stressed at the thought of not receiving an income" and that whilst the

previous award enabled him to alleviate some stress it "by no means covers all of his expenses" (paragraph 10).

14. The Worker also swears to his weekly expenditure requirements of $462.79, $43.48 more than the total put forward in his Affidavit of 6 March 2007. The obvious increase being $20 for miscellaneous expenses (purchases to repair his trailer, fence and veranda which he states were falling apart and becoming dangerous) and a slight increase in power.

15. It is also noted that the Worker's savings have diminished from $3,462.27 to $1,184.23. In this regard I also note the findings of his Honour Justice Mildren in *Wormald v Aherne* (supra):

> "..where a worker has had his payments stopped altogether by the employer exercising a right to discontinue payments under s69, there must inevitably be some hardship to the worker in the usual run of cases, even if the worker is fortunate enough to have other independent means. If the savings of a thrifty worker are to be whittled away pending the hearing of his appeal that is a hardship… Even if a worker is a millionaire this does not necessarily mean that the balance of convenience must be decided against him" (paragraph 10).

16. The Employer's submissions did not focus on "undue hardship" and centred on the issue of "exceptional circumstances", pursuant to section 107(6)(b) of the Act.

Exceptional Circumstances

17. The Employer submits that her Honour Ms Fong Lim RSM misconstrued section 65(2)(b)(ii) of the Act at the original interim benefits application.

18. Section 65(2)(b)(ii) of the Act provides:

> *'(2) For the purposes of this section, loss of earning capacity in relation to a worker is the difference between –*
>
> > *(a) his or her normal weekly earnings indexed in accordance with subsection (3); and*

(b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if –

…

(ii) in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her,

and having regard to the matters referred to in section 68'.

19. The Employer referred the Court to paragraph 7 of her Honour's decision, which states:

> "The Employer submits that the Worker has been assessed by Konekt as capable of undertaking the duties of a water tank/truck driver and that brings the Worker within Section 65(2)(b)(ii) and therefore the Worker is likely to fail in his application for benefits. The Worker argues that Section 65(2)(b)(ii) does not apply to him because his date of injury was prior to the commencement of that section".

20. In support of the submission contained therein the Employer's solicitor referred the Court to his Affidavit sworn on 19 March 2007 which annexes the labour market research report (Konect) and medical report of Dr Graham Lewis, dated 29 January 2007.

21. The Employer claims that the Worker was assessed as suitable for a position of Water Tanker Driver/Truck Driver (as he holds a HR licence) and that the estimated remuneration of $865 per week exceeds the Worker's normal weekly earnings. Further, that Dr Lewis found that "any incapacity for work is not related to the original right foot injury" (answer to question 2), the Worker "certainly does have a capacity for suitable employment" (answer to question 4) and on the basis of Dr Lewis' examination "there are not now restrictions in place by reference to his right heel" (answer to question 6).

22. The Employer also submitted that it was on the basis of the Konect report and Dr Lewis' report that a Form 5 notice was issued. The Employer

questions her Honour's determination that the scales were "evenly balanced" in terms of the Worker's likelihood of success.

23. The Employer claims that pursuant to section 65(2)(b)(ii) in assessing loss of earning capacity reference is to be had to the amount the Worker is reasonably capable of earning if he was engaged in the most profitable employment reasonably available. However, in this case the Worker was injured on 15 August 2006, therefore, he falls within the previous provision (as section 65(2)(b)(ii) only came into effect on 1 November 2002) and the Employer does not have to demonstrate availability of employment.

24. It is also the Employer's submission that if her Honour had correctly construed section 106(2)(b)(ii) of the Act then she may have found differently in regard to the strength of the Worker's case. Further, pursuant to section 107(6)(b) the misconstruction of a provision is an "exceptional circumstance" and the balance of convenience should therefore be reconsidered because the likelihood of success is less than that considered in her Honour's decision.

25. The Employer denies liability for the back injury as it occurred as a consequence of a placement organised by his GP in conjunction with CRS, and is not causally connected to the original injury.

26. In reply to the Employer's submissions the Worker's solicitor submitted that the evidence supports that there is a serious question to be tried, including:

(a) a dispute on the medical documents – The Employer's medical reports indicate the Worker is fit whereas the Worker's indicate that the Worker is restricted by his right foot;

(b) the application of section 65, the correct interpretation of the same along with the application of section 68 – It was submitted that whilst the Worker may be deemed capable of 15 hours work a week, and although he currently undertakes work as a Water Tank driver

voluntarily the Worker's Affidavit evidence is that the automatic tanker is being replaced by a manual tanker and consequently he will be ceasing the volunteer work as he will have difficulties driving a manual tanker which will only serve to aggravate the pain in his lower back and right foot; and

(c) whether the back injury is a new or consequential injury and whether liability extends to the back injury.

27. The Worker submits that unless the Employer has demonstrated on new evidence that the Worker's circumstances have changed it is not necessary to reassess the balance of convenience. Further, the allegation of an error of Ms Fong Lim RSM is not new evidence as the evidence was before the Court in the initial application.

Determination

28. The purpose of interim benefits, in my view, is to ensure the Worker, who is actively pursing his claim, can meet his necessary financial expences and proceed with litigation without having to suffer economic hardship.

29. The Employer did not make submissions as to whether the Worker's circumstances have changed since his previous application for interim benefits. Accordingly, it is not necessary for the Court to reassess the balance of convenience factors. What the court must decide is whether the worker overcomes either of the thresholds set by section 107(6) of the Act, namely, undue hardship and exceptional circumstances (per *Baker v National Jet Systems*).

30. The Worker's evidence is that he is single and reliant upon weekly benefits to survive. He claims that whilst the previous award of weekly benefits has assisted him to alleviate some stress that the amount awarded, namely $516.90 a week, it by no means covers all of his expenses.

31. As stated in paragraph 14 above, the Worker's current Affidavit of 22 May 2007 swears to weekly expenditure requirements of $462.79, being $43.48 more than his Affidavit of 6 March 2007. He also swears that his savings have diminished from $3,462.27 to $1,184.23.

32. I am satisfied that the Worker is dependant on his weekly payments for survival and without an order for further interim benefits he would suffer undue hardship. I am also satisfied that the Worker has undertaken reasonable steps to pursue his substantive claim (as required by her Honour Ms Fong Lim RSM at paragraph 20 of her decision of 23 March 2007). On the latter issue, I note from the Court file that the parties have appeared at the initial directions conference, which resulted in orders being made to progress the proceeding, and that whilst the Worker has not filed a consolidated statement of claim that both proceedings are next before the Court on 3 July 2007.

33. Upon being satisfied that the worker has overcome the threshold of undue hardship set by section 107(6)(a) of the Act, it is not necessary for the Court to consider the threshold of exceptional circumstances, section 107(6)(b) of the Act.

34. In the event that I am incorrect in the application of the threshold test I find that a misconstruction of section 65(2)(b)(ii), alleged or otherwise, is not an "exceptional circumstance" as intended by the *Work Health Act*.

35. Subsection 107(5) states that the Court "may make more than one interim determination of a party's entitlement to compensation". However, in making a further determination the Court must be satisfied "(a) the party would suffer undue hardship if the further determination were not made; or (b) the circumstances are otherwise exceptional" (subsection 107(6)).

36. The section provides for bases for which the Court can give consideration as to whether to award the Worker with a further determination. It is my view

that the words "the circumstances are otherwise exceptional" are intended to cover the Worker's exceptional circumstances, that is an unusual situation that a Worker may find themselves in (that may not be covered under the threshold of undue hardship), which would also warrant consideration by the Court in its discretion to make a further award for interim payments.

37. Further, it is my view that if the Employer is of the opinion that her Honour Ms Fong Lim RSM did misconstrue the application of section 65(2)(b)(ii), which resulted in the strength of the Worker's being assessed as higher than it should have been, the appropriate course for the Employer is to appeal her Honour's decision pursuant to section 106 of the Act.

38. My orders are:

1. The Employer pay the Worker interim benefits of $516.90 gross per week commencing from 23 May 2007 and for a period of 12 weeks from the date of this order.

2. The payments in Order 1 be paid to the Worker within 7 days

3. The costs of this application be costs in the cause.

Dated this 13th day of June 2007

_____

KATHRYN GANLEY
ACTING JUDICIAL REGISTRAR