

CITATION: *Watson v Crushing Services International Pty Ltd* [2007] NTMC 034

PARTIES: IAIN VOSS WATSON

v

CRUSHING SERVICES INTERNATIONAL
PTY LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20628866

DELIVERED ON: 18 June 2007

DELIVERED AT: Darwin

HEARING DATE(s): 4 June 2007

JUDGMENT OF: Acting Judicial Registrar Ganley

CATCHWORDS:

Interim determination – Factors to consider – Full and frank disclosure – failure to disclose outside employment whilst receiving weekly payments - section 107 of the Work Health Act

Wormald International (Australia) Pty Ltd v Barry Leslie Aherne [1994] NTSC 54
McGuinness v Chubb Security Holdings Australia Ltd (Unreported, Dr Lowndes SM, 26 March 2006)

REPRESENTATION:

Counsel:

Worker: Mr Andrzej Kudra
Employer: Ms Vicki Kossaris

Solicitors:

Worker: Morgan Buckley
Employer: Cridlands

Judgment category classification: C
Judgment ID number: [2007] NTMC 034
Number of paragraphs: 55

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

No. 20628866

[2007] NTMC 034

BETWEEN:

IAN VOSS WATSON
Worker

AND:

**CRUSHING SERVICES INTERNATIONAL
PTY LTD**
Employer

REASONS FOR DECISION

(Delivered 18 June 2007)

ACTING JUDICIAL REGISTRAR GANLEY:

1. The Worker has made an application for interim benefits pursuant to section 107 of the *Work Health Act* (“the Act”). The Worker seeks the following orders:
 - “(i) That the Employer pay the Worker interim payments of arrears of weekly compensation as for total incapacity pursuant to the provisions of the Northern Territory *Work Health Act* for a period of 10 weeks.
 - (ii) That the Employer pay the Worker interim payments of weekly compensation as for total incapacity to the provisions of the Northern Territory *Work Health Act* for a period of 12 weeks with such payments to be made weekly, with the first payment and any arrears to be paid with (sic) 7 days of the date of this Order.
 - (iii) Costs of this Application.
 - (iv) Such further or other Orders as this Honourable Court deems fit”.

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

Worker's Submissions and Evidence

3. In support of his application the Worker relies upon his Affidavits sworn 15 May 2007 and 25 May 2007 and the Affidavit of his solicitor, Mr Andrzej Kudra, sworn 1 June 2007.
4. The Worker's injuries are described at paragraph 2 of his Affidavit as a right ankle injury sustained on 13 April 2005, right wrist injury sustained on 21 May 2005 and an adjustment disorder with major depression, anxiety and paranoia sustained soon after 21 May 2005. In relation to the latter the Worker relies upon a report of Dr McLaren, dated 4 April 2007 (Annexure "IVW21" of the Worker's Affidavit, sworn 15 May 2007) which states:

"... he shows quite a severe mental disorder with vegetative changes, a moderate to severely depressed mood, a highly developed sense of persecution and conspiracy and an anxiety state with panic attacks and phobic features" (page 4).
5. The Worker's wrist and ankle injuries were accepted by the Employer on 15 June 2005, however, on 26 June 2006 the Employer stopped the Worker's weekly payments due to an alleged "constructive failure to undertake rehabilitation". The Worker claims that he did his best in the circumstances to attend appointments and jobs offered to him, however, due to his "severe mental illness at the time" he could not bring himself to attend some appointments or undertake employment.
6. As a consequence of the cancellation of his benefits the Worker applied for and obtained sickness benefits through Centrelink.

7. It was submitted that the Worker that he has tried to rehabilitate himself and return to work, and the Worker “openly deposes” to five attempts between July 2005 and April 2006 to undertake “shut-down” work at the Argyle Diamond Mine Site for Kimberley Industries. However, that whilst undertaking such work the Worker would “traverse long distances” and the Worker “withdrew from his work colleagues at the end of each shift and spent any spare time in his own room”.
8. The work undertaken at the Argyle Diamond Mine is elaborated upon by the Worker in his subsequent Affidavit sworn on 25 May 2007. The Worker states that he does not feel that he will ever be able to return to full time work as a mechanic and his recent attempt at the Argyle mine (the weekend prior to swearing his Affidavit of 25 May 2007) “caused [him] substantial pain and anxiety” and he wishes to be retrained in another field (paragraph 10).
9. It is also submitted by the Worker that he cancelled his Centrelink benefits on 14 March 2007 in an attempt to return to the workforce. The Worker is employed at U-Cart Concrete for 3 hours each day which “involves very little interaction with others and only very light physical activities” (paragraph 11 of Worker’s Affidavit of 15 May 2007). In his subsequent Affidavit of 25 May 2007 the Worker states that despite being paid for only 3 hours per day he regularly stays at work for “4 to 4½ hours” as he takes “regular lengthy breaks” if he experiences pain or anxiety (paragraph 9).
10. The Worker claimed that by cancelling his weekly payments the Employer failed to give a thorough consideration of the Worker’s injuries and their affect on the Worker’s capacity to work.
11. The Worker’s Affidavit of 15 May 2007 deposes to:

- (a) Income of \$601.88 - comprising \$350 (part time employment), \$193.50 (his partner's Asylum Seeker Assistance payment) and \$58.38 (family tax benefit for his partner's daughter);
- (b) Assets of \$14,000.00 – comprising Toyota Land Cruiser \$4,000.00, Tools of the trade \$5,000.00 and personal effects of \$5,000.00;
- (c) Debts of \$72,985.56 comprising:
 - (i) \$7,000.00 - ANZ Credit Card;
 - (ii) \$5,000.00 – Debt to his father;
 - (iii) \$10,000.00 – Debt to his sister;
 - (iv) \$8,000.00 – Debt to his mother;
 - (v) \$400.00 - Centrelink Debt;
 - (vi) \$300.00 – Territory Housing;
 - (vii) \$105.00 – Telstra;
 - (viii) \$150.00 – Child Support;
 - (ix) \$150.00 – Client contribution to NTLAC for Family Court matter;
 - (x) \$41,530.56 – Partner's "alleged debt to Centrelink";
 - (xi) \$150.00 – for school fees for partner's daughter.
- (d) Weekly Expenditure of \$512.70, comprising:
 - (i) \$170.00 – food / household;
 - (ii) \$37.50 – Telephone;
 - (iii) \$100.00 – Fuel;
 - (iv) \$12.50 – Electricity;
 - (v) \$25.00 – Provisions for child, clothes, shoes;
 - (vi) \$30.70 – Prescriptions;
 - (vii) \$125.00 – Rent;
 - (viii) \$12.00 – Car registration.

12. The Affidavit also deposes to a taxable income of \$62,670.00 for the financial year ending 30 June 2006 with an estimate of approximately \$15,000 this financial year (paragraph 29). The Worker also claims that his financial circumstances have continued to worsen and he has started "pawning jewellery" in an effort to pay his debts (paragraph 30).

Employer's Submissions and Evidence

13. The Employer submitted a Chronology as part of the Employer's submissions against the making of an interim order for compensation.
14. First and foremost the Employer opposed the application on the basis that the Worker seeks interim payments for "total incapacity" backdated to 26 March 2007 and future benefits to 4 September 2007. The Employer argued that it is clear from the Worker's Affidavit that he has capacity to work and that he has and is undertaking part time work. The Employer sought an order that the Application be dismissed with costs in favour of the Employer on this basis.

Threshold issue

15. Whilst the Application does seek interim benefits on the basis that the Worker is totally incapacitated, and the Worker's Affidavit evidences part time employment, it is my view that any application by the Worker for interim determination warrants consideration of the application on its merits against the factors raised by *Wormald v Aherne*, particularly considering the Act is beneficial legislation.

Whether there is a serious question to be tried

16. The Employer submitted that the Court is to have regard to the Employer's determination to cancel the Worker's payments along with the medical evidence which questions whether the Worker suffers from a work related injury and whether he is actually incapacitated.
17. The Worker's solicitor did not specifically address the Court on the serious question to be tried issue. Upon the Court's interpretation, it is the Worker's submission that his injuries continue to affect his capacity to work and that the cancellation of his weekly benefit and the dispute over his injuries are of itself evidence of the serious issue between the parties.

18. The Worker's Affidavit of 15 May 2007 annexes a Royal Darwin Hospital medical summary dated 27 May 2005 in respect of his right wrist injury and right ankle injury ("IVW1"), along with a report of Dr Norman Rose, Psychiatrist, dated 15 November 2005 to the Insurer ("IVW2") and a report of Dr Neil McLaren, Psychiatrist, dated 4 April 2007 ("IVW21").
19. The medical summary provides evidentiary support that the Worker attended Royal Darwin hospital at the time in respect of his wrist and ankle injuries. However, it is the documentation attached to the parties respective Index of Documents which evidences that the Worker suffers from pain in his right ankle and right wrist with no diagnosable cause.
20. Upon consideration of the documentation filed in support of the application it would appear that a significant aspect of the Worker's claim is his psychological injury which he alleges arose as a result of the wrist and ankle injury.
21. In November 2005 Dr Rose assessed the Worker and reported that:

"... [the Worker] has had an almost catastrophic psychiatric reaction to his two injuries at work and his subsequent loss of job. In view of the fact that much of the preoccupation is about ongoing pain I consider that it has been the injuries at work as well as the dismissal from employment that have contributed to Mr Watson's psychiatric condition.

...

I consider that it is because of his psychiatric condition that he has poorly complied with attempts to treat and rehabilitate him. In fact I consider that he is ill enough for in-patient psychiatric treatment" (page 4-5).
22. The Employer obtained video surveillance evidence of the Worker which was provided to Dr Rose and the Worker's treating psychiatrist, Dr McLaren. Dr Rose (report of 16 March 2006, Annexure "AAK5" of Worker's solicitor's Affidavit sworn 1 June 2007) commented on the video summary which depicted Mr Watson "entering, alight and driving his

vehicle walking, collecting his mail, playing poker machines and sitting drinking and smoking cigarettes. Dr Rose concluded:

“In view of the difference between what I observed on the video and Mr Watson’s presentation on 9 November 2005, I can only conclude that either he has made a great psychiatric recovery since I assessed him, or alternatively his presentation when I assessed him was not in accordance with his clinical condition, but rather it may well have been manufactured or fabricated” (page 2).

23. Dr McLaren (report of 4 April 2007, Annexure “IVW21“ of Worker’s Affidavit of 15 May 2007) does not concur with Dr Rose and states:

“I cannot agree with his conclusions. For example, he said that [the Worker’s] appearance in the video was in “stark contrast” with his earlier presentation. I disagree. The video clearly shows him slumped or sprawled in the casino in an attitude of disinterest or even disdain. He did not “accept affectionate gestures” from his partner in anything like the common use of this term, further he seemed not to notice them. When playing the poker machines, he appeared to be in little better than a state approaching stupefaction. He further stated: “if Mr Watson’s concentration and memory are good enough for him to play poker machines, then it is good enough for him to do clerical work”. As an employer, I would not employ any person whose behaviour in the work environment was similar to that displayed by your client in that video”.

24. There is an obvious dispute on the medical evidence as to extent of the Worker’s injury and the cause of the psychological injury. A determination of the issues will depend on oral evidence at the trial and the Court’s assessment of the same. Accordingly, it is my view that there is a serious issue to be tried.

Balance of Convenience

25. There are a number of factors to be considered in deciding where the balance of convenience lies, including: proof of hardship, the status quo, strength of the Worker’s case, delay in making the application or in bringing the application for substantive relief, and discretionary grounds such as whether the Worker has made full disclosure of all of the relevant

circumstances (see *Wormald International (Australia) Pty Ltd v Barry Leslie Aherne* [1994] NTSC 54).

26. The above factors are not intended to be an exhaustive list and are not relevant in every case. The circumstances of each application will determine the weight to be accorded to each factor (per *McGuinness v Chubb Security Holdings Australia Ltd*, Dr Lowndes SM, Unreported, 24 March 2006 applying *Wormald v Aherne*).

Hardship

27. Whilst an interim award is not dependant on proof of hardship it is an important factor for the Court's consideration in determining where the balance of convenience lies (*Wormald v Aherne*, supra).
28. It is the Worker's submission that his entire weekly household income only just meets the weekly household expenditure and does not allow the servicing of debts incurred since the Worker was injured. Further, that the Worker has been pawning jewellery to feed his household and he has been ringing family to wire money to pay bills and to meet his partner's medical treatment. The Worker's solicitor submitted that the Worker is also assisting his partner by driving her to meet medical appointments.
29. The Employer submitted that there is no real hardship to the Worker based on his Affidavit evidence, in that the household income (\$601.88) outweighs the household liability. It was also argued by the Employer that the Worker had not discharged his obligation to prove an actual inability to meet the necessities of life following the cancellation of his benefit. Further, even if the Worker was on benefits there may still be hardship to the Worker for which the Employer is not responsible.
30. As to the debts highlighted by the Worker at paragraph 20 of his Affidavit sworn 15 May 2007, the Employer states that in respect of the substantial debts to his father, sister and mother amounting to \$23,000.00 there is no

objective evidence as to why, how or when they were incurred or what the arrangement is in respect of repayment. Further there is no current evidence regarding his partner's debt to Centrelink of \$41,530.56.

Status Quo

31. The Worker has not been in receipt of weekly payments since they were cancelled on 10 July 2006 due to alleged non-compliance with his medical / rehabilitative treatment. The Worker has been in receipt of Centrelink payments and is currently earning \$350.00 per week as a consequence of part time employment.

Court's perception of the strength of the Worker's case

32. Whilst it is not for the Court at this stage to assess the merits of the Worker's application, and an interim determination does not bind the Court in its final determination, it is appropriate for the Court to consider the strength of the Worker's case including the application of the legislation to the Worker.
33. The Employer submitted that the Worker's case is "not strong based on the medical evidence on factual circumstances". Further, despite extensive investigations there is no diagnosis and no objective findings for the Worker's ongoing physical problems.
34. In terms of the Worker's mental state, the Employer argued that whilst Dr Rose initially found there was a significant mental injury his subsequent report concluded that either the Worker had made a "great psychiatric recovery" or that his presentation at consultation was "manufactured or fabricated".

35. It is also submitted by the Employer that causation of the Worker's mental injury is in question as the Employer submits that it arose out of disciplinary action.
36. The Worker relies on the original report of Dr Rose and that of Dr McLaren, and reiterates that Dr Rose originally consulted the Worker at the request of the Employer. At the time Dr Rose was alarmed by the Workers mental condition and recommended intensive therapy. Further, Dr McLaren does not support Dr Rose's interpretation of the surveillance evidence and despite the same Dr McLaren is of the opinion that the Worker is suffering from a severe mental injury.

Delay in bringing the Application

37. It was submitted that the Worker has suffered from a mental illness for some time, which ultimately led to the Form 5 notice being served upon him for constructive failure to comply. Despite this the Worker has sought treatment with a psychiatrist of his own accord and has sought independent legal advice. Further, the Employer was notified of the application in January 2007 and the Worker has been undertaking a fact finding process, despite harassment by his Employer and the surveillance of him. The Court was advised that the substantive claim is next before the Court on 26 June 2007.
38. The Employer did not make submissions on this factor.

Ability of the Worker to Repay Benefits

39. The Employer questions the Worker's ability to repay given the alleged total value of his assets, being \$14,000.00, which the Employer submitted points to no capacity.
40. The Worker did not make submissions on this factor.

Full and Frank Disclosure

41. In *Wormald v Aherne* (supra), his Honour Justice Mildren stated:

“Relief might also be refused on other discretionary grounds, for example, if the applicant has not made full disclosure of all the relevant circumstances”.
42. Full and frank disclosure by the Worker was considered by Dr Lowndes SM in *McGuinness v Chubb Security Holdings Australia Ltd* (Unreported, 26 March 2006). His Honour found that a Worker’s failure to make full and frank disclosure of his wife’s additional income, and hence the income of the household, impacted significantly upon his credibility and reliability as regards his financial situation and other matters relevant to his application for interim benefits.
43. It was submitted on behalf of the Worker that he “kept nothing close to his chest” in that he openly disclosed his rates of pay, the dates he has worked, income he has received, and the expenditure of the family.
44. The Employer argued that the Worker failed in his obligation to the Court and to the majority of doctors who consulted with him, particularly Dr McLaren. The Employer referred the Court to Dr McLaren’s report of 4 April 2007 (“IVW21” of Worker’s Affidavit of 15 May 2007) where he stated that the worker “has not worked regularly for nearly two years following a work injury” (page 1).
45. The Employer also submitted that on the Worker’s own evidence (Annexure “IVW1” of Affidavit of 25 May 2007) the Worker undertook shut down work on 8 July to 10 July 2005, 23 September to 25 September 2005 and 9 December 2005, 17 to 19 February 2006 and 28 April to 30 April 2006. Further, during each period the Worker was receiving weekly benefits and for the final two periods the Worker was certified unfit for work.

46. It was also submitted by the Employer that whilst the Worker has conceded that he earned income whilst in receipt of weekly benefits, it was only disclosed at the time of the interim benefits application as it was not pleaded in the Worker's Statement of Claim.
47. The Employer argued that the basis for the Worker's disclosure was as a result of the Worker's suspicion that the insurer had arranged for his day to day activities to be observed. Further, the Worker's numerous reports to Dr McLaren that he was "being watched" and his Lawyer's request for confirmation and that it stop, occurred around the time the Worker was undertaking work and not disclosing it to his Employer.
48. The Worker's solicitor argued in response that the Worker's actions were an attempt by the Worker to rehabilitate himself and that the Worker has not tried to hide anything as all details of work undertaken by him have been provided to the Employer.

Determination

49. It is my determination that the balance of convenience lies with the Employer for the following reasons.
50. There is no evidence of hardship as the Worker's weekly expenditure does not outweigh his household income. Further there is a lack of evidence to support when, how and why the Worker incurred the debts he deposes to.
51. The status quo is preserved by the interim determination not being made.
51. The Strength of the Worker's case is compromised by the surveillance footage and the Worker undertaking work whilst receiving benefits whilst certified totally unfit and against a background of the Worker failing to comply with rehabilitative requests by the Employer.
52. There is delay by the Worker in making this application as the Worker's weekly payments were cancelled 10 July 2007 and the current application

was filed 16 May 2007. It is also clear from the Worker's Affidavit that he does not have the ability to repay any interim benefits pending the resolution of his claim, which would be a prejudice to the Employer.

53. The Worker has not been full and frank in his disclosures and as a consequence the credibility and reliability of the Worker's evidence is affected (*McGuinness v Chubb Security Holding Australia Ltd*, supra), for instance:

- (a) the nature of the Worker's relationship with the person he refers to as his "partner" is unclear as is his obligation to Ms Warford and her daughter. The Court notes Dr McLaren's report of 4 April 2007 ("IVW21" of the Worker's Affidavit of 15 May 2007) which states:

"... [the Worker] was first referred to me on 23rd January, this year by his general practitioner. I had previously met him a number of times when he accompanied his then defacto partner for her regular appointments ... at the time of referral, he had separated from his partner after a brief relationship but remained under the same roof. Her nine year old child was also living with them".
- (b) in light of (a), the Court questions the Worker's obligation to meet the day to day expenses of Ms Warford and her daughter. Further, there is no evidentiary support for the Worker's obligation to pay Ms Warford's Centrelink debt of over \$40,000.00 and there is also no evidence of when and how it was incurred.
- (c) there is no evidence to support how the Worker incurred his credit card debt or why, how or when he incurred the \$23,000.00 debt to his mother, father and sister, and what the arrangement is in respect of repayment.
- (d) the Worker actively engaged in work on 5 separate occasions between 8 July 2005 and 30 April 2006 with the same company

without notice to his Employer or any of the medical profession who consulted with him. At the time, the Worker was in receipt of weekly payments and on the final two occasions he was certified totally unfit for work. The Employer only became aware of the said employment when the Worker filed this application as it was not pleaded in the Statement of Claim.

54. My orders are:

1. The application is dismissed.
2. The question of costs is reserved.

Dated this 18th day of June 2007.

Kathryn Ganley
Acting Judicial Registrar