

CITATION: *Kane v Anyinginyi Congress Aboriginal Corporation* [2007]
NTMC 036

PARTIES: HELEN KANE

v

ANYINGINYI CONGRESS ABORIGINAL
CORPORATION

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20613526

DELIVERED ON: 18 June 2007

DELIVERED AT: Darwin

HEARING DATE(s): 13 June 2007

JUDGMENT OF: Acting Judicial Registrar Ganley

CATCHWORDS:

Interim determination – Factors to consider – Full and Frank Disclosure - Onus on
Worker to substantiate expenses and outgoings - 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: Ms Kerry Sibley
Employer: Ms Peggy Cheong

Solicitors:

Worker: Ward Keller
Employer: Hunt & Hunt

Judgment category classification: C
Judgment ID number: [2007] NTMC 036
Number of paragraphs: 52

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

No. 20613526

[2007] NTMC 036

BETWEEN:

HELEN KANE

Worker

AND:

**ANYINGINYI CONGRESS ABORIGINAL
CORPORATION**

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) Interim benefits pursuant to s.107 of the *Work Health Act* in the amount of \$1,215.00 per week.
 - (ii) Cost of and incidental to this application to be costs in the cause.
2. In support of her application the Worker relies upon her Affidavit sworn 24 April 2007 and the Affidavits of her solicitor, Kerry Anne Sibley, sworn 17 May 2007 and 13 June 2007.
3. 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).

Whether there is a serious question to be tried

4. The Worker is claiming compensation in respect of three injuries, namely, bilateral wrist pain and right ankle / foot pain.
5. It was submitted on behalf of the Worker that the fact that liability has been declined is of itself supportive of a determination that there is a serious question to be tried.
6. Whilst not specifically addressed in this aspect of the Worker's submissions the worker relies upon the medical reports of Dr Delaney (Annexure "KAS6" of Worker's Solicitor's Affidavit of 17 May 2007) and Dr Champion (Annexure "KAS7" of Worker's Solicitor's Affidavit of 17 May 2007).
7. Dr Delaney, Sports Physician, diagnoses the Worker's bilateral wrist pain as "de Quervains tenosynovitis" which he states is "largely attributable to long distance driving in the course of her work". The right foot and ankle pain he diagnoses as being associated with "fallen arches" which were developing with age and "may have been exacerbated" by "a long static foot posture whilst driving at work", however, "her employment was not a direct cause" (page 1-2).
8. Dr Champion, Consultant Physician, concludes that the "nature and conditions of the Worker's employment, specifically the driving duties, have been a substantial causal influence on the de Quervain's tensynovitis and related disorders" in the Worker's wrists. In respect of the right foot / ankle injury, Dr Champion concludes that it is unlikely the driving caused the pathological features but very likely contributed to the "tibialis posterior tenosynovitis" and "the intermittent application of the break would have stressed her right foot and ankle region disorders and so it was no surprise that she reported pain" (page 7 and 8, respectively).

9. The Employer opposed the application on the basis that the Worker “has not demonstrated an arguable case or a serious question to be trialled”. The Employer submitted that “on the medical evidence to date, the overwhelming medical opinion is that that Worker’s condition is not related to her previous employment with the Employer”. Further, the Worker ceased such employment with the Employer in about December 2005.
10. The Employer acknowledges the support of both Dr Champion and Dr Delaney of the Worker’s claim, however, relies on three reports annexed to the Worker’s solicitor’s Affidavit sworn 17 May 2007. Namely the reports of Dr Rowe, Orthopaedic Surgeon, dated 19 July 2006 (Annexure “KAS9”), Dr Kapila, General Hand and Micro Surgeon, dated 1 August 2006 (Annexure “KAS10”) and Dr Stevenson, Consultant Physician, dated 13 March 2007 (Annexure “KAS11”).
11. The Employer’s solicitor submitted that all three doctors examined the Worker, at the request of the Employer, and all three concluded that the condition and present symptoms suffered by the Worker are as a result of a congenital condition and not as a result of her employment with the Employer.
12. It is the Employer’s case that it is “highly unlikely” that the driving undertaken by the Worker led to the condition in her wrists and right foot, and it is more likely that the Worker’s pre-existing condition led to her predisposition to an injury.
13. The Employer also submitted to the fact that the Worker has not returned to work for 18 months, and that she is in the position she would be irrespective of the work undertaken with the Employer. The Employer also raises concern with the Worker’s election to undergo surgery to her ankle, scheduled for 15 June 2007. The Employer relies on Dr Champion’s recommendation that the Worker undergo surgery to her wrists before the ankle as it is likely that the Worker’s wrists will not stand up to the weight

bearing required of crutches, concluding that the foot surgery would possibly worsen wrist and there is no proposal put forward on how the surgery will impact on the Worker.

14. It is evident that there is a dispute between the parties as to the cause of the Worker's injuries and particularly whether the driving undertaken by the Worker aggravated her pre-existing genetically determined "flat feet" and whether the driving is the "real, proximate or effective cause" of the Worker's injuries.
15. In my view there is a serious issue to be tried on the medical evidence.

Balance of Convenience

16. 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).
17. 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

18. 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).

19. The Worker's Affidavit of 24 April deposes to her financial situation having deteriorated significantly since she stopped receiving her pay in November 2005 (paragraph 30).
20. The Worker has not received an income in strict terms since November 2005. The Worker deposes that her property on Scotland Island, which she has owned for 16 years, has not been rented since 2004 as it needs "major renovations" (paragraph 31). The Worker has relied upon the release of superannuation entitlements on 4 May 2006 in the amount of \$14,300.07 (paragraph 30), along with the support of her mother to meet her day to day expenses. The Worker also deposes that when she stopped receiving her pay she could not meet her mortgage commitments and her mother refinanced her home to loan the Worker the arrears on her mortgage together with penalty charges due to late payment, namely \$30,000 (paragraph 32 and 33).
21. The Worker deposes to the fact that her Mother has loaned her money for day to day survival which is in a St George Bank account in her mother's name. The Worker is a signatory to the account and she lives off the proceeds and pays all her expenses, including her mortgage (paragraph 35). The Worker deposes that the basis for the loan is that the monies advanced will be repaid (paragraph 34).
22. The Worker estimates her current outgoings per month as \$3,442.37 with an estimate of \$4,000.00 including food (paragraph 38). Documentation to support the outgoings are found at Annexure "HK6", namely:
 - (a) Council Rates notice, Mother's property, for the period 31 August 2006 to 31 May 2007, in the amount of \$1417.34;
 - (b) AGL gas notice, Mother's property, 19 January 2007, in the amount of \$68.87;
 - (c) AGL electricity notice, Mother's property, for the period 16 October 2006 to 12 January 2007, in the amount of \$88.41;

- (d) Water account, Mother's property, for the period 1 October to 31 December 2006, in the amount of \$182.45;
 - (e) Telstra account, Mother's property, issued 21 February 2007, in the amount of \$425.71;
 - (f) Landlord Insurance, for Scotland Island property, for the period 7 November 2006 to 7 November 2007, bi-month instalment of \$84.90 deducted on 28 November 2006;
 - (g) Sims Electrical Services Pty Ltd invoice, Scotland Island property, dated 27 November 2006, in the amount of \$1,045.00;
23. The Worker also deposes to the Mortgage repayment of her Scotland Island property being \$2,000 per month (paragraph 31) and she currently expends \$280.00 per week "on a week-by-week basis" on a hire care as she does not own, or have access to a car and one is needed to convey her very unwell mother to various medical appointments. The care hire amount is paid by direct debit from the St George bank account (paragraph 36).
24. In making her application for an interim determination the Worker describes her situation as "critical" in that the money she has borrowed from her mother will soon run out and her mother is in no position or condition to borrow further and the Worker is certified unfit for work by Dr Saunders (paragraph 44).
25. The Worker also submits that as a consequence of her financial position she cannot afford to have surgery privately and is currently awaiting surgery on the public waiting list for her wrists. The Worker's surgery to her right foot is scheduled for 15 June 2007 (Affidavit of Worker's solicitor, sworn 13 June 2007).
26. The Employer questions the status of the Worker's Scotland Island property and the lack of evidence to support the \$2,000 per month payments and the amount of the alleged arrears. The Employer also questions why the

property is not producing an income in light of the various amounts of money applied to it, including the Landlord insurance taken out for the period November 2006 to November 2007 (“HK6” of the Worker’s Affidavit of 24 April 2007).

27. The Employer also submits that as at 14 September 2006 the joint account had \$59,000, and has been steadily drawn upon to reduce it to \$13,000 as at March. The Employer questions the lack of collaborative evidence of the Worker’s mother to confirm the arrangements between mother and daughter and whether the money borrowed is to be repaid or whether the money is in fact a gift.
28. The Employer also questions the breakdown in the accounts and the apportionment of expenses, as there is no evidence of the same. The Employer submits that any award of interim benefits is based on the Worker’s actual expenses and outgoings. At present all the Worker is able to demonstrate is payment of her mortgage, and it remains unclear why the property does not derive an income given the Worker lives with her mother. It is further submitted by the Employer that the receipts submitted are global receipts with no breakdown and there is no obligation on the Worker to pay her mother’s ongoing rates, which is her mother’s responsibility.
29. The Employer submits that it is not open to the Court to halve the expenses and the Worker’s situation is similar to any other Worker whose claim is disputed. Further, the Worker has not sought suitable employment and the Employer argues that the Worker is capable of undertaking work she is qualified in, psychology / counselling, which is largely a sedentary position and argued that the Worker would be more successful in obtaining such work in Manley as opposed to the Territory.
30. The Employer submits that in the event that the Court is not persuaded that the balance of convenience does not favour the Worker that interim benefits are contingent upon the Worker’s expenses, and are not tied to the Worker’s

normal weekly earnings, namely \$1215.00, and are restricted to a maintenance regime. Further there is no details to support the Worker's outgoings estimated at \$3,442.37 to \$4,000 a month which averages to \$794.39 to \$923.07 per week.

31. The Worker's solicitor submitted in reply that the fact that the Worker had been denied interim payments was of itself a hardship. Further, in terms of the Employer's allegation of the Worker's capacity to work Dr Champion has certified her permanent impairment. The Worker's solicitor questions Dr Stephenson's conclusion (page 7 of Annexure "KAS11" of Worker's Solicitor's Affidavit sworn 17 May 2007) that the Worker's driving was not "extraordinary" the Worker's solicitor questions the use of a study of taxi drivers driving in NSW being used to assess the Worker's travel from Tennant Creek to Katherine and Alice Springs and surrounding areas over rough roads.

Status Quo

32. The Worker concedes that she has not been in receipt of weekly payments and has been reliant upon outside means since November 2005.
33. The Employer submits that the status quo has been clearly set and does not favour the Worker as she has been in her current position for the last 18 months. The Employer questions the Worker's choice not to apply for Centrelink benefits and determination not to pursue alternative or suitable employment even though she has the capacity to work.
34. The Worker's solicitor submitted in reply that the status quo was irrelevant in light of the strength of the Worker's case and the amount of compensation at stake, 18 months of arrears and ongoing treatment.

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

35. 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.
36. The Worker claims that prior to her employment with the Employer she had never suffered any symptoms or pain in her right foot and she first noticed the pain after driving around the Northern Territory in the course of her employment with the Employer (paragraph 41 of the Worker's Affidavit sworn 24 April 2007). Further that she only noticed the "symptoms in her wrists after prolonged driving in difficult conditions" where she was required to "forcefully grip the steering wheel" (paragraph 42).
37. Whilst the Worker has received some comfort to her wrists from injections to her right wrist she requires medical surgery to both her wrists and her right ankle. The Worker relies on the reports of Dr Delaney and Dr Champion to support her claim that her injury, particularly her right foot / ankle injury, is attributed to the long distance driving and that the driving "aggravated" an underlying condition which is compensable under the Act.
38. The Employer relies on the medical evidence of Drs Rowe, Kapila and Stephens and claims that the Worker's only support is Dr Champion, noting Dr Delaney' report of the Worker's pain free status for 6 weeks after being injected in the wrists in March 2006.s

Delay by the Worker

39. The Employer submits that the Worker's conduct in maintaining her claim since December 2005 and not progressing it more quickly is a relevant factor for the Court's consideration.

40. The Worker's solicitor submitted in reply that there has been no delay and the application was issued within 2 weeks of the certificate of mediation.

Prejudice to the Employer/Ability to repay

41. The Worker concedes that there is prejudice to the Employer by the fact that the Worker resides interstate, however, any prejudice in being awarded weekly benefits is mitigated by the evidence that the Worker is a mortgagee of a property.
42. The Employer claims that the Court is aware of the Worker's ownership of a property, however, the Court has no evidence in relation to the property or its worth, further the onus is on the Worker in the circumstances where she is seeking the Court's discretion of interim benefits after 18 months.

Full and Frank Disclosure

43. 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”.

44. 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). In considering the Worker's application the Court found that that the Worker's claimed increases and expenses were largely unsubstantiated. Further, without evidence of primary documentation to the Court is unable to make a decision on what the financial circumstances of the Worker are.

Determination

45. It is my determination that the balance of convenience lies with the Employer.

46. There is no evidence of hardship. The Worker resides with her mother and all expenses are met by an account in her mother's name. The Worker did not submit a detailed breakdown of her actual weekly expenses and outgoings and despite deposing to her monthly mortgage payment of \$2,000, along with an invoice to repair her property, she relies on her mother's bank statement and tax invoices, without corroborating Affidavit, to support an application for weekly interim benefits of \$1,215.00.
47. There is no evidence to support the Worker's estimated outgoings of \$3,442.37 to \$4,000 per month which averages to \$794.39 to \$923.07 per week. As submitted by the Employer's solicitor interim benefits are based on a maintenance regime, and not normal weekly earnings, to allow the Worker to meet her outgoings and expenses. It is not a matter for the Court to conduct a breakdown on the information deposed to, the onus is on the Worker to satisfy the Court. Further, the Court cannot have regard to invoices specific to the Worker's mother's ongoing obligations such as annual council rates. It is also not reasonable to include a \$280 weekly car hire fee to convey the Worker's mother to medical appointments and / or enable the Worker to visit her mother as an expense to be met by an Employer. The car hire fee is an excessive week by week expense and in the Court's view is sufficient to meet the loan of a car.
48. Whilst there is evidence by the Worker that she has had the Scotland Island property for 16 years, there is no evidence to support the repayments or the worth of the property. Further, the Worker's evidence is that the property is not income producing. It is of concern to the Court that the Worker claims that she has not rented her property since 2004 but the Worker has submitted a claim for landlord insurance in the amount of \$467.40 for the period 7 November 2006 to 7 November 2007.
49. The status quo is preserved by the interim determination not being made.

50. The Strength of the Worker's case is primarily dependant upon the Worker proving that the driving aggravated her pre-existing genetically determined "flat feet" and that the driving is the "real, proximate or effective cause" of the Worker's injuries.
51. There is delay by the Worker in making this application as the Worker's has not been in receipt of income from the Employer since November 2005. Further, there is some delay by the Worker in progressing her claim as the application for compensation was filed on 17 May 2006 and the matter is yet to be listed for hearing.
52. My orders are:
1. The application is dismissed.
 2. The cost of the application is reserved.

Dated this 18th day of June 2007.

KATHRYN GANLEY
ACTING JUDICIAL REGISTRAR