CITATION: *Papalii v Forstaff* [2007] NTMC 039

PARTIES:	LACQUI PAPALII
	v
	FORSTAFF
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20421119
DELIVERED ON:	28 June 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	29 May 2007
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

Work Health Act – Costs of adjournment application – Application of R63.11(8) of the Supreme Court Rules
Work Health Act ss 95 and 110

REPRESENTATION:

Counsel:

Worker:	Ms Gearin
Employer:	Mr Davis

Solicitors:

Worker:	Withnall
Employer:	Cridlands

Judgment category classification:	C
Judgment ID number:	[2007] NTMC 039
Number of paragraphs:	23

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

No. 20421119

[2007] NTMC 039

BETWEEN:

LACQUI PAPALII
Worker

AND:

FORSTAFF
Employer

REASONS FOR DECISION

(Delivered 28 June 2007)

Ms SUE OLIVER SM:

1. The hearing of this application commenced on 29 May 2007 and was listed for five days. The matter was originally listed to commence hearing on the 29 January 2007 but on that date the employer was granted an adjournment following the worker being granted leave to file an amended statement of claim in court on the basis that the employer, by reason of the amendment, was not in a position to proceed. The question of costs was reserved.

2. The amended defence was filed on the 13 February 2007.

3. The evidence in chief of the worker, Mr Lacqui Papalii was concluded on 29 May. The following morning I was advised that the parties had reached a settlement of the claim which included an agreement for costs in favour of the worker, save for the question of costs of the adjournment that had been reserved for which the employer sought an order in its favour.

4. The worker argues that as the general rule is that the costs follow the event, the worker should not be required to bear the costs of the adjournment. The

worker says that the reason advanced at the time by the employer for seeking the adjournment was that the employer needed to have the worker further medically examined by its doctors and obtain further medical opinion because the statement of claim had been amended to plead an ongoing incapacity rather than a closed period claim.

5. Copies of letters were tendered by the worker to show that it was only on 24 May 2007 that the employer sought further advice from each of the doctors who had previously provided reports. The letters requested opinion as to the proposition that the development of the symptomatic right leg condition was consequent to an altered gait on the left side; whether the altered gait was caused by or exacerbated by the failure to treat the meralgia paresthetica of the left leg promptly and as to the effect of the symptomatic osteoarthritis of the right knee on the ability to perform the duties in his former employment with the employer. The answers to those questions were requested to be based on an hypothesis of the injury and treatment of it consistent with the workers claim as amended. The worker was not, during the 4 month adjournment period, requested to attend for examination by the employer.

6. The amendment made to the statement of claim on 29 was directed to specifically plead a consequential right knee injury and incapacity resulting from the initial left knee and hip injury. As I have said, the employer submitted, as the basis for the adjournment being granted, that that amendment substantially altered the workers claim taking it from a closed period case to an ongoing incapacity case.

7. The employer submitted that the extent of the amendments were graphically illustrated by the fact that almost the entire further amended statement of claim now appears in red, therefore indicating that each and every paragraph had been amended and or replaced. Clearly that visual change is apparent on the face of the document, however in my view, the substance of the statement of claim, and therefore the case required to be met by the

Employer was not so substantial in effect as might be suggested by the document on its face.

8. The original statement of claim had been amended on the 23 February 2005. The differences between that amended Statement of Claim and the further amended Statement of Claim filed on 29 January 2007 may be summarised as follows:

- More extensive particulars of the work history with the employer are provided.
- Better particulars of the accident causing the worker's injuries were included.
- The particulars of injury were amended to include the history of the worker's report of the injury and of the employer's responses to his claims.
- The nerve entrapment injury in the hip and the surgery to release the entrapped nerve were included for the first time.
- The consequential injury to the right leg and resultant incapacity was included for the first time.

9. It may be noted however that the first amended Statement of Claim, in addition to providing particulars of the soft tissue injury to the left pleaded also that the worker suffered further injuries to be advised. The amended statement of claim also pleaded that as a consequence of the injury the worker was unable to fulfil his pre-injury duties resulting in the worker not being able to work in his pre-injury capacity. Long term incapacity pursuant the section 65 of the *Work Health Act* was pleaded. The submission that the case that was required to be met by the employer was a closed period case presumably arises not from what was pleaded in the statement of claim but from the workers answers to the employers request for particulars dated 2

May 2006 in which the worker stated the period of incapacity alleged to be from 13 January 2004 to 08 April 2005.

10. The notice of defence and the counterclaim to the amended statement of claim dated 23 February 2005 admitted the particulars of the worker's employment save for the normal weekly earnings but denied that at the time of the alleged injury the worker was acting out of or in the course of his employment with the employer and denied that there was any incapacity or that if any incapacity existed it was as a result of a pre-existing condition. The substance of the Notice of Defence and Counterclaim filed in response to the amended statement of Claim filed 29 January 2007 is the same. A workplace injury is denied and any incapacity from the left knee injury or consequential right knee injury is denied. The counterclaim asserts that the worker had not been incapacitated since April 2004 and sought recovery of all work health benefits paid.

11. The worker filed an affidavit sworn by his solicitor Vanessa Marie Farmer on 29 January 2007 in relation to the worker's application for leave to further amend the statement of claim. That affidavit deposes to the fact that on 27 December 2006 by letter to the solicitor for the employer the worker accepted that the claim was a closed period claim concluding 21 June 2005. The closed period nature of the claim was also confirmed in a response to Ms Farmer from the employer's solicitor dated 29 December 2006 who advised further that notwithstanding the workers limitation of the incapacity to April 2005 that the employer would contend that the worker was not entitled to any benefits after September 2004. Clearly that contention was not carried through to the defence and counterclaim that asserted that the worker had not been incapacitated since April 2004. It may be noted that the primary defence to all statements of claim is that the employer denied that the worker suffered a workplace injury as required by the Act.

12. On 3 January 2006 the worker's solicitor wrote again to the employer's solicitors and in that letter she requested advise as to whether the employer sought to rely upon the section 69 cancellation of benefits or on the primary issue of liability advising that this would obviously affect the issue of *dux litis*. Significantly the letter advised that, subject to the employer confirming the same, counsel would be likely to amend the pleadings and that it was anticipated that an ongoing incapacity arising in the right leg from overuse and over compensation as identified in the report of Dr David Millons would be pleaded. She further advised that she looked forward to receiving a copy of the MRI and/or report of Dr Michael Wilks and hearing from the employer's solicitor in relation to the issue of the employer's case so that she could "amend the pleadings and forward the same to you for your consent rather than by way of contested interlocutory application".

13. On 16 January 2007 Mr Farmer wrote again to the solicitor for the employer noting that she had not received a response in relation to her query of the issue of *dux litis* and advised that the worker proposed to amend the pleadings but could not do so until a response was received to the employer's election of whether it relied on the issue of liability or the issue of the section 69 notice. By email response the solicitor for the employer on the 16 January 2007 advised that the issues to be addressed at the hearing were those raised in the notice of defence and counterclaim filed on behalf of the employer and that "liability is, very much, a live issue, and that accordingly is appropriate for the worker to be *dux litis* at the hearing".

14. By e-mail on 25 January 2007 the worker's solicitor forwarded the proposed amended statement of claim to the employer's solicitor. Seeking advice by close of business that day as to whether there would be consent to the filing of that document or whether it would be necessary to argue that matter on 29 January. I accept that the timing for a response to that communication was problematic because the following day was a public holiday. However I do

not think it can be said, given the letter of 6 January 2007, that the proposed amendments were not anticipated.

15. As I have noted no further examination of the worker took place subsequent to the adjournment. It follows that when the hearing commenced on 29 May that the employer was in no better position to dispute the fact of the injury, of whatever nature or consequence, than it had been on 29 January. Notification of the change in the injury alleged and the ongoing incapacity had been received on 6 January 2007 on the basis of the report of Dr David Millons. It cannot be said then that the employer was taken by surprise on 29 January however it was proper to allow the opportunity (not taken) to seek further medical examination and reports on the worker's present condition.

16. Counsel for the employer submitted that the conduct of the employer subsequent to the adjournment is irrelevant to the question of costs because the relevant issue is whether the adjournment was properly sought and granted. He submits that I should follow Rule 63.11(8) of the Supreme Court Rules (Order 63 applying by virtue of Rule 23.02 of the Work Health Court Rules) which provides as follows:

> (8) The costs of and occasioned by an adjournment made necessary by the default of a party shall be borne by that party

17. I would not describe the adjournment of the hearing on 29 January as having been made necessary by the default of the worker. The late amendment of the statement of claim was due at least in part to the failure of the solicitor for the employer to respond in a timely manner to the communication of 6 January 2007 from the worker's solicitor.

18. Further the adjournment was granted to prevent prejudice to the employer's case by requiring the employer to proceed without the opportunity to test the alleged ongoing partial incapacity by medical examination. The employer at

the end of the day was however prepared to proceed with the hearing without the benefit of that course of action.

19. I note also that Rule 63.2 of the Supreme Court Rules provides that the following words have the following effect

"Costs reserved"	Subject to Rule 63.20, the party in whose favour an order for costs is made at the conclusion of a proceeding is entitled to the costs of any application in that proceeding in respect of which the order is made.

The Work Health Rules provide that the court shall have a very broad discretion in relation to an award of costs.

> 23.03 Power and discretion of Court
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> (1) Subject to the Act, these Rules and any other law in force in the Territory, the costs of and incidental to a proceeding are in the Court's discretion and the Court has the power to determine by whom, to whom, to what extent and on what basis the costs are to be paid.
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> (2) The Court may exercise its power and discretion in relation to costs at any stage of a proceeding or after the conclusion of a proceeding.
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> (3) In exercising its discretion under this rule in relation to a proceeding commenced under section 104 of the Act, the Court must have regard to the matters referred to in section 110 of the Act.
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> Section 110 provides that
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> In awarding costs in a proceeding before the Court, the Court shall take into account the efforts of the parties made before or after the making of the application under section 104 in attempting to come to an agreement about the matter in dispute and it may, as it thinks fit, include as costs in the action such reasonable costs of a party incurred in or in relation to those efforts, including in particular the efforts made at the directions hearing and any conciliation conference.

20. In *Harradine v Department of Health and Community Services* [2007] NTMC 003 His Honour Mr Luppino SM considered the interrelationship of the provisions of the *Work Health Act*, the Work Health Rules and the

Supreme Court Rules in relation to the application of Rule 63.11(5). His Honour formed the view that the Rule in question did not apply notwithstanding that it seemed to impose a mandatory direction in relation to an award of costs on an application for an order for an extension or abridgement of time fixed by the Rules. His Honour considered whether the effect of section 95(1) of the *Work Health Act* was to authorise Rules (ie a mandatory direction such as in Rule 6.11(5)) inconsistent with section 110. Section 95(1) provides that rules authorised to be made cannot be "…inconsistent with this Part…". Section 110 does not appear in the same part of the Act as section 95(1) and his Honour queried whether there was a legislative intent to authorise rules inconsistent with section 110. Following an analysis of the application of delegated legislation and the operation of the common law in relation to costs, His Honour concluded that "such a position would only be permissible if there was a clear expression in the Act that the Work health Court Rules applied as if they had been enacted in the Act itself or that the common law was specifically overturned.

21. Whilst I agree with His Honour's analysis and conclusion, I also take the view that the words in section 95(1) which appear to limit inconsistencies between the Rules and the Act to matters within Part VI should be read only as making it clear that the jurisdictional and procedural matters of the Work Health Court set out in that Part cannot be altered by the prescription of different procedures in the Rules. Costs are not a procedural issue but are, according to the common law and section 110 in the discretion of the Court and therefore must be exercised judicially. Section 95(1) cannot therefore be taken to authorise Rules inconsistent with a provision of the Act that directly confers a discretion in relation to an award of costs as in section 110. In any event, as I have said, I do not consider that the reason for the adjournment can be said to be entirely due to the "default" of the worker so as to fall within Rule 63.11(8) of the Supreme Court Rules.

22. In considering the matters set out in section 110 I note that the employer's primary position throughout the conduct of this matter was to deny liability on the basis that the injury and incapacity, which was disputed, did not arise out of or in the course of employment. That position was maintained until the conclusion of the worker's evidence at which point a settlement of the claim was agreed. Based on his evidence in chief the worker has suffered a long term injury to his right leg consequent on the original injury to his left leg, in particular the trapped nerve injury, not being surgically resolved in a timely fashion due to his reliance on the lengthy waiting lists in the public health system. Had his claim been accepted in a timely fashion he may well have been able to access surgical treatment for that injury at an earlier date thereby avoiding the ongoing consequential injury and incapacity that on his evidence he now endures.

23. Taking those matters into account the employer is to have the costs thrown away of the adjournment, fixed at Counsel's fee for 1 day and witness expenses for attendance on that day at 100% of the Supreme Court Scale.

Dated this 28th day of June 2007.

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Sue Oliver
STIPENDIARY MAGISTRATE