CITATION:	*Jelley v Holt* [2007] NTMC 057
PARTIES:	RION GILBERT JELLEY
	v
	DONALD G HOLT
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20706790
DELIVERED ON:	13 August 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	30 July 2007
JUDGMENT OF:	Acting Judicial Registrar Ganley

CATCHWORDS:

Interim determination - second application – factors to consider – whether "undue hardship" or "circumstances otherwise exceptional" – workers duty of full and frank disclosure - section 107(5) and (6) of the *Work Health Act*

Wormald International (Australia) Pty Ltd v Barry Leslie Aherne [1994] NTSC 54
Tanya Maree Baker v National Jet Systems (Unreported, Ms Fong Lim RSM, 4 April 2006)
McGuiness v Chubb Security Holdings Australia Ltd (Unreported, Dr Lowndes SM, 26 March 2006)
Kiely v Department of Employment Education and Training [2004] NTMC 81
Farrell v Kardu Numida Inc (Unreported, Judicial Registrar Fong Lim, 24 May 2000

REPRESENTATION:

Counsel:

Worker:	Ms Cathy Spurr
Employer:	Mr Duncan McConnell

Solicitors:

Worker:	Halfpennys
Employer:	Morgan Buckley

Judgment category classification:	C
Judgment ID number:	[2007] NTMC 057
Number of paragraphs:	73

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

No. 20706790

[2007] NTMC 057

BETWEEN:

DION GILBERT JELLEY
Worker

AND:

DONALD G HOLT
Employer

REASONS FOR DECISION
(Delivered 13 August 2007)

Acting Judicial Registrar Ganley:

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

Background

2. It is accepted that the Worker sustained an injury to his left knee on 9 December 2004 and subsequently requested reinstatement of his benefits in early October 2006.

3. As a consequence of the Employer's failure to reopen the Worker's claim the Worker applied for interim benefits on 5 March 2007.

4. On 2 April 2007, Ms Fong Lim RSM handed down an *ex tempore* decision. Her Honour ordered the Employer to pay the Worker interim benefits for 12 weeks, "with the level of benefits to be determined upon the Worker filing and serving an Affidavit establishing Nett Weekly Earnings and level of personal debt within 14 days" with the Employer to "file and serve any Affidavit in reply within 7 days of receipt of the Worker's Affidavit".

5. On 11 April 2007 Ms Fong Lim RSM further ordered that the "interim benefits referred to in Order of the 2nd April 2007 be paid at $516.90 gross per week".

6. On 16 July 2007 the Worker filed his present application seeking the following orders:

> '1. That the employer pay the worker interim payments of weekly compensation as for total incapacity pursuant to the provisions of the Northern Territory Work Health Act for a period of 12 weeks at the rate of $516.90 gross per week.
>
> 2. Costs of and incidental to this application.
>
> 3. Such further or other orders as this Honourable Court deems fit.

7. The leading authority in relation to applications for interim benefits is *Wormald International (Australia) Pty Ltd v Barry Leslie Aherne* [1994] NTSC 54, in which His Honour Justice Mildren stated that 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.

8. As this is the second application by the Worker, the Court must also have regard to the relevant provisions of the *Work Health Act*, subsections 107(5) and (6), 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'.

9. It is the Worker's submission that in exercising its discretion the Court must only be satisfied of "undue hardship" on the part of the worker or that "exceptional circumstances" apply.

10. The Employer submitted that applications for interim benefits were akin to obtaining an interim injunction and that the focus was: firstly, whether there was "undue hardship" suffered by the Worker and secondly, having regard to the issues to be determined and circumstances of the proceedings, whether the Court should go ahead and make an interim order.

11. It was argued by the Employer that hardship, the strength of the Worker's case, delay and the Worker's ability repay were important considerations because the Court is forcing an Employer to hand over money it may have no obligation to pay. The Court was referred to *McGuiness v Chubb Security Holding Australia Limited* (Unreported, Dr Lowndes SM, delivered 24 March 2006) as upholding *Wormald v Aherne* (supra) and standing for the principles to be applied.

12. The Employer's solicitor was invited by the Court to respond to the findings of Ms Fong Lim RSM in *Tanya Maree Baker v National Jet Systems*, Unreported, delivered 4 April 2006, where her Honour found:

> "… 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)".

13. In response, it was submitted by the Employer's solicitor that her Honour's finding was to be considered in light of *McGuiness v Chubb* (supra), which assessed the balance of convenience factors. The Employer's solicitor argued that it would be prejudicial to the Employer if the Court could not consider progress of the proceedings, which would allow the Worker to "simply meander or dwardle" through work health proceedings, and to this

extent the *National Jet* Case should not be followed. However, if the Court was not with the Employer and determined to confine itself to hardship, the passage from the *National Jet Case* did not stand for proposition that the Employer has to point to change of circumstances (which it conceded it had not) to rebut the presumption that a Worker can get a continuation of benefits, it stands for the proposition that the balance of convenience factors do not have to be revisited but hardship does.

14. The Court finds that *McGuiness v Chubb* (supra) can be distinguished on the facts from the *National Jet Case* and the present case as it relates to an initial interim application and this Court is bound by the *National Jet Case* as it was determined by a Magistrate.

15. In order for the Court to exercise its discretion to award the Worker interim benefits the Worker must establish that he would "suffer undue hardship" if it were not made, or that his "circumstances are otherwise exceptional".

16. It is also this Court's finding that both the Worker and Employer have an inherent obligation to be full and frank in their disclosure to the Court and to comply with the *Work Health Act* / *Rules* and Court Orders. Further, whilst "delay" is a balance of convenience factor, it is also a relevant consideration for the Court in determining subsequent applications. To this end the Court concurs with the finding of Judicial Registrar Fong Lim (as she then was) in *Stacy Meeking v Aon Risk Services*, 13 September 2000, that:

> "The purpose of interim benefits is to ensure that the Worker, who is diligently pursuing his claim, can continue to meet his or her necessary expenses to continue in the litigation without having to suffer, among other things, economic hardship" (paragraph 4).

"Undue Hardship"

17. In support of his application the Worker relies upon his Affidavits sworn 5 March 2007, 28 March 2007, 4 April 2007 and 13 July 2007 and his Solicitor' Affidavit of 8 March 2007.

18. The Worker's solicitor argued that the Affidavit evidence supports the significant financial hardship being suffered by the Worker. Further, that the Worker has no income, cannot obtain Centrelink benefits and the Employer failed to pay his interim benefits on time, which required the Worker to chase up payments on a number of occasions.

19. It was submitted that the Worker has incurred a large debt for physiotherapy as a consequence of the Insurer advising him that it would pay and has subsequently determined not to. The Worker also deposed to having to cease physiotherapy as he could not afford it, in spite of his doctor's instructions to have it three times per week (paragraph 19, Affidavit of Worker, sworn 13 July 2007).

20. In support of the application it was also submitted that the Worker had made attempts at finding work (paragraph 20 of Worker's Affidavit, sworn 13 July 2007), however he lives remotely and he was travelling to Queensland between 17 to 31 July 2007 with his parents and will attempt to look for work whilst he is there (paragraph 23 of Worker's Affidavit, sworn 13 July 2007).

21. The Employer relies on Affidavits of Steward James Boland, sworn 19 March 2007 and 2 April 2007. It was argued that there was inadequate evidence to suggest that the Employer was flouting its obligations under the Act by late payment of the interim payments. The Employer submitted that the Worker did not provide any evidence of hardship as a consequence of the late payment in that there was no evidence that his electricity had been cut off or that he had been unable to buy food.

22. In terms of the physiotherapy debt, it was submitted that the Worker received a substantial lump sum payment from the Employer which in the absence of alternative evidence could "easily have paid out the arrears of his physiotherapy" so the Worker could avail himself of physiotherapy on an ongoing basis.

23. It was argued by the Employer that an "interesting twist" to the Workers claim for financial assistance was his 400km travel per week, which included three physiotherapy sessions. On the one hand the Worker argued that he could not afford to attend physiotherapy, however, his living expenses include $100 week on petrol to enable the Worker to attend physiotherapy, which it was submitted "does not stack up". Further, there was no evidence to support the submission that the Worker's inability to attend physiotherapy would impact on his ability to work.

24. The Employer referred the Court to Dr Cohen's most recent report of March 2007 (Annexure "A" of Affidavit of Steward Boland, sworn 2 April 2007), which stated, inter alia, that the Worker had improved in that there was no evidence of rotator instability, flexion had increased 15 degrees, the patello-femoral joint revealed normal tracking, and the patella was stable. The report concluded:

> "From the point of view of his return to work duties, he does not plan to return to work as a stockman. He is now in Sydney and plans to remain in Sydney. He would like to undertake other duties, and I have suggested to him, that at this stage, he would be ready to return to work at light duties, duties that avoid squatting, kneeling and the carrying of heavy loads. I would expect him to be able to progress to normal duties, gradually, over the next three months" (page 2).

25. In light of the above, it was argued by the Employer that the Worker had capacity to work and that the area in which he lived was not remote. The Employer referred the Court to a map which indicated that the town where the Worker resided, "Fairy Meadow", was 10km outside Wollongong a large regional city in NSW, 100km away from Sydney and on the main railway

line. It was submitted by the Employer that the area was of "significant population density with historically low levels of unemployment". The Employer's solicitor's submissions from the bar table as to low levels of unemployment in the area cannot be accepted and the Court does not accept that it can "take judicial notice of the current unemployment levels that are prevailing in this country" to support the proposition.

26. The Employer submitted that the first issue in determining undue hardship was the amount potentially payable, $516.90 gross per week or approximately $26,000 per annum, which was close to the minimum wage and a low threshold for loss of earning capacity.

27. As to the Worker's expenditure, the Employer questioned the Worker's liability to repay his father for the car loan. It was submitted that there is no evidence of a formal loan agreement and repayment obligations in the Affidavit of the Worker of 13 July 2007. Further, that the Worker claims $100 on cigarettes and alcohol and various utility type expenses including home insurance, and the later was questioned on the basis of the Worker's assets (deposed to as a car, swag and bbq) which had not been claimed prior to this application.

28. The Employer invited the Court to consider the percentage breakdown of the Worker's expenditure, namely: 13% on cigarettes and alcohol; 20% for loan repayment (with no evidence regarding the Worker's ability to suspend this); 22% on fuel and running costs for the car. In terms of the latter it was submitted that whilst the Worker was not working he was driving around clocking up $150 week in motor vehicle expenses.

29. The Employer also submitted that the Court should have doubts as to the Worker's claim for rent which was supported by two consecutive tax invoice receipts for $1200 and $300 made out to "Rion" from "Peter" with no address or surnames. The Employer invited the Court to question whether the Worker was in fact renting the house from someone related to him or his

living partner and whether the Worker was full and frank in his disclosures to the Court.

30. It was also argued by the Employer that the Worker's Affidavit did not "condescend" to sufficient detail to satisfy the Court of the Worker's undue hardship. Further, the evidence supported a scenario of the Worker living with his girlfriend, contributing to household expenses, driving his girlfriend to work, drinking and smoking, and driving his car around all week.

31. It is the Employer's case that the Court cannot be satisfied as to the Worker's efforts to obtain employment in that the Worker's Affidavit merely deposed to the Worker looking in the paper four to five times a week, and having made 10 telephone calls which were unsuccessful (paragraph 21 of Worker's Affidavit sworn 13 July 2007). The Employer argued that the Worker has a "mild knee problem" with partial earning capacity, and before the Court orders the Employer to continue interim benefits it must be well satisfied the Worker cannot obtain work for himself, particularly in light of wide variety of occupations (as evidenced in Dr Millons' report, Annexure "CLS-2" of Worker's Solicitor of 8 March 2007) as ringer, hang glider builder, seafood inspector, shop manager, station manager, stockmen and care taker.

32. In response, the Worker's solicitor submitted that the approach to be applied was not to start from the position that the Worker has not been full and frank in his disclosure and that the Worker had deposed evidence to the car loan, which was heavily detailed in his Affidavit of 4 April 2007, and his Affidavit of 5 March 2007 details the agreement and loan repayments.

33. It was also argued that the Worker's former employment, except for seafood inspection "required heavy lifting". It was submitted that the Worker's most recent Affidavit (sworn 13 July 2007) deposed to seeking employment in the retail sector, and that Dr Millons' report made it clear that the Worker

requires retraining to assist him to return to work due to the nature of his injury and restrictions.

Whether Worker would suffer Undue hardship

34. The Worker bears the onus of proving, on the balance of probabilities, that he will suffer "undue hardship" if the determination is not made in his favour.

35. Undue Hardship in the context of subsection 107(6) of the Act was considered by Ms Fong Lim RSM, in *Baker v National Jet Systems* (supra). Her Honour noted *Wormald v Aherne* (at p.9) where his Honour Justice Mildren indicated that "hardship is a subjective thing and it depends on the worker's particular circumstances and expectations". In considering his Honour's finding, Ms Fong Lim RSM stated that *'what must be remembered is that in the present case the Worker must prove "undue hardship" before the court can make a further interim determination in her favour'* (paragraph 11).

36. Ms Fong Lim RSM then went on to consider the word "undue" which her Honour found "suggests that the hardship must be of a more substantial nature than just mere hardship or misfortune". Her Honour noted the Concise Oxford dictionary definition of:

> "excessive, disproportionate, not suitable" (paragraph 12).

37. The Stroud's Judicial dictionary of Words and Phrases, 6th edition, was subsequently noted by Ms Fong Lim as having two entries of assistance:

> "Undue Hardship is caused when that hardship is not warranted by the circumstances (*Tote Bookmakers v Development and Property Holding Co.* [1985] Ch 261).
>
> The word "undue" adds something more that just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant (*Jones v Trollope Colls Cementation Overseas*, the Times January 26 1990)" (paragraph 13).

38. Ms Fong Lim RSM concluded (at paragraph 14):

> "… 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).

39. In considering the Worker's present application the Court notes the Worker's "currently weekly expenses", as deposed to in his Affidavit sworn 13 July 2007, are:

(a)	Food and household	$126.00
(b)	Alcohol	$35.00
(c)	Cigarettes	$70.00
(d)	Gas	$7.60
(e)	Electricity	$18.07
(f)	Home Insurance	$10.33
(g)	Petrol	$100.00
(h)	Pharmaceuticals	$15.00
(i)	Telephone	$15.00
(j)	Car registration / running costs	$65.00
(k)	Rent	$150.00
(l)	Loan repayments	$150.00
		$762.00

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40. The Affidavit also deposes to $27,340 in assets, being a motor vehicle worth $27,000, a swag $240.00 and a bbq $100.00 (paragraph 7). The Worker's debts are deposed to as a car loan $20,000, personal loan $10,000 and physiotherapy $940.00 (paragraph 8).

41. The Worker's Affidavit of 28 March 2007, sworn in support of the initial interim application, deposed to the Worker residing with his girlfriend (paragraph 2), that they keep their finances separate at 50%, with his parents assisting him to meet his day to day financial needs (paragraph 3), his girlfriend earns $562 gross per week (paragraph 4), their rent is $300 per week, petrol for his V8 car for 400km to the tank is $85 per week, the Worker takes his girlfriend to the train station each morning, attends physiotherapy 3 times per week, and travels to Sydney on weekends to see his sister (paragraph 8).

42. In terms of the car, the petrol has increased to $100 per week since 28 March 2007, and the Worker deposes to not undertaking physiotherapy as he cannot afford it. The Court questions whether the Worker continues to travel 160km each weekend to see his sister in Sydney (as deposed at paragraph 8 of his Affidavit of 28 March 2007).

43. The evidence as to the loans for the car is conflicting. The Worker's Affidavit of 3 March 2007 annexes a letter from the Worker's father to the Worker's solicitor dated 22 February 2007 stating the car was purchased with a loan of $20,000 loan on 26 October 2006, along with a loan for $10,000 for furniture of $3,800.00 (subsequently sold for $800) and $6,200 for living costs backdated to 1 December 2006 (Annexure "RJ-4").

44. In his further Affidavit, sworn 4 April 2007, the Worker deposes to his father advancing him the amount of $31,430.71 (Annexure "RJ-1") including two amounts of $12,690 and $16,000 on 28 July 2006 for the purchase of a vehicle from "Australian Fleet Sales".

45. The evidence as to the loan repayments to the father is contained in the letter from the Worker's father dated 22 February 2007 (Annexure RJ-4 of Affidavit 5 March 2007) where it is stated:

> "payments of $150 per week are made by Rion when funds are available. These loans were necessary to save Rion from getting into severe financial difficulty. (Interest is charged at 7.25% per annum on outstanding balances)".

46. The Worker's motor vehicle is a V8, which the Worker concedes is the reason his petrol is "so expensive". The Court questions the Worker's choice of vehicle and expence of the same given the Worker's lack of finances at the time of purchase, which according to paragraph 39 was 26 October 2006 and on paragraph 40 was 28 July 2006.

47. The Worker's evidence to support his rent of $150 per week is evidenced by three tax invoices, the first is dated 2 March 2007 and marked to "Rion Jelley" from "Peter Homsi" for "Bond" of $1000 and $900 for rent for "3 weeks" (Annexure "RJ-1" of Affidavit sworn 28 March 2007) and the second and third for $1200 and $300 (referred to in paragraph 28 above as part of Employer's submissions) are made out to "Rion" from "Peter". The tax invoices do not refer to the Worker's girlfriend, and there is no lease documentation to support the rental agreement. The Court is not satisfied as to the validity of the receipts to substantiate the Worker's ongoing obligation to pay $150 per week rent.

48. The Worker' claim for gas at $7.60 per week is evidenced by an account for $91.00 (Annexure "RGJ-6" of Affidavit of 13 July 2007). The Worker claims electricity in the amount of $18.07 per week, relying on an invoice ("RGJ-5") for $216.84 for 12 weeks. The Worker also claims household insurance in the amount of $10.33 per month. The invoice (Annexure "RGJ-7") evidences that the policy is for both the Worker and his girlfriend for $41.33 per month, with the payment being deducted from a "national

account" on the "29th* day of each month". The Courts calculations of the three amounts reveal that the Worker is claiming the full amount for each of the three amounts as his weekly expense. The Court questions whether this is the case particularly in respect of the Worker's liability to pay the household insurance, given his limited assets of a bbq and swag worth $240, and there is no evidence of a National bank account in his name for the payment to be deducted.

49. The food and household expense of $126.00 is supported by various receipts. The Court finds that whilst it cannot be satisfied that the Worker paid for such amounts that the amount claimed is not unreasonable.

50. In considering the Worker's application the Court notes Dr Lowndes reference in *McGuiness v Chubb* (supra) to a decision of Judicial Registrar Fong Lim (as she then was) *in Kiely v Department of Employment Education and Training* [2004] NTMC 081, where the Court stated:

> "It is accepted that a person without income suffers financial hardship however the level of hardship can only be judged by reference to the whole of the Worker's financial circumstances. The Worker should establish to the Court by reference to primary documents, his level of weekly spending, any savings he has, any debts he is paying off eg credit cards etc. The Worker should attach to his affidavit primary documents supporting any claim for payment of rent or mortgage, electricity bills and other essential items" (paragraph 13).

51. On the basis of the above case law, along with her Honour's findings in the *National Jet Case*, the Court must be satisfied on the documentary evidence submitted that the Worker's financial circumstances are such that he would suffer "more than just hardship caused by having less income but something in excess of that taking into account all of the circumstances". The Court also notes that being unable to pay the "necessities of life without benefits" has been considered as justifying the further interim payment.

52. The evidence submitted by the Worker is not consistent in respect to his household and car expenses. The Worker deposed to a relationship with his girlfriend which is based on separate finances and a 50% division in expenses, however, the documents adduced and the Worker's own evidence does not support the arrangement. The rental invoices (if the Court were to accept them as such) do not refer to the Worker's girlfriend, the Worker claims the gas, electricity and house insurance in total as his weekly expenses, the Worker drives his partner to the train station, however, there is no proportionate split for petrol and car running costs.

53. As to the Worker's liabilities, there is no evidence to support the amount owing for physiotherapy, and the Worker's principle liabilities are a car loan for $20,000 and a personal loan of $10,000, which is supported by a letter annexed to the Worker's Affidavit of 5 March 2007. The letter also evidences the personal loan agreement, and whilst including interest, states that repayments are $150.00 per week "when funds are available" (Annexure"RJ-4" of Affidavit of Worker sworn 5 March 2007).

54. On the evidence, it is open to the Court to find that there is no obligation for the Worker to make a $150.00 loan repayment to his father each week, and therefore this amount does not fall within the category of a "necessity of life" expense.

55. The Court also takes into consideration that the Worker's claim is for total incapacity, however, there is some evidence of capacity of the Worker as submitted by the Employer at paragraph 23 above.

56. The Worker's solicitor submitted that Dr Millons "made it clear that the Worker requires retraining to assist him to return to work", however, Dr Millons' report actually states that the Worker:

> '… would certainly warrant a formal vocational and functional assessment to see if there might be some suitable avenue of employment along which he might be directed or for which he might

> be retrained. He would be better suited to work of a lighter, semi-sedentary nature in an office or store environment or in a supervisory role, avoiding excessive walking, kneeling, squatting, climbing and long periods of driving" (page 9, Annexure "CLS-2" of Worker's Solicitor of 8 March 2007).

57. The Worker's evidence is that he reads the paper "4-5 times per week", and has made calls about 10 jobs, particularly in retail, which have not been successful. This Court concurs with the Solicitor for the Employer that the Worker's Affidavit evidence does not condescend to sufficient particularity to satisfy the Court. Accordingly, it is open for the Court to conclude that the evidence supports a Worker who is driving 400km a week, maintaining a drinking and smoking habit of over $100 per week but not actively seeking employment.

58. In order for the Court to exercise its discretion pursuant to section 107(6)(a) of the *Work Health Act*, the Worker must establish that he would suffer undue hardship if the further determination was not made.

59. The Worker has submitted a breakdown of his current weekly expenses, however, the evidence does not support the expenses claimed.

60. As stated by this Court in Kane v Anyinginyi Congress Aboriginal Corporation [2007] NTMC 36:

> "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" (paragraph 47).

61. In that case the Worker applied for an initial determination for interim benefits. The Worker resided with her mother and deposed that all expenses were met through an account in her mother's name to support her claim for hardship. Whilst this case can be distinguished as this case involves a second interim determination and this Worker has submitted a detailed breakdown of his actual weekly expenses, the facts are similar to *Kane* in

that the evidence supporting the apportionment / liability to pay the expenses has been questioned by the Court.

62. It is the Worker who bears the onus of proving his claim of undue hardship. It is not this Court's role to go through each piece of evidence to divide the unsubstantiated from the substantiated amounts, then apportion the respective substantiated amounts between the Worker and his girlfriend, to determine whether the Worker would suffer undue hardship if the order was not made.

63. On the evidence submitted it is not open for the Court to make an award under the heading of "undue hardship". The worker has not made full disclosure of all the relevant circumstances (*Wormald v Aherne*). Further, the Worker's conflicting evidence has impacted significantly upon his credibility and reliability as regards his financial obligations (*McGuiness v Chubb*) to support a claim of undue hardship, as prescribed by section 107(6)(a) of the *Work Health Act*.

Circumstances are otherwise exceptional

64. The Worker argues that his situation falls within section 107(6)(b), namely that his "circumstances are otherwise exceptional" as the Employer had not obtained the medical evidence that it indicated it would and all the medical evidence supports that the Worker suffers from his injury of 9 December 2004. The Court was referred to the following evidence:

(a) Dr Millons' opinion that "the development of the degenerative change in the knee is a direct consequence of the injury" and that the Worker has been "carrying problems in his knee since 9 December 2004" (page 8, Annexure "CLS-2" of Affidavit of Worker's solicitor sworn 5 March 2007);

(b) Dr Millons opinion that "there has been no new injury per se … and the state of [the Worker's] left knee is the end result of the injury on

9 December 2004" and the worker requires retraining as the work undertaken previously is not suitable for the injury (page 9, Annexure "CLS-2" of Affidavit of Worker's solicitor sworn 5 March 2007);and

(c) Dr Kohen's opinion that the Worker's status is "a manifestation of his previous injury". Further, "an injury leading to a tear of the anterior cruciate ligament causes a lot more damage to the knee than simply the anterior cruciate ligament … the persistent instability led to [the Worker] developing medial and lateral meniscus tears, and this damage will result in premature development of osteoarthritis" (page 2, Annexure "CLS-2" of Affidavit of Worker's solicitor sworn 5 March 2007).

65. It was argued by the Worker that the evidence remains the same as the last application and the Employer has not provided any contradictory medical evidence. Further that both the lack of evidence and causation as to the Worker's injury constitutes an exceptional circumstance.

66. The Employer responded by submitting that the starting point was a commonsense approach and the words implied that what was required was "something exceptional about this persons situation that may not be hardship and may be something else". It was argued that the legislature included it as "one of those any other reasons provisions", which did not invite the court to consider whether the Employer had obtained medical evidence or not.

Whether the Workers "circumstances are otherwise exceptional'

67. In assessing this application against other interim benefit applications, the Court is not satisfied that a failure by the Employer to obtain medical evidence or evidence of "causation" constitutes a circumstance that is otherwise exceptional to this case, as provided in section 107(6)(b) of the *Work Health Act*.

68. In a recent decision *of Skinner v Top End Mental Health Services* (Unreported, Acting Judicial Registrar Ganley, 3 August 2007) the Employer did not take the opportunity to adduce any medical evidence and the Court made its determination to dismiss the application based on the evidence submitted.

69. It is the Worker who bears the onus of proving his / her application and that the circumstances of his case are exceptional from other applications to invite the court to exercise its discretion.

70. The Court concurs with the Employer's solicitor that the words imply that what is required is something exceptional about the Worker's circumstances. In the case of *Atkins v A & B Welding* [2007] NTMC 35, this Court found 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" (paragraph 35).

71. This is not a case in which the Worker has established that his circumstances are otherwise exceptional to warrant the Court to exercise its discretion to make a further interim determination.

72. In concluding, the Court concurs with the findings of Judicial Registrar Fong Lim (as she then was) in *Farrell v Kardu Numida Inc* (Unreported, Judicial Registrar Fong Lim, 24 May 2000):

> "… the Court can only issue a further order for interim benefits if it is convinced there will be undue hardship if the order is refused or that there are exceptional circumstances which justify a further order. However even if either of these alternatives are fulfilled then the court can still refuse to make the order if other factors balance against the Worker in making the order. Two of those factors could be the Worker's bona fide attempts to pursue his application and the continuing disability of the Worker to work. I stress that the Court's

discretion is still widely unfettered when refusing an order for further interim benefits (paragraph 11).

73. The Court makes the following Orders:

1. The Worker's application for a further interim determination refused.

2. The costs of this application are reserved with liberty to apply.

Dated: 13 August 2007

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Kathryn Ganley
Acting Judicial Registrar