CITATION: *PHILLIPS v G & K AKERS CONTRACTING PTY LTD* [2009] NTMC 040

PARTIES:	SHAWN PHILLIPS v G & K AKERS CONTRACTING PTY LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	20826835
DELIVERED ON:	18 NOVEMBER 2009
DELIVERED AT:	DARWIN
HEARING DATE(s):	14 OCTOBER 2009
JUDGMENT OF:	ACTING JUDICIAL REGISTRAR SMYTH

CATCHWORDS:

WORK HEALTH – Application for interim benefits – considerations which apply- serious question to be tried – balance of convenience

Workers Rehabilitation and Compensation Act (NT), ss 107
Wormald (Australia) Pty Ltd v Aherne [1994] NTSC 54
American Cyanamid Co v Ethicon Ltd [1975] AC 396
Australian Broadcasting Corp v O'Neill (2006) 227 CLR 57
Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618
McGuiness v Chubb Security Holdings Australia (Unreported, Work Health Court, Dr Lowndes SM, 23 March 2006)

REPRESENTATION:

Counsel:

Worker:	Mr B O'Loughlin
Employer:	Ms R Shaefer

Solicitors:

Worker:	Priestleys
Employer:	CridlandsMB

Judgment category classification:	B
Judgment ID number:	[2009] NTMC 040
Number of paragraphs:	26

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

No. 20826835

BETWEEN:

SHAWN PHILLIPS
Applicant/Worker

AND:

G & K AKERS CONTRACTING PTY LTD
Respondent/Employer

REASONS FOR JUDGMENT

(Delivered 18 NOVEMBER 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. This is the worker's application for an order of interim benefits pursuant to s 107 of the *Workers Rehabilitation and Compensation Act* ("the Act").

2. The worker relied on the affidavits of Shawn Phillips sworn 1 May 2009, 31 August 2009, 22 October 2009 and the affidavits of Mellissa Rhona Dunn sworn 13 October 2009 and 14 October 2009. The employer relied on the affidavit of Rachael Helen Schaefer sworn 13 October 2009.

APPLICATIONS FOR INTERIM BENEFITS

3. The law in respect to an application for interim benefits under the Act is fairly well settled. As stated by Mildren J in *Wormald (Australia) Pty Ltd v Aherne* [1994] NTSC 54:

> "…the approach to the exercise of the discretion to award interim payments is the same as in an application for an interlocutory injunction - i.e. that 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. However, I do not accept that this necessarily means that an interim award cannot be made in the absence of

proof of hardship to the worker. There are many factors to be considered in deciding where the balance of convenience lies. In many cases, proof of hardship to the worker will no doubt be of importance. But in cases where the worker has had his payments stopped altogether by the employer exercising a right to discontinue payments under s69, there must inevitably be some hardship to the worker in the usual run of cases, even if the worker is fortunate enough to have other independent means. If the savings of a thrifty worker are to be whittled away pending the hearing of his appeal, that is a hardship to him; if he has income from investments he has made, likewise it is a hardship to him to have to use that income to live upon rather than for other uses with which it might legitimately be put. Even if the worker is a millionaire, this does not necessarily mean that the balance of convenience must be decided against him - interim payments may ultimately have to be repaid, and there is less risk of the employer not being able to recoup his money than in the case of a worker with little or no means. Often the balance of convenience will best be served by restoring the status quo, so that a different emphasis to questions of hardship will arise in cases where payments have been stopped than in cases where the employer has neither made voluntary payments nor been required by the provisions of the Act or by Court order to make payments. Other relevant factors might include any perception the Court forms of the strength of the worker's case: see *Castlemaine Tooheys Ltd and Others v. State of South Australia* (1986) 67 ALR 553 at 559; the amount of compensation at stake; any delay in making the application or in bringing on the application for substantive relief, and where the fault lies for that delay; the period of time which might elapse before the substantive application can be heard; the degree of any prejudice to the employer if the order is made, especially if the worker is outside the jurisdiction, or outside of Australia. Relief might also be refused on other discretionary grounds, for example, if the applicant has not made full disclosure of all of the relevant circumstances. These are not intended to be an exhaustive list of the factors which may well be considered; nor will all of these factors be relevant in every case; and the weight to be given to each factor will depend upon the circumstances of the case."

Serious Question to be Tried

4. The test, as espoused by Mildren J, for an interlocutory injunction is that the Court must be satisfied that there is a serious question to be tried. In

American Cyanamid Co v Ethicon Ltd [1975] AC 396 at 407, Lord Diplock stated:

> "The use of such expressions as "a probability", "a prima facie case", or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried…It is not part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend not decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial."

5. Some continuing debate has surrounded the use of the terms "serious question to be tried" and "prima facie case". The High Court has recently stated, in *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57, that the Court's previous approach in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 is preferred. In explaining the approach in *Beecham* the High Court stated that there is no difficulty in continuing to use the term "serious question to be tried" but it is to be used in the context of the principles discussed in *Beecham*. An applicant should demonstrate a likelihood or probability of success. The degree of likelihood to be demonstrated, or the probability needed, will depend on the nature of the rights asserted and the practical consequences which flow from the order sought.

6. How the test as espoused by the High Court in *Beecham* and *O'Neill* affects, if at all, the consideration given to an application for interim benefits is not a question which has been explored by the Territory Courts. Previous decisions of this Court have described the test as "an arguable case", "a strong possibility of ultimate success", "a dispute between the parties", "an obvious dispute on the medical evidence", "a triable issue" and "serious issues to be resolved amongst the parties". In my mind, in order for the Court to be satisfied that a serious question to be tried exists there should be

sufficient evidence provided, acknowledging that such proceedings are at an early stage and there has not been the benefit of fully testing the evidence, that the worker has an arguable case with a reasonable prospect of success.

Balance of Convenience

7. The non-exhaustive list of factors to be considered when determining the balance of convenience were set out in *Wormald* by Mildren J. Such factors have been subsequently adopted by this Court. In *McGuiness v Chubb Security Holdings Australia* (unreported decision of the Work Health Court, 23/3/06) the following factors were identified by Dr Lowndes SM:

- Hardship to the worker;
- The ability of the worker to repay the interim benefits in the event that the substantive application for compensation fails;
- Any perception the Court has of the strength of the worker's case;
- The amount of compensation at stake;
- Any delay in making the application or in bringing the application for substantive relief and where the fault lies for that delay;
- The period of time which might elapse before the substantive application can be heard;
- The degree of any prejudice to the employer if the order is made, particularly if the worker is outside the jurisdiction;
- Relief might also be refused on other discretionary grounds such as a failure on the part of the worker to make a full and frank disclosure of all the material circumstances.

The Worker's Evidence

8. The worker's evidence, in relation to the background to this matter, can be summarised as follows:

- On 31 May 2007 he was working as a truck driver and he injured his right knee as he was walking to a bus after his truck driving shift ended. He felt a sharp pain to his right knee.

- He was diagnosed as suffering a medial miniscal tear and patello femoral degeneration of the right knee, and he continues to suffer pain.

- On 13 September 2008 he completed a claim form which was subsequently accepted by the employer.

- He subsequently developed depression as a result of the work injury.

- On 28 April 2008 the worker was issued a final medical certificate from Dr Wal Tracy clearing him for work. The worker deposes that he informed Dr Tracy that he was feeling down and the Doctor suggested returning to work would help. The worker also deposes that Dr Tracy told him that if he continued to have knee problems to come back to see him.

- Before returning to work he was advised by his employer that he needed a HR truck licence, which he subsequently obtained. He was then told he would need to take a medical test and a drug test. The worker asked for a delay in taking the drug test but was refused. The worker was subsequently terminated.

- After receiving termination payments the worker started his own business detailing cars. When he was trying to align a car seat with a bolt hole the pain became too much. He decided he could no longer work.

- He sought financial assistance from his former employer's insurer on the basis that his injury of May 2007 was continuing. Such assistance was refused on the basis that the worker had suffered a new injury in the course of his car detailing business (presumably) and that he had previously been medically cleared by Dr Tracy.

- As a result of his injury the worker is incapacitated for work and continues to suffer from pain, swelling and clicking in his right knee as well as from depression.

- In about August 2009 the worker had a reaction to anti-depressant medication whereby he was admitted to hospital and told to stop taking the medication. Subsequently he became suicidal, attempted suicide twice and has been admitted to hospital.

- The worker filed an application to the Work Health Court on 30 September 2008. On 12 June 2009 the employer agreed to pay interim benefits in the amount of $470 gross per week, and such payments were made up to and until 14 October 2009.

- The worker has attended vocational assessments arranged by the employer and such reports state that the worker is motivated to return to work.

- The worker is due to see another orthopaedic surgeon on 27 November 2009.

9. In support of his application the worker pointed to a number of doctors' reports (as annexure SP1 to the worker's affidavit dated 31 August 2009):

   (a) Dr Balasa (General Practitioner 20 July and 7 August 2009) – certifies, through medical certificates, that the worker is suffering from a right knee injury, depression and anxiety and is unfit for work from 26 June 2009 to 10 November 2009.

(b) Dr Wright (Orthopaedic Surgeon 26 February 2009) – the Doctor has reviewed five other medical reports from Drs Sharland, Martin, Isherwood-Hicks and Bowles. He states that, from the history given, the worker's original symptoms have never settled down and the current symptoms are a result of that injury. He considers the initial injury is the cause of the worker's current incapacity, notwithstanding increasing symptoms when the worker was working as a car detailer.

(c) Dr O'Conner (Consultant Psychiatrist 11 May 2009) – sets out the worker's history in some detail and refers to the worker: being compelled to leave his worksite accommodation, his partner loosing her job at the mine, the worker moving into a remote pub and abusing alcohol, operations on the right knee, an injury to the right knee while hanging washing up, a further operation on right knee, a move to a caravan park, failure to secure further work with employer, unable to finish work as a car detailer, deterioration in the worker's mental state, separation from partner, a further deterioration in mental state and a move to Perth. The Doctor's diagnosis is the worker is suffering from a major depressive episode with co-morbid anxiety. The Doctor states that the depression was precipitated, and is being perpetuated, by a right knee injury that occurred at work on 31 May 2007 and the resultant psychosocial consequences of this injury and its management. The Doctor is of the view that there was no pre-existing personality disorder nor any significant overt personality dysfunction prior to the onset of the worker's illness. The Doctor concludes that the worker is currently suffering from a psychiatric condition that arose in the course of his employment with the employer. The report states that the worker has developed a depressive illness which was precipitated by his inability to work following the injury to his right knee, and he has been incapacitated for employment since 31 May 2007 to date as a result of the injuries. In relation to the worker's failure to file proceedings in time, the Doctor states that, at the time it was more likely than not that

the worker was suffering from a serious psychiatric condition that would have impacted negatively on his ability to manage his affairs or instruct his solicitor.

(d) Dr Spear (Consultant Psychiatrist 20 July 2009) – diagnoses (DSM-IV) the worker as suffering from a major depressive disorder in partial remission, anger management issues (history of alcohol and cannabis abuse), right knee injury and not working and relationship issues. The Doctor states that not working appears to be the main cause of the mental health symptoms, along with the knee surgery, substance abuse, relationship issues and financial pressure. The Doctor states that if the worker in not able to work because of the injury to his knee then he would agree that the employment with the employer was the cause of his mental health condition.

(e) Dr Slinger (Consultant Orthopaedic Surgeon 22 July 2009) – states that his diagnoses of the incident of 31 May 2007 is a tear of the medical meniscus of the right knee and an aggravation of pre-existing degenerative changes at the patella. In relation to the injury of 12 June 2008 "the car detailing injury" it was simply an aggravation of pre-existing symptoms continuing as a result of the May 2007 injury and not a new injury. The cause of his present medical condition is the accident of 31 May 2007. The incapacity of his employment is directly attributable to the work injury of 31 May 2007.

10. In relation to the worker's financial circumstances it was the worker's evidence that he was presently living with his partner and they had recently had a child. He stated that as a result of the employer's failure to accept liability he was finding it difficult to make ends meet.

11. The worker had previously received interim benefits by consent for the period 12 June 2009 to 14 October 2009 at the rate of $470 gross per week.

12. In so far as household income was concerned it was the worker's evidence that:

(a) His partner, Ms Kirsty Jackson, received the following fortnightly Centrelink benefits on the basis that he would receive an interim benefit: Family tax benefit ("FTB") A $156.94, FTB B $92.68, Parenting payment $120.39, Baby bonus $398.85 (for 26 weeks from 23 September 2009) and rent assistance of $131.32, totalling $900.18 per fortnight or $450.09 per week. The Court was informed that should no interim benefit be made then the worker's partner's parenting payment may rise to $411.50, making a total of $1191.29 per fortnight or $595.64 per week.

(b) Centrelink documents, dated 15 October 2009 (Annexure SP1 to the worker's affidavit of 22 October) were provided in support of the current or proposed income. That document indicated that the worker's partner received $156.94 FTB A, $92.82 FTB B, $131.20 in rent assistance and $146.94 in Newstart allowance.

(c) The worker was not presently receiving Centrelink benefits. The worker deposed that, if he was not to be awarded interim benefits then he would possibly be eligible for either a Newstart allowance or sickness allowance which are both $411.50 per fortnight. He also stated he may be eligible for rental assistance in the amount of $131.32. That would be a total of $542.82 per fortnight at $271.41 per week. No supporting documentation was provided to support such statements.

13. In so far as household expenditure was concerned it was the worker's evidence that:

(a) The worker pays (including his partner) $260 per week in rent. Copies of various rent receipts from June to August 2009 were provided in support, and were in the name of the worker's partner (annexure SP6 worker's affidavit 31 August 2009). It was the worker's evidence that

the lease was soon to expire and all indications were that a new rental premises would need to be found. His evidence was that a new premises would likely cost $300 per week in rent. No supporting documentation was provided in relation to the future rental costs. It was also the worker's evidence that he would incur removalist costs and household costs (cleaning the outgoing property) of $470 which equates to $39.17 over a period of 12 weeks.

(b) In relation to expenses for water and electricity the worker pays $7.50 per week in water usage which is charged along with the rent. A receipt dated 2 June 2009 was provided. The worker's evidence was the water usage was likely to go up to $10 per week but no supporting documentation was provided. It was also the worker's evidence that electricity usage was $25.94 per week. Supporting power accounts were provided for a two month period (June and August 2009) showing $414.20 usage over 2 months (annexure SP7 worker's affidavit 31 August 2009).

(c) In relation to expenses for telephone, the worker had deposed to paying upwards of $82.10 per week in telephone expenses (which was supported by documentation). When invited by the Court to explain such high telephone usage the amount was subsequently revised by the worker to an approximate amount of $25 per week. No supporting documentation was provided.

(d) In relation to expenses for groceries the worker deposed to spending $180 per week, for two adults. This was supported to some degree by a various number of grocery receipts (annexure SP9 worker's affidavit 31 August 2009).

(e) In relation to expenses for car registration the worker deposed to spending $10.02 per week for car registration. A copy of a registration certificate was provided in support (annexure SP10 worker's affidavit 31 August 2009).

(f) In relation to expenses for petrol the worker deposed to spending $45 per week. A number of petrol receipts were provided in support (annexure SP11 worker's affidavit 31 August 2009).

(g) In relation to vehicle expenses the worker deposed to spending $20 per week. A number of receipts were provided in support, which included receipts to new tyres ($179), machining of discs ($198) and brakes/undescribed parts ($80, $90, $150) (annexure SP12 worker's affidavit 31 August 2009).

(h) In relation to medical expenses the worker deposed to spending $45 per week (annexure SP15 of the worker's affidavit of 1 May 2009 and SP13 worker's affidavit 31 August 2009). Pharmacy receipts were provided in support, for $16.25 on 16 April 2009, $11.25 on 24 April 2009, $15 on 9 May 2009, $34 on 19 May 2009, $13.25 on 20 July, and $18.90 on 7 August 2009. In a letter from the worker's solicitor to the employer's solicitor, dated 13 October 2009, it is conceded that the worker is not currently on medication. Further, the worker's affidavit of 31 August 2008 refers to anticipated additional medical costs concerning the birth of his child but none have subsequently been deposed to. In relation to dental expenses the worker provided copies of dental receipts for various dental work done dating from May 2009 to August 2009. There was no evidence that such dental work was ongoing, or whether the work which had been undertaken had rectified the dental problem. The worker deposed to an outstanding dental bill of $300. The worker also deposed to three outstanding ambulance bills, from 2 August 2009, 8 August 2009 and 10 August 2009, of $738 each or $2214 in total. The outstanding dental and ambulance bills should be properly dealt with under the worker's debts. There were no other medical bills provided, such as doctor's surgery receipts or the like.

(i) In relation to expenses to pay debts, the worker deposed to the following debts: $251.32 to Power and Water from 2 October 2008,

$76.70 to Video Ezy from 6 March 2009, $1010 to GE Finance from 22 January 2009 (in the partner's name), $5919.91 to Lion Finance from 31 October 2008 (in the partner's name), $266.01 to ANZ Bank from 7 October 2008 (in the partner's name), $835.45 mobile broadband from 4 January 2009 (in the partner's name), a Centrelink Debt of $1600.28 (it would appear that the worker continued receiving Centrelink benefits whilst receiving interim benefits and is now required to pay money back to Centrelink) and an outstanding Telstra account of $3453.53 from 27 August 2009. Further, as mentioned above, the worker has a $300 outstanding dentist bill and a $2214 ambulance bill. Total debts amount to $15 927.20. I note some of the bills date back to late last year (annexure SP16 worker's affidavit 1 May 2009).

(j) In relation to expenses for entertainment the worker deposed to spending $40 per week on entertainment such movies or dinner. No supporting documentation was provided.

(k) In relation to expenses for clothing the worker deposed to spending $30 per week on clothing. Some supporting documentation was provided including for the purchase of jeans, baby clothes and other clothing items (annexure SP14 worker's affidavit 31 August 2009).

(l) In relation to the hairdressers cost for his partner the worker deposed to an expense of $5 per week. No supporting documentation was provided.

(m) In relation to the costs for the new baby the worker deposed to an expense of $80 per week for the purchase of formula, nappies, wipes, nappy bags, powder, shampoo and creams and breast pads. No supporting documentation was provided.

(n) In relation to miscellaneous expenses the worker deposed to expenses of $35 per week. Various receipts for recharge of mobile phone,

purchase of cigarettes, parking ticket and alcohol were provided (annexure SP15 worker's affidavit 31 August 2009).

(o) In relation to the costs of baby equipment, such as bottles, teats, bottle brush, dummies, steriliser, breast pump, blankets, sheets, wraps, cot, baby car seat and baby monitor, the worker deposed to an expense of $83.34 per week or $1000 over a 12 week period. No supporting documentation was provided.

14. In summary, on the worker's evidence the household income is $450.09 per week and expenditure is $1052.22 per week, making a shortfall of $602.13 per week, assuming the worker is unable to get Centrelink benefits. On the worker's evidence, if the worker was able to get Centrelink benefits the household income would increase by $271.41 per week (for the worker) and increase by $145.55 (increase in parenting payment for the worker's partner), making a total income of $867.05, or a shortfall of $185.17 per week.

15. The worker provided various other supporting documentation, via Ms Dunn's affidavits, with little explanation as to what those documents showed. For example, the worker provided a copy of an ANZ bank statement for the period 20 July to 18 August 2009. The statement shows two deposits of $842 from the employer, which were the interim benefit payments agreed by consent. It shows one withdrawal at a liquor shop for $10, a withdrawal for $200 from the ANZ branch in Busselton and two withdrawals of $840 and $640 described as "Halls Head Central SC Halls Head WA". There is no explanation in relation to those two large withdrawals, nor is there any other evidence from the bank statement that the worker was drawing on his account to pay his living expenses during the period 20 July to 18 August 2009.

The Employer's Evidence

16. The employer relied on the affidavit of Rachael Helen Schaefer affirmed 13 October 2009, annexing Royal Darwin Hospital records, Peel Health Campus (WA) Emergency Department notes and various correspondence between the parties.

Worker's Submissions

17. Mr O'Loughlin, Counsel for the worker, pointed to the medical evidence, the reports of Drs Wright, Slinger, O'Conner and Spear, and submitted that whether the worker continues to suffer as a result of his right knee injury and continues to be incapacitated as a result of the same is a serious question to be tried. It was submitted that all Doctors agreed that the current complaints and restrictions arose from the original injury in May 2007. It was submitted that the worker has a strong case which was well beyond the "serious question to be tried" or "prima facie" test applicable to interlocutory injunctions and interim benefit applications.

18. In relation to the balance of convenience the worker submitted:

(a) Hardship - that on the affidavit material the worker is already suffering financial hardship and will continue to do so.

(b) Delay - there has been a slight delay in filing the original application seeking interim benefits while waiting to receive medical reports to support such application. There was also a delay in filing his application to the Work Health Court against the employer's decision to dispute ongoing liability of his claim. However, there was medical evidence from Dr Wright to the effect that the worker had been suffering from a serious psychiatric condition which would have negatively impacted on his ability to manage his affairs and instruct his solicitor at the time he was due to lodge the application in the Work Health Court after receiving notification of mediation. It is submitted that none of the delays would be considered as inexcusable delays.

(c) The amount of compensation at stake – it was submitted that the worker's agreed normal weekly earnings indexed to 2009 are $1828.27 gross entitling him to s 65 benefits of $1372.20 gross per week. It was submitted that the amount of compensation at stake was significant.

(d) Full Disclosure of all relevant circumstances – it was submitted that the worker had made full disclosure of all the relevant circumstances.

(e) The degree of any prejudice to the employer if the order is made – it was submitted that, given the strength of the medical evidence and lack of any current specialist opinion against the worker's claim, it was difficult to see how the employer could argue that the worker no longer suffered as a result of his work injury and was no longer incapacitated for employment.

The Employer's submissions

19. It was the employer's case that the worker had made a claim based on a work injury which occurred on 31 May 2007 and not in relation to any aggravation of the pre-existing knee condition arising out of his employment as a car detailer. It was further submitted that the worker was not incapacitated for work, he could have re-applied for his position with his employer but chose not to do so, rather he returned to work in his own business. It was submitted that the worker had the capacity to earn up to $1,000 gross per week as a crane driver, on the basis of vocational assessments which had been undertaken. In the alternative it was submitted that, if the worker is incapacitated for work, it is a result of a pre-existing psychiatric condition, which predates the worker's knee injury and developed independently of the knee injury.

20. In relation to the balance of convenience it was submitted:

(a) Hardship –There are no current Centrelink statements in relation to the worker to support his claims as to Centrelink benefits. The worker has

stated he is not in receipt of Centrelink payments but has not provided a statement corroborating that. It was submitted that the Centrelink document annexed to Mr Dunn's affidavit of 14 October 2009 suggests benefits were ceased because the worker's entitlement could not be established as opposed to him not being entitled. Further, it was submitted that the worker was receiving Centrelink benefits and interim benefits for a period (16 June to 6 July) and this has not been explained. Further, detailed bank statements have not been provided in relation to the worker and his partner. It was submitted that the one bank statement which was provided was only for a very short period of time and does not support a pattern of expenditure.

It was submitted that the baby bonus was a significant boost to the household income and there were no primary documents to allow the Court to properly assess this extra income.

In relation to the increased costs of moving and rent increases it was submitted that the amounts were only estimations and it was not clear how the figures were calculated.

In relation to the telephone expenses, the bill of $3453 had remained unpaid despite an allowance in the previous interim benefits payments.

In relation to the amount claimed to pay off debts, the same amount was claimed on the initial interim benefits application and the worker has not attempted to pay off the debts.

(b) Status Quo – it was submitted that the worker had been in receipt of interim benefits in the amount of $470 gross per week since approximately 16 June 2009 to 14 October 2009. The worker had not received weekly benefits from late April or May 2008 when his benefits were ceased. The worker had been receiving Centrelink benefits in May 2009. It was submitted that the worker had not been receiving any

income for the period June 2008 (the car detailing business) to March 2009 (the commencement of Centrelink benefits).

(c) Delay – it was submitted that there have been significant delays in the worker prosecuting his claim including: filing his application to the Work Health Court outside of time (over 1 month late), making the initial application for interim benefits on 28 May 2009 some 8 months after the application for substantive relief, and a delay responding to a request for further and better particulars which took some 5 months. It was submitted that the worker had not attempted to explain the delay in bringing the initial application for interim benefits despite deposing to struggling financially.

(d) Prejudice to the Employer/Ability to Repay – it was submitted that the worker has no ability to repay in the event that the employer was successful.

(e) Full and Frank Disclosure – it was submitted there had been less than full and frank disclosure by the worker, namely: insufficient Centrelink and bank statements and an insufficient explanation concerning recent hospital admissions and suicide attempts.

21. It was submitted that the balance of convenience does not lie with the worker given the volume of missing documentation, despite the worker being given a second chance by the Court to provide such documentation. It was submitted that the application should be dismissed. In the alternative it was submitted that, if the Court was inclined to grant the application, any award should be made on the worker's actual expenses and outgoings. In that respect it was submitted that an amount of $470 gross per week was reasonable.

Decision

22. On the basis of the evidence presented, particularly the medical reports of the four relevant Doctors, I am satisfied there is a serious question to be tried. The worker would appear to have an arguable case and reasonable prospects of success in proving that his injury was caused in the course of his employment and it is continuing.

23. In relation to the balance of convenience:

Hardship – the worker is currently living with his partner and they have recently had a child. He has deposed to financial hardship, and that may well be the case, but the most accurate way to assess that is to examine the actual household's incomings and outgoings.

The requirements to prove hardship are adequately set out in the reasons of Dr Lowndes in *McGuiness*:

> "Where a worker relies on hardship as a factor favouring the making of interim payments order, the he or she bears the onus of proving, on the balance of probabilities, that they will suffer hardship if an interim award is not made.
>
> Hardship needs to be sufficiently established. The Court must be provided with such evidence – documentary or otherwise – as is available which relates the whole of the worker's financial situation in terms of income and expenses. The Court is reliant on the worker to make full and frank disclosure of his or her financial situation so that the Court can be placed in a position to accurately and reliably assess the worker's needs – both present and future. Unless those things occur the Court is unable to reach any decision regarding the worker's level of hardship, as hardship may not in fact exist, or if it does it may vary in its intensity – it could be minimal, moderate or extreme".

In relation to the Centrelink benefits I note that the worker's partner has not sworn an affidavit as to her income. Notwithstanding that, the documentation which was provided supports evidence as to the worker's partner's income. In relation to the worker's present income, it would have been preferable to have a statement from Centrelink saying that he was no

longer in receipt of benefits. However one of the statements dated 23 September 2009 states "As your social security payments have stopped….", and I am satisfied that the worker is not currently in receipt of Centrelink benefits. I find that the household income is $450.09 per week.

In relation to the expense for rent I am not prepared to speculate on a possible future rent increase for the worker nor speculate on what removalists costs may be. In order to assess such future expenditure the Court should have been provided with supporting documents. I will therefore use the worker's current rent of $260 for the basis of my calculation for expenses.

In relation to water and electricity I am prepared to accept an expense of $33.45 ($7.50 + $25.95). I am not prepared to speculate on electricity price rises either. In relation to the revised telephone expense of $25 I am prepared to allow that expense on the basis that it is a reasonable amount in the circumstances, nothwithstanding there is no substantiating account. The amount claimed is significantly less than originally claimed by the worker. In that respect Dr Lowndes said in *McGuiness*:

> "It is recognised that certain items of expenditure such as food may not require substantiation provided they appear reasonable on the face of things, and having regard to the size of the household. It is accepted that many households are not in a position to produce documentary evidence of the amount spent on food per week. However, there may be other items of household expenditure that may require supporting evidence if they are to be accepted and factored in to the Court's assessment of the worker's level of hardship."

In relation to the expense for groceries I am prepared to allow the expense of $180 as being reasonable for two adults and possibly one infant child.

In relation the expense for car registration I am willing to find that $10.02 is reasonable. I note that the worker's partner's car registration was not included.

In relation to car expenses I note that the expenses claimed relate to tyres, machining of discs and brake pads. In my opinion these are not items which would normally be replaced on a frequent basis, and unlikely on a yearly basis. I am not satisfied that they are a legitimate expense which should be included in weekly expenses. Had the worker deposed to a yearly mechanical bill for service of his vehicle, with supporting receipts, I may have allowed that, but he did not.

In relation to medical expenses there is a wide range of material. Pharmacy receipts are *ad hoc*, the worker does not properly explain what his weekly medical expenses are and what is expected on a weekly basis. The worker must do more than simply attach receipts to his affidavit, he must explain the nature of the expense, why it is required and what future expenses are anticipated. I am not satisfied that there is any more than a $10 per week pharmacy expense. In relation to dental expenses, the worker has not explained whether such expenses are ongoing or have ceased. The dental work done dates from May to August 2009. I am not satisfied that such expenses are ongoing and therefore I cannot reliably and accurately assess such needs. The type of expenses do not fall within the category of continuing household expenses which may be reasonable on their face. The ambulance bills should be similarly treated as a debt. Further, there is no evidence of the need to regularly attend a general practitioner and if so how much it may cost.

In relation to the worker's debts it would seem that the household has amassed debts of up to $15 927. The worker has requested $100 per week to pay off such debts. I am willing to allow such an expense.

In relation to entertainment, the worker has requested an expense of $40 per week for dinner or movies. In my opinion $40 a week for such an expense would be reasonable given the worker's circumstances. As recognised in *McGuiness*, this is the sort of expense which is difficult to substantiate with documentary evidence.

The expense for clothing of $30 per week for two adults and one infant is reasonable, particularly given the purpose of the baby bonus, included in the household income, which is to assist in the costs of newborn children.

In relation to the hairdressers cost $5 per week is reasonable.

In relation to the general costs for a new baby, notwithstanding the lack of receipts, the amount of $80 is reasonable, particularly given the purpose of the baby bonus, included in the household income, which is to assist in the costs of newborn children.

In relation to the expense for miscellaneous, such as cigarettes and alcohol, the amount of $35 would be reasonable.

In relation to the purchase of baby equipment, notwithstanding the lack of receipts, the amount of $83.34 per week is reasonable, particularly given the purpose of the baby bonus, included in the household income, which is to assist in the costs of newborn children.

Thus the worker's expenses as accepted by the Court are as follows:

- Rent $260
- Water and Electricity $33.45
- Telephone $25
- Groceries $180
- Car Registration $10.02
- Petrol $45
- Medical/Pharmacy Expenses $10
- Debts $100
- Entertainment $40
- Clothing $30
- Hairdresser $5

- Costs for New Baby $80
- Miscellaneous $35
- Baby Equipment $83.34

Total Expenses $936.81 per week and the total income is $450.09 per week, making a shortfall of $486.72 per week.

Delay – as submitted by the worker there has been delay, however there is an explanation for the delay, and I do not find the delay a significant factor.

Full and Frank Disclosure – it is apparent the worker has endeavoured to be full and frank, however the documentation is lacking in a number of areas. It would be preferable to have full documentation outlining the worker's and his partner's income and expenditure, including full copies of Centrelink records and bank statements over the relevant period. Also, the manner in which evidence of expenditure is presented not entirely acceptable. It is not acceptable to simply attach various copies of receipts and invoices to affidavits without a detailed explanation. The nature of expenses should be explained fully such that the Court is able to make sense of such documents. Dental expenses and pharmacy expenses, as discussed above, are examples of expenses which could have been better explained.

The ability to re-pay the payments – the worker has little ability to repay the payments in the event his substantive application is unsuccessful.

Perception as to the strength of the worker's case – On the medical evidence the worker would appear to have a relatively good case, namely that he has suffers and continues to suffer an injury arising out of the course of his employment. There are counter allegations that his injury arose out of subsequent employment, or his mental state was a result of a number of factors, including a pre-existing condition, however those allegations are not borne out to a significant degree at this stage.

Amount of compensation at stake – little information was provided as to the amount of compensation at stake, however given the severity of the alleged injury (both to the knee and psychiatric) the amount of compensation at stake, even if it is for a fixed period of a few years, is likely to be significant.

The period of time which may elapse before the application is heard – the worker's proceeding is at a relatively early stage, a hearing of the proceeding would be at least 6-8 months away.

The status quo – the worker has not received s 65 benefits since April or May 2008 when such benefits were ceased. He was receiving Centrelink benefits for part of 2009, but had no apparent income between June 2008 and March 2009. The worker received interim benefits from 16 June 2009 to 14 October 2009.

24. Having weighed all of the above matters up, the balance of convenience barely favours the worker. I am not particularly satisfied with the worker's standard of disclosure, however I am satisfied on the general body of evidence, including the fact that the worker has recently has a new born child, that there will be financial hardship if an interim benefits order is not made. That may not have been the case if there had been no child. The other factors which weigh in the worker's favour are the strength of his case, supported by the medical reports, and the amount of compensation at stake.

25. I am of the view the worker is entitled to an amount of interim benefits which enables him to meet reasonable living expenses whilst actively pursuing his substantive application in the Court. In that respect the shortfall in household income amounts to $486.72. An amount of $548 gross per week is adequate to make good the shortfall. I would expect that, if the worker were to make a future application for interim benefits, that the deficiencies raised in this judgment would be addressed. In particular I

would expect to see proof of payment towards the substantial household debts and full disclosure of all financial records.

26. Therefore my orders are:

1. The worker is entitled to an interim payment of compensation.

2. The employer pay the worker interim benefits of $548 gross per week from 14 October 2009 to the date of this determination.

3. The employer pay the worker interim benefits of $548 gross per week for 12 weeks following the date of this determination.

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

Dated this 18th day of November 2009

_____

CRAIG SMYTH
ACTING JUDICIAL REGISTRAR