CITATION: *GARDNER v BORAL LTD* [2009] NTMC 043

PARTIES:	GEORGE TIPU GARDNER v BORAL LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	20726293
DELIVERED ON:	28 SEPTEMBER 2009
DELIVERED AT:	DARWIN
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JUDGMENT OF:	ACTING JUDICIAL REGISTRAR SMYTH

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

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
McGuiness v Chubb Security Holdings Australia (Unreported, Work Health Court, Dr Lowndes SM, 23 March 2006)
Baker v National Jet Systems [2006] NTMC 028
Atkins v A & B Welding [2007] NTMC 35
Farrell v Kardu Numida Inc (Unreported, Work Health Court, Fong Lim JR, 24 May 2000)

REPRESENTATION:

Counsel:

Plaintiff:	Mr Baker
Defendant:	Ms Tregear

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Hunt and Hunt

Judgment category classification:	B
Judgment ID number:	[2009] NTMC 043
Number of paragraphs:	35

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

No. 20726293

BETWEEN:

GEORGE TIPU GARDNER
Applicant/Worker

AND:

BORAL LTD
Respondent/Employer

REASONS FOR JUDGMENT

(Delivered 28 September 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 George Tipu Gardiner affirmed 1 November 2007, George Tipu Gardiner affirmed 23 July 2009, Cindy Anne Lynch sworn 27 July 2009 and Clifton Sydney Baker sworn 13 August 2009. The employer relied on the affidavit of Pamela Kay Tregear affirmed 5 August 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. If the test, as espoused by Mildren J, is the same as an interlocutory injunction then 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."

Balance of Convenience

5. 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 worked 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 brining the application for substantive relief and where the fault lies for that delay;
- The period of time which might elapse before the subtstative 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 Proceeding/s

6. The worker made an application to the Work Health Court on 1 October 2007. An application for interim payments of weekly compensation was first made on 14 November 2007 and such payments were ordered on 14 November 2007 at an amount of $880 nett per week for 12 weeks. Further, consent orders were made to pay interim benefits in the amount of $1002.80 gross per week for 12 weeks commencing on 6 February 2008.

7. A statement of claim was filed 7 March 2008 seeking payments of weekly benefits for total/partial incapacity from 27 August 2008 continuing, payment of medical expenses, interest and costs. The worker was a mobile plant operator for the employer and alleged he sustained an injury during the period up to and including the period of 30 May 2007 in the course of his employment. The injury claimed was reactive depression and development of arthritis and/or exacerbation of an arthritic condition. The injury allegedly resulted from a crush injury to his left elbow (a claim which had been accepted by the employer) and from harassment when he resumed work after a short period following recovery from that injury. The claim alleges the worker suffered stress, anxiety and arthritis arising from a number of incidents between himself and his superiors. The worker's claim was rejected on 27 August 2007.

8. A defence was filed on 7 April 2008, which denied reactive depression or that reactive depression did not lead to the arthritis, and otherwise generally denied the claim. The employer admitted that the worker suffered an injury

(the crush injury) on 25 September 2006 but denied harassment by its employees, or in the alternative pleaded reasonable administrative action.

9. By consent on 8 February 2008 the worker's interim benefits were continued at $1002.80 for 12 weeks commencing on 6 February 2008. By consent on 16 May 2008 the worker's interim benefits were continued at a rate of $1002.80 gross for 12 weeks commencing on 14 May 2008.

10. On 28 May 2008 the worker's proceeding was listed for hearing on 20 October 2008 for 5 days. On 30 July 2008 the worker's solicitor ceased to act. On 5 September 2008 the hearing date was vacated and by 24 September 2008 the worker had engaged new solicitors, a notice of appearance was filed on 25 September 2008.

11. A separate application to the Work Health Court was made on 21 August 2009. It relates to a claim made on 8 May 2009 which pertains to a left elbow injury, left shoulder injury and injuries resulting from harassment at work. The first injury occurred on 25 September 2006, the second on 4/5 April 2007 and the third during 2006 and 2007. That claim was rejected by the employer by notice of decision dated 16 June 2009 (and is now proceeding number 20928255). The second claim was brought because there were further alleged injuries not pleaded in the original statement of claim (in proceeding 20726293). That matter was subsequently adjourned pending medical reports and mediation. Mediation has recently occurred with no change. That matter has presently been adjourned to a directions conference on 7 October 2009. It is assumed that the second claim will be consolidated into the first and a consolidated statement of claim will be filed. On that basis, for the purposes of this application I also take into consideration relevant aspects of the second claim.

The Worker's Evidence

12. The worker relies on Mr Baker's affidavit, sworn 13 August 2009. Mr Baker's affidavit annexes a report from Dr Goodhand, a general practitioner,

dated 26 July 2009 but received by facsimile on 13 August 2008. In relation to his application generally, the worker relies on the factual matters recounted by Dr Goodland, which can be summarised as follows:

- On 25 September 2006 the worker was injured at work when a 200 kg metal plate fell on his left arm crushing it.

- On 27 September 2006 the worker was reviewed by Dr Giese, the company doctor, who considered he was fit to return to work on light duties.

- On 9 November 2006 he was given a final certificate with the advice that the nature of his injury was such that it may take up to 12-18 months to resolve.

- On the worker's return to work there were a number of incidents between him and his supervisors, alleged harassment, after which he was transferred to another work site in early 2007. Due to certain reasons, I assume not related to his claim, he was off work for a month until about the end of March 2007.

- On 4 or 5 April 2007 the worker wrenched his left shoulder whilst climbing into a machine at work. He took some medication and continued working. Following this injury he started to develop pain and swelling in other joints, in particular his left shoulder and arm, wrists, hands and eventually his hips, knee's, ankles and feet. He needed more time off work and has not worked since May 2007.

- The worker saw a rheumatologist on 11 July 2007 and a diagnosis of rheumatoid arthritis was confirmed and treated. However, he has not been able to return to work because of the disability associated with the arthritis and ongoing pain in his left shoulder, elbow pain and anxiety about ongoing harassment in the workplace.

- Dr Goodhand states that "it is evident that there is a relationship between the subsequent work stress created by the first (elbow) injury and the trauma from the second (shoulder) injury and the evolution/exacerbation of Mr Gardiner's previously undiagnosed Rheumatoid Arthritis".

- Dr Goodhand's report is somewhat consistent with an earlier report by Dr Hassall (annexed to the worker's affidavit of 11 November 2007) which states in part that, in relation to stressors in this case, "he seems to have a valid claim for aggravation or exacerbation of his rheumatoid arthritis".

- The worker also relies on his affidavit affirmed 23 July 2009. It comprises a medical certificate dated 5 May 2009 from Dr Goodhand, which relates to the left elbow pain as at 4 February 2009, and certifies him unfit from 4 February 2009 to 28 February 2009. It comprises a medical certificate dated 22 July 2009 from Dr Goodhand, which refers to an elbow injury, left shoulder injury and stress/anxiety. It certifies him unfit from 4 August 2009 to 4 February 2010. That is, he has been certified totally unfit for a 6 month period.

13. The worker's affidavits also depose to household income and expenditure. An affidavit was also sworn by Cindy Anne Lynch, the worker's spouse, deposing to household income and expenditure.

14. On the basis of the information contained in those two affidavits it would appear that the household income comprises:

- $427.60 per fortnight – the worker's Centrelink Sickness Allowance

- $150 per fortnight – a payment from a lodger named Koel

- $396.40 fortnight – the worker's spouse's Centrelink Newstart Allowance

15. Total household income on the above amounts to $974 per fortnight, or $487 per week.

16. Annexure CAL6 to the affidavit of Cindy Anne Lynch comprises an unofficial Westpac bank statement with no account name and with a balance of $123.56 (as at 16 July 2009). That bank statement shows Ms Lynch's Centrelink Newstart payments. It also shows Centrelink Family Allowance payments of $241.88 (on 17 June 2009) and $249.40 (on 15 July 2009). These payments are not explained by Ms Lynch, although it would appear they were conceded in submissions. Further, the statement is devoid of any bank account entries from 24 June to 6 July 2009. I note that a bank statement for the same account was provided as annexure GG-11 to the worker's affidavit of 1 November 2007 and Family Tax Benefits appear on that 2007 statement as well. Further, as is apparent from the worker's Centrelink payment paperwork (annexure GG2 of his affidavit affirmed 23 July 2009), and annexure GG-10 of his affidavit affirmed 1 November 2007, he holds a Commonwealth Bank account. No current statement from that Commonwealth Bank account was provided, although he had previously provided such a statement in his affidavit of November 2007.

17. In relation to household expenditure the worker deposes, in his affidavit of 23 July 2009, to the following re-current expenses:

- $100 per week for Rent
- $250 per week for groceries, vegetables and meat
- $60 per week child support obligation
- $35 per week pharmacy expenses
- $25 per week credit card repayment

18. The amount for rent is supported by the Westpac bank statement at annexure CAL6 of Ms Lynch's affidavit. The amount for groceries, vegetables and

meat is not supported by any specific documentation, however the amount would appear reasonable, if not a little low, for 3 adults (worker, spouse and lodger) and one teenager (the worker's spouse's son). There is no supporting documentation for the child support obligation, but the worker has a debt of $15,382.27 to the Child Support Agency as of 19 June 2009, and it is his sworn evidence that he is paying $60 per week. There is no supporting documentation for the pharmacy expense, but it is not unreasonable, given the nature of the injuries claimed. The credit card payment is supported by a document from the Commonwealth Bank.

19. In relation to other re-current household expenses there are no further specifics deposed by either the worker or Ms Lynch. In relation to electricity expenses, Ms Lynch's affidavit annexes a disconnection notice and bill for $640.74 dated 5 June 2009. She states that she borrowed $740 to pay the bill, but does not say from whom and on what terms she borrowed the money. She states that a disconnection fee is to be added to the next bill. Assuming the electricity bill is representative of the bills normally received it amounts to approximately $50 per week. The bill indicates that the previous bill (I assume for the previous quarter) was for approximately the same amount ($626.92). It is preferable that, in relation to bills issued quarterly, a number of bills should be provided to take into account seasonal fluctuations. In relation to telephone expenses I note that the worker's land line telephone was disconnected in September 2008 and has not been reconnected. The worker's affidavit of November 2007 annexes a telephone bill indicating telephone expenses in excess of approximately $125 per month (for August, September and October 2007), and the worker deposes to $20 per week for the telephone. Again, it would have been preferable to have more recent telephone bills for 2008 before the line was disconnected. However, assuming the telephone line is to be reconnected (which is why, I assume, the information has been put before me), an amount of $20 per week for telephone is reasonable.

20. In relation to one-off household expenses, evidence was that the household car needed repairs and was presently unroadworthy and unregistered. The annual registration for the car is $474.95. I was not given information in relation to how much it would cost to repair the car and I was not told whether it was the worker's intention to get the car repaired. I assume that to be so. Although the worker deposed, in his 2007 affidavit, that the car's running costs were $20 per week and petrol was $80 per week, there was no supporting evidence (ie. petrol receipts, insurance payments, mechanics bills). The household was also facing a $112 re-connection fee from Power and Water Corporation (as at 13 July 2009), a parking fine of $90 (as at 22 July 2009), a Telstra debt on the outstanding account of $99.02 (as at December 2008). Ms Lynch also has a debt to Centrelink of $500 and is paying it off at $22 per fortnight.

The Employer's Evidence

21. The employer relied on the affidavit of Pamela Kay Tregear affirmed 5 August 2009. That affidavit annexes a report of Dr Potter, Rheumatologist, dated 2 March 2009. Dr Potter's findings can be summarised as follows:

- The worker had a previous diagnosis of rheumatoid arthritis.
- Currently (as of 25 February 2009) inactive joint disease with no clinical deformity or activity of disease, no swollen joints. A reasonable assumption therefore is the previous diagnosis is that of him being in remission.
- The physical signs in musculoskeletal terms are nil. Symptoms relate to fluctuating inconsistent pain, particularly in the shoulders and hips, not clinically apparent today.
- The worker is fit for normal duties. There is no physical restriction, no physical limitation. Limitations therefore relate to constitutional, motivational and other factors, not objectively assessable herein.

- That stress in the workplace causing the condition he suffers from is speculation only.

- Since he has normal inflammatory markers, no joint swelling, apparently normal x-rays, no function loss, then the prognosis on the date seen 25.2.09 is that of recovery from the episode. That is not a permanent prognosis.

More Than One Determination of Interim Benefits

22. The circumstances of this matter are somewhat unusual. The worker has previously had a number of determinations of interim benefits. The first of those applications was contested, the others were by consent.

23. Section 107 of the Act relevantly provides:

> (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.

24. It was my understanding, on the submissions, that the worker relied on the evidence of financial hardship as outlined above to constitute evidence of undue hardship in order to satisfy s 107(6)(a), or in the alternative that such matters constituted exceptional circumstances. The aspect of undue hardship was examined by Fong Lim JR in *Baker v National Jet Systems* [2006] NTMC 028 at paragraphs 10-14:

> "When the court considers hardship to the Worker in the analysis of the balance of convenience it often concentrates on the financial hardship of the Worker however as his honour Mildren J states in Aherne's case (supra) at page 9:

"..where a 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 it 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….. Even if a worker is a millionaire this does not necessarily mean that the balance of convenience must be decided against him."

His honour indicated that hardship is a subjective thing and it depends on the worker's particular circumstances and expectations. 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.

The word "undue" suggests that the hardship must be of a more substantial nature than just mere hardship or misfortune. The Concise Oxford dictionary defines undue as:

"excessive, disproportionate, not suitable"

Stroud's Judicial dictionary of Words and Phrases 6th edition has 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)"

It is my view that 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."

25. The worker deposed that he had "reduced expenses to as much as possible because of our current financial situation. This has had a major effect on our standard of living". Although the present household income is applied to rent, food, pharmacy expenses and debts, it is clear that the worker is

without telephone, car and is apparently having difficulty finding the funds to pay the electricity bills. The latter are as much the necessities of life as the former. The worker's affidavit of 23 July 2009, deposing to household income, stands in contrast to his affidavit of 1 November 2007. It would appear that household income has been dramatically reduced. I therefore find that the worker would suffer undue hardship if another order were not made.

26. I understood the submissions made on behalf of the worker to argue that, should he fail to show "undue hardship", "exceptional circumstances" should be found in the alternative. That argument was not well developed, but from what I could discern it was inferred that the financial status of the worker could be considered as "exceptional circumstances" notwithstanding a failure to prove "undue hardship". As an aside that is unlikely to be correct. In circumstances where a worker fails to prove undue hardship, when focusing on financial hardship, it is unlikely the legislature intended the worker be given another chance by showing that his financial circumstances were otherwise exceptional. The exceptional circumstances refer to something else. In the case of *Atkins v A & B Welding* [2007] NTMC 35 at paragraph 35, this Court held 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."

27. In the normal course of events, if the worker has been successful in his or her previous application for an interim determination, and 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) of the Act (see *Baker v National Jet Systems* [2006] NTMC 028 at paragraph 9). That rationale is

founded on the assumption that, where a serious question to be tried has been established in a particular matter it is unlikely to change. Similarly where the balance of convenience has been determined, it is not necessary to duplicate that process unless circumstances have changed such that the balance has swung in favour of the employer, and it is the employer who normally needs prove that. For example, the worker may have been less than full and frank in recent disclosures, or alternatively had since failed to properly prosecute his claim, notwithstanding undue hardship has been proven.

28. I have held that the threshold of s 107(6) of the Act has been overcome. Normally, it would be sufficient to leave the matter there. However, this is not an ordinary matter. The serious question to be tried and balance of convenience were contested once and that was on 14 November 2007. After that, determinations were made by consent. However, I know nothing of the circumstances of the contested application, I was not referred to, nor can I locate on the public record, any reasons for that first decision. In my opinion, in these specific circumstances, notwithstanding that s 107(6) of the Act has been satisfied, I will re-examine the balance of convenience as it presently stands on the evidence which has been recently presented (and the serious question to be tried issue). In any event the employer submitted that the circumstances relating to the worker had changed since the last application and the matter should be reconsidered.

Determination

29. It is my opinion that there is a serious question to be tried. There is a clear conflict in the medical evidence of Dr Goodhand and Dr Potter. The issue of the worker's rheumatoid arthritis and any causal effect by harassment at the workplace, along with a determination of other subsequent injuries claimed, point to a serious question to be tried. The matter of arthritis caused by harassment was headed to hearing if the worker had not changed solicitors.

30. In relation to the balance of probability:

Hardship – the household income comprises (including all of his spouse's income) of $607.94 per week. The weekly re-current household expenditure, which have been accepted by the Court, (including a $11 per week Centrelink debt, $50 per week for electricity and $20 per week for telephone) comprises $551 per week. Thus, on the known weekly expenses there would appear to be a surplus of $56.94 per week.

The worker is also facing unspecified costs for the repair of the family car, car registration fee of $474.95, repayment of a $740 debt to pay the power bill, a parking fine of $90, a Telstra debt of $99.02. Assuming the car is repaired there will be running costs (ie. petrol) associated with the car, and although no recent information was provided in that respect there was evidence of prior running costs.

In relation to significant one off items of expenditure in *McGuiness*, Lowdnes SM stated:

> "It is my opinion that significant one off items of expenditure should be included in the calculation of expenses and treated as relevant to the issue of hardship if the worker can demonstrate, in all probability, that such expenses would not have occasioned hardship had payments continued to had the worked not been injured. If financial hardship and expense would, in all probability, have occurred notwithstanding the cessation of payments or the employer denying liability, then it is difficult to see why they should be considered by the Court, bearing in mind that the issue is hardship occasioned by the cessation of payments or denial of liability…. In discharging that burden, the worker is faced with a somewhat daunting task, which requires a level of detail that is missing in his application. In order to show that hardship in meeting one-off single expenses, such as motor vehicle repairs and the cost of surgery, would not have occurred had he continued to receive weekly benefits or had he not been injured, the worker would have to prove not only household income as at the date of cessation of payments but also household expenditure as at that time. It is also incumbent upon the worker to set out the nature of the single one-off expenses and to quantify them."

I have no direct evidence as to whether the one off expenses would not have occasioned hardship had liability not been denied. However, it is open to me to infer that defaults on utility accounts (such as power, telephone etc) brought about by failure to pay such accounts, are likely to have been caused by lack of financial means, which has arisen from a decreased household income ultimately as result of the alleged injury of the worker and denied liability. The maintenance of utilities, which are often considered essential for day to day living, are normally given priority over less important expenditure. Evidence of a difficulty in meeting utility bills, such that there is a threat that the utility may be cut off, is indicative of hardship. However, it is extremely difficult to make any finding in relation to the car repairs when there is no evidence as to the cost of such repairs. For example, if the car requires $10,000 repairs, then it would have been likely to occasion hardship regardless as to whether liability was denied.

The worker deposed to severe financial hardship in November 2007, and extreme hardship in July 2009. Yet there is little explanation how the worker was capable of meeting living expenses from August 2008 to present. Ms Lynch deposes that she has had to borrow $740 to meet the July 2009 power and water bill, and received a $500 advance from Centrelink to pay for a new windscreen and mechanical work on her car. There is no information as to how previous bills or household expenses, from August 2008, were paid.

Delay – the present application comes after the last application which was granted, by consent, on 20 May 2008 for the period 14 May 2008 to 6 August 2008. It has been over 12 months since interim payments have ceased. There is no sworn evidence from the worker to explain the delay, nor why an application was not made earlier. The only explanation given for the delay, in submissions by Mr Baker, was that the worker had changed solicitors in September 2008 and "had difficulty in bringing his case together". No further explanation was given. No explanation was given why he did not make a further application in August 2008 when the old

order expired. It would appear, not on evidence but on submissions, that on engagement of new legal representation a new claim was proposed, with the hope of consolidating it with the existing claim. The new claim was lodged in May 2009, liability was denied, mediation took place in August 2009. Joint proceedings was raised with the Court in late 2008, the procurement of further medical reports (such as the Potter and Goodhand reports referred to above) delaying matters into 2009. That is some explanation for the delay.

Full and Frank Disclosure – It is my opinion that the Court, would have been more ably assisted, if the worker had set out all necessary information, rather than have the court pick through various bits of the affidavit materials. There are issues with the worker's disclosure on the application. Ms Lynch's income for the Family Tax Benefit was not disclosed in her affidavit. I am not sure whether that was an oversight on part of those advising the worker, or an attempt to hide income. Given the payments are quite obviously discernable on an examination of the bank statement annexures attached to Ms Lynch's affidavit, I am prepared to give the worker the benefit of the doubt and assume an oversight. There is no proper explanation for the delay in bringing the application and how the worker has managed to make ends meet since interim payments were ceased, other than a statement that household income has been pared back significantly. Again, full and forthright disclosure of such matters would have assisted the court to ascertain the genuine hardship suffered. The Court is not overly assisted by general statements such as "we are in severe financial hardship" or "there has been a major effect on our standard of living". There is no information in relation to car repairs, whether such repairs are planned, and if so what the future running costs of the car would be.

The ability to re-pay the payments – I was not given evidence as to the worker's ability to repay any payments in event he was unsuccessful. He has significant debts to both the Commonwealth Bank and the Child Support Agency. I assume therefore that the worker has little, if any, ability to re-pay the interim payments. The worker, as far as I can tell from the

Centrelink documents, has no substantial assets. Ms Lynch's Centrelink paperwork discloses she has a 50% share in a lot of land, however she has no obligation to repay payments awarded to the worker.

Perception as to the strength of the workers case – as I understand the worker's claims (both his first and second claim) the major issue will be whether he has arthritis and whether it arose from the course of his employment. There will also be continuing issues regarding the on-going crush injury to the left elbow and the subsequent injury to his left shoulder. There are conflicting medical views as to his current medical state, notwithstanding whether arthritis can be caused by stressors or factors such as harassment in the workplace. In my view it will be a matter for the trial and evidence at trial, as amongst medical experts, as to whether the worker is suffering from the injuries as claimed and whether they were incurred in the course of employment. I rate the worker's prospects as fair on the basis of the evidence.

Amount of compensation at stake – I have no evidence as to the amount of compensation at stake, but assuming the worker proves that he remains incapacitated and has been so since May 2007, the amount of compensation could be significant.

The period of time which may elapse before the application is heard – the worker's second claim is presently working its way through court processes. There is likely to be a substratum of similar facts between the two cases, however the medical issues remain complex and further medical reports may be needed. It is unlikely to be a short period of time before the application is heard. I would estimate a period of 6-10 months before the application, in its consolidated form, could be heard. There is therefore some weight to be given to this factor.

The status quo – the worker ceased work in or about May 2007. The worker received interim payments from November 2007 to August 2008.

The worker has not been receiving interim payments for approximately 12 months.

31. Having weighed all of the above matters up, the balance of convenience continues to favour the worker.

32. In respect to the amount the worker should be awarded I note he seeks $1300 gross per week to "provide an amount which would enable me to have a reasonable standard of living and meet my liabilities". I was not provided with any information as to how an amount of $1300 gross would enable the worker to maintain a reasonable lifestyle. I was not told what effect, if any, an award would have on the worker's Centrelink payments. I note that the worker had previously been awarded an amount, including by consent, of $1002.80 gross per week. That amount was awarded with knowledge of the worker's spouses Centrelink payments. There was no evidence as to why the worker's reasonable cost of living had increased by $300 gross per week since payments were made in late 2008. There was no evidence that during the period of his previous payments he was suffering hardship. Since late 2008 his rent had not increased, and I infer the cost of food and other consumables would have only risen by the CPI, which is approximately 2.5%. Given that, in the exercise of my discretion to order interim payments I find that an amount of $1030 gross per week is an appropriate amount.

33. I am of the opinion that the worker is entitled to an interim payment of compensation. However, should the worker make a further interim payment application the Court will expect full and forthright disclosure of all relevant matters. It should not be a matter for the Court to dredge through four affidavits with numerous annexures, picking at relevant parts to support the worker's application. The worker's affidavit, and any related affidavit, should be specific enough so that it assists the Court without significant further inquiry. When deposing to affidavits, evidence as to the factors to be considered by the Court should be addressed. Household income should be itemised precisely, with each and every aspect of income particularised

and supported by appropriate documents. Similarly household expenditure should be itemised precisely, source documents should be provided. Sufficient receipts should be provided for food, pharmacy, petrol and household supplies. Where expenditure is in the nature of monthly or quarterly bills a representative sample of at least 3 of the past bills should be provided. If the household incurs a debt, the nature of the debt and the intended means of its payment should be specified. If household items, such as the car, require repair then the cost of repairs should be particularised. If utilities have been disconnected then the worker should depose as to the intention to reconnect the utility and depose to bill payments. If the worker, or his/her spouse, is in receipt of Centrelink benefits the Court should be informed as to any effect on those payments any interim determination may have. Further, if the worker requests an amount for a "reasonable standard" of living he should justify such a request with relevant background information. Such requirements are self evident through decisions of this Court, such as the case of *McGuiness* (supra).

34. Section 107(3)(a) of the Act gives a discretion to order commencement of payments within a period of 10 weeks before the determination is made. I have considered an appropriate time for that purpose and, in the circumstances of this matter and given the time taken to make this decision, an allowance of 4 weeks prior to the determination is appropriate. Section 107(3)(b) of the Act gives me discretion to order the end of payments within a period of 12 weeks after the determination is made. I have considered the appropriate time for that purpose and 12 weeks is appropriate.

35. My orders are therefore as follows:

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

2. The employer pay the worker interim benefits of $1030 gross per week for the 4 weeks prior to the date of this determination.

3. The employer pay the worker interim benefits of $1030 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 28th day of September 2009

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CRAIG SMYTH
ACTING JUDICIAL REGISTRAR