

CITATION: COLAWAY v JR SERVICES (NT) PTY LTD [2009] NTMC 059

PARTIES: APRIL COLAWAY
v
JR SERVICES (NT) PTY LTD

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 20932157

DELIVERED ON: 2 DECEMBER 2009

DELIVERED AT: DARWIN

HEARING DATE(s): 19 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

McGuinness v Chubb Security Holdings Australia (Unreported, Work Health Court, Dr Lowndes SM, 23 March 2006)

Phillips v G & K Akers Contracting Pty Ltd [2009] NTMC 040

Australian Broadcasting Corp v O'Neill (2006) 227 CLR 57

REPRESENTATION:

Counsel:

Worker: Ms Spurr
Employer: Ms McLean

Solicitors:

Worker: Halfpennys
Employer: CridlandsMB

Judgment category classification: B
Judgment ID number: [2009] NTMC 059
Number of paragraphs: 30

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

No. 20932157

BETWEEN:

APRIL COLAWAY
Applicant/Worker

AND:

JR SERVICES (NT) PTY LTD
Respondent/Employer

REASONS FOR JUDGMENT

(Delivered 2 DECEMBER 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 initially relied on the affidavits of April Colaway sworn 28 September 2009, Catherine Louise Spurr sworn 9 October 2009 and April Colaway sworn 23 October 2009. A further affidavit of April Colaway, sworn 20 November 2009, was relied upon following a further mention of the application before the Court. The employer relied on the affidavit of Candis Louise McLean affirmed 16 October 2009.
3. The law in respect to an application for interim benefits under the Act is fairly well settled (see *Wormald (Australia) Pty Ltd v Aherne* [1994] NTSC 54 per Mildren J).

Serious Question to be Tried

4. As I have previously observed, in *Phillips v G & K Akers Contracting Pty Ltd* [2009] NTMC 040, the phrase "a serious question to be tried" has been

the subject of recent High Court authority (see *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57). In demonstrating a serious question to be tried 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. In my opinion, 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

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 *McGuinness 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

6. The background to the worker's application, as deposed in her affidavits, can be summarised as follows:

- The worker was employed by the employer as a cleaner.
- On 11 December 2008 the worker was working at a training centre in Nhulunbuy undertaking cleaning duties.
- During the course of her duties as she carried rubbish bags downstairs she missed a step, fell and landed on her buttocks. She rested for 10 minutes before continuing work.
- On 12 December 2008 she attempted to report her injury to her manager but was told he was too busy. She attended to her duties but was in too much pain.
- Following her shift she told her supervisor that she had fallen, she told him she was Ok but sore.
- On 13 December 2008 the pain became worse, she telephoned her supervisor to tell him she could not work but his mobile phone was switched off. She then went to work with the intention of speaking with him, she again commenced duties but was in too much pain. She tried contacting the supervisor again without luck.

- On 14 December she tried to contact the supervisor without success. The worker then went to Gove Hospital and was admitted for observation until 17 December 2008.
- On 25 December 2008 the worker was still in pain, she attended Gove Hospital again, was admitted until 30 December 2008 and was then transferred to Royal Darwin Hospital (“RDH”) to 13 or 14 January 2009.
- The worker returned to Nhulunbuy but was airlifted and admitted to RDH from 25 February to 13 March 2008.
- The worker was again admitted to hospital on 3 April to 18 April 2009, and was again referred to RDH from 29 April to 3 March 2009.
- The worker was admitted to Gove Hospital on 3 May until 13 May 2009.
- The worker underwent surgery at Flinders Medical Centre for an L5/S1 Laminectomy and postero-lateral and interbody fusion. She was a patient at Flinders Medical Centre from 9 to 22 September, following which she returned to Nhulunbuy.

7. From the medical perspective the worker relied on a number of reports annexed to the affidavits of Catherine Louise Spurr and Candice Louise MacLean, which comprised:

- Medical imaging report of the lumbar spine dated 9 October 2003.
- Occupational Therapy Report by Carly Neller dated 25 October 2005.
- Physiotherapy Individual Client Assessment by Richard Newton dated 8 November 2005.
- Psychological report of Cathy Trotter dated 9 January 2006.

- Report of Dr Yang to Dr Belthikiotic dated 12 March 2008.
- Report of Dr Krisnan of Gove District Hospital dated 22 December 2008.
- Royal Darwin Hospital Medical Discharge Summary dated 8 January 2009.
- Royal Darwin Hospital Medical Discharge Summary dated 15 March 2009.
- Report of Dr Vrodos to Dr Howard dated 1 May 2009.
- Report of Dr Talbot dated 23 July 2009.
- Workers Compensation Medical Certificate dated 25 August 2009.
- Letter from Dr Davidson to Dr Burrow dated 24 February 2009.
- Letter from Dr Green to Ms Budds, TIO, dated 20 August 2009.

8. Of the medical reports the two most relevant reports are the Letter from Dr Davidson to Dr Burrow and the letter from Dr Green to Ms Budds. Dr Davidson, the worker's general practitioner, states in summary:

- The worker was reviewed 6 weeks ago in Royal Darwin Hospital after a fall at home.
- The worker has known lumbar and cervical disc disease.
- The worker has developed a left foot droop following increasing sensory neurological signs in the left leg as well as urinary incontinence with altered sensation on the left side of the perineum and buttock.

- The worker is also describing pain and increasing loss of power and coordination in her left upper arm and has visible fasciculation along the left upper limb.

9. Further, Dr Green's letter:

- Reviews a majority of the reports and documents referred to above.
- States that it is reasonable to conclude that the worker has experienced an aggravation of her premorbid, pre-injury lumbar symptoms and the development of left lower limb neuropathic pain following the events of 11 December 2008.

10. The worker's affidavits also depose to household income and expenditure. The worker presently resides with her estranged husband. For the purposes of her application I have been requested to consider her income and expenditure as the only relevant income.

11. On the basis of the evidence contained the worker's two affidavits it would appear that the worker's income comprises Centrelink benefits in the amount of \$594 per fortnight or \$297 per week.

12. In relation to household expenditure the worker deposes, in her affidavits, to the following expenses:

- \$75 per week for food (which she reimburses to her husband)
- \$7.50 per week for cleaning products (reimbursed to her husband)
- \$25 per week for petrol
- \$50 per week for pharmaceuticals
- \$30 per week for telephone
- \$23.07 for car registration and running costs

- \$19 for a loan
 - \$15 for other expenses
 - \$9 for union fees
 - \$69.23 for family money
 - \$24 for nebuliser and ventolin
13. Total expenses amount to \$346.80 per week, or a short fall of \$49.80 per week. It was the worker's evidence that the rent and utilities (water/power) were paid by her husband's employer. She deposed that she was on the wait list for Territory Housing and once she received housing from the Housing Commission she would have to pay rent. She had not been advised what the amount of rent might be. There was no evidence as to what the costs of electricity or water may be either.
14. In relation to the expenses claimed for food and cleaning products, it was the worker's evidence that she was unable to do the food shopping and her husband did that. It was her evidence that she would reimburse her husband approximately \$75 for the food and \$7.50 for cleaning products per week. The worker did not provide receipts for cleaning products on the basis as she did not keep receipts for them. In relation to food three receipts were produced namely, 12/8/09 for \$69.81;14/8/08 for \$15.48 and \$22/8/09 for \$67.98.
15. In relation to the claim for petrol two receipts were provided namely, 30/4/09 for \$40 and 17 May 2009 for \$50.01.
16. In relation to the expense for pharmaceuticals the worker provided two Gove pharmacy receipts, namely 20/3/09 for \$15.90 and 25/3/09 for \$34.75. The worker also provided a print out from Gove Pharmacy of a record of prescription medication purchases dating from 18 December 2008 to 12 August 2009.

17. In relation to the expense for the telephone, the worker provided one copy of a receipt for the recharge of a pre-paid optus mobile phone in the amount of \$100 dated 25 August 2009. There was no evidence that the worker maintained a fixed line telephone at her home.
18. In relation to the expense for car registration and running costs the worker provided a car registration certificate noting the registration costs for 6 months were \$313.60. The worker also deposed that the last service of her car, in April 2009, cost \$200. No receipt in relation to that service was provided nor evidence as to how often she expected the car to be serviced. The worker deposed that she was unaware as to whether her car may need new tyres. There was no other information as to the running costs of her car (insurance etc).
19. In relation to the expense for a loan, there was no information provided as to who the loan was with, how much the loan was for, when it would be expected to be paid or how it was being paid.
20. In relation to the expense for “any other expenses” there is no explanation what the other expenses were. There is a mowing receipt for \$15 for three mows between 6 and 31 July 2009 however there is little or no explanation provided.
21. In relation to the expense for union fees there was no information provided as to how these fees were being paid.
22. In relation to the expense for family money it was the worker’s evidence that she transferred money to her family in the Philippines. The worker stated that she sends \$300 per month to her family in the Philippines for her brother and sister’s family. The worker provided a copy of her Commonwealth Bank Account statement, for 1 April to 17 August 2009. The account is the one into which her Centrelink payments are paid. It shows a number of overseas transfers to Laguna and Quezon in the Philippines. It also shows EFTPOS debits and cash withdrawals. It is

assumed that the worker draws on the account for her claimed expenses, as no other source of income has been identified.

23. In relation to the expense for nebuliser and ventolin there were no express receipts provided however the purchase of a nebuliser and ventolin are noted on the Gove Pharmacy report.

The Worker's Further Evidence

24. In response to a request for further clarifying information from the Court the worker filed a further affidavit to the effect:

- Her pension is insufficient to cover all of her expenses and she needs to borrow money from her estranged husband in order to cover those expenses.
- The way in which she pays her husband back is through paying \$150 to his family in the Philippines. She pays a further \$150 to her family in the Philippines. That money is forwarded when her pension comes in on a fortnightly basis.
- She generally withdraws the balance of the money remaining in the account at either Westpac or Woolworths depending on whether she is able to get around. An updated bank statement is annexed to her affidavit.
- In relation to her pharmaceutical expenses the worker still requires all of the expenses specified in her affidavit sworn 28 September 2009. The \$50 specified in that affidavit does not include the nebuliser and ventolin. She deposes that if she does not have the money then she cannot obtain pharmaceuticals but still needs them. An updated Gove Pharmacy Report is annexed.
- In relation to the issue of whether a fall occurred at home, a further letter annexed letter from Dr Davidson explains that reference to a fall

at home was due his own interpretation rather than by reference to the hospital medical file.

The Employer's Evidence

25. The employer relied on the affidavit of Candice Louise MacLean and annexed medical report/letter.

Determination

26. It is the employer's case that there is no serious question to be tried. The employer points to the fact that liability is disputed on factual and medical grounds. The employer specifically refers to references in medical reports to a "fall at home" on 11 December 2008, as opposed to a fall at work as claimed by the worker. The employer also points to a reference in a hospital emergency department record dated 14 December 2008 referring to "no real injury but needed P forte when she got home". The employer points to a statement of Dr Green saying that the requirement for surgery performed by Dr Vrodos on 9 September 2009 was not specifically a consequence of the alleged injury and the worker would have come to surgery irrespective of the incident on 11 December 2008. The employer argues that even if it can be shown that the worker sustained an injury in the course of her employment, there is uncertainty which remains in regard to the consequences which would flow from that alleged injury.
27. It is the worker's case that she suffered an injury, as defined in the Act, in the course of her employment, namely an aggravation of a pre-existing injury. In relation to the reference to a fall at home, there is no explanation why Dr Davidson has referred to a fall at home in his letter of 24 February 2009. Similarly Dr Vrodos refers to a fall at home in his letter of 1 May 2009. However, such statements are inconsistent with other medical letters such as Dr Krishnan's letter to Dr Davidson dated 22 December 2008 where he mentions the worker presented with acute on chronic lower back pain post lifting something heavy at work. It is also

somewhat inconsistent with the Gove Hospital emergency department records of 14 December 2008 which state “Lifted rubbish downstairs (few journeys) on Friday night @ work”. The same notes refer to a phrase in contention “No neck injury” which the employer interprets as “No real injury”. I note Dr Green interprets those notes as referring to “no neck injury”. I note that other medical records refer to an incident at work. The Gove Hospital admission notes refer to “this episode: at work 12 Dec, lifted heavy trash bags, some soreness, worked Saturday, pain persisted and worsened overnight.....”. Further Royal Darwin Hospital medical discharge records refer to a “fall at work”. The matter is further clarified by Dr Davidson’s letter annexed to the worker’s affidavit of 20 November 2009.

28. It is my opinion that there is a serious question to be tried.

29. In relation to the balance of convenience:

Hardship – The worker deposes to being in extremely financial hardship as a result of only being in receipt of Centrelink payments. She states her pre-injury earnings were \$910.95 gross per week, and now she is on a Centrelink benefit paying \$545 per fortnight. Her disclosed expenditure of \$346.80 exceeds her income by \$74.30 per week.

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”.

Although the worker deposes to an income of \$545 per fortnight, her bank statements revealed, and Centrelink documents indicated, an income of approximately \$594 per fortnight, making a shortfall of \$49.80. Further, worker's most recent affidavit indicates that her Centrelink income would appear to have increased to \$651.60 a fortnight (\$325.80 per week), or a shortfall of \$21 per week on her deposed expenses.

In relation to the worker's expenses for food and cleaning products, I note the comments in *McGuiness* to the effect that “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”. Notwithstanding sparse documentation provided, I find that \$75 per week for food and \$7.50 per week for cleaning products not unreasonable for one person.

In relation to the worker's expenses for petrol, the expense of \$25 per week would appear to be reasonable, assuming she is physically capable of driving a car.

In relation to the worker's expenses for pharmacy products I note that only two receipts were provided, dated March 2009. Given the worker claims to spend \$50 or more on pharmacy items, I would have expected more receipts. The worker also provided a Gove Pharmacy Report (“the report”) showing prescription medications dispensed. In the absence of receipts I rely on that report as being an accurate representation of the worker's pharmacy purchases. In that regard there is some discrepancy between the worker's affidavit and the report. For example:

- (i) The worker says she takes Endone tablets (8 per day) which come in packets of 20 and cost \$5.30. The report shows she was dispensed

Endone on only two occasions 20 January 2009 120 tablets at \$5.30 and 23 February 2009 20 tablets at \$5.30. There has been no Endone dispensed since February 2009. If, as the worker says, she consumes Endone at approximately 3x20 tab packets per week, I would have expected to see it on the report.

- (ii) The worker says she takes Oxycontin (2 per day), that the packet lasts 10 days and costs \$6.30. The report says she was dispensed Oxycontin on 20 January, 30 January, 13 February, 23 February, 20 March, 21 May, 27 June and 12 August 2009. The last two prescriptions list the quantity as 60 tablets prescribed, one to be taken twice daily at a cost of \$5.30. Such a prescription would last 30 days not 10.
- (iii) The worker says she takes Laculose, it last about one week and costs \$16.30. There are no receipts for such purchases other than a hand written note on the report under “over the counter medications”. If purchased every week some documentary evidence of purchase should exist.
- (iv) The worker says she takes Gastrogel, which lasts about one week and costs \$6.80. The same comments apply as for Laculose.
- (v) The worker says she takes Lipex, lasts about one month and costs \$6.80. The report shows that she was dispensed Lipex on 18 December 2008, 20 January, 21 May and 28 July 2009 and costs \$8.25.
- (vi) The worker says she takes Karveside which lasts about one month and costs \$6.30. The report shows she was dispensed Karveside on 18 December 2008, 20 January, 21 May and 28 July 2009 and it cost \$5.30.

- (vii) The worker says she takes Lexapro which lasts about 1 month and costs \$8.70. The report shows she was dispensed Lexapro on 18 December 2008, 20 January, 9 May, 21 May, 3 June and 28 July 2009 and costs \$12.50.
- (viii) The worker says she also buys sorbalene cream for rashes which costs \$12.32 and needs to buy two per week. There was no supporting documentation provided.
- (ix) The worker also separately deposes to spending \$24 per week on nebuliser and ventolin. Those items are pharmaceutical products and there is no explanation why they have not been included with the general claim for pharmacy items. The report shows the worker was dispensed a ventolin nebuliser on 4 June and 28 July 2009 at a cost of \$6.80. It also shows she was dispensed Salbutamol (which is medication used in a ventolin inhaler) on 4 June and 28 July 2009, which cost \$6.50. There is no explanation how long such medication lasts, the two prescriptions are almost two months apart, but assuming they are used once per week, which would be considered high use, the cost of such items would be \$13.30 per week. There is no explanation where the expense for \$24 is derived.
- (x) There are other medications disclosed on the report which the worker does not mention in her affidavit, these include: Oxycondone, Clathryomycin, Somac, Panamax, Neurontil, Seretide, Simvastatin, Amitrptyline, Topiranate and Metoclopramide.
- (xi) The total expenditure on dispensed medicines from the Gove Pharmacy for June was \$165.20 and \$77.66 for July 2009.

The expense claim for pharmacy products comprises a considerable amount of the worker's weekly expenses, \$74 as claimed (including ventolin and nebuliser). There are significant discrepancies between what is claimed and what appears in the documentation. The worker has not been

dispensed Endone since February 2009, the last two prescriptions of Oxycontin should last 60 days not 10, there are no supporting receipts for Laculose, Gastrogel or Sorbelene Cream (all which are used weekly) and the expenses for a nebuliser and ventolin is inconsistent with the pharmacy report and appear higher than they should.

In relation to the further Gove Pharmacy Report, annexed to the worker's affidavit of 20 November 2009 and which covers the further period 25 August 2009 to 10 November 2009:

- (a) Endone, 20 tablets, was dispensed on 2 October 2009 for \$5.30.
- (b) Oxycontin, 20 tablets, was dispensed on 2 October 2009 for \$5.30.
- (c) No Lipex, Karveside or Lexapro were dispensed.
- (d) A ventolin inhaler was dispensed on 6 October 2009 for \$1.20. Ventolin Nebulisers were dispensed on 6 October and 10 November 2009 for \$1.50. The issue of the cost of ventolin and nebuliser was brought to the worker's attention but no further explanation was given as to how the figure of \$24 per week was calculated.
- (e) The total amount spent on dispensed pharmaceuticals in October was \$20.35.
- (f) No further receipts were provided for over the counter products.

In relation to the claim for the telephone expenses the worker has claimed \$30 per week. In support only one pre-paid mobile phone receipt has been provided. It would appear that such a pre-paid phone would need to be recharged every three or so weeks (assuming \$30 usage per week). The documentation is inadequate but \$30 per week seems barely reasonable.

In relation to the car running expenses, excluding petrol, the worker claims an expense of \$23.07. A registration certificate for 6 months at \$313.60 was provided, which equates to \$6.03 per week. The worker also deposes

to a car service on 27 April 2009 for \$200. That equates to \$3.84 per week, or \$7.70 assuming, generously, two services per year. Total car running costs would be \$13.73 per week. There is no explanation of any other running costs and why such costs would be \$23.07 as opposed to something less. Further there is no supporting documentation for the car's service and the worker's bank records do not show a debit of \$200 on 27 April 2009.

The worker discloses a \$19 per week debt. There is no supporting information as to who the debt is owed to, how much the debt is for or when the debt may be paid off.

The worker claims any other expenses as \$15 per week but no explanation is given. A receipt for garden mowing is provided, by an unknown person, as three mows for \$15. It is not clear whether this is the \$15 referred to.

The worker claims payment of union fees at \$9 per week. There is no supporting documentation on how this is paid. The worker's bank statements, indicating her only source of income, and from which her expenses are paid, do not show periodic deductions for union fees.

The worker claims expenses of \$69.23 per week to transfer money to her family in the Philippines. The money is transferred from the worker's bank account. The worker's husband also deposits money into that account for transfer to his relatives. It is a matter therefore of ascertaining what money is deposited and transferred by the husband and removing those from the calculations. The worker deposed that her husband deposits money from the post office into the account. There are deposits of \$730 from her husband from 1 April to 17 August 2009. It is assumed that only this money was transferred to the worker's husband's family (ie. that the worker's money was not being transferred to the husband's family). Any other money above \$730 I assume was transferred to the worker's family, as the worker states she only transfers money to her family. Over the period 1 June to 12 August 2009 approximately \$3763.26 was transferred

to the Philippines by the worker (including transfer fees). During that period \$330 was deposited into the account by her husband. That would mean that \$3433.26 was transferred by the worker to her family over a 73 day period. That equates to an average of \$47.03 per day or an average of \$329.22 per week. There is therefore a considerable and unexplained discrepancy between what the worker says and what the bank records disclose.

Further in relation to the bank records, the worker's sole income is deposited into her bank account. It is therefore assumed, in the absence of evidence to the contrary, that she would draw upon her bank account to pay her expenses, such as food (which she reimburses her husband for), pharmacy expenses, petrol etc. The bank records for the period 1 April to 12 August 2009 the following withdrawals only:

- 29 April 2009 \$9 Woolworths Gove
- 6 May 2009 \$140 Westpac ATM
- 17 June 2009 \$50 Woolworths Gove
- 18 June 2009 \$70 Westpac ATM
- 2 July 2009 \$100 Westpac ATM
- 14 July 2009 \$103.98 Woolworths Gove
- 28 July 2009 \$130 Westpac ATM

In June to July, a period in which the worker was not in hospital, only \$453.98 was withdrawn from her account (other than bank transfers to the Philippines). That equates to \$43.53 a week on average withdrawn from the account. There is no explanation from the worker why, if she is required to spend at least \$75 per week in food, \$7.50 cleaning products, \$75 per week in pharmacy expenses, \$19 for a loan, \$30 per week for telephone and \$25 in petrol (totalling at least \$230 per week), where this

money was being withdrawn from. On the face of the worker's bank records there does not appear to be money being withdrawn from her account which coincides with what she says she requires to maintain a reasonable standard of living.

In response to the above issues the worker provided more recent bank records annexed to her further affidavit of 20 November 2009. Those records disclose that: for the period 6 October to 20 October 2009 the worker was paid a \$798.64 pension (there is no explanation why this is higher than the \$545 or \$594 originally deposited to), \$767.43 was transferred to the Philippines, \$50 was spent at Woolworths on 7 October 2009 and \$14.06 on 16 October 2009. For the period 20 October 2009 to 3 November 2009 the worker was paid a pension of \$651.60 (again greater than previous amounts deposited to), there were deposits of \$400 and \$300 on 20 October and 27 October 2009 presumably by the worker's husband, there were withdrawals of \$887.21 to the Philippines and withdrawals of \$131.72 and \$89.82 at Woolworths on 21 October and 22 October 2009. On 3 November 2009 there was a cash withdrawal of \$640 from an ATM.

The worker states, in her affidavit of 20 November 2009, that she borrows money from her husband because her pension is insufficient to pay her expenses. She states that part of the way she pays that back is by paying \$150 to her family and paying \$150 to his family when her pension comes in. Her pension is paid fortnightly. A payment of \$150 per fortnight is consistent with the worker's previous evidence that she pays \$69.23 weekly to her family. However, evidence as to borrowing money from the worker's husband has come very late in the process, notwithstanding that she has had the full opportunity to clarify the financial relationship between her and her husband. On the worker's evidence as it now stands, she pays \$150 per fortnight to her family in the Philippines, and \$150 per fortnight to her husband's family in the Philippines. That is a total of \$300 per fortnight or \$150 per week being transferred to the Philippines. That amount still does not correspond to what is indicated by the bank

statements. The worker's previous bank statements show in excess of \$300 per week being transferred to the Philippines. The worker's more recent bank statements show on average approximately \$238 per week or \$477 per fortnight transferred to the Philippines over a 4 week period from 6 October to 3 November 2009.

The Court has concerns as to the legitimacy of the expense of money being transferred to family in the Philippines. There has been no substantial evidence from the worker as to the precise nature of the family to whom money is being transferred, other than they are the worker's brother and sister's family and that if she does not send money they will not have enough to live on. In my view substantially more evidence would be required in order for the Court to accept expenses of that nature.

However, if for the sake of argument the Court was willing to accept the substantiated expenses of the worker, they would be as follows, per week:

- \$75 for food
- \$7.50 for cleaning products
- \$25 for petrol
- \$50 for pharmacy expenses
- \$13.30 for ventolin and nebuliser
- \$30 for telephone
- \$13.73 for car running expenses
- \$69.23 for family in the Philippines

That amounts to expenses of \$283.76 per week. The worker currently receives \$651 per fortnight, or \$325.50 per week. On the accepted expenses and income, the worker is in surplus by \$41.74 per week.

On the basis of the foregoing I am not reasonably satisfied that the worker is suffering hardship, or would suffer hardship, if she was not granted interim benefits. First, there would appear to be a surplus in the worker's expenditure. Secondly, there are significant discrepancies in the worker's evidence relating to expenses for pharmacy items, car maintenance, union fees, other expenses, money transfers to relatives overseas and expenditure from her accounts. The fact that she has borne these expenses herself, or will continue to bear these expenses, is not demonstrated by the evidence. However, as Mildren J stated in *Wormald v Ahern* it is not necessarily the case that an interim award cannot be made in the absence of proof of hardship to the worker, as there are many factors to be considered in deciding where the balance of convenience lies. However, hardship is generally a very important fact in the exercise of the discretionary relief.

Delay – The injury is alleged to have occurred on 11 December 2008. The claim for compensation was made on 2 June 2009, a period of almost six months following the alleged injury. The application to the Work Health Court was filed on 22 September 2009, a period of over 9 months following the alleged injury. The interim benefits application was brought on 29 September 2009 some ten months after the injury.

The employer submits that the delay in making the claim is not explained and has prejudiced the employer from making proper investigations at an early stage. The worker submits that she was in and out of hospital in Nhulunbuy and Gove for a considerable part of the first half of 2009 which goes some way to explaining the delay in filing a claim and bringing a proceeding. There is no evidence as to when she sought legal advice or explanation as to why she did not lodge a claim earlier. However, the worker points to the fact that she attempted to alert her supervisor of her injury shortly after the injury happened.

The worker was in and out of hospital for parts of the first half of 2009 but there is no good explanation as to why she did not file a claim for

compensation until June 2009. It would appear that the worker had the wherewithal to apply for Centrelink benefits soon after the alleged injury. Although the prejudice argument was not fully developed, I would expect that the employer would face some degree of prejudice by not being informed of the claim for some 6 or 7 after the alleged injury.

There has been some delay but I do not think the delay is significant.

The ability to re-pay the payments – the worker deposes to very little in the way of assets, approximately \$2950 in personal property. There appears to be little to no ability to re-pay the payments.

Perception as to the strength of the workers case – the proceeding is at a very early stage, pleadings have yet to be filed and the issues between the parties are yet to be fully developed. There are unresolved questions in regard to what happened at the workplace on 11 December 2008, what the worker told medical staff, and the effect of her significant pre-existing injury on her claim. On the evidence available the worker would seem to have a reasonable chance of proving an injury (being an aggravation of a pre-existing injury) occurred during the course of her employment. However, what flows from that injury in terms of compensation is likely to be more problematic. As Dr Green stated, the surgery that worker had in September 2009, would have been required regardless of the injury at the workplace. Issues such as whether the injury was causative of her present and on-going incapacity will call for further medical evidence.

Amount of compensation at stake – it is not known what the amount of compensation at stake is, and the matter would be complicated by the worker's pre-existing conditions and on-going incapacity.

The period of time which may elapse before the application is heard – given the worker's application has only recently been commenced, a hearing of the worker's application would likely be some time off (optimistically 12 months).

The status quo – the liability for the injury was deferred by the employer. The employer submitted that the worker possibly received some weekly benefits between the time the claim was lodged on 2 June 2009 until the date liability was denied on 11 August 2009. Although there was no evidence of such payments being made. The worker’s bank statements disclose no such payments, and the worker had been receiving Centrelink benefits since April 2008, through June and August. The status quo would appear to be the worker receiving Centrelink benefits and no weekly benefits.

Having weighed all of the above matters up, the balance of convenience lies with the employer. Primarily, the worker has failed to sufficiently establish hardship. There are significant discrepancies in the worker’s evidence as to her expenses when compared to her bank statements and other records and there is inadequate supporting documentation. I am not satisfied there has been full and frank disclosure. Matters such as her ability to re-pay the payments also weigh against her application. Although other factors such as the time to hearing of the substantive application and the perceived strength of the worker’s case weigh in her favour, they are not sufficient to swing the pendulum away from the employer.

30. My orders are therefore as follows:

1. The worker’s application for interim benefits is dismissed.
2. The costs of this application be costs in the cause.

Dated this 2nd day of December 2009

CRAIG SMYTH
ACTING JUDICIAL REGISTRAR