CITATION: *Franco Carnesi v Austop Security Pty Ltd* [2011] NTMC 010

PARTIES:	FRANCO CARNESI
	V
	AUSTOP SECURITY PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Interlocutory
FILE NO(s):	21021674
DELIVERED ON:	4 April 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	28 March 2011
JUDGMENT OF:	J Johnson JR

CATCHWORDS:

WORKERS REHABILITATION AND COMPENSATION ACT - INTERIM DETERMINATION - SECTION 107(6)(a) – INTERPRETATION OF "UNDUE HARDSHIP"

REPRESENTATION:

Counsel:

Worker:	Mr Spazzapan
Employer:	Mr Taylor

Solicitors:

Worker:	Ward Keller
Employer:	Minter Ellison

Judgment category classification:	C
Judgment ID number:	[2011] NTMC 010
Number of paragraphs:	47

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

No. 21021674

BETWEEN:

FRANCO CARNESI
Worker

AND:

AUSTOP SECURITY PTY LTD
Employer

REASONS FOR JUDGMENT

(Delivered 4 April 2011)

Mr J JOHNSON JR:

1. It is "accepted practice"[1] in the Work Health Court "that 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"[2].

2. This is the fourth successive application by the worker in the proceeding proper for an interim determination and, in the interests of brevity, I will focus in these reasons on the only real issue in contention between the parties viz: whether the worker will "suffer undue hardship" if a further interim determination is not made. I do so on the basis of the parties implicitly conceding by their prior conduct that the elements of an

[1] *Day v Yuendumu Social Club Inc & Anor* [2010] NTSC 07

[2] *Wormald International (Aust) Pty Ltd v Aherne* [1994] NTSC 59 at par 10

interlocutory injunction have been made out; the worker having explicitly disavowed reliance upon section 107(6)(b); and the employer confining its submissions to section 107(6)(a) of the Act.

Facts and Submissions

3. The worker was injured in the course of his employment on 28 December 2003 and liability for that injury was accepted by the employer pursuant to the Act. In May 2010 the worker was issued with a Notice of Decision and Rights of Appeal cancelling payments of weekly benefits of compensation. That Notice was based on 2009 expert medical opinion of Drs David David, David Millons and David Gorman, and a worksite evaluation report of the Recovre Group.

4. At the time of the worker's initial application for an interim determination on 25 June 2010 he was certified by Consultant Psychiatrist McLaren as being fit for a "Graded return to work, light duties, alternative setting", with the notation "not fit for full time duty".

5. The 25 June application resulted in Consent Orders being entered for the employer to pay the worker interim benefits of compensation for the period from 17 June 2010 to 30 September 2010 in the amount of $548.31 gross per week. The worker avers in that application to 75 percent of his normal weekly earnings ("NWEs") being $1,111.80 gross per week in 2010 and to receiving $974.00 net per week into his Bank account prior to the cessation of benefits. I understand there to be some dispute as to the amount of NWEs but I am not told the details. In the event, in that initial 25 June 2010 application, and the two subsequent applications which were also by consent, the parties appeared content to settle for an interim determination in the amount of $548.31 gross per week.

6. As I have indicated above, two further applications for an interim determination followed the worker's initial application and, by consent,

these resulted in the worker continuing to be paid interim weekly benefits up to 7 March 2011.

7. This current application therefore seeks a further interim determination for the 12 week period from 7 March 2011 to 30 May 2011 in the amount of $591.96 gross per week (to reflect 2011 indexation) and, on this occasion, is opposed by the employer on grounds that the worker will not "suffer undue hardship" if the further determination is not made.

8. The worker's most recent medical certificate provided by his General Practitioner certifies him unfit for any duties from 1 March 2011 to 1 June 2011 with a diagnosis of "Atypical facial pain after fascial (sic) injury, PTSD and depression & anxiety".

9. At the end of 2010 the worker's spouse accepted an offer by her employer to transfer to Gippsland in Victoria on the same salary she was receiving in Darwin ($45,000 per annum inclusive of vehicle and telephone allowances). The cost of that transfer was borne by the worker and his wife, and the worker deposes to the cost of transporting their household goods and vehicles to Victoria to be $12,798.00.

10. Counsel for the worker, Mr Spazzapan, points out that the weekly household expenses of the worker deposed to in the four separate applications for an interim determination which he has so far made amounts to an average of approximately $1,700 per week ie, between $350 and $400 per week in excess of the couples joint household weekly income. That shortfall, it appears, has been met by credit card debt and reliance upon a payment for permanent impairment.

11. In terms of weekly household expenditure, a number of items bear specific mention. Firstly, the worker deposes to his wife's "personal and work related expenses" to be $500.00 per week. On some measures, that level of weekly expenditure would appear to be excessive. However, in the work

with her employer, the worker's spouse receives regular "commissions", and I understand that to mean that in her role as an Accounts Manager she is required to meet with clients on a regular basis so that particular accounts are maintained or grown and that the commissions she receives are a reflection of her performance in that task.

12. Secondly, the worker has been prescribed human growth hormone treatment by a Dr Julie Epstein which I understand to involve injections of testosterone at a current cost of $175.00 per week plus a courier fee of $20.00 per week. The cost of this treatment is, I am informed by Mr Spazzapan, one of the issues in dispute in the worker's application proper before the Work Health Court.

13. Thirdly, in September 2010 the worker was awarded compensation for permanent impairment (section 71 of the Act) of $40,787.76. I am not told the detail but I understand there may be a further permanent impairment assessment on foot which is in dispute between the parties.

14. Nothing else in the worker's evidence of weekly household expenditure is remarkable and, albeit that the couple run and maintain 2 vehicles and 2 mobile telephones, in the scheme of things these do not incur disproportionate expense in terms of overall weekly expenditure.

15. Mr Spazzapan urges that the worker's joint household income and expenditure is, like many Australian families, based on living from week to week with credit card debt underpinning a relatively utilitarian lifestyle, albeit in affluent Australian terms. Under those circumstances, it is argued, the worker would "suffer undue hardship" if a further determination were not to be made.

16. Counsel for the employer, Mr Taylor, focused to a large extent on scrutiny of the transaction records of the individual and joint bank accounts of the worker and his partner for the period from 1 December 2010 to 22 February

2011 annexed to the worker's affidavit sworn 3 March 2011. Through that scrutiny, and by pointing largely to expenditure of the worker's spouse on what were referred to as "luxury" items, the employer alleged that, far from being "frugal" in his expenditure, the worker was "free-spending" and "spending on luxuries".

17. Examples of such expenditure incurred by the worker's spouse which were highlighted included items such as hairdressing; jewellery purchases; gym membership; clothing; furniture; other personal discretionary expenditure; significant expenditure on a shopping visit to Melbourne city in February 2011; and a number of relatively large cash withdrawals.

18. This is a clear demonstration, says the employer, that the worker is not and will not "suffer undue hardship" if a further interim determination is not made. Far from "living week to week" and having to "rein in" or to be "frugal" in expenditure, the worker is expending joint household income on luxuries and a further interim determination should not be "a mere handout for the sake of it".

19. Further, the employer suggested that the worker was not being forthright with the Court as the figures in his affidavit evidence appeared to show expenditure in excess of disclosed income and there was no information to support rental or bond payments, or where they were being directed.

20. This was further evidenced, says the employer, by the last minute affidavit evidence of the worker's partner. That evidence averred to the worker's partner having made "an error" in a previous affidavit by stating her annual income as $48,000 gross per annum when it is was actually $45,000 gross per annum inclusive of vehicle allowance and phone allowance, but that she had neglected to include commissions which she had received in January and March 2011. In the event, she finally deposed her net income in the period between 16 January 2011 and 15 March 2011 (a period of 8.6 weeks as she is paid monthly) to be $7,460.96 net which is $867.55 per week. From the

bank records it is apparent that the worker was receiving $489.31 net per week in interim benefits as a result of the most recent consent interim determination. Thus, net household income would approximate $867 net per week if a further interim determination were not to be made, and $1,400 net per week (allowing for a slight increase as a result of 2011 indexation) if it were to be made.

"Undue Hardship"

21. Sections 107(1) and (3) of the *Workers Rehabilitation and Compensation Act* provide that the Court may make an initial interim determination of a parties entitlement to compensation for a specified initial period, and section 107(5) allows for the making of more than one interim determination. However, section 107(6) requires that, an initial determination having been made, any further determination can only be made if the worker, (a) "would suffer undue hardship if the further determination were not made", or (b) "the circumstances are otherwise exceptional". Whilst this is the fourth application by the worker for an interim determination, the initial and further 2 determinations that have already been made were made by consent and, as a result, the issue of "undue hardship" has not previously come before the Court.

22. The case law is replete with dictionary definitions and discourse on the meaning and application of the term "undue hardship" and I was referred to one of those by Mr Taylor[3].

23. However, it seems to me that, within the overall context of the Act, the term "undue hardship" cannot and should not be interpreted in isolation or in absolute terms. I say that because:

[3] *Jelley v Holt* [2007] NTMC 057

> [T]he context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.[4]

24. An earlier English case addresses the same issue in this way[5]:

> In the present case, if I might respectfully make a criticism of the learned judge's method of approach, I think he attributed too much force to what I may call the abstract or unconditioned meaning of the word 'representation'. ... The real question which we have to decide is: What does the word mean in the context in which we find it here, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy?

25. In *Words and Phrases Legally Defined*[6] the term "undue" is addressed by reference to a number of Canadian cases and opinion that:

> "Undue" and "unduly" are not absolute terms whose meaning is self-evident. Their use pre-supposes the existence of a rule or standard defining what is "due". Their interpretation does not appear to me to be assisted by substituting the adjectives "improper", "inordinate", "excessive", "oppressive", or "wrong", or the corresponding adverbs, in the absence of a statement as to what, in this connection, is proper, ordinate, permissible or right.

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[4] Per Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 39

[5] *Re Bidie* [1948] 2 All ER 995, at page 998 per Lord *Greene* M.R.

[6] LexisNexis Butterworth, 4th Edition, Volume 2, at 1215

> The proper approach to determining if something is "undue", then, is a contextual one. Undue-ness must be defined in light of the aim of the relevant enactment. It can be useful to assess the consequences or effect if the undue thing is allowed to remain in place.
>
> The Supreme Court has also recognised that the term implies a requirement to balance the interests of the various parties. In a case dealing with whether an employer had accommodated an employee's right to exercise his religious beliefs up to the point of undue hardship, Wilson J, writing for the majority, found it helpful to list some of the factors relevant to such an appraisal. She concluded by stating: "This list is not intended to be exhaustive and the results which will be obtained from a balancing of these factors against the right of the employee to be free of discrimination will necessarily vary from case to case".

26. Looked at in this way, it is worth remembering that an injury is, by definition, not visited upon a worker by choice (section 57 of the Act). The statutory scheme of the *Workers Rehabilitation and Compensation Act* is first and foremost directed to "workers' rehabilitation and compensation" and there is nothing inherent in that focus suggestive of a worker being manifestly poorer because of injury; other of course than by the mandatory 25% reduction in weekly benefits 26 weeks post injury (section 65(1)) and, perhaps, the section 65(2)b)(ii) deeming provision. Patently, if an employer denies liability ab initio, or exercises its power to reduce or terminate weekly benefits of compensation subsequently, an injured worker will almost inevitably suffer financial hardship and that, arguably, is the foremost reason why provision for an interim determination was provided by the legislature.

27. True it as that the scheme of the Act is by its nature an integral part of our adversarial system of justice, and disputes will arise between the parties in the normal course of events. But again, disputes in the context of a beneficial worker's rehabilitation and compensation scheme do not necessarily dictate that an injured worker should suffer financial hardship as a result. Subject to the elements supportive of an interlocutory injunction having been met, section 107 essentially guards that principle.

28. Thus, it may be argued, in the overall context and objects of the Act, section 107(6)(a), with its attendant notion of "undue hardship", is but recognition by the legislature of the circumstance postulated in *Ahern*[7] whereby "Even if the worker is a millionaire, this does not necessarily mean that the balance of convenience must be decided against him".

29. A related issue is the circumstance where an unemployed worker who has had benefits denied, reduced or terminated has a partner who generates a separate income from paid employment. The question then arises as to whether or not the income of the partner should be taken into account in assessing prospective undue hardship to the worker. Logic would have it that in such assessment household income as a whole ought be taken into account, but does that mean that by force of such circumstance a worker's employed partner must also be placed in a position of undue hardship? The answer to that question will, of course, depend on the particular circumstances of each case, but I do not think it can fairly be said that the scheme of the Act is to impose such a burden on a person not a party to the litigation.

30. Finally, I note that the requirement of section 107(6)(a) is prospective in the sense that it does not necessarily require a worker to be suffering undue hardship at the time the application for a further determination is made; rather, it points consideration to whether a worker will suffer undue

[7] *Supra*, at par 10

hardship if a *further* determination is not made. Whilst that may appear to be a fine distinction, it does serve to provide further context to the evidentiary onus upon the worker.

Findings

31. It is prudent here to remind myself that the duty of the Court is to apply section 107(6)(a) of the Act in accordance with its terms. However, I should also be mindful of the fact, and I find, that the conceptual notion of a worker "suffering undue hardship" should not be defined in absolute terms. The proper approach to determining if hardship is "undue" is a contextual one and it must be defined in light of the aim of the relevant enactment.

32. To aid in that task, I agree that it is "helpful to list some of the factors relevant to such an appraisal" (paragraph 25 above). These might include the circumstances where, if a further determination were not to be made, a worker would lack the capacity to:

- Finance any recommended medical and allied health professional services consistent with treatment and rehabilitation, including medication, therapeutic healing, domestic assistance, and retraining;
- Maintain the essentials of life such as food, accommodation, and access to medical and dental services;
- Maintain a standard of living not manifestly dissimilar to that enjoyed pre-injury including personal needs, transport, entertainment, standard of clothing and the like; and
- Service debt repayment commitments entered into pre-injury.

33. Further factors applicable to the circumstances of this particular case might include consideration of:

- Spousal income and its contribution to total household income; and
- One-off lump sum payments received by the worker.

34. The balancing factors from the employer's perspective if a further determination were to be made might include:
    - Evidence of dishonest intent – ie, a lack of truthfulness or disclosure, feigning symptoms of loss of earning capacity, and the like;
    - Prejudice, particularly as that applies to capacity to recoup interim payments of benefits if the Court was to find against the worker in the proceeding proper; and
    - The balance of convenience in the broader sense of interruption to business efficacy.

35. These factors must, of course, come with the usual caveat that they are "not intended to be exhaustive and the results which will be obtained from a balancing of [them] will necessarily vary from case to case" (paragraph 25 above).

36. Firstly, in relation to the balancing factors for the worker, if a further interim determination were to be made joint household income would be approaching $1,400 per week, and there would be little doubt as to the worker's capacity to meet his commitments in terms of the essentials of life, standard of living, and debt repayment. In fact, the employer would have it go further than that, in the sense that the worker's spouse would be able to continue to afford "luxury" expenditure. On the other hand, if a further interim determination were not to be made, joint household income would drop to $867 net per week. If that were to be the case I have little doubt that, whilst the couple would be able to maintain the essentials of life, they would lose most of the capacity to maintain a standard of living not manifestly dissimilar to that enjoyed pre-injury. Even allowing for the most basic expenses (ie, rent ($290), utilities ($60), medically prescribed hormone replacement treatment ($195), food and household supplies ($125), private health insurance ($30), credit card repayments ($50), and allowing only a

nominal amount for the worker's wife to attire and present herself appropriately ($100)), weekly household income would quickly be exceeded. That is without any allowance for vehicle, telephone, petrol, and other personal needs expenses.

37. That then brings consideration to the factor of spousal income. As I have said at paragraph 29 above, logic would have it that in consideration of the circumstances of the workers present application, the joint household income of both he and his wife ought to be taken into account. Obviously, if as here, the worker receives no income, such consideration rests entirely upon spousal income. It follows that it is that income, and that circumstance of interdependence, against which undue hardship must be prospectively assessed.

38. As I have elsewhere indicated, the worker's wife is employed as an Accounts Manager with Southern Cross Media Pty Ltd where she is able to earn commission income for maintaining and growing customer accounts. In that role I have little doubt that personal grooming, attire and travel are an important part of her job. So, I think it may fairly be said, she is required to expend money on those things in order both to keep her job and to generate additional income by way of commission. Whilst such expenditure may be characterised as "luxury spending" or "free spending" by the employer, that may not be a proper description in the circumstances described above. Rather, in my opinion, it may more accurately be seen as a connected part of generating joint household income.

39. Contextually therefore, in the absence a of a further interim determination the reduction in joint household income would have a considerable impact on the wife of the worker both in her capacity to meet the personal grooming and travel requirements of her employment, and to continue to generate the current level of joint household income by earning commissions.

40. One-off lump sum payments, in this case a permanent impairment payment received by the worker, is the next matter for consideration. As a general rule in common law personal injury claims, the only mechanism available to a Court to compensate for irreversible physical or psychological damage is money. That, along with the "once and for all" principle, ordinarily dictate that such payments are free from the attenuating impost of normal rules of assessment for the purposes of taxable income; qualification for social security benefits; and the like. So too of course, are they free of account for the purpose of weekly benefits under the Act.

41. It follows, in my opinion that compensation for permanent impairment should likewise not be taken into account in assessing joint household income for the purposes of undue hardship. To do so would, by definition, require them to be whittled away on the everyday incidences of household expense when such payments by way of capital sum for non-economic loss are designed for a demonstrably different purpose i.e.,

> Non-economic loss is based on the 'lifestyle effects' of the permanent impairment including pain, suffering, the individual's mobility, enjoyment of recreation, leisure activities, social relationships and any other loss, including any loss of expectation of life.

42. That then brings me to the balancing factors for the employer. The first of those is evidence of dishonest intent. The employer contends that the worker is being less than "forthright" in his affidavit evidence (paragraphs 12 and 13 above). Doing as best I can, I have scrutinised the affidavit evidence before me and can find no cogent basis for such a contention. I do agree that there is a lack of documentation going to rent, but in my opinion that is not determinative of itself. And, whilst I might be forgiven for thinking that the worker's evidence is somewhat self-serving, in my experience that is not unusual in applications of this nature. No affidavit evidence in support was

submitted by the employer and, in the circumstances, I find that its contention is not made out on the balance of probabilities. No other evidence was adduced before me going to feigning of symptoms or the like.

43. As to prejudice, I note that the worker is currently residing interstate. He has been in receipt of interim benefits for a total period of 38 weeks (17 June 2010 to 7 March 2011) at a rate of $489.31 gross per week. That gives a total of the employer's exposure to date of $20,835.78. If a further interim determination were to be made for a 12 week period at the 2011 indexed rate of $591.96 that would amount to an additional $7,103.52 for a total exposure of something in the order of $28,000.

44. The worker owns no real property. He does own a vehicle and, presumably, other goods and chattels of some worth, but no doubt would find it oppressive if the Court were ultimately to find for the employer. Mr Spazzapan points to the worker's receipt of $40,000 by way of permanent impairment, and the possible receipt of further such payment, as evidence of the worker's capacity to repay. However, at least half of that initial payment has, as I understand it, already been disbursed and, as any further such payment is in dispute between the parties, it is difficult to see that as a complete answer to the question.

45. I conclude that if the Court were ultimately to find for the employer there would be some degree of prejudice to it, albeit that in the scheme of things the quantum is not large and would pale into insignificance beside the costs of a contested 5 day hearing and the overall costs of the litigation.

46. Finally, I turn to the balance of convenience in the broader sense of interruption to business efficacy. I infer that, from the viewpoint of a small business, the cost of maintaining compulsory worker's compensation insurance (section 126 of the Act) is not inconsiderable. The worker was in receipt of benefits of weekly compensation for 6 and a half years before they were terminated so it is conceivable that there was some impact upon the

business efficacy of the employer as a result. I am not told of the current trading status of the employer so it is difficult to assess the extent of any such impact. Nonetheless, the whole point of compulsory workers compensation insurance is to ensure that the risk is shared and there is nothing before me to indicate that the prime insurer, in this case the Territory Insurance Office, will suffer any interruption to its business efficacy if a further interim determination were to be made.

Conclusion

47. In balancing all of the above factors, and in the exercise of my discretion, I find that the worker will "suffer undue hardship", as I interpret the meaning of that term in light of the aim of the Act, if a further interim determination is not made. I make Orders accordingly.

Orders:

1. Interim Determination to issue in favour of the Worker for the payment of interim benefits in the amount of $591.96 gross per week.
2. Interim Determination to apply with effect from 7 March 2011 and for a period of 12 weeks thereafter.
3. Costs in the cause.

Dated this 4th day of April 2011

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JULIAN JOHNSON
JUDICIAL REGISTRAR