CITATION: *Keating v Global Insulation Contractors* [2012] NTMC 003

PARTIES:	RONALD WILLIAM KEATING
	V
	GLOBAL INSULATION CONTRACTORS (NSW) PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Interlocutory
FILE NO(s):	20910638
DELIVERED ON:	25 January 2012
DELIVERED AT:	Darwin
HEARING DATE(s):	23 January 2012
JUDGMENT OF:	J Johnson JR

CATCHWORDS:

SECTION 107 OF THE *WORKERS REHABILITATION & COMPENSATION ACT* – whether appropriate mechanism to enforce payment of weekly benefits of compensation during appellate period

REPRESENTATION:

Counsel:

Worker:	Mr McConnel
Employer:	Mr Crawley

Solicitors:

Worker:	Ward Keller
Employer:	Cridlands MB

Judgment category classification:	C
Judgment ID number:	[2012] NTMC 003
Number of paragraphs:	33

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

No. 20910638

BETWEEN:

RONALD WILLIAM KEATING
Worker

AND:

GLOBAL INSULATION CONTRACTORS (NSW) PTY LTD
Employer

REASONS FOR JUDGMENT

(Delivered 25 January 2011)

Mr J JOHNSON JR:

1. This is an Application by the worker for an interim determination. It is somewhat of a novel application. I am not aware of any previous use of the section 107 powers of the Court to achieve the ends here sought by the worker.

2. The circumstances are that on 20 June 2011 Her Honour Ms Morris SM handed down her findings of fact and law following a 5 day contested hearing in the substantive proceeding. Those findings were in the following terms:[1]

    1. The applicant was a worker as defined in s3 of the Act at the relevant time.

    2. On the 19th of July 2007 the worker suffered an injury as defined in s3 of the Act.

    3. That this injury arose out of or in the course of the worker's employment as defined in s4 of the Act.

[1] *Ronald William Keating v Global Insulation Contractors (NSW) Pty Ltd* [2011] NTMC 021

4. The worker was partially incapacitated for work as a result of the injury for the first six months after the injury from 25 July 2007 to 24 January 2008.

5. During the period referred to above the worker actually earned in employment a negligible amount.

6. During the period referred to above the worker's normal weekly earning amounted to $2664.31 per week.

7. During the period commencing from the end of the six month period referred to in 4 above:

   i) The worker was partially incapacitated for work as result of the injury from 24 January 2008 to today.

   ii) The amount the worker is reasonably capable of earning in a week in work he is capable of undertaking is $349.32 plus superannuation (being 53% of a full time equivalent for a security officer).

   iii) The worker is entitled therefore to compensation:

   (1) Pursuant to s 64 and s65 of the Act: and

   (2) Pursuant to s73 of the Act in the sum of $5902.25

3. Pursuant to section 116 of the Act, the employer appealed the findings recited above to the Supreme Court. Section 116(1) makes it clear that such appeal can only lie on a question of law and, importantly in the context of this application, cannot be brought "until the proceeding in which the decision or determination was made has been finally determined by the [Work Health] Court".[2] It will be necessary to return to this formulation later in these reasons.

4. The employer's appeal came on for hearing before Her Honour Blokland J in the Supreme Court on 30 and 31 August 2011 and was reserved for decision.

[2] Section 116(3) of the Act.

5. On 9 December 2011, the worker filed an application in this Court for an interim determination pursuant to section 107 of the Act. The application first came on for hearing on 21 December 2011 but, for a number of reasons, and by consent, was not fully argued before me until 23 January 2012. By that time Her Honour's decision on appeal in the Supreme Court had been handed down and, for the reasons there enumerated by Her Honour,[3] the appeal was dismissed.

6. Counsel for the employer, Mr Crawley, confirmed to me from the Bar Table during the course of this present application that he had instructions to institute an appeal to the Court of Appeal against Her Honour Blokland J's decision at first instance. Mr Crawley also indicated his estimation that by the time that appeal is filed,[4] heard, and determined, a further period of six months may well be consumed.

7. At the conclusion of the hearing of the application before me it became apparent that there was some deficit in the worker's affidavit material and the worker offered to provide more fulsome evidence as to his financial and other circumstances in support of his application. That course was not opposed by the employer and I adjourned the application for two weeks to allow that to occur and for the employer to consider and respond to it.

8. However, upon careful reflection, I have come to the conclusion that the worker's application cannot succeed and that it must be dismissed. I will therefore hasten to publish my reasons for reaching that conclusion so as to save the parties any further evidentiary work, and avoid any further delay.

[3] *Global Insulation Contractors (NSW) P/L v Keating* [2012] NTSC 04
[4] The time for filing has not yet expired.

Brief History of the Proceeding

9. It will give some context to these reasons if I very briefly outline the chronology of the substantive proceeding.

10. The worker filed an Application to the Work Health Court on 26 March 2009 following an unsuccessful mediation of the dispute between the parties on 2 February 2009[5]. That Application founded upon an injury allegedly sustained by the worker on 19 July 2007. The reasons for delay in filing an Application to the Work Health Court are canvassed in the decision of Ms Morris SM[6] and are not contentious for present purposes.

11. In the event, it was not until 6 September 2010 that the substantive Application came on for hearing in the Work Health Court. Since that time the decision of Ms Morris SM has been published, the decision of Her Honour Blokland J on appeal to the Supreme Court has been published, and a further appeal to the Court of Appeal will shortly be filed. If Mr Crawley's estimate of time is accurate[7], the proceeding will not be finally determined on appeal until June or July of this year; a period of five years from the date of injury.

12. To point out so is not to imply criticism, but simply to indicate the time frame within which the worker can expect finality to his claim and, I infer, his future life options.

13. I was told by the parties today that the worker has not previously applied for an interim determination and is currently living on a disability support pension.

[5] See sections 103J(1) and 104(3) of the Act. The time lapse is not in issue for present purposes.

[6] See Her Honour's reasons at par 44.

[7] Par 6 Above.

Jurisdictional Error

14. My first sentiment upon a review of the worker's application prior to hearing was that this Court, in particular in its interlocutory jurisdiction, may well be functus officio[8] and, thereby, acting beyond its jurisdiction if it were to purportedly determine the worker's application. Section 116(3) of the *Work Health Act* appeared to support that sentiment, as did Rule 87.10 of the *Supreme Court Rules* which makes it clear that an appeal shall not operate as a stay of proceedings.

15. In answer, the worker urged two main strands of argument before me. The first was that there had been no 'final determination' of the substantive proceeding. This was because, notwithstanding the primary findings of fact and law made by Her Honour, Ms Morris SM, her orders specifically invited further submissions as to the calculation of the amount of compensation pursuant to sections 64 and 65, and costs.[9] This, it was said, indicated that quantum having not been finally determined, neither had the substantive proceeding.

16. The second strand followed the first to the extent that, assuming there had in fact been no final determination of the proceeding, it would be premature for the worker to pursue other avenues because there was "no judgement to enforce". These avenues were described as those available pursuant to Section 97 of the Act[10] and section 132 of the Act.[11]

17. With respect, neither of those strands of argument appears to me particularly convincing. Whilst the worker's application was not opposed by the employer on

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[8] The question is whether the statute pursuant to which the decision-maker [is] acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen – per Gleason CJ in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11.

[9] (Supra) at par 57.

[10] Effectively, this section provides the necessary machinery to enforce an award of money made by the Work Health Court by use of the Chapter 2 "Rules for enforcement of orders" in the *Local Court Rules*.

[11] This section provides, inter alia, that if an employer defaults in payment of an amount of compensation for a period exceeding 1 month, the person entitled to the compensation may make a claim against the approved insurer.

jurisdictional grounds, what it overlooks is that such an interpretation would give section 116(3) of the Act no work to do at the time primary findings of fact and law are published in the Work Health Court. Arguably, the section 116 appeal period clock[12] would thereby not start ticking until such time as an exact measure of quantum has been attached to each individual area of finding.

18. For mine, I do not believe that to be the intention of the relevant legislative provisions and, as far as I am aware, has not been the practice in this Court historically. In my experience in the Work Health Court, such detailed calculation is normally done by the party's lawyers, subsequent to findings of fact and law being published by the hearing Magistrate.[13] The lawyers are often best equipped to do so in what is a specialised area of the law, and where Magistrates have an already heavy workload.

19. In any case, I would have thought that the parties and, with respect, Her Honour Blokland J, would have been alive to section 116(3) of the Act at the time of the hearing in the appeal that has now been determined, and I did not see any reference to it in Her Honour's decision.

20. In a legislative environment where an appeal is confined to questions of law, it seems to me that matters requiring minutely detailed calculations of quantum should not bar the application of section 116 of the Act once primary findings of fact and law have been formally handed down by the Court. Such an approach could ultimately be used as a delaying tactic by a party and would not appear to me to serve the public policy endeavour of hastening finality in the justice system in general and, in particular, for beneficial legislation of the type embodied by the *Workers Compensation and Rehabilitation Act*.

[12] See Rule 87.07 of the *Supreme Court Rules.*

[13] See Part 22 of the *Work Health Court Rules* and use of the terminology "After the Court has made a final order in a proceeding…" in Rule 22.01.

21. It is abundantly clear in my view that the appeal that was filed, and the appeal that shortly will be filed, by the employer do not stay the primary findings of Ms Morris SM. In my opinion the use of section 107 to enforce payment of weekly benefits of compensation in the intervening appellate period would turn such abundance on its head. Whilst I can see the practical utility for the worker to proceed in the way in which he proposes, and even absent any objection from the employer, that is no ground in my opinion for this Court to fall into jurisdictional error.

22. It may be though, with respect, a ground for the parties to attempt an agreement that as best it can meets their separate interests during the appellate period.

23. As was said in *Manning Services Australia Pty Ltd v Peter Pulman*,[14] I accept that the intention of the legislature in providing for interim awards in section 107 of the Act, was to ameliorate a worker's hardship pending the final determination of the claim. Notwithstanding the submissions of the worker, I am not convinced that the findings of Ms Morris SM are other than a final determination, in fact and in law, of the worker's Application to the Work Health Court.[15] True it is that the Court apparently retains some discretion through the power referred to in Rule 87.10 of the *Supreme Court Rules*,[16] and it may have to arbitrate at some time in the future if detailed calculations of quantum cannot be agreed between the parties.[17] However, in my opinion that is far removed from an interlocutory application for the payment of interim benefits whilst the worker awaits the decision on appeal to the Court now appropriately seized of the proceeding by virtue of section 116(2) of the Act.

[14] [1993] NTSC 24 at par 54.

[15] Section 104 of the Act.

[16] Presumably grounded in section 94 of the Act.

[17] Rule 22.02(3) of the *Work Health Court Rules*.

24. I was not directed by the parties to any authorities on point on this issue, and I have not had the opportunity to extensively research it in the time available to me. In any event, I am not convinced that such research is productive in this interlocutory jurisdiction of the Court as it would serve only to further delay the worker's endeavours to obtain some financial relief pending the outcome of the appeal. More important, I would have thought, is to hasten the conclusion of this application for an interim determination so that the worker may press on with the other options available to him.

25. I venture that it would be possible to formulate a decision that would see the worker entitled to some form of weekly benefits pursuant to section 107 of the Act pending the outcome of appeal. Counsel for the worker, Mr McConnel, argued on authority that in terms of the elements of an interlocutory injunction,[18] the 'status quo' is the findings of Ms Morris SM and, if that be accepted, my preliminary view was that the elements of an interlocutory injunction had probably been made out; other than apparent prejudice to the employer occasioned by the worker's incapacity to repay if the appeal was upheld. However, given my concerns as to jurisdiction, in my opinion such an approach could enliven the prospect of bringing the administration of justice in this Court into disrepute.

26. It would also in my view be amenable to judicial review.[19] Whilst I heard nothing from Mr Crawley to indicate that such a course was likely, that may simply mean that he has no current instructions to that effect. If such a course was to be taken it would serve only to further delay, and increased costs of the overall proceeding.

[18] *Wormald (Australia) Pty Ltd v Aherne* [1994] NTSC 54 at par 10

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

A Way Forward

27. For many years, the appeal provisions in workers' compensation legislation in New South Wales were similar to those which continue to apply in this jurisdiction insofar as an appeal to the Supreme Court is confined to a question of law.[20]

28. In *Lovett Building Co Pty Ltd v Burns*,[21] Kirby P as he then was in the New South Wales Court of Appeal, commented on the attitude of that Court to stay of proceedings in workers' compensation matters:

> Until recently, appeals against awards providing for the payment of weekly compensation lay only for error of law or the erroneous admission or rejection of evidence. The stringency of this criterion of appeal was emphasised in numerous cases in this Court. Such stringency made it more difficult for an appellant to disturb an award in favour of a worker's entitlement to weekly compensation than, say, where an appeal lay on fact as well as law in a judgement of the District Court or the Supreme Court. This combination of circumstances (the reliance on weekly compensation for bare necessities and the limited grounds available to disturb an award providing for its payment) produced a practice in this Court special to applications for a stay of such awards pending appeal. Of necessity, this was never a universal rule. As with any discretionary decision, each case had to be determined on its own facts. However, the general practice was described by Moffitt P in [case]. With the concurrence of Samuels JA and Glass JA, His Honour said:
>
> > "…the attitude of this Court revealed in the course of its practice in regard to stay of proceedings in respect of awards

[20] Section 116(1) of the Act

[21] (1991) 26 NSWLR 37 at page 40, with references omitted.

> has been that, having regard to the nature of proceedings for Workers' Compensation and having regard to the limited nature of appeal and the policy which emerges from those two matters, it is the invariable or almost invariable practice that a stay of proceedings is not granted against a current order. It may be that special circumstances will exist in respect of awards for past periods. Once the matter comes before this Court, of course, the question of whether the appeal should be expedited or whether it should take its ordinary course with the other litigants who are waiting to have their cases heard … is a matter for this Court, although in anticipation it is helpful and proper that a first instance Judge who knows the position make some order."

Finding that the payment of compensation was necessary for the continued maintenance of the worker in that case and that the employer had not displaced the onus, the application for a stay was rejected.

The only variation to this practice to emerge in more recent years was a greater willingness of the Court to provide a stay of back-payments and to afford a degree of expedition to the hearing of such appeals. In part, by expedition, the Court sought to protect the utility of the employer's appeal whilst safeguarding the worker's receipt of weekly payments pending the disposal of the appeal.

29. Of course, I accept that any such prior 'practice' in New South Wales is of no binding effect in this jurisdiction. Nonetheless, it would appear to me to provide some foundation for argument.[22]

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[22] See *also HIH Winter Workers Compensation (SA) Ltd (Sebel Furniture Ltd) v Wayne David Hickman* [1997] SAWCT 34; *Barry Leslie Aherne v Wormalds Australia* [1994] NTSC 116; *Workcover/Royal & Sun Alliance (Ams Engineering Pty Ltd) v Toohey* [2000] SAWCT; and *Zienkiewicz v The Smith's Snack Food Co Ltd* [2002] SAWCT 16

30. It is not the place of this Court to advocate future action to parties in dispute. However, given my findings in relation to the jurisdiction of the Court to entertain the worker's present application for an interim determination, it seems to me that the worker's proper course if he wishes to maintain his claim for interim relief is to utilise the provisions of section 97 of the Act and/or section 132 of the Act.[23]

31. In her decision, Ms Morris SM has specified the worker's NWEs in the period July 2007 to January 2008, and the amount the worker is reasonably capable of earning thereafter up until the date of her decision. As I understand it, the parties have agreed 2012 NWEs at $2011.80.

32. In that light, and given my comments at par 22 above, an agreement between that parties that provided for some form of weekly benefit for the immediate future would "protect the utility of the employer's appeal whilst safeguarding the worker's receipt of weekly payments pending the disposal of the appeal".

33. Finally, I accept that these reasons are hastily written and may contain errors or omission. However, in my opinion the interests of justice dictate that I move to determine this application by the worker in the shortest possible timeframe so as to avoid any delay in the worker's attempts to realise an entitlement.

Orders:

1. The worker's application for an Interim Determination is dismissed.

2. The adjourned date for the worker's application, 9:00am on 6 February 2012, is vacated.

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[23] Par 16 above.

3. Costs reserved.

4. Certified fit for Counsel.

Dated this 25th day of January 2011

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JULIAN JOHNSON
JUDICIAL REGISTRAR