

CITATION: *Phil Ashly v AEC Environmental Pty Ltd* [2013] NTMC 016

PARTIES: PHIL ASHLY
v
AEC ENVIRONMENTAL PTY LTD

TITLE OF COURT: WORK HEALTH

JURISDICTION: Work Health

FILE NO(s): 21223620

DELIVERED ON: 29 July 2013

DELIVERED AT: Darwin

HEARING DATE: 23 July 2013

JUDGMENT OF: JMR Neill

CATCHWORDS:

S.107 Workers Rehabilitations and Compensation Act – Power of the Court to make any interim determination of a party’s entitlement to compensation in any amount less than the party’s statutory entitlement.

REPRESENTATION:

Counsel:

Worker: Ward Keller
Employer: Hunt & Hunt

Solicitors:

Worker: Mr Grove
Employer: Ms Cheong

Judgment category classification: A
Judgment ID number: [2013] NTMC 016
Number of paragraphs: 29

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

No. 21223620

BETWEEN:

PHIL ASHLY
Worker

AND:

AEC ENVIRONMENTAL PTY LTD
Employer

SUMMARY OF DECISION

(Delivered 29 July 2013)

Mr John Neill SM:

1. The Worker Phil Ashly has applied by interlocutory application filed on 27 June 2013 for a further interim determination of his entitlement to compensation. During the course of these proceedings the Court has previously made one interim determination plus one further interim determination of Mr. Ashly's entitlement to compensation, in both instances in the form of weekly payments for specified past periods.
2. The Employer AEC Environmental Pty Ltd opposes this application. These proceedings are listed for hearing for five days commencing on 16 September 2013. Any such further interim determination would provide compensation in the form of weekly payments to Mr. Ashly up to and perhaps beyond that hearing.
3. Both parties by consent arranged to bring this interlocutory application before a magistrate rather than before the Judicial Registrar who normally hears such applications. The parties have asked for a ruling whether the Work Health Court has the power in its discretion to pay a Worker any less

than the amount of his entitlement to compensation calculated in accordance with the *Workers Rehabilitation and Compensation Act* ("the Act"), specifically the amount of weekly benefits, in an interim determination of a party's entitlement to compensation. If there is such a power, should the discretion ordinarily be exercised to limit any amount of interim weekly benefits to no more than the bare amount necessary for a Worker's needs? The Employer in this case has consented, without prejudice to its position, to make payments of weekly benefits to Mr Ashly from the date the last determination came to an end up to and including Monday 29 July 2013 when these Reasons are delivered.

4. Mr.Grove for the Worker argues that there is no such power. In the alternative, he argues that if there is, there is no warrant for ordinarily limiting the Court's exercise of discretion to the minimum necessary amount.
5. Ms Cheong for the Employer argues that there is such a power and its exercise should ordinarily limit any interim weekly payments to the amount necessary in each case for a Worker's needs.
6. As a matter of practice Judicial Registrars of the Work Health Court for many years have from time to time made interim determinations of compensation in the form of weekly payments in amounts less than a Worker's full entitlement under the Act, apparently without challenge to their power to do so. None of the many Decisions of Judicial Registrars I have read in arriving at my decision in this case appears to have considered the question of the Court's power to exercise any discretion to make an interim determination for less than a Worker's full statutory entitlement. None of those Decisions discussed whether as the usual starting point the amount of weekly payments should be limited to the amount necessary for the Worker's needs, although that has sometimes been the outcome.

7. Neither counsel in this present application was able to refer me to any case before any judicial officer in any Northern Territory Court where these issues were either argued or ruled on with reasons. I was referred to an interlocutory Decision of Magistrate Loadman in *William Payne v McArthur River Mining Pty Ltd* [2003] NTMC 028 where an entitlement to interim weekly payments was in contention. His Worship said at paragraph 16: "The calculations which support the arithmetic leading to the sum of \$765.00 gross per week are set out in paragraph 5 of the said submissions. This Court does not understand the criteria employed because the issue is not how much he needs to balance his budget, but an amount of money calculated in accordance with a legislated formula".
8. It is plain that Magistrate Loadman was of the view in that case that the amount of interim weekly payments should be calculated on the basis of the Worker's statutory entitlement. However, the Reasons in that case do not reveal how His Worship arrived at that view or whether he did so in the purported exercise of some discretion or on the basis there was no power to order otherwise.
9. The relevant power is set out in Section 107 of the Act. It provides as follows:

"S.107 Interim Determination

- (1) Subject to this section, the Court may make, vary or revoke an interim determination of a party's entitlement to compensation.
- (2) The making or refusal to make an interim determination is not to be taken to be a finding in respect of a party's entitlement to or liability for compensation.
- (3) A party is entitled to compensate for the period specified in the interim determination, being a period:
 - (a) commencing within 10 weeks before the determination is made; and
 - (b) ending within 12 weeks after the order is made.
- (4) The Court may only revoke an interim determination:
 - (a) on the making by the Court of a formal finding in respect of liability; or

- (b) with the consent of the parties.
 - (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.
 - (7) Nothing in this section is to be taken to affect the power of the Court under this Part to order, at this time it finally determines a party's entitlement to compensation, the repayment of all or part of the amount paid under an interim determination."
10. Subsection 107(1) gives the Court discretion ("may") to exercise power to do something. That something is to "make, vary or revoke an interim determination" of something else. That something else is "a party's entitlement to compensation".
11. "Compensation" is relevantly defined in section 3 of the Act to mean "a benefit, or an amount paid or payable, under this Act as a result of an injury to a worker...". This definition includes amounts to be determined on the facts of each case in accordance with a strict statutory formula, such as weekly payments pursuant to sections 64 and 65 of the Act and the calculation of "normal weekly earnings" pursuant to section 49 of the Act. It also includes amounts to be determined according to the Court's discretion (although such discretion must be exercised judicially) such as rehabilitation expenditures and legal costs.
12. Because the power granted by subsection 107(1) involves making a determination of a party's entitlement (emphasis added) to compensation, the Court must ascertain and rule on that entitlement. In the case of weekly payments that is to be done pursuant to a statutory formula. Once the entitlement is determined, the Court has the discretion under subsection 107(1) to "make, vary or revoke" the interim determination of that

entitlement. There is nothing expressly stated in subsection 107(1) providing for any additional discretion the Court might then exercise, such as reducing the amount of the entitlement in the determination it has made.

13. Is there anything elsewhere in section 107, or in the Division and Part of the Act where section 107 is located, or in the Act as a whole, which might enlarge the Court's discretion generally or otherwise confer power to order payment or payments of the entitlement to compensation determined on an interim basis in an amount less than that entitlement?
14. Subsection 107(3) which provides for the Worker's actual receipt of the determined interim compensation over a specified period uses the expression "A party is entitled to compensation...". This refers back to the interim determination of a party's entitlement to compensation set out in subsection 107(1). That appears to argue against any discretion to make an interim determination for any amount less than a party's actual entitlement to compensation.
15. Subsection 107(6), which is limited to further interim determinations, specifically requires the Court to consider a Worker's "undue hardship" or otherwise "exceptional circumstances" as a precondition to making a further interim determination. This necessarily requires the Court's consideration of the minutiae of the Worker's overall circumstances, particularly his financial circumstances. Is this sort of consideration limited to the issue of whether a further interim determination will be made at all?
16. Mildren J in *Wormald International (Aust) v Barry Leslie Aherne* (unreported) 21 June 1994 from page 7.8 to page 10.8 considered the need in most cases for an applicant for interim benefits to disclose his circumstances, including financial circumstances. However, he also noted that the Act did not specifically spell out any criteria for the exercise of the Court's discretion "to make such an order" - page 7.9. On page 8.2 to 8.3 Mildren J referred to his earlier Decision in *John Edgar Perfect v NT of A*

(unreported - 29 May 1992). He made it clear the exercise of the court's discretion under consideration was limited to whether "the worker had a sufficiently arguable case, and then consider whether, in the exercise of the court's discretion, having regard to all the relevant circumstances, relief ought to be granted or refused". That is, he was considering the Court's discretion solely on the threshold issue of making any interim determination, at all. There was no discussion of any second exercise of discretion relevant to the quantification of the interim benefit. There was no suggestion that "balance of convenience" factors such as financial circumstances for example had any relevance other than to this threshold issue.

17. There is nothing else in the Act which touches specifically on the question of interim benefits or which might in any relevant way provide a broad discretion to the Court.
18. There was no specific power in the original *Work Health Act* enacted from 1 January 1987 to make interim determinations of weekly benefits to be paid to a Worker. However Asche CJ of the NT Supreme Court in *J. H. Constructions Pty Ltd v Davis* (unreported) 3 November 1989 held at pages 13 - 15 that he was satisfied that the Work Health Court had the power to make interim orders as part of its implied power to make orders pending a substantive hearing. Subsequently, the Act was amended to include the present version of section 107 providing the specific power to make an interim determination of a party's entitlement to compensation. The *Work Health Act* which subsequently became the *Workers Rehabilitation and Compensation Act* was and is a code. All the power of the Work Health Court must be found in the Act or if it is not found there, as part of the Court's implied power. The Court has no inherent jurisdiction.
19. Since the enactment of section 107 dealing specifically with the Court's power in relation to interim compensation that section has been and is the source of that power in the Court. However, that does not mean the Court

does not still have implied powers. Mildren J in *Consolidated Press Holdings Limited v Wheeler* (1992) 84 NTR 42 specifically held the Work Health Court does have implied powers (paragraph 13). He adopted the analysis of implied powers in *Grassby v The Queen* (1989) 87 ALR 618 at 628 where Dawson J said: "However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise...". At page 628 Dawson J further considered what might be an implied power and said: "Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be derived by implication from statutory provisions conferring particular jurisdiction".

20. Is it necessary for the exercise of the Court's power under section 107 of the Act to imply a discretion in the Court to make an interim determination of a party's entitlement to compensation to be paid in some amount less than that entitlement? I cannot see that it is.
21. Is the implication of such a discretion required for the effective exercise of the section 107 jurisdiction? Does the existence of the section 107 power to make the determination of the full entitlement mean a discretion to order payment of a lesser amount is required to be derived by implication? I do not see either such implication as being necessary for the exercise of the section 107 power.
22. The general principle underlying quantification of weekly benefits under the Act is set out in a unanimous Decision of the Court of Appeal in *AAT King's Tours Pty Ltd v Robert Albert Halliday Hughes* (1994) 4 NTLR 185. The Court said in paragraph 39: "In our opinion, it is a legitimate approach to the construction of the definition to look at the object of the legislation. The intention appears to be to provide to the worker during disability amounts by

way of compensation calculated by reference to the normal weekly earnings which he could have counted upon receiving if there had been no disability. To that extent it reflects an 'income maintenance' approach". Accordingly no power to take a different approach arises by implication. If the legislature had intended a different approach in the case of interim weekly benefits then that would have to have been made plain in the empowering legislative scheme.

23. I am supported in arriving at this conclusion by the Decision of the NT Supreme Court in *Yuendumu Social Club Inc v Sandra May Day* [2010] NTSC 22 where Blokland J held in paragraph [14] that where there might be any ambiguity in the interpretation specifically of section 107 of the Act, its provisions should be interpreted in a benign and liberal manner, and a construction most favourable to the Worker is to be preferred where any ambiguity exists.
24. I am satisfied that the scheme of section 107 is that where the Court in its discretion makes an interim determination then the party entitled to the compensation is to receive for a period calculated pursuant to subsection 107(3) of the Act the entitlement to the compensation in question, the amount of such compensation having been determined in accordance with the Act, and that there is no discretion in the Court to order interim payments of compensation in any lesser amount.
25. I now turn to consider the merits of this application. I note from the pleadings that the Worker's claim was initially accepted by the Employer but that payments of compensation ceased when the Worker returned to work with the Employer. The return to work scenario arising under subsection 69(2) of the Act was considered in another unanimous Decision of the Court of Appeal in *Ruby Sayson v Northern Territory of Australia* [2006] NTCA 11 in paragraphs [26] to [31] inclusive. Riley J (as he then was) discussed a return to work where the Worker challenged the cancellation of payments of

compensation by the Employer in the absence of any written notice pursuant to subsection 69(1) of the Act. He held that no such notice was required. He went on to say in paragraph [28] that where the Worker in such a case challenged the cancellation of payments of compensation: " In that regard the employer will bear the onus of establishing the change of circumstances which it asserts warranted the cancellation or reduction of the amount of compensation".

26. This onus is relevant to the exercise of my discretion in this case. In *Aherne* (above) Mildren J considered on page 10.1 that:" 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". Clearly Mildren meant by "a different emphasis" one which might favour an applicant Worker. I am satisfied for the purposes of this interlocutory application that this is a case where payments have been stopped and this more favourable emphasis of the question of hardship does arise.
27. In the present case I have before me the affidavit of the Worker sworn 26 June 2013 - Exhibit W1, his affidavit sworn 2 January 2013 - Exhibit W2 and his affidavit sworn 10 April 2013 - Exhibit W3. On the basis of the material in those exhibits I am satisfied that the Worker presently has no income and he and his wife have a present need for income in addition to the wife's earnings in order to "balance the budget" in the words of Magistrate Loadman in *Payne* (above).
28. The Worker has deposed in clause 22 of Exhibit W1 that without the further interim weekly payments he is seeking, or at least some of it, his wife will have to take on a third job to earn enough money to balance the household budget. She is presently working two jobs. This of itself does not constitute

undue hardship for the purpose of subsection 107(6)(a) of the Act, because it is not undue hardship to "the party" - that is to the Worker. However, I am satisfied this prospect amounts to "exceptional circumstances" within the meaning of subsection 107(6)(b) of the Act.

29. I am satisfied on the basis of the recent medical certificate from the Worker's general practitioner that there is evidence of his current incapacity for work. I note this will be the last time that further interim weekly payments will be needed given the hearing is listed to commence in about 9 weeks' time. I am satisfied on all the evidence before me that the balance of convenience favours my making a further interim determination. The Employer by Ms Cheong on 23 July 2013 conceded these proceedings raise an arguable case. The parties agree for the purpose of this application that 75% of the Worker's indexed normal weekly earnings at present are \$1,849.22 gross.

ORDERS

(a) I make a further interim determination of the Worker's entitlement to compensation being payments in the amount of \$1,849.22 gross per week.

(b) The interim determination is to commence to be paid to the Worker on and from 30 July 2013 for a period of 12 weeks.

(c) The costs of and incidental to the Worker's interlocutory application filed 27 June 2013 are to be costs in the cause, certified fit for counsel, to be taxed in default of agreement at 100% of the Supreme Court scale.

Dated this 29th day of July 2013

John Neill

STIPENDIARY MAGISTRATE