CITATION: *Andros v Australian Fuel Distributors Pty Ltd* [2013] NTMC 025

PARTIES:	TRACY ANDROS
	V
	AUSTRALIAN FUEL DISTRIBUTORS PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Interlocutory
FILE NO(s):	21239424
DELIVERED ON:	21 May 2013
DELIVERED AT:	Darwin
HEARING DATE(s):	8 May 2013
JUDGMENT OF:	J Johnson JR

CATCHWORDS:

SECTION 107 OF THE *WORKERS REHABILITATION & COMPENSATION ACT* – Whether worker has established a prima facie case in the sense of showing a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial - Where worker suffering from a progressive non-employment disease exacerbated by an "injury" under the Act - Suggested form of legal reasoning to be applied.

REPRESENTATION:

Counsel:

Worker:	Ms Farmer
Employer:	Ms Cheong

Solicitors:

Worker:	Withnalls
Employer:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2013] NTMC XXX
Number of paragraphs:	14

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

No. 21239424

BETWEEN:

TRACY ANDROS
Worker

AND:

AUSTRALIAN FUEL DISTRIBUTORS PTY LTD
Employer

REASONS FOR JUDGMENT

(Delivered 21 May 2013)

Mr J JOHNSON JR:

1. This is an application by the worker in the substantive proceeding for an interim determination. The worker made an application for mediation on 11 September 2012[1] and was issued with a "No Change" mediation certificate on 17 October 2012. A formal Application to the Work Health Court followed on 23 October 2012.

2. Two primary injuries were subsequently pleaded by the worker in her Statement of Claim: the first involving an injury to her head which she hit on a steel frame; and the second, injuries to her head, cervical spine, left hip and back as a result of a slip and fall. Both these injuries are pleaded as having occurred during the course of her employment on 17 November 2011. The worker was 47 years of age at that time.

3. The substantive dispute arises as a result of the employer issuing the worker with a Notice of Decision, dated 18 September 2012, cancelling weekly benefits of compensation pursuant to section 69 of the Act. This Notice founded upon the expert opinion and accompanying medical certificate of Consultant Physician Dr Peter Stevenson who examined the worker on 31 August 2012, and upon grounds

[1] Section 103J(3) of the Act.

that "you have ceased to be incapacitated for work as a result of your work injury on 17 September 2011"[2]. At that time the worker was attempting to participate in a graduated return to work program with the employer but, it appears, was never able to complete a full shift "…because of pain in my left shoulder and lower back"[3]. Ultimately her role with the employer was "made redundant"[4].

4. Thereafter the worker has not been able to participate in any work and her capacity for work is presently limited to light duties for 3 hours per day, 9 hours per week[5]. This is her first application for an interim determination.

Serous Issue to be Tried

5. In *Day v Yuendumu Social Club Inc & Anor*[6], then Chief Justice His Honour Martin (BR), described the "approach" to be taken to an application for interim payments in the following way:

> It is common ground that it has been the accepted practice in the Work Health Court to approach an application for interim payments in the same way as an application for an interlocutory injunction is approached. This practice conforms with the views expressed by Mildren J in *Wormald International (Aust) Pty Ltd v Aherne.*[7] In that decision, Mildren J accepted, for the purposes of that appeal, "that the approach to the exercise of the discretion to award interim payments is the same as in an application for an interlocutory injunction – ie 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". Following the decision of the High Court in *Australian Broadcasting Corporation v O'Neill,*[8] it may be more appropriate to ask whether the plaintiff has established a prima facie case in the sense of showing "a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial".

6. My first task then is to ask whether the plaintiff has established a prima facie case in the sense of showing a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. To do so I think I

---

[2] Affidavit of the worker sworn 19 April 2013 at annexure "TA 3".

[3] Affidavit of the worker sworn 19 April 2013 at par 7.

[4] Affidavit of the worker sworn 19 April 2013 at par 12 and annexure "TA 5".

[5] Affidavit of the worker sworn 2 May 2013 at par 2 and annexure "TA 1".

[6] [2010] NTSC 7.

[7] [1994] NTSC 59.

[8] [2006] HCA 46.

must first look at the expert medical opinion available to me. The preponderance of this opinion consists of three reports which were exhibited by the parties at hearing.

7. The first of these in time was that that of Consultant Orthopaedic Surgeon Dr John Talbot dated 23 January 2012, approximately 2 months post injury. The only diagnostic investigation available to Dr Talbot at that stage was a plain x-ray of the lumbosacral spine and his opinion was essentially that:

> 7) At this stage, two months after the fall at work and bearing in mind Ms Andros' inappropriate presentation, I doubt whether the work injury is still the cause of her claimed symptoms. I can find no obvious organic reason for her presentation.
>
> 8) I can find no clear organic diagnosis to treat. I have mentioned above that an MRI scan may be helpful just in case she has sustained a lower lumbar disc injury but I would be rather doubtful if that was so.

8. The second expert report in time was that of Consultant Orthopaedic Surgeon Mr Ba Nyunt dated 30 March 2012. By that stage the worker had undergone an MRI of the lumbar spine and that diagnostic investigation was available to Nr Nyunt who was of the following opinion:

> **Diagnosis:** lower back pain
>
> **Cause:** degenerative disc disease L4/L5 and L5/S1. At L5/S1 focal disc bulge contacting left S1 nerve roots with annular tear.
>
> …..
>
> 3. My opinion is that all the diagnoses are not related to Ms Andros work injury of 17/11/2011. My impression is that she has pre-existing degenerative disc disease as I mentioned. Injury on 17/11/2011 aggravated her pre-existing condition.
>
> …..
>
> 10. Ms Andros injured her back about four months ago. Injury might still play a role for her present ongoing symptoms. She said she is a bit improved with epidural cortisone injection. On the average this aggravation should last only 3 to 6 months. In her last visit on 21/03/2012 she presented a number of none (sic) organic Waddell's sign, which includes complained of pain in all movement including axial rotation and axial compression. Her straight legs rising we (sic) 70 degrees on lying and 90 degrees on sitting on distression (sic). Previous visit showed there is diminished sensation over L4, L5 and S1 area not related to any specific nerves distribution. All these three are positive Waddell's sign.
>
> 11. My opinion is that at the moment she should be able to return to part-time restricted duties. Aggravation of the injury alone is consider (sic), she should be

> able to return to normal duty in about six month (sic). But the degenerative disc disease L4L5 and L5S1 might prevent her to do so.

9. The third expert report in time is that of Consultant Physician Dr Peter Stevenson dated 13 September 2012, approximately 6 months after the report of Dr Nyunt referred to above. It was this report and accompanying medical certificate that was relied upon by the employer for its decision to cancel payments of weekly benefits to the worker in September 2012. Dr Stevenson was very firm in his diagnosis and opinion:

> 2) Clinical findings are illness behaviour but no specific musculoskeletal or neurological diagnosis.
>
> 6) … The work injury was non-specific minor soft tissue strain which is long resolved.
>
> 7) There is no ongoing requirement for treatment. She can resume her usual work. To work or not is her own economic choice.
>
> 9) There are guidelines on return to work with non-specific back pain. She is fully fit and is no longer incapacitated by her injury.
>
> 10) **Prognosis**
>
> Ms Andros may have intermittent non-specific discomfort like most of the middle-aged population. They are benign if not medicalised and she maintains normal activity.

Consideration

10. It needs first to be appreciated that every "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury" is itself an "injury" under the Act[9]. If that "injury" resolves, then it is no longer compensable under the Act.

11. In that context, the issue of a worker who is suffering a progressive non-employment disease exacerbated by an "injury" under the Act is, conceptually at least, fairly simple. In *Salisbury v Australian Iron and Steel Ltd*[10], Jordan CJ used this form of legal reasoning to explain it:

> It is necessary now to consider the case of a worker who is suffering from a progressive non-employment disease which, although it has not yet incapacitated

---

[9] *Sharon Louise Spellman v Returned Services League of Australia Alice Springs Sub-branch Incorporated* [2004] NTMC 87 per Trigg SM at par 25.

[10] (1943) 44 SR (NSW) 157

him, will in its ordinary course eventually do so, at first partially and then totally. Such a worker may incur an employment injury which incapacitates him for one or other of a number of different reasons.

(1) It may cause an incapacity which is not associated with his non-employment disease, for example where a worker suffering from a not yet incapacitating non-employment heart disease cuts his hand while working and is unable to resume work only because the cut has not yet healed.

(2) It may cause incapacity which is associated with the unemployment disease, as where it is not of itself incapacitating, but its effects, in combination with those of the not otherwise incapacitating disease, are incapacitating.

(2)(a) In this type of case, the employment injury may be purely temporary in its effects. For a time it produces effects and then it ceases to produce any. So long as it produces effects, these, added to those of the disease, cause incapacity which would not otherwise exist. But when it ceases to produce effects, the stage of the disease is found to be what it would have been, and its course to continue as it would have done, if the injury had never occurred.

(2)(b) Or it may be permanent in its effects. When these are added to the effects of the disease, they cause partial incapacity which did not previously exist and would not otherwise have then come into existence, or it prematurely increases the extent of a previously existing disease incapacity. The effects of the injury do not disappear. They continue, in combination with the effects of the disease, to contribute to the premature occurrence of disability which would not then have been produced by the disease alone, and to continuance of the incapacity so occurring. In the long run the disease alone, would have caused the disability, but the injury anticipates it.

In the case which I have numbered 2 (a), the worker is entitled to compensation so long as the employment injury produces effects and these effects, added to the effects of the disease as it existed when the injury occurred, are sufficient to produce disability. It is not necessary that the employment injury should be the sole cause of disability. It is sufficient if it is a contributing cause. It may be the catalyst which precipitates disability in a medium of disease. But when the stage is reached at which the employment injury ceases to produce effects and could therefore no longer be a contributing cause to any incapacity which may then exist, the right to compensation ceases.

In case 2 (b), for a time at least, it is the addition of the effects of the employment injury which produces incapacity, or an increased incapacity, which would not otherwise have existed. So long as these effects continue, the fact that a non employment injury supervenes (in the form of an accentuation of the non employment disease), sufficient of itself to produce the incapacity or increased incapacity, does not deprive the worker of his right to continue to receive

compensation. To hold that it does would be inconsistent with the authorities cited above.

12. On my reading of the expert medical reports in this proceeding it appears quite clear that this is a case akin to that numbered 2(a) by Gordon CJ in the above extract. All the expert opinion is at one in the sense that the effects of the worker's work injuries should or have resolved; that all the worker's present diagnoses are not related to the work injury; and that the worker is displaying illness behaviour or "Waddell's sign". Only Dr Nyunt canvasses the possibility that the worker's degenerative disc disease may ultimately effect her capacity to return to full time-work but that is clearly in the context "that all the diagnoses are not related to Ms Andros work injury of 17/11/2011".

13. In my opinion the worker in this proceeding has not established a prima facie case in the sense of showing a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. The weight of the expert medical opinion available to me, and which I have attempted to distil at par 12 above, did not persuade me to that necessary threshold.

14. The worker's application for an interim determination must therefore be dismissed.

Orders:

1. The worker's application for an Interim Determination filed 19 April 2013 is dismissed.

2. Costs in the cause.

Dated this 21st day of May 2013

_____

JULIAN JOHNSON
JUDICIAL REGISTRAR