| | |
|---|---|
| CITATION: | *Garlin v United Group* [2012] NTMC 045 |
| PARTIES: | RICK GARLIN |
| | v |
| | UNITED GROUP LIMITED |
| TITLE OF COURT: | WORK HEALTH COURT |
| JURISDICTION: | Interlocutory |
| FILE NO(s): | 21234628 |
| DELIVERED ON: | 11 October 2012 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 8 October 2012 |
| JUDGMENT OF: | J Johnson JR |

**CATCHWORDS:**

SECTIONS 107(1) AND 75 OF THE *WORKERS REHABILITATION & COMPENSATION ACT* – whether a worker may enforce the cost of rehabilitation needs by interim determination.

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Worker: | Mr Crawley |
| Employer: | Mr Liveris |

*Solicitors:*

| | |
|---|---|
| Worker: | Hall Payne Lawyers |
| Employer: | Jarman McKenna |

| | |
|---|---|
| Judgment category classification: | C |
| Judgment ID number: | [2012] NTMC 045 |
| Number of paragraphs: | 41 |

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

No. 21234628

BETWEEN:

**RICK GARLIN**
Worker

AND:

**UNITED GROUP LIMITED**
Employer

REASON FOR JUDGMENT

(Delivered 11 October 2012)

Mr J JOHNSON JR:

1. This is an Application by the worker for an interim determination. It is a somewhat unusual Application: it is the first time in my experience in the interlocutory jurisdiction of this Court that a worker has sought an interim determination other than for weekly benefits of compensation that have either been declined ab initio, or subsequently reduced or terminated. By contrast, the worker here seeks by his Application an interim determination comprised of the following three elements:

    - $304.00 per week for attendant care services and home help;
    - $275.00 as a one-off lump sum to purchase recommended home help equipment; and
    - A determination that the employer engage a rehabilitation consultant to undertake a contemporary assessment of the worker's rehabilitation needs so as to ensure that, as far as is practicable, he is restored to the same physical, economic and social conditions in which he was before suffering the relevant injury.

2. I am told by both parties from the Bar Table today that the worker has met the pre-condition imposed by section 103(J)(3) of the Act, and that is

confirmed by Annexure "RG7" to the worker's affidavit affirmed on 28 August 2012.

**Context**

3. On 29 January 2009 the worker was employed as a crane operator/rigger with the respondent when he suffered an injury to his right wrist during the course of his employment. A claim for compensation was duly submitted to the employer and liability accepted. Unfortunately for the worker and the employer, there appears to have been a downward spiral of the worker's physical and psychological health since that time, leading to a total loss of earning capacity from April 2009 and continuing. Thus, it may be seen, the worker has been in receipt of weekly benefits of compensation for total incapacity for a continuous period of three and a half years. During that intervening period the worker alleges further injury to his left arm through overuse to compensate for his inability to use his right wrist. There have been numerous surgical and other interventions funded by the employer's insurer, but medical opinion appears to remain the same, albeit with some qualification, that the worker is unfit to return to work in any capacity[1].

4. The worker has also been diagnosed with an 'Adjustment Disorder with Depression secondary to his reported pain and disability' by Consultant Psychiatrist Dr Peter Whetton[2].

5. It would be fair to say I think that some of the experts who have examined the worker question the veracity of his reporting of symptoms. One even goes so far as to say that should further investigations "reveal a better capacity than he presented to me then I would be very happy to revise my thoughts about his employability"[3].

---

[1] See, for example, report of Occupational Physician Dr Robin Chase, dated 20 December 2011, at par 10.

[2] Report dated 22 September 2011 at page 4.

[3] Report of Hand, Plastic & Reconstructive Surgeon Dr Murray Stapleton, dated 23 November 2011, at par 14.

6. In truth though, the medical reports paint a somewhat distressing picture of a worker with complex injuries to both wrists that do not appear to have resolved by extensive surgery, cortisone injections or analgesics, and psychological sequelae "of such severity as to render him unfit for any employment"[4] on their own. And, as Dr Brown says[5]:

> Apart from some dramatisation, which could have been exasperation, there was no other suggestion of conscious exaggeration.
>
> I considered his psychological symptoms as consistent with his psychological constitution [which has reacted] to his physical situation.

7. But the nub of this dispute is the following opinion of Dr Stapleton[6] which, it appears, has subsequently been adopted as the case management strategy of the employer's insurer:

> I would recommend no further treatment. I believe this gentleman should be let be, accepting that he won't work again in any occupation for which he is suitably qualified to do and that he has reached maximum medical improvement.

8. It is effectively that opinion, and that case management strategy of the insurer, which brings the worker before this Court in pursuit of an interim determination.

9. As I have outlined in the first paragraph of these reasons, the worker seeks an interim determination comprised of three separate elements. The first in order is in the nature of a weekly benefit for attendant care services and home help, the statutory entitlement to which resides in section 78 of the Act.

---

[4] Report of Dr Phillip Brown, Psychiatrist and Psychologist, dated 24 November 2011, at page 25. The employer's insurer has apparently accepted liability for this injury – see par 9 of the worker's affidavit affirmed 28 August 2012.

[5] Supra at page 23.

[6] Supra at par 9.

10. In his affidavit the worker avers that due to the physical restrictions resulting from his injuries he requires assistance with his personal care and day-to-day living. It appears these services were provided initially by his wife and fiancé but, since the break-up of his last relationship early in 2012, these services have been exclusively provided by the worker's elderly parents. The worker avers that he has had to move into his parents' house in Sydney for that purpose.

11. However, by June 2012 the worker avers that his parents, who were in poor health, had reached the stage where they were no longer able to cope with the assistance he required, so he commissioned and paid for an expert assessment of his personal care needs by Rehabilitation Consultant Claire de Jager. In her comprehensive report following a 'Functional Assessment' on 20 June 2012, Ms de Jager recommends personal care services for the worker for 1 hour per day, 7 days per week to assist the worker with showering and dressing. The cost of such a service would amount to $304.00 per week[7]. Ms de Jager is of the view that, by providing such assistance[8]:

> ...it is anticipated to enhance and restore dignity, self-esteem, confidence, and a sense of independence. By restoring these cognitive and emotional factors, it will significantly impact on other aspects such as social isolation and psychological well-being.

12. The second in order is a one-off lump sum payment of $275.00 for the purchase of equipment recommended by Ms de Jager in the report to which I have referred above. Essentially, this equipment is designed to assist, and ease the difficulties encountered by, the worker with daily personal needs such as teeth cleaning, shaving, eating, and the like.

13. The third in order is an interim determination that the employer's insurer fund a contemporary assessment of the worker's rehabilitation needs for the

---

[7] 1 hour per day Monday to Friday at $38.00 per hour, and 1 hour per day Saturday and Sunday at $57.00 per hour.

[8] At par 6.1 of her report.

purposes of Division 4 of Part 5 of the Act. That Division has the following stated purpose:

> 75 Purpose
>
> (1) The purpose of this Division is to ensure the rehabilitation of an injured worker following an injury.
>
> (2) For the purposes of subsection (1), ***rehabilitation*** means the process necessary to ensure, as far as is practicable, having regard to community standards from time to time, that an injured worker is restored to the same physical, economic and social condition in which the worker was before suffering the relevant injury.

14. The parties were not able to indicate to me today the cost of such an assessment.

**The Law**

15. Whilst I was initially surprised by this Application, it is readily apparent on a reading of section 107 that there is no reason to constrain the meaning or intent of "interim determination" exclusively to weekly benefits of compensation. Section 107 (1) provides that:

> Subject to this section, the Court may make, vary or revoke an interim determination of a party's entitlement to compensation".

16. And, in its turn, "compensation" is itself defined in section 3 of the Act to include, relevantly:

> a benefit, or an amount paid or payable, under this Act as a result of an injury to a worker.

17. In the event, it seems to me that the starting point must be, with respect, the findings of His Honour Mildren J in *Maddalozzo and Ors v Maddick* (1992) 84 NTR 27, at par 22:

> Unlike the former Act, an employer whose employee suffers a compensable injury is required by the Act to take a real interest in

> his employee's welfare. Section 61 of the Act, now repealed and replaced by s 75A of the Act, requires an employer to provide suitable employment to an injured worker or find suitable work with another employer for him and to participate in efforts to retrain the employee. The focus of the Act covers a wide range: Part IV of the Act deals with occupational health and safety, and there is also a heavy emphasis on the rehabilitation of injured workers, not merely on providing a scheme for mere monetary compensation. Thus the Act seeks to prevent injuries from occurring, as well as to rehabilitate those who are injured and to provide for monetary compensation. The shift of emphasis, when compared with the former Act, is apparent when it is realised that the former Act provided solely for compensation for injured workers and for a compulsory insurance scheme to make sure that the compensation would be paid. Under the former Act, an employer could ignore the welfare of his injured worker and leave the whole problem, including the problems associated with compensation, to his insurers. This is plainly no longer the case.

18. In the time available, I have not had the opportunity to comprehensively research the application of section 107 to an interim determination other than for an entitlement to weekly benefits of compensation, but related cases which I did read said nothing of it, and neither Counsel could direct me to a case on point.

19. Notwithstanding, the language of the section is apparently wide; the only explicit constraint being "benefit, or an amount paid or payable, under this Act as a result of an injury to a worker". If the worker can discharge the relevant evidentiary onus in favour of the award of an interim injunction then, arguably, that ought translate to an interim entitlement to any such "benefit or amount paid or payable". Importantly for present purposes, "benefit" stands alone from "amount paid or payable" and it is the latter that readily lends itself to an entitlement to interim weekly benefits of compensation[9]. In this Application though, the focus is on entitlement to a "benefit" more broadly.

[9] Sections 64 and 65 of the Act.

20. Arguably, and in the scheme of the Act, the terminology used in section 107(1) is in broad terms referrable to the heads of damage in Division 3 (headed *Amount of compensation*), and Division 4 (headed *Rehabilitation and other compensation*), of Part 5. Thus, and giving the term "interim determination" a broad meaning consistent with promoting the purpose or object underlying the Act[10], arguably an interim determination is capable of application to any amount "of a party's entitlement to compensation" or, by definition, any "benefit" specified within Divisions 3 and 4 of Part 5.

**Consideration**

21. I think it may fairly be said that an employer's insurers can sometimes become exasperated as costs mount on a particular claim, and the likelihood of restoring pre-injury earning capacity dims. At that stage some will then draw a line in the sand by use of the terminology "closing our file"[11]. Effectively, that is one available mechanism to force a worker into dispute so as to have this Court determine long term liability. There is nothing inherently wrong with that, but the question arises whether such endeavour ought shield an employer's insurer from any liability in the interim, ie; until such time as that dispute is finally heard and determined and any appeal period has expired. In terms of weekly benefits of compensation the answer to that question is clearly "no" subject to the elements of an interlocutory injunction having been made out. But the question of a "benefit" more broadly, in my opinion, requires some further enquiry.

22. A weekly benefit of compensation to provide a worker with recurrent attendant care services appears to me to be consonant with an entitlement to interim weekly benefits of compensation. It is an entitlement clearly authorised by 75 of the Act and readily fits an objective interpretation of "interim determination" insofar as it is capable of either maintaining the

[10] Section 62A of the *Interpretation Act*.

[11] As was the case here – see Annexure "RG6" to the affidavit of the worker affirmed 28 August 2012.

status quo or shielding a worker from any financial detriment which may flow from an adverse decision of an employer. In my view therefore, it is a "benefit" capable of realisation by the terms of section 107(1) of the Act.

23. A one-off lump sum payment does not so readily lend itself to similar interpretation but it does, nonetheless, have the capacity to assist an injured worker with urgent one-off payments that expert opinion recommends for his or her rehabilitation in keeping with community standards. There appears nothing in my examination of section 107(1) of the Act that, of itself, would preclude such need being met by an interim determination.

24. The status quo in relation to rehabilitation was that which existed prior to 20 June 2012 when the worker avers to his solicitors being informed by the employer's insurer that "... no further rehabilitation will be undertaken as I am not considered fit to return to any employment"[12]. That letter had been preceded by a letter dated 13 June 2012 from the worker's then rehabilitation provider which was headed "Case Closure" and to which I have referred at par 21 above.

25. In its affidavit[13] the employer "... confirms that significant rehabilitation assistance has been provided to the worker since the accident by Working Life and also by 4cRisk". I am not told the details of that "assistance" nor have I been provided with any closure or like reports from Working Life or 4cRisk. All I do know is that all such "rehabilitation assistance" has now been terminated.

26. Again, and keeping in mind the apparent purpose of sections 107(1) and 75 of the Act, it seems reasonable to me that, in the circumstances in which the worker presently finds himself, it would not be straying into jurisdictional error if I was to order a contemporaneous assessment to determine how the

[12] Par 10 of the worker's affidavit affirmed 28 August 2012.

[13] Affidavit of Lisa Biglin, Group Manager Health Services Group of United Group Limited, affirmed 4 October 2012, at par 10.

worker might best be "restored to the same physical, economic and social condition in which [he] was before suffering the relevant injury", and to do so by means of an interim determination. The worker continues to have an entitlement to rehabilitation and, in my opinion, it will speed that rehabilitation effort if a contemporary assessment is quickly undertaken.

27. I did not understand either Counsel to argue before me today that what the worker was seeking by his Application for an interim determination was not capable of being actualised by section 107 of the Act. The closest the employer came to that contention was an affidavit from one Lisa Biglin which asserted that the worker's Application did not "sit well" with section 107, followed by assertion that the worker failed to meet the elements supportive of an interlocutory injunction in any event[14].

28. Counsel for the worker, Mr Crawley stressed the provisions of section 75 of the Act which I have recited at par 13 above, and asserted that the worker should not be left to independently self-fund those "fundamental rights". More critically, it was said, and given that the substantive proceeding was not likely to be heard by the Court until the middle of 2013 at the earliest, the intervening 9 month period would see the worker's already parlous circumstances further decline if he was not provided with some interim assistance. This was, said Mr Crawley, the "classical situation" that section 107 was designed to deal with, and the only mechanism available to assist the worker in "reintegrating" himself into society whilst awaiting the final determination of the Court.

29. The employer's view through Counsel, Mr Liveris, was that on the worker's own evidence he had somewhere between $1200 and $1300 per month available after deducting household and personal expenses from his weekly benefits of compensation, and that this amount ought properly be directed to

[14] Supra, at par 12.

those additional expenses now being sought by way of interim determination.

30. Mr Liveris also focused on the bona fides of the symptoms as reported to the various medical experts by the worker, and to which I have briefly referred at par 5 above. He defended the employer's decision to cease all rehabilitation assistance to the worker on grounds of the veracity of the worker's self reported symptomatology, and the expert medical evidence that he would never return to work. All of these things, it was said, would pose significant prejudice to the employer if an interim determination was made.

**Findings**

31. Firstly, I should address the elements of entitlement for the award of an interim determination directed by His Honour Mildren J in *Ahern*[15].

32. There is little doubt in my opinion that the contest between the parties, founding as it does upon the application of section 75 of the Act, amounts on the balance of probabilities to a 'serious question to be tried between the parties'. I have elsewhere in these reasons made known the Court's perception of the importance of that contest in the scheme of the Act. I will therefore move to consideration of the 'balance of convenience'.

33. In my opinion the key to the balance of convenience in this Application lies in the findings of His Honour Mildren J in *Maddalozzo*[16]. In my view, the opinion expressed by Dr Stapleton which I have recited at par 7 above, stands in stark contrast to the workers compensation legislative framework in this jurisdiction, and to rely upon it, as the employer appears to have done, is to disavow one of the central tenets of the scheme of the Act.

---

[15] *Wormald (Australia) Pty Ltd v Aherne* [1994] NTSC 54

[16] Supra.

34. Of course I acknowledge that the employer has, in effect, reached the end of its tether in terms of what more can be done. But in my opinion that dilemma can, and must, be answered by reference to section 75 of the Act.

35. By its decision, which was absent any form of considered explanation or contemporary medical certification, in my opinion the employer here has caused prejudice to the worker in the foreseeable form of the possibility of further deterioration in the worker's capacity to be "restored to the same physical, economic and social condition in which [he] was before suffering the relevant injury".

36. If it was presently concerned as to the quantum of its longer term liability, it was open to the insurer to bring an Application pursuant to section 104(1) of the Act[17] whilst continuing to maintain the status quo by meeting its section 75 obligation.

37. After careful consideration of all the factors in *Ahern*[18] it is my opinion, and I find on the balance of probabilities, that there is a serious question to be tried between the parties and that the balance of convenience lies in favour of the worker.

38. I also find that the elements of entitlement which the worker seeks by his Application for an interim determination are capable of realisation by the terms of section 107(1) of the Act.

39. I will exercise my discretion and order accordingly.

40. In doing so, I am conscious that my findings in this interlocutory jurisdiction of the Court are not amenable to appeal in the normal course of

[17] See definition of "insurer" in section 3 of the Act.

[18] Supra.

events[19]. However, if the employer is of the view that I have strayed into jurisdictional error, it does have recourse to judicial review[20].

41. Finally, let it be clear that in awarding an interim determination for the employer's insurer to fund an entitlement to a contemporary assessment of the worker's rehabilitation needs, I have not been asked to extend, and I explicitly do not extend, the interim determination beyond that boundary.

**Orders:**

1. Interim Determination to issue in favour of the Worker for the payment of the following amounts:

   - $304.00 gross per week for the purpose of attendant care services and home help to the extent of 1 hour per day, 7 days per week;
   - A one-off lump sum of $275.00 to fund specified personal needs equipment; and
   - The costs of a rehabilitation assessment to determine how the worker might presently be best "restored to the same physical, economic and social condition in which [he] was before suffering the relevant injury"

2. The worker is to account to the employer for the above amounts.

3. Interim Determination to apply for a period of 12 weeks from the date of this decision.

4. Costs in the cause.

Dated this 11th day of October 2012

**JULIAN JOHNSON**
JUDICIAL REGISTRAR

[19] Section 114A(2) of the Act.

[20] *Day v Yuendumu Social Club Inc & Anor* [2010] NTSC 7.