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

PARTIES:	RONALD WILLIAM KEATING V GLOBAL INSULATION CONTRACTORS (NSW) PTY LTD (ACN 003 100 276)
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Northern Territory
FILE NO(s):	20910638
DELIVERED ON:	20 June 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	6, 7, 8, 9, 10 September and 18 November 2010
JUDGMENT OF:	Morris SM

CATCHWORDS:

WORKER'S COMPENSATION -- "Injury" and "disease" -- in the course of employment -- live in accommodation -- fly in fly out worker -- notice of injury -- claim for compensation out of time – reasonable cause for not making claim -- unaware injury work related -- mistake in fact and law -- incapacity

Workers Rehabilitation and Compensation Act (NT)

Zickar v MGH Plastics Pty Ltd (1996) 187 CLR 310, considered
Kennedy Cleaning Services Pty Ltd v Petrovska (2000) 174 ALR 626, considered
Young v HWE Contracting Pty Ltd [2004] NTMC 36, applied
Hatzimanolas v ANI Corporation (1992) 173 CLR 473, applied
Maddalozzo v Maddick (1992) 108 FLR 159, applied
Tracy Village Sports and Social Club v Walker (1992) 111 FLR 32, applied
Van Dongen v NT of Australia (2005) 16 NTLR 169, considered

REPRESENTATION:

Counsel:

Worker:	Mr McConnel
Employer:	Mr Crawley

Solicitors:

Worker:	Ward Keller
Employer:	Cridlands MB

Judgment category classification:	B
Judgment ID number:	[2011] NTMC 021
Number of paragraphs:	57

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

No. 20910638

BETWEEN:

Ronald William Keating
Worker

AND:

Global Insulation Contractors
Employer

REASONS FOR JUDGMENT

(Delivered 20 June 2011)

Ms MORRIS SM:

1. Ronald Keating's working life has been characterised by employment that relies on his body's strength and physical labour. From school he has been a trolley collector, a garbage man, a roof tiler and a scaffolder. He has rarely worked in a sedentary job. He has not worked in an office or in administration. His work has been outdoors.

2. Mr Keating has been unable to continue with this type of work since around July 2007. He has been on medication for pain, a long term relationship has broken down, he has had a number of different temporary residences and an instance of being overwhelmed by his circumstances led him to overdose on prescription medication. He is on a disability payment from Centrelink. He has also formed a new relationship and become a parent.

3. Mr Keating has applied under the *Work Health Act* for benefits and compensation in connection with an injury suffered by him arising out of or in the course of his employment with Global Insulation Contractors, his employer in July 2007.

4. Mr Keating commenced employment with the employer as a casual scaffolder on the Alcan Gove G3 project. He was subsequently appointed as a permanent employee but with the duration of his employment on the project to be governed by the employer's workload during the construction phase. As a scaffolder he generally worked in a gang of three with a scaffold supervisor.

5. Mr Keating is a worker within the meaning of the *Act*. The employment was on a fly in fly out basis. He normally lived in Queensland. While on-site, at the employer's cost, the worker was accommodated in the G3 village and meals were provided.

6. The worker flew out from the G3 project on 25 July 2007 and has not returned.

The Claim

7. The worker submitted a claim for compensation for an injury which was received by the employer on 22 December 2008. The employer issued a notice of decision pursuant to section 85 of the Act dated 23 January 2009 disputing liability for the claimed injury.

8. The worker sought mediation of a dispute with NT Worksafe on 28 January 2009. The mediation occurred but resulted in no change. A certificate of mediation was issued on 4 March 2009 and proceedings were commenced on 26 March 2009.

Did the worker suffer an injury on or about 11, 13 and/or 19 July 2007?

9. Injury means a physical injury and includes a disease and the aggravation, acceleration, exacerbations, recurrence or deterioration of a pre-existing injury or disease. Disease includes a physical ailment, disorder, defect or morbid condition, whether of sudden or gradual development.[1]

10. The worker's claim is that he suffered a prolapse of his lumbar disc, which occurred over a period of days and resulted in the prolapsing disc material compressing the S1 nerve root.

[1] S3, the *Workers Rehabilitation and Compensation Act (the Act)*

11. From the objective evidence (medical records etc) it is clear that during July 2007 the worker suffered symptoms of a physical ailment for which he sought treatment and ultimately flew out of Gove on 25 July 2007.

12. Diagnosis of this ailment from the medical experts is largely agreed between the employer and the worker, being a prolapsed disc with nerve root impingement and the weight of the medical opinion before me supports a finding that the rupture of the disc occurred shortly before 19 July 2007.

13. However how and when the injury was precipitated is less clear. The worker's evidence as to where and how the injury may have occurred is not supported by the medical records of the site medical centre. Where there are discrepancies as to dates and consultations I prefer the written evidence of the clinic notes. The worker was not a good historian but I do not find that he has deliberately attempted to mislead the court. The expert medical evidence (apart from Dr Lorentz raising it as a 'possibility') does not support the lifting injuries described by the worker, which occurred up to two or three weeks prior to 19 July, being causal of a prolapsed disc.

14. The first mention of lower back pain in the medical records of the work clinic is on his attendance of 13 July 2007 to the medical clinic. He attended the clinic again on 19 July and later attended Gove hospital on 20 July for his back pain. I am satisfied that from about 19 July until he left Gove on 25 July 2007 the worker, because of his back pain, only undertook light duties when he worked, and some days he did not work at all.

15. Whilst I am unable to find from the evidence the exact day and time some sort of physical trauma precipitated the injury, I am satisfied that the worker suffered an injury, as per its full definition in the Act, at least on 19 July 2007, the day the worker woke to have severe pain and difficulty getting out of bed.

16. Was this an aggravation of a pre-existing injury such as lumbar disc degenerative disease? This is important as it is not necessary for there to be any proof of a causal connection between the employment and the injury if an injury happens within the protected period of employment. However, as counsel for the worker submits, "It is only if the worker – relying on the "disease" provisions of the

definition of injury – was asserting that the injury is a culmination of a disease, or the ordinary consequences of the progress of a disease, that he would need to show that the employment materially contributed to that injury. The worker does not do so in this case."[2]

17. The worker's submission is that he suffered an injury as distinct from the progression of a disease. The injury being the prolapse of his lumbar disc, which occurred over a period of days and resulted in the prolapsing disc material compressing or irritating the S1 nerve root.

18. The employer's submission is that "There is no doubt that the pre-existing degenerative changes to the worker's lumbar spine come within the definition of "disease". That was generally accepted by the doctors in their evidence. Similarly, there can be no doubt that the disc protrusion diagnosed as "the injury" was accepted by them as an aggravation, acceleration or exacerbation of such disease".[3]

19. The employer's submission is that if the injury is both injury and exacerbation of disease, then the provisions and exclusions in relation to disease must apply. The worker's submission is that if the injury is both injury and disease, then only if the worker was relying solely on the disease provisions, would the exclusion apply.

20. In the High Court case of *Zickar*[4], also considered in *Kennedy Cleaning*[5], the Court held that a cerebral aneurism was a disease, but its rupture was an injury. Hence it was sufficient that the rupture occurred in the course of employment to be compensable, without having to establish that the employment contributed to it. In *Kennedy Cleaning* the impairment was also found to be an injury, so there was no need to resort to the deeming provisions.

21. The Employer submits that in the Northern Territory we have the same definition of disease as in *Kennedy Cleaning*, and seeks to distinguish *Zickar* on that basis.

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[2] Submissions p10
[3] Submissions p15
[4] *Zickar v MGH Plastics Pty Ltd* (1996) 187 CLR 310
[5] *Kennedy Cleaning Services Pty Ltd v Petrovska* (2000) 174 ALR 626

"The ultimate prolapse of a disc in a degenerate lower back may be an injury by application of the principles in *Zickar*, but it also satisfies the definition of aggravation, exacerbation, recurrence or deterioration of a disease."[6]

22. I accept the employer's submission that the Act positively excludes a disease unless the employment in which the worker is or was employed materially contributed to the worker's contraction of the disease to its aggravation, acceleration or exacerbation. This statutory direction is contained in s4(6A) and (8) of the Act.

23. There is evidence that the worker has pre-existing degenerative changes to his lumbar spine. The evidence of the medical experts (including that we all have these degenerative changes to some extent as we age) is sufficient for me to find that these degenerative changes are a disease as defined in the Act.

24. I find, from all the evidence that the impairment suffered by the worker i.e., the prolapsed disc, falls within the definition of an injury simpliciter, notwithstanding it may have occurred against the backdrop of a disease. The onset of pain was relatively sudden, as opposed to a chronic situation with onset of pain over a period of months. This finding is supported by the expert evidence of Dr Day, Dr Curtis and Dr Chase.

25. If the injury also falls within the definition of a disease, and applying the principles in *Zickar* and *Kennedy Cleaning*, I find even with regard to s4(6A) and (8) of the Act, that the worker is entitled to rely solely on the impairments captured by the definition of injury (without the further inclusion of disease). The addition of sub sections (a) and (b) to the definition of injury in section 3 of the Act ensures the inclusion of additional circumstances of injury than that normally inferred. All disease is thus an injury, but not all injuries are diseases. Section 4(6A) and (8) add constraints to those additional circumstances. However I do not find that these constraints also then apply to injuries which may be classified as both an injury and a disease or aggravation of a disease.

[6] Submissions p14

In the course of employment

26. If there was an injury, did the injury occur in the course of employment?

27. I adopt the reasoning of their Honours' in *Young v HWE Contracting Pty Ltd*[7] and *Hatzimanolas v ANI Corporation*[8], and from the evidence before me conclude that the circumstances of the worker's employment bring the injury into the course of his employment. The worker, as in those cases, was a fly in fly out worker in a remote location. The worker was obliged to live in accommodation provided by the employer and the reason for the worker being in that location, away from his normal residential address, was to complete assigned shifts and shift breaks as notified by his employer.

28. As the Employer points out however, "simply being in a remote location does not in itself mean that one is in the course of employment. Outside of a worker's actual work duties and the obligations an incidents of employment, the essential criteria as to whether a worker is in or outside of the course of employment is whether the employer has expressly or impliedly induced or encouraged the worker to engage in a particular activity in which he was injured."[9]

29. The evidence, including that the accommodation was provided to the worker for the express purpose of taking breaks and rest between working shifts, and including that there is no evidence that the worker was doing anything untoward or unauthorised in that accommodation supports that the worker was in the course of his employment. I reject the Employer's submission that sleeping is an 'ordinary daily activity required of oneself irrespective of his employment status,' and thus is not in the course of employment. There are many ordinary daily activities which, in certain circumstances, can be done in the course of employment, including eating, washing, dressing and sleeping.

30. I therefore find that when the worker awoke in his accommodation on the morning of 19 July 2007 with severe back pain he was in the course of his employment.

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[7] [2004] NTMC 36
[8] (1992) 173 CLR 473
[9] Submissions p19

Notice of injury

31. Did the worker give notice of the injury to the employer as soon as practicable as required under section 80 of the Act?

32. "Compliance with s 80(1) of the Act is a condition precedent to a worker's entitlement to compensation. It is not a procedural section."[10]

33. "The question of whether or not a worker has failed to give notice as soon as practicable is a question of law. The facts which bear upon this question are for the Work Health Court to determine, but the ultimate conclusion is necessarily a question of law."[11]

34. There is sufficient evidence to find that the worker notified his employer of his injury and that the employer was aware of the injury. He presented to a clinic provided by his workplace and received treatment at that clinic on 13 and 14 July 2007. He notified his immediate supervisor, Mr Loraine, who observed him suffering from pain. He was then taken by the work site health officer employed by his employer for treatment. He was placed on light duties, and ultimately transferred earlier than scheduled, at his request, but organised by his employer, off site because of his injuries.

35. The employer submits that the work clinic was not operated by the employer and was not delegated to receive notice of injuries by the employer. Given that, and that the worker never suggested before he flew out of Gove that his back problems were related to his employment at all, the employer says that the worker has failed to give notice as required by section 80 and section 81(1)(d). However it is clear that the clinic was provided by the employer as a place for injured and ill workers to receive treatment whilst they were on site at a remote work place. Notes are taken by trained medical staff of those injuries and treatment prescribed. In my view, in all the circumstances of this case, notification to an on site employer provided medical service of an injury, is notification to an employer. In any event, if I am wrong about that, Mr Loraine, the supervisor, was also aware of the injury of the worker, having been advised by the worker,

[10] *Maddalozzo v Maddick* (1992) 108 FLR 159 at 163
[11] Ibid at 170

consequently organising light duties and having organised an early transfer out of Gove. That neither the worker nor Mr Loraine knew or realised that the injury was in the course of the worker's employment (as a matter of law) does not preclude the notification of the injury itself. The further involvement and notification of the work site health officer also supports this finding.

36. Given this finding, I do not need to make a determination as to the admissibility of MFI W 14 and the affidavit of Mr Keenan and the calling of various witnesses for cross-examination.

Claim for compensation out of time

37. A claim for compensation must be lodged within 6 months of the occurrence of the injury. I have regard to the circumstances between the date of the injury and the expiry of the six month period, up to January 2008. Failure to lodge within that time frame is not a bar to proceedings if it is found that the failure was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause.[12]

38. The worker's submission is that 'the circumstances of the worker's understanding of his medical condition at the relevant time, and his failure to appreciate that his injury was a compensable injury, are both independent mistakes sufficient to overcome the time limitation in this matter.'[13]

39. The evidence of the worker, both in examination and cross examination is not clear as to his reasons.

> "Now, which is true? --Well, I went for the income protection because of the future work aspect and I also didn't know you could claim income protection and plus also do a workers' comp.
>
> You say you went for income protection because you didn't want to claim workers compensation: that's what you told us on oath this morning? – Yes.

[12] The *Act*, s182(3)
[13] Worker's Submissions para 199.

> Because you thought if you claimed workers compensation it would affect your future employment prospects; do you remember telling us that this morning? – Yes.
>
> And was that true?—Yes.
>
> So doesn't that mean you were aware you could make a claim but you chose not to? – I suppose, yes
>
> And yet in this letter it says, 'When I was first injured I was unaware I could make a claim.' Do you understand the difference? – Yes, I suppose, yes.
>
> So the statement in this explanation for delay is wrong, is that correct? – Well, I suppose that if you read it that way, yes."[14]

40. The worker's submission is that he thought the injury would resolve with physiotherapy and he would be able to return. His supervisor Mick Hemmings suggested to the worker he utilise his income protection insurance for the few weeks he would be off work. The worker also believed that the injury was not compensable because it had not occurred at the actual worksite whilst he was physically working, but whilst he was in the living quarters provided near the site.

41. I follow the reasons of Mildren J in *Tracy Village Sports and Social Club v Walker* at 42 on this issue.

> "But for there to be mistake, there must be evidence that the worker knew that in some circumstances he is entitled to compensation, applied his mind to the circumstances of his position as he knew them to be, to the law as he understood it and misconceived his true position in either fact or law or both….It is to be contrasted with the position of a person who does not think about the matter at all, who is in a state of passivity of thought owing to the absence of any conception of the matter, or who is not acting upon any misconception of law of facts. Such a person's state of mind is one of ignorance, not mistake:[15]"

[14] Transcript p108
[15] *Tracey Village Sports and Social Club v Walker* (!992) 111 FLR 32

42. From all of the evidence I find that the worker chose not to apply for workers compensation because he was concerned about future work prospects. He made this choice in the light of what he thought was his condition at the time, i.e., firstly, that it would resolve within six weeks, and then after that time, that it would resolve with each of the treatments that he attempted. I also find that the worker did not initially realise that the pain in his back which caused him to reduce and then cease his normal duties, was related to his employment with Global Insulation. This finding is supported by the document "Amendment Request Deviation to R&R"[16] where both the worker and his supervisor Ron Liddle signed a request for an earlier fly out date with the justification "Has obtained a non-work related injury".

43. I find that the worker did turn his mind to compensation and that he misconceived his true position in both fact and law.

> "A hope or expectation that a worker may make a complete recovery may amount to a reasonable cause and may more readily do so where the injury is latent, difficult of diagnosis or, possibly, difficult of prognosis: *Fenton v Owners of Ship 'Kelvin'*[1925] 2 KB 473 at 482;*Butt v John W Easton Ltd* (1920) 29 CLR 126.
>
> Mere ignorance of the law alone will not be sufficient. However ignorance of the law when combined with other factors may amount to reasonable cause."[17]

44. Thus I find that the proceedings are not barred having been made outside the six months.

Incapacity

45. Was the worker totally, partially or not incapacitated for work?

46. The general consensus of the expert witnesses is that the worker has been partially incapacitated for work since July 2007 as a result of his lower back condition.

[16] Exhibit W4
[17] *Van Dongen v NT of Australia* (2005) 16 NTLR 169 per Riley J at 181

47. The opinions vary as to the extent of the incapacity. I accept the employer's summary of the evidence thus:

1. Dr Shaw – light physical or sedentary work 20 hours per week.

2. Dr Curtis – fit for lighter work initially part time but then full time

3. Dr Day – expressed no opinion

4. Dr Cameron – avoid heavy lifting, working in a confined spaces or with excessive jarring. The jobs identified by Ms Zeman would be suitable.

5. Dr Smith – avoid excessively heavy and repetitive bending and lifting. He could drive a crane.

6. Dr Chase – he sees no difficulties with any of the jobs referred to in the report of Ms Zeman.

7. Dr Lorentz – capable of performing the jobs identified by Ms Zeman.

8. Ms Zeman – including crane driver.

48. Having regard to the totality of the evidence, including the evidence of Ms Coles and Mr Caldwell, I find that Mr Keating would be unable to return to work as a crane operator or fork lift driver. I prefer the evidence of Ms Coles to that of Ms Zeman due to her extensive experience, including her knowledge of the practicalities of work offered and performed on mine sites. Whilst he may be able to physically perform the driving or operating work, the ancillary duties, such as preparation of load would involve physical exertion and discomfort, beyond his current capacity. Many of the places of employment for these kinds of roles would also be unsuitable for the worker, such as rough and uneven ground around mine or building sites. Even other employment in less arduous environments, such as a loading dock, would require ancillary duties, such as organising pallets, which the worker would not be able to complete.

49. However he would be capable of performing more sedentary work, such as video store worker, some security or gate keeper roles or console operator.

50. I accept that due to the length of time out of employment, Mr Keating would not be able to return to full time employment immediately, and at the time of trial would not be able to work in these sedentary roles for more than 20 hours per week. Rehabilitation and return to work assistance would be required both to

achieve this number of hours of employment and to increase employment over time to full time.

Entitlement to and amount of compensation

51. It is agreed that the worker's normal weekly earnings were $2664.31 (being $2441.11 in wages and $223.20 as a non cash benefit). It is also agreed that the quantum of medical expenses is $5902.25.

52. For the first 26 weeks of compensable incapacity the worker is entitled to 100% of his normal weekly earnings less his actual earnings.[18] Thereafter until 104 weeks of compensable incapacity the worker is entitled to 75% of the difference between his normal weekly earnings as indexed and the amount he is capable of earning in employment which is reasonably available to him.[19] After 104 weeks the worker is entitled to 75% of the difference between his normal weekly earnings and the amount he could earn in the most profitable suitable employment, irrespective of whether it is available to him or not.[20]

53. The factors to consider in assessing the most profitable employment are defined in the Act at s 68:

> *In assessing what is the most profitable employment available to a worker for the purposes of section 65 or reasonably possible for a worker for the purposes of section 75B(3), regard shall be had to:*
>
> *(a) his or her age;*
>
> *(b) his or her experience, training and other existing skills;*
>
> *(c) his or her potential for rehabilitation training;*
>
> *(d) his or her language skills;*
>
> *(e) in respect of the period referred to in section 65(2)(b)(i) – the potential availability of such employment;*
>
> *(f) the impairments suffered by the worker; and*
>
> *(g) any other relevant factor.*

[18] S64
[19] S65(2)(b)(i)
[20] S65(2)(b)(ii)

54. The employer's submission is that the worker, if entitled, could claim 100% of his normal weekly earnings from July 2007 to January 2008, less his actual earnings from a couple of nights at a nightclub. Thereafter he would be entitled to 75% of the difference between his normal weekly earnings less the rate of pay for a cockatoo, a crane driver, a fork lift driver, a supervisor or a video shop attendant.

55. Having considered the factors in s68 and the evidence before me described above, I find that the most profitable employment the worker could undertake is that of a security officer, with a normal weekly remuneration of $659.10 plus superannuation.

Conclusion

56. The orders and findings I thus make are:

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.

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

57. Given those findings I invite submissions as to the calculation of the amount of compensation pursuant to s 64 and s65 and costs.

Dated this 20th day of June 2011

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Elizabeth Morris
STIPENDIARY MAGISTRATE