CITATION: *CKL v HSE Mining Pty Ltd* [2007] NTMC 002

PARTIES:	CKL
	-v-
	HSE Mining Pty Ltd
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH ACT
FILE NO(s):	20506041
DELIVERED ON:	19 January 2007
DELIVERED AT:	DARWIN
HEARING DATE(s):	19 December 2006
DECISION OF:	D LOADMAN, SM

CATCHWORDS:
INTEREST AWARDS PURSUANT TO SECTION 109 WORK HEALTH ACT – INDEMNITY COSTS – BOTH CLAIMED CONSEQUENT ON SUMMARY JUDGEMENT ENTERED AGAINST EMPLOYER

Act
Work Health Act

REPRESENTATION:

Counsel:

Worker:	Mr Colin McDonald QC
Employer:	Ms Judith Kelly

Solicitors:

Worker:	Ward Keller
Employer:	Cridlands

Judgment category classification:	B
Judgment ID number:	[2007] NTMC 002
Number of paragraphs:	28

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

No. 20506041

BETWEEN:
CKL

Worker

AND:
HSE MINING PTY LTD

Employer

DECISION

(Delivered 19 January 2007)

Mr David LOADMAN SM:

1. The relevant applications for the purposes of this decision comprise:-

   a. an application for summary judgement and other relief made pursuant to rule 6.03(a) of the Work Health Court Rules ("the rules")(the Worker's application");

   b. There is a second interlocutory application filed pursuant to the same rule seeking a stay of the summary judgement application or an adjournment of same to a date to be fixed. This application is stated to be in pursuance of part 6 and rule 3.04 of the rules. ("the Employer's application").

2. With the leave of the court the initial affidavit in support of the Employer's application, sworn by David Langdon Sweet ("Sweet") 13 December 2006, was supplemented with further affidavits by Sweet sworn 18.12.2006 and 19.12.2006.

3. On 19.12.2006 after argument the court ordered that summary judgement be entered against the employer in favour of the worker in terms to be formulated and the Employer's application was adjourned to 20 December 2006.

4. On 20 December 2006, by consent, orders were made in terms of paragraphs 2, 3, 5 and 8 of the Worker's application.

5. The relevant paragraph for the purposes of this decision is paragraph 5 of the Worker's application which is in the following terms:-

> "that the employer pay the worker interest pursuant to section 89 of the *Work Health Act* on all arrears or weekly benefits calculated on and from 22 February 2005 to the date of payment in such sum as this Honourable Court may determine"

6. The interest prescribed by regulation 14 of the regulations under the *Work Health Court Act* applicable to an order in terms of section 89 of that Act specifies the rate of interest to be an amount of 20%. Interest at that rate is included in the monetary sum for which judgement was duly entered in favour of the Worker against the Employer.

7. Those paragraphs of the Worker's application which are contested are the following paragraphs:-

> "6. That the Employer pay the Worker interest pursuant to Section 109(1) of the *Work Health Act* on all arrears of weekly benefits owing on and from 6 October 2006 to the date of payment, to be calculated at 20% per annum or at such other figure as this Honourable Court may determine.
>
> 7. That the Employer pay the Worker further interest pursuant to Section 109(3) of the *Work Health Act* on all arrears of weekly benefits owing on and from 6 October 2006 to the date of payment, to be calculated at 20% per annum or at such other figure as this Honourable Court may determine.
>
> 9. That the Employer pay the Worker's costs of and incidental to this application to be taxed on the indemnity basis, or in the alternative on the standard basis, at 100% of the Supreme

Court Scale in default of agreement and certified fit for counsel.

10. Such further or other Order or Orders as this Honourable Court deems meet."

The Employer concedes liability for relevant costs on the standard basis at 100% of the Appendix to the Supreme Court Scale.

8. Section 109 of the *Work Health Act* is in the following terms:-

"109. Unreasonable delay in settlement of compensation

(1) If, in a proceeding before it, the Court is satisfied that the employer has caused unreasonable delay in accepting a claim for or paying compensation, it must –

(a) where it awards an amount of compensation against the employer – order that interest on that amount at a rate specified by it be paid by the employer to the person to whom compensation is awarded; and

(b) if, in its opinion, the employer would otherwise be entitled to have costs awarded to him or her – order that costs be not awarded to him or her.

(2) Where a weekly or other payment due under this Act to a person by an employer has not been made in a regular manner or in accordance with the normal manner of payment, the Court must, on an application in the prescribed form made to it by the person, order that interest at a rate specified by it be paid by the employer to the person in respect of the amount and period for which the weekly or other payment was or is delayed.

(3) Where the Court orders that interest be paid under subsection (1) or (2), it may, in addition, order that punitive damages of an amount not exceeding 100% of such interest be paid by the employer to the person to whom compensation is awarded or to whom the weekly or other payment due under this Act is payable."

9. The rule relating to the entitlement to make application for summary judgement is rule 21.02 which is in the following terms (only the relevant provisions are quoted):-

"21.02 Application for summary judgment

(1) A party may apply for summary judgment on relevant grounds, including the following:

(a) the other party, having filed a notice of defence, has no real defence to the claim made in the proceeding;

(c) the other party has no real cause of action;

(d) the proceeding is frivolous, vexatious or an abuse of the process of Court.

(2) A party who applies for summary judgment may, if applicable, also apply for compensation or other relief to be assessed."

10. The basis upon which summary judgement was applied for and indeed acceded to by this court was on ground 21.02 1(a) and or (c) above. The basis for the judgement was a decision of the Full Court of the Northern Territory in a matter of Chaffey v Santos Limited [2006] NTSC 67 ("Chaffey"), a majority judgement of Mildren and Southwood JJ. The decision in Chaffey simplistically amounted to the purported legislative power to remove the entitlement to include in "normal weekly earnings" superannuation contributions being declared invalid for reason of being inconsistent with section 50 of the *Northern Territory (Self-Government) Act*.

11. It is significant however, that His Honour Mr Justice Angel came to an antithetical conclusion. This court was informed, and accepted it to be so, that an application for special leave to appeal to the High Court of Australia was imminent and that in light of the nature of the decision, most likely to be the subject of the grant of special leave. What is important from the point of view of this court's decision in relation to those contested matters referred to, is to highlight the fact that although according to the principles of stare decisis, Chaffey binds this court and as a consequence excludes the existence of any valid defence to the Worker's claim, it is not a unanimous decision and certainly creates a situation where there is prospectively an arguably valid appeal.

12. It is not intended to burden this decision with every communication which passed between the relevant firms of solicitors representing the interests of the Worker on one hand and the Employer on the other, but what was canvassed in general terms was:-

1. If any payment was made pursuant to Chaffey would the Worker put in place an arrangement to secure repayment in the event of Chaffey being overturned by the High Court;

2. The quantum of costs relating to issues and offers to pay sums of money and costs set out in the letter the 30 November 2006, all of which ultimately came to naught.

13. It is put on behalf of the Worker that the conduct of the Employer amounts to "unreasonable delay" as set out in section 109 of the *Work Health Act*.

14. As a consequence it is then contended that if "unreasonable delay" is established then pursuant to Section 109(1)(a) *Work Health Act* it (the court) must, where compensation is ordered, (as has been the case) order that interest on that amount at a rate specified by it, be paid by the Employer to the person to whom compensation is awarded. As to the amount of interest, although at the time of the decision in question, section 109 conferred a discretion as opposed to an obligation to award interest, His Honour Mr Justice Mildren in the matter between Wormald International (Aust) Pty Ltd and Barry Leslie Aherne delivered 23 June 1995 (unreported) ("Wormald"), at page 4 makes the statement "As to the rate, I consider, having regard to s.89 of the Act, that the appropriate rate was 20 per centum per annum", although in fact the basis of that award was a contravention of section 109(2). His Honour does not explain his adoption of 20%. The court was informed that R J Wallace SM had in fact ordered interest at 12% per annum in relation to an appropriate analogous matter.

15. In Wormald also, His Honour, vested with a discretion which was then in the same terms as that subsection is currently framed, exercised his discretion and ordered punitive damages namely "that sum which represents a 100% of the interest so ordered to be paid". That was then and is now the maximum, the relevant wording of limitation being a capacity to exercise a

discretion to award punitive damages of an amount not exceeding 100% of that interest.

16. Further, in Wormald His Honour, presumably as a consequence of a contravention of section 109(2), ordered payment of interest on interim compensation at the rate of 25 per centum per annum. Again there is no explanation as to the reason for adopting that yard stick.

17. In this matter the Worker seeks, in addition to the orders already set out above, an order for indemnity costs. Rule 23 of the Rules deals with the issue of costs in this jurisdiction. Rule 23.02 propounds that practice directions issued by the Chief Magistrate (of which there are none relevant) and order 63 of the Supreme Court Rules applies. Rule 23.03(1) provides that the costs of an incidental to a proceeding are in the court's discretion and "the Court has the power to determine by whom, to whom, to what extent and what basis the costs are to be paid."

18. It is this court's view and finding that it does have the power to award costs on an indemnity basis either because of the wide discretion conferred in rule 23.03(1) or because of the invocation of the Supreme Court Rules. In the event that the court does not grant an order in favour of the Worker for indemnity costs then the Employer concedes it should bear costs on the standard basis and the percentage of the appendix which should be ordered in favour of the Worker is the percentage of 100 per centum. There is a provision of the *Work Health Act*, namely section 110, which under the heading "Costs" may have some bearing on the matter, but, relates to an application under section 104 and in this court's construction doesn't amount to a variation of the above criteria which amounts simply to the fact that costs are within the discretion of the court.

19. Mr McDonald contended that the delay in payment following upon the decision in Chaffey sufficed to constitute "unreasonable delay" and to lay the basis for an award of indemnity costs.

20. Ms Kelly, on behalf of the Worker, contended that a proper interpretation of the correspondence made it clear that the Employer accepted the validity of the Worker's claim following on Chaffey. She further contended that as the law was unsettled and as has been pointed out by the court, involved a pronouncement of a majority decision in the Full Court of the Northern Territory, it could not be said that the efforts, in essence, to secure repayment in the event of a successful appeal against the Chaffey decision, amounted to unreasonable behaviour or conduct on the part of the Employer. Previously argued on 19 December 2006 by Ms Kelly, were a series of consequences contingent on the facts specified and those prognostications are set out below:-

<table>
<tr><td>1. Work Health Court grants application for adjournment</td><td colspan="2">2. Work Health Court refuses application for adjournment</td></tr>
<tr><td rowspan="3">NO ACTION NECESSARY TILL SPECIAL LEAVE APPLICATION HEARD</td><td colspan="2">2(a) employer lodges appeal in Supreme Court
worker enters appearance
parties attend directions hearing and adjourn appeal</td></tr>
<tr><td colspan="2">2(b) employer makes application for stay of execution of judgment in Work Health Court (contested application)</td></tr>
<tr><td>2(c)

stay of execution granted:

same position as if application for adjournment had been granted except that it will have taken four more steps (and associated costs) including a contested hearing

CONTINUE AS PER 1(a) OR 1(b) AS THE CASE MAY BE

After the High Court determines the Chaffey application/ appeal, the appeal to the Supreme Court will need to be disposed of and there is likely to be an argument as to costs.

CONTINUE AS PER 2(e) OR 2(h) AS THE CASE MAY BE</td><td>OR 2(d)

stay of execution not granted:

employer pays worker c. $8,400 arrears (including interest) plus $80.00 odd per week in the future

GO TO 2(e) OR 2(f) AS THE CASE MAY BE</td></tr>
</table>

February 2007 (application for special leave heard by High Court)		February 2007 (application for special leave heard by High Court)	
1(a) High Court refuses special leave in Chaffey: employer consents to summary judgment in Work Health Court and pays arrears plus interest pursuant to s89 plus costs (which are minimal).	**OR 1(b)** High Court grants special leave in Chaffey: GO TO **1(c)** OR **1(d)** AS THE CASE MAY BE	**2(e)** High Court refuses special leave in Chaffey: The employer's appeal to the Supreme Court is dismissed. There is an argument about costs. There is a possibility the employer may be ordered to pay its own and the worker's costs of this appeal which is only necessary because the summary judgment application was not adjourned. (Alternatively – the worker may be ordered to pay these costs.)	**OR 2(f)** High Court grants special leave in Chaffey GO TO **2(g)** OR **2(h)** AS THE CASE MAY BE

Some time between April and July 2007 (appeal heard by High Court)		Some time between April and July 2007 (appeal heard by High Court)	
1(c) High Court dismisses appeal in Chaffey: employer consents to summary judgment in Work Health Court and pays arrears plus interest pursuant to s89 plus costs (which are minimal).	**OR 1(d)** High Court allows appeal in Chaffey: summary judgment application in Work Health Court dismissed (costs minimal).	**2(g)** High Court dismisses appeal in Chaffey: The employer's appeal to the Supreme Court is dismissed. There is an argument about costs. SEE **2(e)** above	**OR 2(h)** High Court allows appeal in Chaffey: The employer's appeal to the Supreme Court is allowed. There is an argument about costs. (The likelihood is that the worker is ordered to pay the employer's costs and to repay between $9,000 and $11,000 in overpaid benefits.) A proposal for repayment in this eventuality has been sought but none has been made. The Employer may have to execute against the worker's property to obtain repayment (with increased costs – a proportion of which will be recoverable against the worker). Alternatively, the employer may try to obtain repayment (and payment of any costs ordered) by deducting amounts owing from future benefits in which case there is the possibility of a challenge to this and a future appeal.

21. This court draws a distinction between an unquestioned assertion that a defence exists where none in fact does, or a failure to acknowledge the obligation to pay pursuant to Chaffey, is to be distinguished from conduct all directed towards the minimisation of costs and monies payable in relation to the several contingencies listed by Ms Kelly.

22. The court finds that the philosophies behind the negotiations conducted between the parties through their solicitors at all material times was directed by the Employer's solicitors indisputably to the minimisation of costs and other financial consequences and the securing of an ability to recover monies in the event that they were to succeed in the appeal to the High Court. That conduct is to be distinguished, as has already been pointed out, from contumelious or specious dismissal of the validity of the claim as pronounced in Chaffey and is not, in this court's finding, such that there has been satisfaction, as is required, in section 109(1) namely "… the Court is satisfied that the employer has caused unreasonable delay …. in paying compensation".

23. As a consequence of the court's finding to that effect, there is no peremptory obligation on it to award interest pursuant to section 109(1)(a) and the court declines to do so.

24. In those circumstances section 109(3) has no work to do because prior to its invocation and application, this court must have ordered interest be paid under subsection (1) and the discretion to make the award referred to in that subsection is simply not enlivened.

25. That then brings the court to the consideration of the argument advanced by Mr McDonald as to the basis upon which indemnity costs ought to be ordered in favour of the Worker against the Employer. In essence he contended that the failure to make payment following upon Chaffey, as it were, immediately that decision was handed down, was in itself not only unreasonable delay but sufficient to amount to a positive contumelious act by the Employer.

26. Ms Kelly propounded that the same arguments which precluded the invocation and application of section 109(3) predicated on an award under section 109(1), applied to the award of indemnity costs, bearing in mind of course, the concession that the Employer accepted an obligation to pay

100% of the Supreme Court Scale on a standard costs basis. She propounded that there had to be a totally specious or unreasonable defence advanced or an assertion made that a stated defence was going to be maintained and the decision of the court of appeal was going to be ignored. As has already been said, that is not what this court finds the expressed philosophy and proper construction of the relevant correspondence demonstrates. It demonstrates, if anything, a course of conduct which would have made secure, payment of the Worker's entitlements, in due course, if the High Court of Australia upheld the majority decision of the Supreme Court of the Full Court of the Northern Territory. If that is wrong it certainly did not, in this court's view as already expressed, amount to an unreasonable delay.

27. There is no contumelious wrong doing, conscious wrong doing, thumbing the proverbial nose at the decision in Chaffey and in all the circumstances the court declines to make an order for indemnity costs.

28. In the circumstances, the court will however, make an order in terms of paragraph 9 of the Worker's application of 9 November 2006, that the Employer pay the Worker's costs of and incidental to this application on the standard basis of 100% of the Supreme Court Scale, in default of agreement to be taxed and certifies that this was a matter proper for the engagement of one of Her Majesty's Counsel by the Worker. Lest there be unnecessary argument, such costs are to include any reserved costs, the costs of and incidental to the Employer's application and the costs of the Worker's application. There is also liberty granted to apply in relation to the scope of the cost order above if circumstances so dictate.

Dated: 19 January 2007

DAVID LOADMAN
STIPENDIARY MAGISTRATE