

CITATION: *Sweeney v Downers Downers EDI Pty Ltd* [2010] NTMC 034

PARTIES: BRAD LEE SWEENEY

v

DOWNERS EDI PTY LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 21012532

DELIVERED ON: 12 May 2010

DELIVERED AT: Darwin

HEARING DATE(s): 5 May 2010

JUDGMENT OF: J Johnson A/Registrar

CATCHWORDS:

WORK HEALTH – INTERIM DETERMINATION. SECTIONS 75A & 75B OF THE ACT.

REPRESENTATION:

Counsel:

Worker: In Person
Employer: Ms Cheong

Solicitors:

Worker:
Employer: Hunt & Hunt

Judgment category classification: C
Judgment ID number: [2010] NTMC 034
Number of paragraphs: 34

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

No. 21012532

BETWEEN:

BRAD LEE SWEENEY

Worker

AND:

DOWNERS EDI PTY LTD

Employer

REASONS FOR JUDGMENT

(Delivered 12 May 2010)

Mr J JOHNSON A/JR

Background to the Application

1. The worker was injured during the course of his employment on 15 March 2008. Pursuant to section 85(1)(a) of the *Workers Rehabilitation and Compensation Act* (“the Act”) the employer accepted liability for the claim and commenced payments of weekly compensation to the worker pursuant to section 64(1) of the Act.
2. On 19 September 2008 the worker underwent surgery at the hands of Consultant Orthopaedic Surgeon Ba Nyunt to repair the rotator cuff of his right shoulder. There followed a significant period of post operative recovery involving physiotherapy, home exercise, and review by Dr Nyunt.
3. On 15 January 2010, some 16 months post surgery, Dr Nyunt certified the worker fit to return to “restricted” work for 8 hours per day, 40 hours per

week. The “restrictions” on his duties were to avoid ladders, avoid lifting anything heavier than 15 kgs, and avoid repetitive use of affected body part (annexure “PC01” to the affidavit of Ms Peggy Cheong sworn 5 May 2010).

4. Acting upon this medical certification, and pursuant to its obligations under section 75A of the Act, the Employer then engaged the services of *Jobfit Allied Health Pty Ltd* to formulate a return to work program for the worker. The worker could not return to his pre-injury employment because, as I understood the evidence, the employer no longer engages in that pre-injury employment activity. I presume that *Jobfit Allied Health Pty Ltd* is “an accredited vocational rehabilitation provider” (section 75B(1)(A) of the Act) although I was provided with no direct evidence to that effect.
5. So it was that the worker’s return to work program was arranged with a new employer, *ISAS Engineering Field Services*, at the same designation of Trades Assistant in which he had been employed pre-injury. The duties listed in the return to work plan (annexure “PC02” to the affidavit of Ms Peggy Cheong sworn 5 May 2010) were:

Light duties. Tasks may include: conducting electrical calibrations of equipment on various sites around Darwin, Rural and Remote areas, support other team members when in need of parts to be delivered to various job sites, performing general Trade Assistant duties as required, and occasional travel to Katherine and Jabiru to perform electrical calibrations as required.

6. The worker commenced his return to work program on Monday 18 January 2010 and worked for 5 days until Friday 22 January 2010. On the next day of work, Monday 25 January 2010, and the day before a public holiday on Tuesday 26 January 2010, the worker telephoned his new employer to advise him that he would not be at work that day as he had to have a new hot water system installed at his residence. The employer, it seems, took exception to this absence, and relying upon it and a number of other alleged

shortcomings in the worker's performance, cancelled the return to work program with effect 27 January 2010.

7. On 1 April 2010 the employer issued a Notice of Decision (section 69 of the Act) cancelling payment of weekly benefits on grounds that the worker had "...unreasonably failed to participate in the return to work program" (attachment to affidavit of the worker sworn 4 May 2010). The worker applied for mediation of the dispute between the parties on 14 April 2010 (section 103 of the Act) and, as I understand it, that mediation was held on 7 May 2010. Also on 14 April 2010, the worker made application for an interim determination (section 107 of the Act) to "pay the worker interim benefits of weekly compensation for a total of 12 weeks". The application first came on for hearing on 28 April 2010 but was adjourned to allow both parties to provide affidavit material and was finally argued before me on 5 May 2010.

Exercise of the Discretion

8. For an authoritative discussion on the factors which bind the exercise of my discretion in proceedings under section 107 of the Act, I refer the parties to the decision of His Honour the Chief Justice in *Day v Yuendumu Social Club Inc & Anor* [2010] NTSC 07. For present purposes it may be accepted "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" (*Wormald International (Aust) Pty Ltd v Aherne* [1994] NTSC 59 at paragraph 10).
9. As to the first limb of that approach ie, the need to establish a serious question to be tried, I prefer, with respect, the formulation that the worker must establish "a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial"

(*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, per Gummow and Hayne JJ at paragraph 65):

The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [69]. This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued [70]:

"The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted."

By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument [71]."

The Worker's Evidence

10. In submissions from the bar table the worker pressed his case that the position offered to him by dint of the employer's return to work program was "not suited" to him but that, notwithstanding, he went into it with an "open mind" and was never given any oral or written warnings as to the matters now alleged by the employer. His evidence was that "all Trades Assistant jobs require overhead work", and intimated that the duties of this particular job required him to learn new skills which appeared, on my understanding of his evidence, to be beyond either his restricted physical capacity or his inherent motivational capacity.
11. The worker, honestly in my assessment, attempted to refute, as best he could in his unrepresented circumstances, the matters alleged by the employer in paragraph 5 of the Notice of Decision (attachment to affidavit of the worker

sworn 4 May 2010), and pleaded with the Court to grant him interim benefits until such time as his proceeding proper could be finalised.

12. Questioned as to the exercise of any current earning capacity, the worker responded that once he declared his current claim for compensation to any prospective new employer, which he was obliged to do, he would not be employed. On my understanding of the worker's evidence, I did not hear him to argue that he had no earning capacity at all. In fact, he did undertake some fishing activity late in 2009 under the terms, as I understand it, of a current professional fishing licence which he continues to hold.
13. The worker's evidence was that prior to the issue of the Employer's Notice of Decision, his weekly benefits of compensation pursuant to section 65(1) of the Act amounted to \$1,273.00 net per week (affidavit of the worker sworn 14 April 2010). No evidence on that issue was adduced by the employer.

Employer's Evidence

14. The thrust of the employer's evidence was that the worker had "no arguable case". Pursuant to its obligations under section 75A of the Act, and acting upon appropriate expert medical opinion, the employer had made effort to find the worker a suitable return to work program consistent with his "transferable skills" but, having worked for only 5 days in the position was not sufficient time to "give it a fair go"; a reflection, in the employer's submission, of the worker's "lack of interest or motivation". There had, on Counsel for the employer's instructions, been no prior discussion or arrangement for the worker to absent himself on 25 January 2010 and, in combination with the other shortcomings asserted at paragraph 5 of the Notice of Decision (attachment to affidavit of the worker sworn 4 May 2010), the employer felt that it could no longer persevere with the arranged return to work program.

15. There was no submission from the employer going to the interceding time between the date of termination of the return to work program (27 January 2010) and the issue of the Notice of Decision (1 April 2010).
16. I should also observe that objectively, and I stress that there was no direct evidence about this, as at 15 April 2010 (14 days post the employer's Notice of Decision), the worker had been in receipt of section 65 benefits for a period in excess of 104 weeks.

Consideration of the First Limb

17. "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 section 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" (*Maddalozzo and Ors v Maddick* [1992] NTSC 46, per Mildren J at paragraph 22). Section 75B of the Act places a reciprocal obligation upon an injured worker in terms, *inter alia*, that he or she *shall* (my emphasis) participate in workplace based return to work programs (section 75B(1)).
18. In either case, a sanction is prescribed for a failure to comply; in the case of an employer's breach of section 75A, a fine, and in the case of a worker's breach of section 75B, the cancellation or reduction of compensation subject to section 69.
19. I should pause to observe that section 75B(2) of the Act is in the following terms:

 “(2) Where a worker unreasonably fails to undertake medical, surgical and rehabilitation treatment or to participate in rehabilitation training or a workplace based return to work program which could enable him or her to undertake more profitable employment, he or she shall be deemed to

be able to undertake such employment and his or her compensation under Subdivision B of Division 3 may, subject to section 69, be reduced or cancelled accordingly.”

20. Two things arise. Firstly, no evidence was adduced before the Court as to the extent, if any, of the worker's residual loss of earning capacity had the return to work program been successful. That, with respect, is a curious omission. I am not at liberty to inform myself and I am reluctant to criticise an unrepresented worker on that account.
21. Secondly, it is clear that the sanction potentially “deemed” upon a worker who fails to participate in a workplace based return to work program is conditioned upon such failure being “unreasonable”.
22. I find that the worker, by the terms of section 75B of the Act, was required to actively participate in the return to work program devised by the employer. However, in my opinion on the evidence before me, he has not done that with the motivation or application required to convince the Court of a sufficient likelihood of success at trial. Nor, in my opinion, has he adduced any cogent evidence as to “unreasonableness” as a basis for him not to do so. To the contrary, I formed the clear view that the worker was simply biding his time until he could achieve a resolution of his entitlements under the Act, and that he required an interim determination to allow him to do so. That is not, in my opinion, a sound basis upon which to argue a finding of a sufficient likelihood of success to maintain the status quo until trial.
23. Of equal persuasiveness, in my view, the expert medical evidence of both the worker’s treating Orthopaedic Surgeon Dr Nyunt (annexure “PC03” to the affidavit of Ms Peggy Cheong sworn 5 May 2010) and the employer's Consultant Occupational Physician Dr Haynes (annexure “PC05” to the affidavit of Ms Peggy Cheong sworn 5 May 2010) is clear in its terms that, subject to some restrictions relating to heavy work and overhead work using

his right arm, the worker is “fit for many of the activities of his pre-injury role” and has reached “maximum medical improvement at this stage”. Such evidence leaves no doubt, in my opinion, that the worker is capable of exercising some measure of earning capacity. Regrettably (see paragraph 19 above) that measure has not been quantified in evidence before me.

24. Nonetheless, the primary evidence is of sufficient force in my opinion to deem the worker “able to undertake such employment” as I understand the meaning of that terminology in section 75B(2) of the Act.
25. True it is that after 16 months post-operative recuperation it would be difficult for the worker to return to a different employer with different duties and expectations. That does not however, in my opinion, pass the threshold test of “unreasonableness” sufficient to excuse him from his obligation under section 75(B) of the Act. And, whilst I do not accept without reservation all of the employer’s allegations going to the worker’s attitude, I do find, as I have said above, that he did not come to the return to work program with the requisite degree of motivation or application.
26. True it is also that the worker was unrepresented in these proceedings and could not be expected to articulate the nuances of workers compensation law. Nonetheless, and albeit with some imposition upon the strict rules of evidence (section 110A(3) of the Act), in my opinion the worker managed creditably to state his case before the Court.
27. I find, on the balance of probabilities, that the worker has not established “a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial”.

Consideration of the Second Limb

28. What, for convenience, I refer to as the second limb of the approach (see paragraphs 8 and 9 above) is whether “the balance of convenience favours the making of an interim award” or, put another way, “whether the

inconvenience or injury which the [worker] would be likely to suffer if an [interim determination] were refused outweighs or is outweighed by the injury which the [employer] would suffer if an [interim determination] were granted" (*Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1, at paragraph 5).

29. In *Australian Broadcasting Corporation v O'Neill* the High Court discussed the history of developments in the law of interlocutory injunctions by reference, *inter alia*, to the decision of the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396:

However, a difference between this Court in *Beecham* and the House of Lords in *American Cyanamid* lies in the apparent statement by Lord Diplock that, provided the court is satisfied that the plaintiff's claim is not frivolous or vexatious, then there will be a serious question to be tried and this will be sufficient. The critical statement by his Lordship is "[t]he court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried" [79]. That was followed by a proposition which appears to reverse matters of onus [80]:

"So *unless* the material available to the court at the hearing of the application for an interlocutory injunction *fails to disclose* that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought." (emphasis added)

Those statements do not accord with the doctrine in this Court as established by *Beecham* and should not be followed. They obscure the governing consideration that the requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought.

30. Notwithstanding that "[t]hose statements do not accord with the doctrine of this Court", nothing on my reading of the cases leads me to the view that what Lord Diplock said at paragraph 407 of *American Cyanamid* does not remain good law ie, that:

“the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that [there is a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial]”.

31. Upon that basis, I do not intend to analyse the balance of convenience in this particular case.

Conclusion

32. On this application by the worker for an interim determination, I have reached the conclusion that, on balance, the worker has not established that there is a serious question to be tried or, indeed, “a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial”. Having reached that primary conclusion, my reading of the case law precludes me from taking any account of the balance of convenience.
33. A strict application of the law may well have that as the end of the matter. However, and from the perspective of both the employer and the worker, in my opinion justice would best be served by allowing the parties to make submissions as to the worker's residual loss of earning capacity, if any, had the return to work program been successful. Whatever my primary findings may be, in my opinion I cannot properly conclude the matter (paragraphs 18 & 19 above) until such time as I have been accurately appraised of that evidence.

Costs

34. Finally, it is my intention to order Costs in the Cause as the most appropriate costs disposition. However I am mindful that there is, as yet, no application for compensation on foot so I give the parties liberty to apply on the question of costs if either wishes to be heard on the issue.

Orders:

1. The worker's application for an Interim Determination is to be the subject of written submissions by the parties as to the extent of the worker's residual loss of earning capacity, if any, had the return to work program been successful.
2. Submissions to be filed and served within 14 days.
3. Costs in the cause.

Dated this 12th day of May 2010

Julian Johnson

Acting Registrar
Work Health Court