

August  
2013

# ROUSSOS LEGAL ADVISORY

Strategic Business Counsel



## Interim payments of compensation no discretion to award less than statutory entitlement

### Court decision – Phil Ashly v AEC Environmental Pty Ltd

#### Interim payments of weekly compensation

When, pending the conclusion of a Court case, an order is made for interim weekly compensation, the Work Health Court often limits the award of weekly compensation to accord with the claimants needs or living expenses. Frequently, this amount is less than the claimant's statutory entitlement based on Normal Weekly Earnings (NWE).

In the *Phil Ashly v AEC Environmental* case, Mr Ashly challenged this approach and contended that while this might be the Court's practice, legally, the amount of (interim) weekly compensation (if made) must be at the level of the statutory entitlement, with no reduction.

The Court agreed and determined that because “the power granted by subsection 107(1) involves making an determination of a party's entitlement (emphasis added) to compensation, the Court must ascertain and rule on that entitlement. In the case of weekly payments that is to be done pursuant to a statutory formula...[T]here is nothing expressly stated in subsection 107(1) providing for any additional discretion the Court might then exercise, such as reducing the amount of the entitlement in the determination it has made.”

In Mr Ashly's case, everyone agreed the “entitlement” was \$1,849.22 per week, being 75% of NWE. The Court ordered that amount as interim weekly compensation.

#### Awarding compensation pending the conclusion of a legal case

The Work Health Court can award a claimant or worker interim compensation (including compensation for weekly payments and medical costs) while everyone waits for the outcome of a case in Court. Interim awards are limited in terms of duration; but can be extended if the claimant would suffer undue hardship or the circumstances are otherwise exceptional.

The making or not making of an award of interim compensation is not be taken as a finding of entitlement or liability. If the claimant loses the case, the Court has power to order repayment.

#### Mr Ashly's circumstances

Mr Ashly's claim for compensation was initially accepted by the employer. Weekly payments stopped when Mr Ashley returned to work with the employer. Previously, the Court made two orders of interim compensation. Mr Ashley applied a third time for some more interim compensation.

Because the employer stopped weekly compensation, the onus was on it to show why. The Court approached the consideration for an interim award favourable to Mr Ashly (compared to, for example, a case involving an outright dispute of liability).

### **How does the Court award interim compensation?**

In the Northern Territory Supreme Court case of *Wormald International (Aust) v Barry Leslie Aherne*, Justice Mildren said you assess this by considering whether "the worker had a sufficiently arguable case, and then consider whether, in the exercise of the court's discretion, having regard to all the relevant circumstances, relief ought to be granted or refused".

### **Mr Ashly's evidence supporting his application for interim payments**

Mr Ashley prepared and submitted three affidavits. Based on this information, the Court was persuaded the balance of convenience favoured extending interim payments because:

- the Court was "satisfied that the Worker presently has no income and he and his wife have a present need for income in addition to the wife's earnings in order to "balance the budget"."
- Mr Ashly deposed that "without the further interim weekly payments he is seeking, or at least some of it, his wife will have to take on a third job to earn enough money to balance the household budget. She is presently working two jobs." The Court was "satisfied this prospect amounts to "exceptional circumstances"."
- of the "recent medical certificate from the Worker's general practitioner that there is evidence of his current incapacity for work."

### **No discretion in the Court to order a lesser amount**

Having considered everything, once you find that you should order weekly compensation, then how do you quantify the amount under s107? If there is anything unclear about interpreting Section 107, then any interpretation has to be constructed favourably to a claimant.

In Mr Ashly's case, the Work Health Court said that:

- there is no implied power to make an award (if you are going to make one) for less than the statutory entitlement.
- it is not necessary to imply any a power to make a an order limiting the entitlement.
- Parliament has not said anything specific in the legislation about limiting weekly compensation to claimant's expenses.

The Court concluded that "the scheme of section 107 is that where the Court in its discretion makes an interim determination then the party entitled to the compensation is to receive for a period calculated pursuant to subsection 107(3) of the Act the entitlement to the compensation in question, the amount of such compensation having been determined in accordance with the Act, and that there is no discretion in the Court to order interim payments of compensation in any lesser amount."

### **Interim determinations can be made for other benefits**

In *Rick Garlin v UGL Ltd*, the claimant sought, and the Court ordered, an interim determination for attendant care services and home help, a lump sum for some personal needs equipment and the costs of a rehabilitation assessment.

The Court noted Mr Garlin contended “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 Court:

- observed “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.”
- determined “recurrent attendant care services is a “benefit” capable of realisation by the terms of section 107(1).”

### **What are the takeaways?**

If you dispute a payment, cancel compensation or otherwise stop anything, then a claimant can straight away ask the Court to use its power to make an interim determination of the claimants “entitlement to compensation.” The “entitlement” is the full entitlement provided by the WRCA.

The claimant would still need to show an arguable case and the balance of convenience, but these are not high hurdles.

An “entitlement” (as that word is referred to in s107) is someone’s right to receive a benefit provided by law. In Mr Ashly’s case, the weekly benefit (agreed by the employer) was \$1,849.22, and that was the amount awarded by the Court, on an interim basis.

In Mr Garlin’s case, the interim determinations were made for other benefits, such as equipment and attendant care services.

### **For further information please get in touch with:**

#### **George Roussos**

Partner  
george@roussoslegaladvisory.com  
+61 8 8981 8783  
www.roussoslegaladvisory.com

PO Box 457 Darwin NT Australia 0801  
Suite 6, 9 Swan Crescent, Winnellie NT 0820  
T: +61 8 8981 8783  
F: + 61 8 8911 0630  
www.roussoslegaladvisory.com

This update is provided for the benefit of clients of Roussos Legal Advisory. It is not a substitute for specific legal advice. The contents of this summary are not intended to be a complete statement of the law on any subject and should not be used as a substitute for legal advice in specific fact situations. Roussos Legal Advisory cannot accept any liability or responsibility for loss occurring as a result of anyone acting or refraining from acting in reliance on any material contained in this summary.