

WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION

MATTER NO: 1990-05
APPLICANT: SYDNEY OPERA HOUSE TRUST
RESPONDENT: JAMES STEWART TERNEN

Determination of Claim for Costs

BACKGROUND FOR THE DETERMINATION

1. The Costs Applicant is the employer in the proceedings ('the employer'). The Costs Respondent is the worker in the proceedings ('worker'). The Commission issued a Certificate of Determination in the matter on 23 July 2004. Leaving aside interim stages, that Certificate determined as to fifteen per cent (15%) permanent impairment of the back at \$9,000 favourable to the worker. It also determined that the employer was to pay the worker's costs as agreed or assessed.
2. The employer filed an Application for an Assessment of Costs dated 8 February 2005. By Notices dated 14 February 2005, the Commission invited the parties to file and serve written submissions. The parties remained in dispute as to costs on matters following. The Registrar has issued a delegation to me to assess the Applicant's costs, which delegation was received by me on 2 May 2005. The parties have made various submissions.
3. The submitted Bill of Costs of the worker is contained in an account of his solicitors, Shead Lawyers, to the employer's insurer, GIO, dated 14 July 2004. It sets out certain claimed Items under the Table (*Compensation Costs Table of Schedule 6 to the Workers Compensation Regulation 2003*).
4. I have considered the Application and all written materials and submissions received.

ASSESSMENT

5. Costs are in the discretion of the Commission (s341 of the *Workplace Injury Management and Workers Compensation Act 1998*).
6. S341 is concerned with by whom, to whom, to what extent, and on what basis costs are to be paid. S337, on the other hand, is concerned with the amount of costs payable and gives a regulation making power to fix maximum costs for legal and related costs. Clause 99 of the *Workers Compensation Regulation 2003* enables a party having the benefit of an unspecified entitlement to costs to apply for an assessment of those costs. On assessment, the quantification of the amount of costs recoverable is governed by that Regulation. Specifically, Clause 84 provides that the only costs recoverable are set out in Schedule 6, except as otherwise provided in Part 19.
7. Proceedings were apparently in respect of or included lump sum compensation. The total background in the papers submitted pertinent to assessment, including (so far as is pertinent) as set out in each of the party's submissions, has been noted. The assessment review following, having noted in its analysis the totality of matters and submissions presented, deals only with pertinent conclusions on assessment as appropriate. The Certificate of Determination also culminated in a registered s66A Lump Sum Agreement as to fifteen per cent (15%) compensation to the worker as stated, no allowance for pain and suffering under s67, and for costs as agreed or assessed.
8. Both parties have put certain written submissions to this assessment. All, without exception, have been closely noted and analysed. In briefest form, such submissions may be encapsulated as:
 - (a) The employer submits that any costs of the worker incurred after the teleconference of 6 November 2002 were unreasonably incurred and should be disallowed pursuant to s342 of the Act (this was expressed slightly differently in its letter of 23 July 2004 to the Commission seeking costs review '*.. pursuant to s115 and/or s342 ..*'). I shall refer to elements of the chronology in summary shortly, but leaving aside other contentions, the inherent employer contentions relative to costs submissions are effectively that the worker should have accepted a 6 November 2002 teleconference offer then made of \$9450, without rejecting it and engaging other interim, including Appeal processes of the Commission. I shall deal with these elements, also briefly, subsequently;
 - (b) The worker within this assessment contends to the contrary in that, again by way of briefest summary:

- The insurer had from 14 July 2004 to 23 July 2004 within which to apply for reconsideration of the Costs Order but did not do so until February 2005. Thus the *'application is out of time'*;
 - That the worker already has an Order for costs;
 - It is more s342 of the 1998 Act (not s115) which has pertinent application to these considerations;
 - Whether or not the worker received ultimately more than any initial employer offer is not completely determinative of costs issues and, in the circumstances of this matter, it was not unreasonable for the worker to reject initial teleconference offer made (6 November 2002).
 - The exercise by the worker of Appeal processes does not of itself, for costs purposes, engage the worker in the unnecessary incurring of costs.
- (c) I shall set out a brief proceedings chronology here for completeness. It is largely agreed.
- Dispute Application (s66 and s67) filed by worker 20 August 2002;
 - Reply filed 5 September 2003;
 - Teleconference 6 November 2002. At this, the employer offered \$9450, apparently singularly for the s66 claim component. The worker rejected it. The matter was *'incapable of resolution'* and was referred to Dr Middleton, Approved Medical Specialist ('AMS');
 - The AMS issued a Certificate as to nil back impairment on 18 February 2003 ('MAC');
 - On 27 February 2003, the worker appealed against the MAC. That Appeal was, apparently, pleading obvious error. The consequence of the Appeal was its reference back to Dr Middleton, with amended Certificate issued on 5 November 2003 (this reference back as determined by the Appeal Panel);
 - On 10 December 2003, the worker further appealed against the amended MAC pleading as to its material defectiveness and seeking further medical examination, which was granted;

- In further consequence, on 24 May 2004, Dr Bencsik, AMS (and member of Appeal Panel here) conducted further examination; the consequence of which was, on 14 July 2004, the revocation of the previous MAC, and the issuance of a new MAC as to Dr Bencsik's finding as to fifteen per cent (15%) permanent back impairment of the worker.
- No further Appeal having been lodged, this became the determinative medical finding and was the basis for the lump sum s66 Certificate of Determination in favour of the worker referred to at \$9000.
- Thereafter, there ensued certain communications by and between the parties, and with the Commission, as to costs submissions (some elements of these are dealt with following)

9. As stated, the totality of all written submissions as to costs contentions has been closely studied and analysed. Not all of that material or content needs to be referred to here. The analysis following deals, briefly and so far only as is pertinent, to elements of some of the primary contentions by the parties and in no particular or selected priority order:

9.1 **Out of time:**

I do not accept that the employer's submission for costs reconsideration is *'out of time'* (as submitted for the worker) in the circumstances here. On 23 July 2004, the employer wrote to the Commission detailing prospective submissions relative to costs (with certain enclosures). Within these costs submissions, the worker acknowledges that the employer had until 23 July 2004 within which to signal any such costs reconsideration '*.. but did not do so until February 2005*', and that the worker had an Order for costs. By some apparent accident of chronology it would seem that the employer did signal for costs of the proceedings to be reviewed on 23 July 2004 (as above), but that on 2 August 2004 it received a notice from the Commission indicating that the said letter content of 23 July 2004 had not been taken into account given the date of the Certificate of Determination (as relates to costs). That Certificate of Determination was of the same date, namely 23 July 2004. Certainly, as at that date, the worker had the benefit of a Certificate of Determination as to costs as agreed or assessed; but I am not prepared, for costs assessment purposes, to disenfranchise the employer from the submissions it makes as to costs analysis within this assessment. However, other elements and other considerations are pertinent to that assessment analysis which follow separately.

9.2 **S342 and s115 of the Act:**

At one point (including in the said 23 July 2004 letter of the employer to the Commission) the employer submitted that ‘.. *the offer made on 6 November 2002 constituted a reasonable offer of settlement in the proceedings for the purposes of s115 and/or s342* ..’ It would seem, though, the inherent submission as expressed to this assessment (employer letter to the Commission 27 April 2005) is put singularly by reference to s342 of the 1998 Act as to the unreasonable incurring by the worker of costs (the contention). In written submissions to the assessment, the worker has submitted that any assessment analysis here is singularly by reference to s342 in any event. This matter does not require a forensic debate on the relative interpretational histories or comparative statutory analyses of the workings of either of the sections. In brief, so far as is pertinent here, s342 allows the Assessor, as delegate of the Registrar, to consider, and to determine as relates to costs, whether or not, and if so to what extent (including within certain discretions), any costs of proceedings are, or are not, reasonably, in whole or in part, incurred at any stage or stages in the proceedings. That is the matter for pertinent analysis here.

9.3 **Reasonableness and related matters generally:**

I deal with matters under this heading as follows, again in no selected priority order of expression.

- In the proceedings, the Certificate of Determination of 23 July 2004 is the basis for the entitlement of the worker to a Costs Order. The terms of that Costs Order are that they be as agreed or assessed. The 23 July 2004 letter of the employer referred to does not alter that Order, or that basis for costs. Nor does it, however, as indicated earlier, disenfranchise the employer (indeed either party) as to submissions on costs, including as to reasonableness or otherwise, submitted upon any basis. These are factors for assessment.
- The Assessor, as delegate of the Registrar within the assessment function, is entitled to, indeed obliged to, have and take due regard to all submissions to the costs assessment. Again, as stated, such due and full regard has been given, in this assessment, to all written materials before it.
- Pertinent to that assessment analysis, not exclusive to the totality of the assessment overview, are these observations:
 - (i) I accept that the two (2) AMS approaches or appeals at the initiative of the worker, following the initial November 2002 teleconference, were not inherently the ‘*fault*’ of the worker.

Leaving aside the quantum result, he was successful in both such initiatives.

- (ii) Taken alone, such initiatives do not connote an unnecessary incurring of costs for the purposes of any analysis of disenfranchising the worker from such activity costs, whether pursuant to s342 of the Act or otherwise.
- (iii) In various ways, the employer has submitted as to some form of prejudice by the delay inherent in the appeal processes initiated by the worker. The time factor alone is not a pertinent consideration to determining relative reasonableness as to costs. Here, the fact (perhaps the unusual circumstance) of two (2) MAC Appeals (and ultimate examination) is not singularly determinative as to reasonableness. It may extract a frustration of the employer to the protraction of finality to the proceedings. As the worker however equally puts to the assessment, such frustration factor is mutual. Delay, or the implementation of appeal rights, by a party singularly of itself, does not subject any such initiative in the exercising of any such appeal or related rights, to costs restrictions or qualifications. The statutory test, including as determinable within assessment, is as to relative reasonableness of costs incurred as to such activities.
- (iv) As stated, I have not disenfranchised the employer from assessment considerations to the submissions it had put in its 23 July 2004 letter to the Commission, and that consideration has been given. Some observations have already been made. For completeness, I trouble with some brief notations on that content of it which appears under certain brief paragraph numberings 1-3 therein:

'1. .. original AMS awarded .. no compensation pursuant to s66 ..': The AMS does not 'award' compensation. The AMS determines a binding medical finding. That finding is appealable. Here, the worker appealed it.

'2. .. Two appeals have been lodged ..': It is unclear what this reference is directed at, but presumably, perhaps implicitly, that '*Two appeals*' was an extravagant exercise of the worker, against other proceedings background. I have already remarked on elements of this above. Briefly, the fact of two (2)

Appeals, or other initiatives, of any party to a proceeding is not singularly determinative as to reasonableness. It is reiterated that here the worker appeared to have succeeded in both, leaving aside quantum outcome against earlier proceedings background.

'3 .. 20 months have elapsed since .. insurer's offer at .. Teleconference': I have remarked upon the delay factor earlier. However, again for completeness, the worker succeeded in these steps. Whatever else has occurred, the correction factors within the MAC processes were sufficient, it seems, to have had drawn out from them a final examination of Dr Bencsik (as referred to). In those circumstances, taking them alone, I believe it would be drawing a long bow to determine that the worker's activity relative to such initiatives was somehow unreasonable.

- (v) What perhaps, more accurately, remains for test or analysis as to reasonableness pertinent to costs assessment is whether the worker unreasonably rejected the lump sum s66 offer at teleconference on 6 November 2002 (then made and rejected at \$9,450.00), in the ultimate determinative (including medical) conclusion pursuant to s66 at \$,9000.00? The worker addresses this question at paragraph 9 of his submissions to this assessment (dated 21 February 2005). As there stated, it would appear that the insurer's offer hovered just under the threshold (when made in November 2002) when a s67 entitlement had also been applied for (and the threshold, ultimately, medically upheld as having a claim basis). That it took an extended period to get to that clearer result, as distinct from original offer, is not, for assessment purposes, entirely or singularly the point. I am not of the view within assessment, on balance and closest analysis, that, taking all matters into account, the worker unreasonably declined the original teleconference offer and engaged the other (medically clarifying) processes. In consequence, the worker should not be disentitled from the Registrar's delegate (Assessor) considering costs submitted to assessment relative to activities post-teleconference of November 2002 and that remains the exercise here in this determination.

In consequence I turn to a brief concluding analysis of the subject account submitted to assessment, namely of 14 July 2004 and so far as only is pertinent to concluding costs determinations as follows:

Professional Costs:

| Item | Conclusion | \$ Amount allowed |
|-------|---|-------------------|
| 2.01 | Allowed | 500.00 |
| 2.02 | Allowed | 40.00 |
| 1.01 | Allowed | 300.00 |
| 2.03 | Allowed | 20.00 |
| 1.02 | Allowed | 100.00 |
| 2.06 | Allowed | 250.00 |
| 4.01 | Allowed | 300.00 |
| 4.02 | Allowed | 60.00 |
| 4.05 | Allowed | 500.00 |
| 4.07 | Allowed | 100.00 |
| 4.08 | Claimed for preparing for conference '6/11/03' (full details noted). The claim is made at the Table maximum of \$500 (2 hours). It is noted that at 4.05 a claim at the Table maximum for reviewing documentation (\$500) has been allowed, including at a stage preparatory or relative to or surrounding the teleconference. I allow the Item but in the reduced component on balance at \$250. | 250.00 |
| 4.12 | Allowed | 190.00 |
| 5.01 | Allowed | 100.00 |
| *4.12 | Claimed for reporting to client on 'outcome of first appeal' at \$190. Item 4.12 is an allowance for client reporting, but 'on the outcome of a conference or arbitration .. '. That is not the case here and the claim as submitted does not fall under this Item activity and cannot be allowed. | 0.00 |
| 5.01 | Claimed for lodging and preparing Appeal against MAC of 5/11/03. An allowance has already been made at the Table maximum under 5.01 above. It is well settled that multiple claims beyond Table maximums cannot be allowed (<i>Orr v. Direct Couriers (Aust) Pty Ltd</i> [2004] NSW WCC pd 28). The Item cannot be allowed on that footing and is disallowed. | 0.00 |
| 4.12 | Claimed for 'Reporting to client outcome of second appeal' at \$190. Commentary on this | 0.00 |

| | | |
|-----------|---|------------|
| | category of claim has been made separately under *4.12 above and for the same reasons this activity claim must be disallowed. | |
| Sub-Total | | \$2,710.00 |
| GST | | \$271.00 |

Disbursements:

| Item | Conclusion | Amount allowed |
|--------------------------------------|------------|----------------|
| Report fee – Dr Macarthur (4/4/02) | Allowed | 279.00 |
| Report fee – Dr Bentivoglio (9/4/02) | Allowed | 500.00 |
| Sub-Total | | \$779.00 |
| GST | | \$77.90 |

Accordingly, in summary, the Applicant is entitled to the following:

| | | |
|--|--------------------|-------------------|
| (a) | Professional Costs | \$2,710.00 |
| | Plus GST | 271.00 |
| (b) | Disbursements | 779.00 |
| | Plus GST | 77.90 |
| Accordingly, total allowed on assessment | | <u>\$3,837.90</u> |

DETERMINATION:

10. Accordingly, costs are assessed at \$3,837.90 (including GST) and the Respondent is to pay the Applicant that amount as costs of the proceedings.
11. Neither party appeared to submit as to costs of this assessment. In any event, in the circumstances of this matter, I make no determination of costs of the assessment accordingly.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF JOHN McGRUTHER, ARBITRATOR, WORKERS COMPENSATION COMMISSION

for REGISTRAR