CITATION:	*Swanson v NTA (No 2) [2008] NTMC 012*
PARTIES:	KENNETH SWANSON v NORTHERN TERRITORY OF AUSTRALIA (NO 2)
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Alice Springs
FILE NO(s):	20214796
DELIVERED ON:	26 February 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	24 January 2008 and 11 February 2008
JUDGMENT OF:	Ms Melanie Little SM

CATCHWORDS:

Work Health Act – Orders consequential to substantive claim.

REPRESENTATION:

Counsel:

Worker:	Mr Doyle
Employer:	Mr Tippett QC

Solicitors:

Worker:	Povey Stirk
Employer:	Collier Deane

Judgment category classification:	B
Judgment ID number:	[2008] NTMC 012
Number of paragraphs:	32

IN THE WORK HEALTH COURT
AT ALICE SPRINGS IN THE NORTHERN TERRITORY OF AUSTRALIA

No.20214796

[2008] NTMC 012

BETWEEN:

KENNETH SWANSON

Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA

Defendant (No 2)

REASONS FOR DECISION

(Delivered 26 February 2008)

Ms Melanie Little SM:

1. On 22 December 2005 I delivered a decision in this matter and the following orders were made:-

    1. With respect to the worker's application: order that the cancellation of the worker's payments of compensation, made by the employer pursuant to section 69 of the *Work Health Act* on 30 May 2002, effective from 14 June 2002 is defective and to that extent the worker's application is allowed.

    2. With respect to the employer's application, I declare and order that the worker suffered a mental injury and that such injury is as a result of reasonable administrative action on behalf of the employer and the said mental injury is not a compensable injury pursuant to the provisions of the *Work Health Act*.

    3. With respect to both applications, the applications are adjourned sine die for consideration of any consequential applications.

2. The worker appealed to the Supreme Court and then to the Court of Appeal. The appeals were dismissed and the orders of 22 December 2005 remain.

3. The worker filed an Interlocutory Application on 22 October 2007 seeking the following orders:-

    1. The worker be paid weekly arrears of compensation from the cessation of those payments on 14 June 2002 until the

decision of the Work Health Court on 22 December 2005.

2. The worker be awarded the cost of proceedings 20214796 to the filing of the employer's notice of defence and counterclaim dated 28 July 2005.

3. Each party bear their own costs after the date of the filing of the employer's notice of defence and counterclaim, dated 28 July 2005, to the date of the decision of the Court on 22 December 2005.

4. The employer pay the worker an amount pursuant to section 89 of the *Work Health Act (NT).*

5. The costs of and incidental to this application be paid by the employer to the worker.

4. The employer does not consent to orders being made in these terms. In support of the application is an affidavit of Rennie Douglas Anderson (the worker's solicitor) dated 18 December 2007. Annexed to that affidavit are the decisions of the Supreme Court, the Court of Appeal, the transcript from the Court of Appeal and the Notice of Defence and counterclaim dated 28 July 2005. There is no affidavit in response from the employer. No issue has been taken with the contents of the affidavit from the worker's solicitor save and except that it is disputed that a statement made by counsel for the employer is a concession which is determinative of the issue raised in application one . This issue will be discussed below. Counsel for the employer filed written submissions dated 22 January 2008. Submissions were made on the Interlocutory Application and I reserved decision. This is now the decision in the matter.

5. It is useful to set out a chronology of relevant dates at this point:-

27/02/2001	Injury sustained
28/05/2002	Medical certificate from Dr Timney
30/05/2002	Section 69 Notice of Decision
14/06/2002	Effective date of cancellation of weekly

	benefits following section 69 decision
02/10/2002	Application to Work Health Court by worker
12/04/2005	Amended Statement of Claim by worker
28/07/2005	Notice of Defence and counterclaim dated 28/07/05
08/08/2005	Notice of Defence and Counterclaim and cover letter from employer's solicitor received by Courts Office Alice Springs for filing ("the date of filing")
26/08/2005	Reply by worker
22/12/2005	Decision of Work Health Court

6. As a consequence of the decision of 22 December 2005, the worker's appeal was successful. The section 69 notice was held to be defective. The section 69 notice did not assert that the worker was not suffering a compensable injury. An application was made by the employer (dated 28 July 2005 and filed in the Court on 8 August 2005), seeking (inter alia) a declaration that the worker was not suffering a compensable injury. A declaration was made that the injury was not a compensable injury and to that extent the employer's application was successful.

7. The worker's Interlocutory Application seeks weekly payments of compensation to be paid from cessation of payments on 14 June 2002 until the Work Health Court decision on 22 December 2005. If the employer had not been successful in its application, the application would have been for payments to be ongoing. The worker is also their seeking costs up to the date of the filing of the employer's notice of defence and counterclaim 8 August 2005. Further, the worker seeks each party bear their own costs from 8 August 2005 to the date of the decision on 22 December 2005. The worker has not provided any explanation as to why they are seeking these orders in these differing terms.

8. I will now raise the issue of the concession. This case was heard in the Court of Appeal on 5 June 2007. At that hearing the question of any entitlement the worker may have to payments as a consequence of the orders of 22 December 2005 was raised in arguendo (annexure E of the affidavit of Rennie Douglas Anderson dated 18 December 2007, pages 14-15 of the transcript). It arose following a comment by Justice Angel. Justice Angel said, "The net result of those orders is the worker is entitled to nothing". Mr Tippett QC originally said "he's [the worker] not entitled to anything" and later he stated "Well, he's certainly not entitled to any payments that were the subject of cancellation". Justice Mildren then stated "Isn't he entitled to payments until such time as the Court makes its order?" Mr Tippett replied "Yes, he's entitled to payments until the order is made but that is all. Those payments will have to be reinstated, of course, as an administrative matter". Mr Doyle on behalf of the worker took this matter up and stated "It would be my submission, in any event, that the applicant would be entitled to payments up until the date of her Honour's adjudication. That must be the case." Justice Mildren then replied "We're not interested in that, really".

9. The worker submits that this amounts to a concession by the employer that order one should be made in the terms they seek. The issue was not the subject of a ruling by the Court of Appeal. The statements made were at the end of the case and were not the subject of any considered submissions. The statement by Mr Tippett QC on behalf of the employer is ambiguous. It does not specify which 'order' he is referring to. Orders were made in both applications in this matter.

10. The interlocutory application has revealed that there are differing interpretations of the approach to be taken in this case. The employer says that there is Court of Appeal authority binding the Court on the question (which would not allow the orders to be made as sought by the worker). The worker says that the Court of Appeal case is not binding in these

circumstances.

11. I do not regard the concession made as to be determinative of the question of whether order one is made as sought by the worker. Where there are matters of case law and interpretation of statutes to consider, it can not be the case that a party (or parties) could bind a Court following comments made by counsel in relation to questions which are not the subject of the matter before the Court. Similarly, the Court is not bound by any comment it makes in passing prior to consideration of the issues. There will be occasions when a concession is binding. I do not believe this is one of those occasions.

12. It is arguable that as the worker has been successful in his appeal, that the date of the decision is the relevant date for cessation of weekly payments. Payments cannot continue after the date of the decision, given the finding that there was no compensable injury. The employer argues that there is no entitlement to any weekly payments, given the decision in their application, submitting that the decision in their application has a retrospective effect (back to the cessation of payments on 14 June 2002).

13. The Court has been referred to the case of *Alexander v Gorey & Cole Holdings* 171 FLR 31, a decision of the Court of Appeal of the Northern Territory. In that case, the worker had had his payments ceased pursuant to section 69(1)(a) of the *Work Health Act*. Ultimately, it was found that this was an invalid cancellation. The employer sought an order pursuant to section 69(2) of the *Work Health Act* and these two applications were heard together. There was a finding by the Court pursuant to section 69 (2) of the *Work Health Act* cancelling the workers payments of compensation. It was held that the Work Health Court could order (in the proceedings brought by the employer pursuant to section 69(2)) that the right to receive payments ceased at the date the incapacity ceased or the date upon which the capacity resulted in a reduction or diminution of

incapacity (section 69(2)). It was found that there was the power to make an order retrospectively cancelling compensation payments pursuant to section 69(2) of the Act. The Court held as follows:-

> "… once entitlement to a weekly payment has ceased, there is no absolute right to continue to receive such payments which are provisional only, even though the employer may be obliged to continue to pay them if the employer does not invoke (or does not successfully invoke) the machinery provided by section 69(1) and that the Work Health Court can order in proceedings brought under section 69(2) that the right to receive the payments ceased at the date upon which incapacity ceased, or the date upon which the incapacity resulted in a reduction or diminution of incapacity" (paragraph 30).

14. It is accepted that there is no absolute right to continue to receive weekly payments of compensation. It is also accepted that an order can be made which has a retrospective effect.

15. In the case before the Court, the employer did not successfully invoke section 69(1) of the *Work Health Act*. The evidence before the Court did not support the certification that the worker was fit to return to work in his pre-injury capacity. The decision was not based upon a procedural technicality. The evidence from the employer's experts did not support the assertions made in the section 69(1) notice and certification. The employer did not make an application pursuant to section 69(2). The Court did not act of its own volition pursuant to section 69(2).

16. It is my view that the case before the Court is distinguishable from that of *Alexander v Gorey & Cole Holdings*. In this case, the employer has not successfully invoked the machinery provided by section 69(1) of the *Work Health Act*. The employer was not entitled to cease weekly payments of compensation. In the case of *Alexander*, it was found by the Court that there were grounds to cancel the weekly payments of compensation pursuant to section 69(2). No equivalent finding was made in this case. The worker's appeal was successful. The employer's application was also

successful but that was not an application pursuant to section 69(2) of the Work Health Act.

17. Both the employer's and the worker's arguments have some appeal. The worker argues that cessation of weekly payments of compensation should take effect from the date of the decision of the Court. The decision in favour of the employer was made on the same day as the successful appeal by the worker and so they do not seek payments after that date. This argument raises the prospect of a worker being awarded weekly payments of compensation, based upon the initial decision of the employer not to dispute the claim. The employer argues that their successful application demonstrates there was no entitlement to any weekly payments of compensation at any time and so they were, in effect, justified in their decision to cancel the payments, notwithstanding that their section 69 notice was defective. This argument does not take account of the cases which emphasise the need for strict compliance with the conditions attaching to a section 69 decision and that the worker should obtain the information required (see *Collins Radio Constructors Incorporated v Day*, unreported decision of the Court of Appeal of the Northern Territory 26 March 1998). The argument by the employer also ignores the fact that there was no assertion in the section 69 notice that there was no compensable injury. That issue was not raised by the section 69 notice and certification.

18. I reject the employer's argument and find that payments should continue on from 14 June 2002. The employer did not successfully invoke the machinery in section 69(1). They are not now entitled to relief as if they had successfully invoked section 69(1) of the *Work Health* Act. I also reject the worker's argument that payments should be awarded until 22 December 2005. There is an alternative date which I find is the preferred date for cessation of weekly payments of compensation. That is the date of the filing of the defence and counterclaim by the employer, 8 August

2005. It was not until that date that the question of whether the worker had a compensable injury became an issue to be determined by the Court. While the worker sought to deflect the question in his reply, it was ultimately an issue which was adjudicated upon in favour of the employer. Had the counterclaim not been before the Court, the weekly payments would have been ongoing (as a consequence of the decision on the worker's appeal). Ultimately the worker has been found not to have a compensable injury.

19. While the unsigned notice of defence and counterclaim is dated 28 July 2005, it was not filed until 8 August 2005. The act of filing a document is crucial to initiating an application and I find that this is the relevant date in these circumstances. There will be an order that the worker be paid weekly arrears of compensation payments from the cessation of those payments on 14 June 2002 until 8 August 2005.

20. The second order sought relates to the question of costs of the worker up until the date of the filing of the employer's notice of defence and counterclaim. The worker seeks an order that the employer pay their costs until that date. The worker's appeal was successful. The notice pursuant to section 69 was defective. An order has been made awarding the worker weekly arrears of payments of compensation up to the date of filing of the employer's notice of defence and counterclaim. I see no reason why the usual order would not be made, that is that the successful party be paid its costs by the unsuccessful party. An order will be made in accordance with order 2 as sought by the worker.

21. The third order the worker is seeking is that each party bear their own costs after the date of the filing of the employer's notice of defence and counterclaim to the date of the decision of the Court on 22 December 2005. This application is inconsistent with application number two. The employer was successful in its application. The question arises, why

should the employer bear their own costs following their successful application? It was put by the worker that this would be an equitable arrangement. That explanation was not elaborated upon. As set out above, in the ordinary course of events the successful party is entitled to their costs being met by the unsuccessful party. I see no reason why the usual order should not be made. I decline to make the order as sought by the worker. The employer seeks their costs. That order will be made from the date of the filing of the defence and counterclaim on 8 August 2005 until the date of the decision on 22 December 2005. I will order that the worker bears their own costs from 8 August 2005.

22. The worker is seeking that the employer pays an amount pursuant to section 89 of the *Work Health Act* in paragraph four of the application. Section 89 of the *Work Health Act* sets out as follows:-

> 89. Late payment of weekly payments
>
> Where a person liable under this Part to make a weekly payment of compensation to a worker fails to make the weekly payment on or before the day on which he or she is required to do so, the worker shall, in respect of that weekly payment, be paid, in addition to any other payment required to be made under this Part, an amount represented by the formula –
>
> A x the prescribed rate of interest x $\frac{B}{52}$
>
> where –
>
> A is the amount of that weekly payment payable to the worker; and
>
> *B* is the number of weeks (with a part of a week being counted as a whole week) occurring within the period commencing immediately after the day on which payment of that weekly payment was due and concluding at the end of the day on which payment of that weekly payment is made.

23. This section applies where a person has a liability to make a weekly payment of compensation and that payment is not made on or before the

day in which the person is 'required' to make the payment. Up until the Interlocutory Application, there had been no application for consequential orders. The worker could have applied at any time from the making of the decision on 22 December 2005 for consequential orders. He declined to do that. While it is accepted there were ongoing Court proceedings, I decline to find that the worker was prohibited from seeking consequential orders. It is accepted that this may have meant adjustments at a later stage. Nevertheless, the worker maintained the series of appeals and did not seek consequential orders. Diametrically opposed views as to the requirement or otherwise to make payments were raised in the application. The matter was in dispute as between the parties. I find that there was no *requirement* that payments be made from any particular date. As a consequence there was no failure to make any weekly payments of compensation and section 89 does not come into play. I decline to make an order pursuant to section 89 of the *Work Health Act*.

24. Finally, the worker is seeking costs of and incidental to the Interlocutory Application be paid by the employer to the worker. In the ordinary course of events, each party bears their own costs in an Interlocutory Application. I see no reason to depart from this usual practice. Each party is to bear their own costs with respect to the Interlocutory Application.

25. If I am found to be in error in that approach, then I will consider the matter further. Both parties were partly successful on the Interlocutory Application. If the question of costs is linked to the outcome of the substantive applications, both parties were successful in their application. An order could be made that each party pay each other's costs of the Interlocutory Application (in line with orders 2 and 3). Alternatively, an order could be made that each party bear their own costs. That would not involve the costs associated with preparation of bills of costs and avoid any issues of taxation. On balance, an order will be made that each party

bear their own costs of the Interlocutory Application.

26. With respect to the Interlocutory Application dated 22 October 2007, Orders are made as follows :

27. Order 1 : The worker be paid weekly arrears of compensation payments from the cessation of those payments on 14 June 2002 until 8 August 2005.

28. Order 2 : The worker is awarded their costs of the proceedings 20214796 to the filing of the employers Notice of Defence and Counterclaim on 8 August 2005, such costs to be paid by the employer.

29. Order 3 : The employer is awarded their costs of the proceedings 20214796 from the filing of the employers notice of Defence and Counterclaim on 8 August 2005 until 22 December 2005 such costs to be paid by the worker. The worker to bear their own costs from 8 August 2005.

30. Order 4 : Decline to make an order pursuant to section 89 of the *Work Health Act (NT)*.

31. Order 5 : Each party to bear their costs of the Interlocutory Application dated 22 October 2007.

32. Certification for Senior Counsel is made with respect to orders two and three.

33. While not raised by either party, I see no reason why the costs awarded should not be at 100% of the Supreme Court Scale and that costs be agreed or in lieu of an agreement to be taxed. Unless liberty to call the matter on is sought by either party within 14 days, there will be an order

that the costs awarded in orders two and three will be at 100% of the Supreme Court Scale and that costs are to be agreed or in lieu of an agreement to be taxed. That order will come into effect in 14 days time unless liberty to call the matter on has been sought by either party. This self executing order has been made in any attempt to save further costs in this matter, as to call the matter back on would have necessitated extra costs to both parties.

Dated this 26th day of February 2008.

_____

Mel
anie Little
STIPENDIARY MAGISTRATE