CITATION: *Boland v NTA* [2009] NTMC 019

PARTIES:	ARTHUR LESLIE BOLAND
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	20809462
DELIVERED ON:	18 May 2009 (by mail)
DELIVERED AT:	Darwin
HEARING DATE(s):	26 March 2009
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

WORKERS COMPENSATION – WORK HEALTH JURISDICTION – MEDIATION – DISPUTE – "REASONABLE" COSTS OF REPORT

Workers Rehabilitation & Compensation Act ss 103B, 103J, 104

REPRESENTATION:

Counsel:

Plaintiff:	Mr Neil
Defendant:	Mr Barr

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Minter Ellison

Judgment category classification:	B
Judgment ID number:	[2009] NTMC 019
Number of paragraphs:	42

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

No. 20809462

[2009] NTMC 019

BETWEEN:

ARTHUR LESLIE BOLAND
Worker

AND:

NORTHERN TERRITORY OF AUSTRALIA
Employer

REASONS FOR DECISION

(Delivered 18 May 2009)

Ms Sue Oliver SM:

1. By way of his initial interlocutory application, the worker sought an order that the employer reimburse him for the cost of obtaining an occupational therapy report provided in October 2008 by Michelle French and Associates (the French Report) in the sum of $12,571.82. Further orders as to interest and costs of the application are also sought.

2. On 23 December 2008 the parties, by written notice, consented to interlocutory orders being made with respect to that application, including that the employer pay the worker the sum of $7,925.50, representing part payment for the French Report and noted that the amount of $4,646.32 remained the subject of dispute between the parties. A consent order was made by the Deputy Registrar on 2 January 2009. It is that outstanding amount, together with a claim for interest and costs that remains the subject matter of the interlocutory application.

3. The issues raised by the parties on the application are:

(a) Whether the court has jurisdiction to determine the application or is the matter a "dispute" that is required by s 103J of the *Workers Rehabilitation and Compensation Act* to be mediated prior to the commencement of proceedings before the Work Health Court?

(b) If the court does have jurisdiction, whether the full amount of the outstanding costs for the French Report are payable by the employer, on a consideration of whether the charges involved in calculating that amount are reasonable.

The Jurisdictional Issue

4. First, the employer submits that by late 2008 there was a "dispute" between the parties because the worker was aggrieved by the decision of the employer relating to a matter or question incidental to or arising out of the workers claim for compensation. The dispute was whether the employer should pay the entire cost of the French Report or whether some only of the cost was payable, the entire cost being unreasonable. Part 6A of the *Workers Rehabilitation and Compensation Act* deals with dispute resolution and section 103B provides:

> For the purposes of this Division, a dispute arises where a worker is aggrieved by the decision of an employer –
>
> (a) to dispute liability for compensation claimed by the claimant;
>
> (b) to cancel or reduce compensation being paid to the claimant; or
>
> (c) relating to a matter or question incidental to or arising out of the claimant's claim for compensation.

5. The employer says that the issue of payment of the costs of the French Report is a dispute because it relates to a matter or question incidental to or arising out of the claim for compensation and as there was no attempt to resolve that dispute by mediation, there is no entitlement on the part of the worker to commence proceedings to recover compensation or for any order

or ruling in respect thereof as the pre-condition of mediation required by section 103J has not been met.

6. Section 103J provides:

> 103J Pre-condition to court proceedings
>
> (1) Subject to subsection (3), a claimant is not entitled to commence proceedings under Division 2 in respect of a dispute unless there has been an attempt to resolve the dispute by mediation under this Division and that attempt has been unsuccessful.
>
> (2) At the conclusion of a mediation, the mediator must issue to each of the parties a certificate in the approved form –
>
> (a) stating that mediation has taken place;
>
> (b) listing the written information provided to the mediator by the parties during the mediation;
>
> (c) setting out the recommendations (if any) of the mediator; and
>
> (d) stating what the outcome of the mediation was.
>
> (3) A claimant is entitled to commence proceedings for an interim determination of his or her entitlement to compensation under section 107 at any time after the claimant has applied to the Authority under section 103D to have the dispute referred to mediation.

7. Section 104 describes the proceedings referred to in section 103J. A claim for compensation under s 78 comes within the ambit of the provision as it is "compensation" under Part 5:

> 104 Applications
>
> (1) For the purposes of the Court exercising its powers under section 94(1)(a), a person may, subject to this Act, commence proceedings before the Court for the recovery of compensation under Part 5 or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under that Part.
>
> (2) Proceedings under this Division may be commenced before the Court by application in the prescribed manner and form or, where

there is no manner or form prescribed, in such manner or form as the Court approves.

(3) Proceedings to which section 103J(1) applies are to be commenced within 28 days after the claimant receives a certificate issued under section 103J(2).

(4) The failure to make a claim within the period specified in subsection (3) shall not be a bar to the commencement of the proceedings if it is found that the failure was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause.

History of the Claim and Proceedings

8. In order to understand how the issue arises, it is necessary to consider the history of the claim and court proceedings.

9. In brief summary, the worker, Mr Boland, suffered partial quadriplegia from a work related injury on or around 6 August 2002. He entered a memorandum of agreement with his employers in August 2004. It is claimed that his medical condition has since deteriorated as a result of which his employment has ceased and that there has also been a consequent increase in his medical and personal attendance needs including, amongst other things, the need for home modifications and for appliances for personal use. On 30 January 2008, Mr Boland's solicitors wrote to the insurer raising a number of issues, including commencement of payments of weekly benefits, motor vehicle modifications, medical and pharmaceutical treatment and rehabilitation needs under s 78 of the Act, including attendant care services.

10. On 11 February 2008 a request for mediation was made by the worker. The certificate of mediation was tendered [E2]. The certificate shows that various matters raised in the letter of 30 January 2008, including weekly benefits, vehicle modification and a pharmacy account were agreed as part of the mediation. The certificate also records an agreement to continue to pay for reasonable home modification expenses and maintenance repairs and or replacement of those items and to obtain a report regarding air

conditioning costs and swimming pool heating and on receipt of that report, to **consider** those costs (my emphasis added). In addition, the certificate noted that the insurer agreed to undertake further steps in relation to other matters raised in the letter as 30 January 2008. Relevantly, these include agreeing "to **consider** a needs assessment report as regards Mr Boland's need for attendant care and external household services. This needs assessment may be organised by Mr Boland or if he prefers will be organised by the Insurer" (my emphasis added).

11. The certificate of mediation is dated 17 March 2008 and is endorsed "That despite the insurer agreeing to undertake further steps as outlined above, it does not change the requirement imposed by the *Work Health Act* that proceedings must be commenced within 28 days after the worker receives this certificate." The endorsement reflects the requirement of s 104(3) that proceedings that are required by s 103J(1) to be mediated as a pre condition to the commencement of court proceedings, are to be commenced within 28 days after the worker receives a certificate issued under s 103J(2) where the mediation has been unsuccessful at resolving the dispute.

12. The endorsement on the certificate of mediation of the s 104(3) time limitation indicates that the mediator did not consider that all matters raised in the referred dispute had been resolved by the outcomes recorded. In my view that correctly reflects the outcome of the mediation. I respectfully adopt the view expressed by His Honour Mr Trigg SM in *Murwangi Community Aboriginal Corporation v Carroll* [2000] NTMC 25 that resolution of a dispute means a total resolution of a dispute and that if there is anything still in dispute, then the dispute has not been resolved. The worker referred to mediation, amongst other claims, a claim for compensation, yet to be quantified, for attendant care services. The mediation outcome of an agreement to **consider** an assessment for the purpose of that claim is not an agreement to meet the cost of all or indeed any of the matters ultimately to be recommended by the assessment. The

s 78 claim referred as part of a dispute to mediation was not resolved by the undertakings given and recorded.

13. The Act does not provide or require the mediator to direct that matters be brought back for further consideration.

14. On 3 April 2008 the worker made application to the Work Health Court. In my view, if there is an aspect of a dispute in relation to compensation unresolved by the mediation, then the worker is entitled to commence proceedings within the required timeframe of 28 days from the date of the certificate of mediation in relation to that aspect of the dispute. Section 104(1) refers both to proceedings for the recovery of compensation under Part 5 or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under that Part.

15. Although a worker might seek the agreement of the employer to waive compliance with s 104(3), a worker is none the less exposed to the risk that the court might not grant leave to commence proceedings out of time (s 104(4)). In this case, the section 78 claims cannot be said to have been resolved by the mediation. In my view the proceedings were not therefore, as a matter of law, commenced prematurely as is suggested by the employer, notwithstanding that the worker was yet to file a statement of claim.

16. In my view neither did the parties resolve what was an incidental question to that claim for compensation, raised in the mediation as part of the dispute, that is, who would bear responsibility for the cost of obtaining the report for the purpose of assessing the needs and, necessarily, the quantum of the claim. The certificate of mediation records agreement for a needs assessment report for attendant care and external household services to be "organised" and that either party might do so at the preference of the worker. The certificate does not record which of the parties was to meet the cost of the report which was a matter incidental to that agreement and therefore incidental to the dispute under mediation. The issue was not

resolved at the mediation. As in my view, the issue was one incidental to issues taken to mediation issues (ie the s 78 claim) the subsequent argument over payment was not a new dispute but concerned a matter that had been the subject of the earlier mediation and which was unresolved.

17. In my view the worker was entitled to commence proceedings within the 28 day period following the failure at mediation to fully resolve the s 78 dispute. The intent of s 103J is to prevent, if possible, resort to court proceedings and the consequent cost implications if disputes can be settled by mediation. However, it does not require at each step of proceedings properly commenced, for the parties to place those proceedings on hold and refer incidental matters to a compensation claim back to mediation. To do so would have the effect of causing the resolution of proceedings to become protracted and indeed might be used by a party disputing a claim as a tool for that purpose.

18. In addition, as I have noted above, the parties consented to an interlocutory order being made that the employer pay the worker the sum of $7,925.50 as part payment for the French Report with the amount of $4,646.32 remained the subject of dispute between the parties. The employer having submitted to the jurisdiction of the court in relation to liability for reasonable costs of the report (as will be discussed below), has some difficulty in now arguing that the court lacks jurisdiction in relation to the dispute over the outstanding costs.

19. Consequently I am satisfied that the court has jurisdiction to entertain the interlocutory application for a consideration of the liability of the employer to pay the remaining costs because it was at the time of the mediation a matter incidental to the s 78 dispute, contemplated by the outcomes recorded and unresolved at the mediation. It is not a new "dispute" as defined by the Act.

Is the cost of the report reasonable?

20. I turn then to the question of whether the cost of the report is a reasonable one to be met by the employer. Again some history is necessary to understand how the parties came to the current position.

21. In early June, Mr Boland's solicitor commenced enquiries with Michelle French and Associates, occupational therapists, in order to obtain a report of Mr Boland's need for attendant care and the other matters related to the s 78 claim. Michelle French and Associates was engaged by his solicitors to come to Darwin to conduct a needs assessment and for the production of a report in that regard. By letter dated 23 September 2008 from the solicitors for the employer, the employer agreed to pay for the costs of the assessment by Michelle French in the following terms:

> "Our Client accepts that Mr Boland wished to have his needs assessment carried out by Michelle French. We confirm that our client will pay the costs of that assessment. Our client has had in the past a good relationship with your client and wishes this to continue."

22. In my view, although the undertaking to pay for the report has the appearance of an unconditional offer, it is implicit that the costs being offered to be met were only those that were reasonable ones. There is no reason to believe that the employer was making an unlimited offer to pay or indemnify Mr Boland with respect to costs incurred. The employer's solicitors were nevertheless aware from the start that the occupational therapist to be engaged was an interstate firm from Melbourne and therefore amongst the costs to be incurred would be costs related to travel to Darwin for the assessment to take place. There is no other way that an assessment and report of this nature could be made. An expectation of travel costs and accommodation and transport while in Darwin would have been anticipated.

23. On 23 October 2008 the worker's solicitors wrote to the employer's solicitors advising that the report was now available and would be provided

upon payment on the invoice of $12,571.82. There followed considerable correspondence back and forth between the parties with, in general terms the insurer taking the position that it could only assess the reasonableness of the cost of the report once it saw the report and Mr Boland's solicitors reiterating that they were not able to obtain the report from Michelle French and Associates until the invoice had been paid.

24. Eventually, Mr Boland paid for the report himself in order to obtain its release, which was attended to on 27 November 2008. On 5 December 2008 the French Report was provided to the solicitors for the employer, together with a request for both payment of the report and advice as to whether the recommendations of the report would be accepted.

25. The solicitor for the employer wrote to the solicitor for the worker on 18 December but before she had received notice of the interlocutory application filed on 17 December. Two letters were sent on that date. One asked for time to consider the report and stated that if a dispute arose it must go to mediation before being the subject of proceedings. The second queried items in the invoice for the report. The items queried related not to professional costs but to the associated travel costs. The letter of 18 December querying the travel costs requested details and receipts as follows:

- Whether the flights were between Alice Springs and Darwin
- Whether the stay was prolonged by seeing other clients in Darwin
- The $1500 24 hour travel time allowance
- Receipts for accommodation, car hire and fuel in Darwin.

26. Prior to the date of this letter the employer had been provided with detail in relation to the cost of the report. On 24 October 2008, the solicitor for the worker had provided the solicitor for the employer with both a copy of a

letter and the tax invoice from Michelle French and Associates. The letter explained what would be included in the detail of the report, including "that additional hours were spent in completing this report, inclusive of equipment investigation and report writing, which have not been included in an effort to keep the overall cost down". The invoice individually itemised travel time, *per diem* allowance, flight cost and accommodation, car hire and fuel. In late November, no advance having been made on the payment for the report by the employer, Mr Boland paid for the report himself on the recommendation of his solicitor. On 6 December 2008 the solicitor for the worker wrote again to the solicitor for the employer, this time enclosing a copy of the report, together with copies of correspondence between it and Michelle French and Associates in which the fee structure for the report was given. He requested that his client be reimbursed for the cost of the report within 7 days. As at 17 December 2008 when the interlocutory application was made, no further communication on the subject of the report or its cost had been received.

27. As previously noted, the matter came before the Deputy Registrar in early January and the consent order referred to was made. It is the travel component of the costs that have remained unresolved, the professional costs of $7,925.50 having been made the subject of the consent order.

28. What is suggested is that the outstanding costs of $4,646.32 made up of the matters referred to in [26] above are unreasonable. On 25 March 2009 the solicitor for the worker filed an affidavit in which he set out in detail the apportionment of the travel related costs. The affidavit deposes to the individual content of the travel cost items. The content is based on information supplied by the office manager of Michelle French and Associates. It was submitted that the information provided in the affidavit is hearsay only and not directly from Ms French. In my view it would involve unnecessary costs to require the worker to provide a personal affidavit from Ms French as to the costs claimed. The tax invoice from the firm was

provided and information provided to the worker's solicitors as to the calculation of the items. The worker has accepted the amounts as reasonable based on the information provided and is therefore entitled to rely on the information provided to him in support of his claim for reimbursement.

Travel Time Claim

29. The $1500 travel time is a capped rate for travel in a 24 hour period which is ordinarily calculated on the basis of an hourly rate of $220 for Ms French and $85 for Ms Cullen. At a total of $305 per hour travel that takes 5 hours will exceed $1500 and therefore attract the cap. The travel actually undertaken from Melbourne to Darwin took 8 hours and 5 minutes. No travel time was charged for the return journey because Ms French and her colleague continued on from Darwin to Alice Springs and the cost of the Darwin/Alice and Alice/Melbourne leg was charged to that client.

30. As I understand the employer's argument, because Ms French and her colleague also undertook an assessment in Alice Springs as part of the same trip, the travel time costs charged to them should be only the cost of travel between Alice Springs and Darwin. In my view it was perfectly open to Michelle French and Associates to arrange their travel for the assessment of Mr Boland and the Alice Springs client in whatever way was most convenient for their professional purposes, taking into account the availability of flight times convenient to their other professional demands. If the travel had been organised as the employer suggests then the firm could have appropriately apportioned half of the travel time Darwin/Melbourne to Mr Boland and half to the Alice Springs client. If that were the case, then travel time Alice to Darwin and Darwin to Melbourne would have well exceeded the $1500 charged, as the travel would have occurred on 2 separate days, therefore not resulting in a 24 hour cap but being charged at the hourly rate, which on my calculations and knowledge of those well travelled routes would be likely to be in the order of 4 hours Alice/Darwin and a similar

figure for half of the journey Darwin to Melbourne, taking into account for both trips travel to/from the airport and waiting time following check in resulting in a bill of at least $1220 each way. Even if only Ms French's travel time was accounted for, the charge of 4 hours each day would clearly be in excess of $1500 in total in the event that the travel was undertaken according to the route and apportionment suggested by the employer.

31. In my view a *per diem* charge of $132 per day ($120 plus GST) is well within the current range for such charges representing meal and incidentals cost. It is noted that the charge was only made with respect to Ms French and for one day only.

32. The total cost for accommodation, car hire and fuel and parking costs and parking costs for their time in Darwin was $984.87 of which half has been apportioned to Mr Boland. The sum of $487.42 for 2 nights of accommodation, car hire and associated fuel and parking expenses for 2 persons is not an unreasonable amount. The amount is below what might generally be expected for reasonable accommodation costs alone for 2 nights in Darwin in July.

33. Finally the flight costs were also apportioned between the Alice Springs client and Mr Boland. In my view this was a fair way to allocate the costs resulting in a total charge of $2526.90 for the travel of both Ms French and Ms Cullen. In my view the fares and apportionment are reasonable. The difference between apportioning the cost in this way and the costs of the airfares if the route Alice Spring/Darwin/Melbourne had been chosen would be so minimal that any difference cannot be said to take it into the realms of an unreasonable charge. Whilst there are no doubt cheaper fares obtainable for the routes, I see no reason why budget airline travel at times inconvenient to efficient work on arrival should be chosen.

34. The employer says that the worker's solicitors were not responsive to their request to explain the make up of the account. Clearly, by reason of the

consent order for professional costs, the employer accepted the reasonableness of that charge. The employer undertook to pay **reasonable** costs. It was not an undertaking to pay only for the cheapest possible method of obtaining the report. In my view, the solicitors for the employer had to hand, prior to the interlocutory application, sufficient information as to each of the itemised charges and their calculation to be able to determine whether or not the costs were reasonable. To my mind there arose a degree of nitpicking, particularly evidenced by asking for receipts for accommodation, car hire and fuel when the total cost for these items was only $487.42 which figure could not possibly be considered an excessive amount by anyone experienced in arranging professional travel and stay in Darwin.

Interest

35. The worker seeks further an order that the employer pay interest on the outstanding sums at the rate of 20% or such other rate as may be determined pursuant to ss 109(1) and (3) of the Act. As previously noted, the employer consented by way of a notice of consent to an interlocutory order to pay the sum of $7,925.50 by way of payment of the professional costs of the report on 23 December 2008, the order being made by the Deputy Registrar on 2 January 2009. The order noted that the sum of $4,646.32, together with the question of interest and costs remained in dispute.

36. Section 109(1) provides that where the Court is satisfied that the employer has caused unreasonable delay in accepting a claim for or paying compensation, it must, 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. The employer has characterised the payment of the costs of the report as compensation because as it submitted if it is not "compensation" as defined by the Act, then no claim is maintainable.

37. It is necessary to consider the two components of the costs. First is the issue of interest on the professional costs that were finally agreed on 23 December 2008. The employer was provided with a copy of the report on 6 December 2008, having been earlier provided with the letter from Michelle French and Associates and their tax invoice on 24 October 2008. It was clearly an extensive report running to 120 pages and very detailed in content. The employer knew what proportion of the account was attributed to professional costs and to the travel expenses. Even if the employer wished to question the travel costs, there was no reason to delay reimbursing Mr Boland for the professional costs. Payment was not agreed until after the interlocutory application. It was hardly in keeping with the spirit of the employer's expressed desire to maintain a good relationship with Mr Boland. I am satisfied the delay in making that part payment was not reasonable.

38. Likewise, in view of the conclusion I have reached as to the adequacy of the material to determine the reasonableness of the travel costs in the possession of the employer's solicitors prior to the commencement of the interlocutory proceedings (the report itself, the invoice and the letters showing the fee structure for the report), I regard the delay in paying the costs of the report as unreasonable.

39. In my view taking into account current commercial interest rates an award of interest at the rate of 15% is to be awarded on the sum of $7,925.50 from the date on which it was paid by Mr Boland until the date of reimbursement following the consent order and at the same rate for the outstanding $4,646.32 from the date on which it was paid by Mr Boland until payment is made to him.

Costs

40. It follows from what I have found in relation to the information that the employer's solicitors had to hand before the interlocutory application that

this was sufficient for them to determine the reasonableness of the charges. The invoice itemising costs had been to hand since 23 October 2008.

41. It was not unreasonable for the worker's solicitor to request reimbursement within seven days, noting that the fee structure for the report was included with that request. It should not have been necessary to require the worker's solicitor to obtain the detail of those charges that were obtained and given or the interlocutory application in order to decide that $4,646.32 was a reasonable charge for the travel and other arrangements required for the assessment. Although I think it is fair to observe that there was some degree of intractability evident on both sides, at the end of the day, it would not be sufficient to displace the ordinary costs order on a successful application given the findings of fact that I have made. Unless the parties which to be further heard on the costs issue, an order for costs for the worker should follow.

42. I make the following orders:

    1. That the employer pay to the worker $4,646.32 by way of reimbursement of reasonable costs for obtaining the French Report for the purpose of assessing his s 78 claim.

    2. That the employer pay to the worker interest at the rate of 15% both on the sum of $7,925.50 and the sum of $4,646.32 from the date on which the amounts were paid by the worker until reimbursed by the employer.

Dated this 18th day of May 2009.

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Sue Oliver
STIPENDIARY MAGISTRATE