CITATION: *Taylor Enterprises (NT) Pty Ltd v Alan Pointon & Work Health Authority* [2009] NTMC 042

PARTIES:	TAYLOR ENTERPRISES (NT) PTY LTD v ALAN POINTON & WORK HEALTH AUTHORITY
TITLE OF COURT:	Work Health Court
JURISDICTION:	Darwin
FILE NO(s):	20823563 & 20916760
DELIVERED ON:	21 September 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	11 August 2009
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

WORKERS COMPENSATION – COSTS IN RELATION TO INTERLOCUTORY APPLICATION AND SUBSTANTIVE APPLICATION – EARLY TAXATION

Workers Rehabilitation and Compensation Act (NT) s 110
Work Health Rules - Rule 23.03
Supreme Court Rules - Rules 63.04, 63.18

TTE Pty Ltd & Anor v Ken Day Pty Ltd (1992) 2 NTLR 143 applied

REPRESENTATION:

Counsel:

Applicant:	Judith Kelly SC
First Respondent:	Pipina Lazarus
Second Respondent:	Greg MacDonald

Solicitors:

Applicant:	Hunt & Hunt
First Respondent:	Ward Keller
Second Respondent:	Solicitor for the Northern Territory

Judgment category classification:	C
Judgment ID number:	[2009] NTMC 042
Number of paragraphs:	46

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

No. 20823563 & 20916760

[2009] NTMC 042

BETWEEN:

TAYLOR ENTERPRISES (NT) PTY LTD
Applicant

AND:

ALAN POINTON
1st Respondent

AND

WORK HEALTH AUTHORITY
2nd Respondent

REASONS FOR DECISION

(Delivered 21 September 2009)

Dr John Allan Lowndes SM:

1. Following my reasons for decision delivered on 10 July 2009, the applicant/employer sought the following orders in relation to its applications in proceedings numbered 20823563 and 20916760:

    (a) that the first respondent pay the applicant's costs of the applications, as well as the applicant's costs of and incidental to the proceeding numbered 20916760;

    (b) such costs to be at 100% of the Supreme Court scale, certified fit for Senior Counsel, to be agreed or taxed in default of agreement;

    (c) such costs to be payable by the first respondent to the applicant forthwith.

2. The first respondent/worker sought the following orders as to costs:

   (a) in proceeding numbered 20823563 the applicant pay the first respondent's costs of and incidental to the proceeding, to be certified fit for counsel and to be taxed in default of agreement at the rate of 100% of the Supreme Court scale;

   (b) in proceeding numbered 20916760 the applicant to pay the first respondent's costs of and incidental to the application filed 21 April 2009, to be certified fit for counsel and taxed and payable forthwith in default of agreement at the rate of 100% of the Supreme Court scale.

3. By way of background the employer filed an interlocutory application in proceedings numbered 20823563 seeking an order that until further order of the Court NT WorkSafe be stayed from proceeding with a reassessment of the worker's permanent impairment assessment from Dr Walton under sections 71 and 72 of the *Workers Rehabilitation and Compensation Act*. The employer also sought costs of and incidental to the application.

4. The employer also commenced proceedings bearing number 20916760. These proceedings were in the nature of a substantive s 104 application, joining the Work Health Authority as a second respondent. In those proceedings the employer filed an interlocutory application seeking orders which mirrored those sought in the interlocutory application filed in proceedings numbered 20823563.

5. The circumstances leading up to the filing of the applications were as follows:

   - By way of a letter dated 18 December 2008 the solicitors for the first respondent requested a report from Dr Walton following his examination of the first respondent, which was due to take place on 14 January 2009.1 That correspondence included a request for an assessment of permanent impairment in accordance with the Guidelines to the Evaluation of Permanent Impairment AMA 4th Edition in the event that the

[1] See [2] of the affidavit of Pipina Lazarus sworn 9 June 2009.

worker's condition had stabilised and he was found to suffer from a psychiatric or psychological injury.2

- In his report dated 10 February 2009 Dr Walton noted the solicitors' request for an evaluation of permanent impairment according to the AMA Guidelines to the Evaluation of Permanent Impairment 4th Edition. Dr Walton stated that "as best I can judge Mr Pointon appears to be suffering from a Class 3: moderate impairment throughout" and "I translate that for medico-legal purposes into a 40% whole person psychiatric impairment."

- By way of letter dated 17 February 2009 the solicitors for the first respondent served a copy of Dr Walton's report on the applicant's solicitors. The final sentence of that letter stated: "Please note Dr Walton assesses Mr Pointon with 40% whole person psychiatric impairment using the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment."[3]

- On 24 February 2009 the solicitors for the applicant sent a letter to NT WorkSafe.[4] A copy of that letter was sent to the first respondent's solicitors. In that letter the applicant's solicitors advised NT WorkSafe that they had recently been served with a copy of Dr Walton's report, which provided a permanent impairment assessment for the worker. The letter went on to say that neither the employer nor the insurer have accepted any liability for a work related psychiatric injury that the worker appears to assert that he has now suffered as a result of his physical injuries. Although being of the view that the assessment was not binding on the employer, the applicant's solicitors sought confirmation from NT WorkSafe that as the employer had not accepted liability for any work related psychiatric injury, the employer would not be bound by the permanent impairment assessment from Dr Walton. In the alternative, the solicitors said that if the permanent impairment assessment is valid, then the employer and the insurer is aggrieved by the assessment and refers same to NT WorkSafe for consideration. The letter concluded thus: "If WorkSafe is of the view that Dr Walton's assessment is a valid assessment for the purpose of s 71 of the Act, then I advise that the employer and insurer is aggrieved by same and we seek a re-assessment of the assessment by a panel under s 72 of the Act".

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[2] See [2] of the affidavit of Pipina Lazarus sworn 9 June 2009.
[3] See [4] of the affidavit of Pipina Lazarus sworn 9 June 2009.
[4] See [5] of the affidavit of Pipina Lazarus sworn 9 June 2009. See also [3] (g) of the affidavits of Peggy Cheong sworn 3 April 2009 and 21 April 2009.

- NT WorkSafe responded by way of letter dated 5 February 2009.[5] A copy of that letter was sent to the first respondent's solicitors. In that correspondence the Authority advised that it had no power to determine "whether any particular impairment identified in the original assessment is attributable to the work related injury and that this question, is in the first instance, a matter for the reassessment panel". The Authority advised that it was satisfied that Dr Walton's assessment had been properly conducted and was in accordance with the prescribed guides. The Authority requested the first respondent's solicitors to provide it with all previous medical reports pertaining to the worker for the consideration of a panel of medical practitioners. The Authority stated that it would commence co-ordinating such a panel.

- On 6 March 2009 the solicitors for the applicant wrote to the first respondent's solicitors and referred those solicitors to the letter from NT WorkSafe dated 5 February 2009.[6] The applicant's solicitors set out the two options available to the employer. The first was that the worker provide written confirmation that he does not at present rely upon the report and permanent impairment assessment from Dr Walton on the basis that the employer has disputed liability for his claim for a psychiatric injury. The second option was that the employer make an urgent application to the Work Health Court for a declaration that NT WorkSafe be prevented from convening a panel or conducting a re-assessment of the assessment from Dr Walton until the issue of the employer's liability for the worker's claim for a psychiatric injury has been determined or agreed between the parties. The letter went on to advise that should written confirmation that the worker does not seek to rely upon Dr Walton's assessment not be received within 7 days, instructions will be obtained to make an application to the Court as per the second option. The letter concluded in these terms: "If the employer is required to proceed with such an application, then I advise that my client will rely on this letter in seeking costs of such application and all attendances incidental to the same from the worker".

- On 6 March 2009 the applicant's solicitors wrote to NT WorkSafe advising the Authority that they disagreed with the approach that the Authority proposed to take.[7] The applicant's

[5] See [6] of the affidavit of Pipina Lazarus sworn 9 June 2009. See also [3] (g) of the affidavits of Peggy Cheong sworn 3 April 2009 and 21 April 2009.
[6] See [3](g) of the affidavits of Peggy Cheong sworn 3 April 2009 and 21 April 2009.
[7] See [3](g) of the affidavits of Peggy Cheong sworn 3 April 2009 and 21 April 2009.

solicitors requested the Authority to delay the convening of a panel for re-assessment for 14 days while they sought their client's instructions as to whether to make an application to the Work Health Court.

- The employer proceeded to file the applications as stated earlier.

6. It is important to bear in mind that the applicant's interlocutory applications and the applicant's substantive s 104 application were set in train by the first respondent's service of the report and purported permanent impairment assessment from Dr Walton. As stated in the applicant's written submissions, "the entire process involving the application(s) was made necessary due to the worker's prematurely obtaining of a permanent impairment assessment of his (disputed) psychiatric injury and before the liability for such injury was determined by the Court".[8] As also pointed out in those submissions, "the whole purpose of the application(s) was to ensure that that there would not be a permanent impairment assessment on foot which could prejudice the applicant/employer if at the end of the worker's substantive proceeding, he is successful in persuading the Court to find that the employer was liable for his psychiatric injury".[9] Finally, as submitted on behalf of the applicant, "the purpose of the applicant's applications was to prevent NT WorkSafe from proceeding with a re-assessment of a permanent impairment assessment served and relied upon by the first respondent". [10]

7. The mischief began with the initial request by the worker's solicitors to Dr Walton to provide a permanent impairment assessment. That mischief crystallised with the service of Dr Walton's report (which included the assessment) on the employer's solicitors. As explained in my reasons for decision delivered on 10 July 2009, the service of the purported permanent impairment assessment triggered the permanent impairment assessment

[8] See [3] of the applicant's written submissions dated 11 August 2009.
[9] See [2] of the applicant's written submissions dated 11 August 2009.
[10] See [4] of the applicant's written submissions dated 11 August 2009.

process under ss 71 and 72 of the *Workers Rehabilitation and Compensation Act*.

8. At the hearing of the applications it was argued that the worker was not pursuing a claim for permanent impairment relating to his psychiatric condition.[11] If that be true, why did the worker's solicitors request Dr Walton to provide a permanent impairment assessment? Why did the worker's solicitors serve on the employer's solicitors a report which included a permanent impairment assessment? If service of the assessment on the employer's solicitors was not intended to constitute a claim for permanent impairment for the purposes of s 72 of the Act, then why didn't the letter of 17 February say so? If the assessment was being relied upon for another purpose (ie other than for the purposes of assessing the worker's permanent impairment), why didn't the letter of 17 February 2009 make that clear?

9. On the face of things, service of the permanent impairment assessment, contained in Dr Walton's report, purported to be a claim for permanent impairment, thereby triggering the provisions of s 72 of the Act and setting in train the process prescribed therein. The worker's solicitors did nothing to dispel that state of affairs. As pointed out in the written submissions made by the applicant's solicitors, "following service of the said report and assessment from Dr Walton, solicitors for the applicant had given the respondent and his solicitors the opportunity to clarify their position with respect to the permanent impairment assessment".[12] Neither the first respondent nor his solicitors responded, or adequately responded, to the letter sent by the applicant's solicitors dated 6 March 2009, the contents of which were summarised above.

10. At paragraph 11 of the applicant' submissions dated 11 August 2009 it was

[11] See [4] and [5] of the worker's affidavit sworn 8 June 2009.
[12] See [9] of the applicant's written submissions dated 11 August 2009.

submitted that the interlocutory applications and the applicant's substantive s104 application numbered 20916760 could have been avoided had the first respondent responded to the letter sent by the applicant's solicitor's to the solicitors for the first respondent and taken the appropriate action to withdraw and/or not rely on the permanent impairment assessment provided by Dr Walton. I accept that submission, adding that the applications could have at an earlier point in time been avoided had the permanent impairment assessment been omitted from Dr Walton's report, or if it had been made clear that the permanent impairment assessment was included in the report for a reason other than making a claim for permanent impairment.

11. By purporting to be a claim for permanent impairment, and in the absence of any contraindications, Dr Walton's report and the permanent impairment assessment contained therein set in train the process established by s 72 of the Act. Consequently the applicant was compelled to protect its position by making application to the Court for the reasons given in my reasons for decision delivered on 10 July 2009. In my opinion the applicant was fully justified in bringing the applications in order to avoid the creation of "a substantive mischief in the application of s 71 and 72 of the Act."[13]

12. It follows that I have rejected the submissions made on behalf of the first respondent that the applications brought by the applicant were unnecessary.

13. I can see no logical basis for the submission that the service of the report, which included a permanent impairment assessment, was entirely appropriate.[14] Service of the report minus the assessment may have been appropriate. However, service of the assessment component was not appropriate as, in the absence of any contraindications, it purported to be a claim for permanent impairment. For the reasons given in my reasons for

[13] See [12] of the applicant's written submissions dated 11 August 2009. See also my reasons for decision dated 10 July 2009.
[14] See p 4 of the first respondent's written submissions.

decision of 10 July 2009, such a claim was premature and did not conform to the statutory regime.

14. The submission that "the employer at all material times was aware that the worker was not pursuing permanent impairment unless and until there was a finding by the Court that the first respondent's psychiatric condition resulted from his work health injury"[15] is baseless, and flies in the face of the uncontradicted evidence.

15. The submission that "the worker, at no time claimed payment of his assessment of permanent impairment within the time required for such payment to be made"[16] appears to miss the salient point, that is, the purported permanent impairment assessment by Dr Walton set in train the process established by s 72 of the Act. That assessment held itself out to be an assessment in terms of s 72(2) of the Act.

16. It was submitted that following submissions during the first application it was "abundantly clear that the worker does not pursue permanent impairment until and if the Court makes a finding".[17] That might be so, but the "horse had bolted", and the mischief had already been created by the service of Dr Walton's report, which included a permanent impairment assessment. On its face the assessment was an assessment for the purposes of s 72(2) of the Act.

17. The first respondent sought to rely upon the following matters as showing that the applications were unnecessary.

18. At paragraph 8 of her affidavit sworn 9 June 2009 Ms Pipina Lazarus, the solicitor for the first respondent, deposed that the worker "concedes a dispute to be resolved in these proceedings is whether a compensable psychiatric injury exists under the Act" and "these issues will be resolved at

[15] See p 4 of the first respondent's written submissions.
[16] See p 4 of the first respondent's written submissions.
[17] See p 7 of the first respondent's written submissions.

a hearing on a date to be fixed". Ms Lazarus went on to say that "there is no entitlement to compensation pursuant to ss 70-72 of the Act until such time as the Court determines a compensable injury under the Act".

19. The worker at paragraph 4 of his affidavit sworn 8 June 2009 deposed as follows: "I am aware and accept I am not entitled to receive compensation for permanent impairment of my psychiatric condition unless and until liability is accepted by the employer or [the] Court makes a finding that my psychiatric condition resulted from my accepted work health injury". In paragraph 5 of the same affidavit the worker says: "I am not pursuing a claim for compensation for permanent impairment related to my psychiatric condition until such time as the employer accepts liability or this Court makes a finding". Finally, at paragraph 6 of his affidavit the worker deposed that he had no interest in the applications and would abide by the Court's decision.

20. At paragraphs 9-11 inclusive of her affidavit sworn 9 June 2009 Ms Pipina Lazarus deposed as to the following:

- the first respondent has no interest in the proceeding and considers that it is a matter between the applicant and the second respondent;
- the first respondent seeks to be released from the proceeding with an order for its costs, on a solicitor/own client basis, of and incidental to the proceeding;[18] and
- the first respondent does not wish to be heard and will abide by the Court's decision.

21. I am not persuaded by this body of affidavit evidence. It avoids the essential question – why did the worker serve on the employer's solicitors Dr Walton's report containing the permanent impairment assessment if the worker accepted that he had no current entitlement to compensation for

[18] See the letter dated 20 April 2009 sent by the first respondent's solicitors to the applicant's solicitors seeking to have the worker excluded from the employer's application.

permanent impairment. To my mind that question has not been satisfactorily answered by the first respondent.

22. The evidence discloses a very poor attempt on the part of the worker to dissociate himself from what appeared to the world at large to be an assessment for the purposes of s 72(2) of the Act by simply asserting that it was not his intention to pursue a claim for compensation for permanent impairment. Again one must ask what was the reason for obtaining the permanent impairment assessment and serving it on the employer's solicitors?. One must also ask why didn't the first respondent's solicitors make it clear that Dr Walton's assessment was not being relied upon for the purposes of making a claim for compensation for permanent impairment.

23. I am not persuaded by the worker's assertion that he has no interest in the applications, and that the subject matter of the applications concerns only the applicant and the second respondent. It was the first respondent that created the situation that prompted the filing of the applications. The service of Dr Walton's permanent impairment assessment on the employer's solicitors set in motion the statutory process established by s 72 of the Act, thereby directly affecting the interests of the employer. For the worker to now distance himself from the proceedings is tantamount to a "hit and run".

24. In my opinion it was entirely appropriate for the worker to be joined to the applicant/employer's s 104 application. The worker had a right to be heard and to be given an opportunity to explain his conduct in prematurely serving a permanent impairment assessment on the employer's solicitors, and to address the legal consequences of that conduct. Furthermore, although the worker denied that he was pursuing a claim for compensation for permanent impairment, to all appearances he was making such a claim when he caused the permanent impairment assessment to be provided to the employer. In

that context I agree with the following submission made on behalf of the applicant/employer:

> Finally, the worker had to be joined to the applicant/employer's section 104 application as he had an interest in this application as the orders sought would affect the worker's rights on being able to rely on the permanent impairment assessment and seek compensation payment from same.[19]

25. It now remains to consider what costs orders the Court should make.

26. It is useful to pause to consider the nature of the applications before the Court.

27. The application filed in proceedings numbered 20823563 was clearly an interlocutory application. The application filed in proceedings numbered 20916760 was an integral part of a substantive s 104 application, such that the application should be treated as a proceeding in its own right – that is, the determination of the application would dispose of the proceedings.

28. Interlocutory applications in the Work Health Court are governed by Rule 63.18 of the Supreme Court Rules, which provides that each party shall pay his or her own costs of interlocutory proceedings, unless the Court otherwise orders.

29. Rule 63.04 of the Supreme Court Rules provides that where an interlocutory order for costs is made, those costs shall not be taxed until the conclusion of the proceedings unless it appears to the Court that the costs ought to be taxed at an earlier stage, and the Court so orders.

30. *TTE Pty Ltd & Anor v Ken Day Pty Ltd* [(1992)] 2 NTLR 143 is the leading authority in relation to costs orders in interlocutory applications. That case is authority for the following three propositions:

- there must be something exceptional about the circumstances of an interlocutory application to excite the discretion of the Court in making an order as to costs, taxation and payment;

[19] See [13] of the applicant/employer's written submissions dated 11 August 2009.

- where the grounds of an interlocutory application or resistance to such an application is without real merit, the successful party should not have to bear its costs; and

- a just approach to taxation and payment of interlocutory costs before the conclusion of proceedings is to consider whether the successful party ought reasonably have anticipated interlocutory proceedings of the kind in question.

31. With respect to the substantive s104 application (including the interlocutory application) costs are in the discretion of the Court: see Rule 23.03 of the Work Health Rules. In exercising its discretion under that rule in relation to a proceeding commenced under s 104 of the Act, the Court must have regard to the matters referred to in s 110 of the Act. Section 110 provides as follows:

> In awarding costs in a proceeding before the Court, the Court shall take into account the efforts of the parties made before or after the making of the application under section 104 in attempting to come to an agreement about the matter in dispute and it may, as it thinks fit, include as costs in the action such reasonable costs of a party incurred in or in relation to those efforts, including in particular the efforts made at the directions hearing and any conciliation conference.

32. In my opinion, it was entirely appropriate for the employer to not only file the interlocutory application in proceedings numbered 20823563, but also to commence the substantive s 104 proceedings numbered 20916760, which joined the Work Health Authority as a party. Both applications sought the same orders. The applications had a seamlessness, raising the same issues and inviting the same arguments.

33. The fact that the Court did not make the specific order as sought by the applicant/employer has no real bearing on the question of costs. In the final analysis the applicant/employer was successful in protecting its position, which it was fully justified in seeking to protect in the first instance. The effect of the decision made by the Court on 10 July 2009 was that the permanent impairment assessment served by the worker was not a valid

assessment pursuant to the Act. The applicant/employer obtained relief by reason of that ruling rather than through a stay of proceedings.

34. In relation to the interlocutory application filed in proceedings numbered 20823563, I consider that it is appropriate to depart from the general rule that each party pay their own costs.

35. As stated before, the initial interlocutory application was necessary as a consequence of the service of the permanent impairment assessment and the failure of the first respondent to respond appropriately following the service of that assessment.

36. That initial interlocutory application would have been unnecessary had the first respondent not served the permanent impairment assessment on the employer in the first instance, or having taken that step made it clear that a claim for compensation for permanent impairment was not being pursued by taking the appropriate action to withdraw and/or not rely on the assessment. At the hearing of the interlocutory application the applicant stubbornly maintained that there was no need for the application. As a consequence of the first respondent's course of conduct the applicant was compelled to incur significant legal costs to protect its position. In my opinion, those circumstances warrant a departure from the general rule that each party pay their own costs of interlocutory proceedings. In my opinion, the circumstances of the case are so exceptional as to move the Court to make an order for costs in favour of the applicant.

37. I have reached a similar view in relation to proceedings numbered 20916760. The interlocutory application filed in these proceedings was, in effect, a proceeding in its own right. The outcome of that application disposed of those proceedings. The applicant/employer was the successful party and the general rule is that costs follow success. I see no reason to depart from that general rule.

38. In coming to that conclusion I have had regard to the provisions of s 110 of the Act. The first respondent took the position that there was no need for that application and considered that it should not be a party to it. For the reasons given earlier the Court takes an entirely contrary view. Given his attitude to the s104 application and the accompanying interlocutory application, the first respondent made no effort to come to an agreement about the matter in dispute. That is a matter which is relevant to the awarding of costs.

39. In my opinion, the circumstances warrant the making of an order that costs awarded to the applicant/employer with respect to proceedings 20823563 and 20916760 be taxed and paid prior to the conclusion of the consolidated proceedings numbered 20823563 and 20914049. I consider that such orders represent a just outcome for the following reasons.

40. The circumstances were exceptional in that in the normal course of litigation under the *Workers Rehabilitation and Compensation Act*, an employer would not have reasonably expected a worker to prematurely serve a permanent impairment assessment in circumstances where it appeared that the worker was pursuing a claim for compensation for permanent impairment.

41. In light of the failure of the worker to take appropriate action to alleviate its concerns, the employer had no choice but to seek appropriate relief to protect its position. In my view the employer would not have reasonably anticipated that it would have to go to such lengths to protect its interests. That also rendered the circumstances exceptional.

42. In my opinion, the position taken by the first respondent in relation to the interlocutory applications and the substantive s 104 application was without real merit.

43. It was common ground between the parties that any costs awarded should be at the rate of 100% of the Supreme Court scale. I am in total agreement with that, given the complexity of the matter.

44. In my view the matter should be certified fit for Senior Counsel, again given the complexity of the matter.

45. I make the following orders:

    (1) That the first respondent pay the applicant's costs of and incidental to the interlocutory application in proceedings numbered 20823563;

    (2) That the first respondent pay the applicant's costs of and incidental to proceedings numbered 20916760 (including the interlocutory application filed therein);

    (3) That such costs be at the rate of 100% of the Supreme Court scale, certified fit for Senior Counsel, to be agreed or taxed in default of agreement; and

    (4) That such costs be payable by the first respondent to the applicant forthwith.

46. I should add that if the matter proceeds to taxation it is important to note the overlap between the interlocutory applications and the s104 application.

Dated this 21st day of September 2009

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE