

CITATION: Lajevardi v Performance Services [2021] NTLC031

PARTIES: ALIREZA LAJEVARDI
V
PERFORMANCE SERVICES PTY LTD

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 2021-00206-LC

DELIVERED ON: 15 NOVEMBER 2021

DELIVERED AT: DARWIN

HEARING DATE(s): 21 AND 22 OCTOBER 2021

DECISION OF: ACTING JUDGE NEILL

CATCHWORDS:

Validity of section 69 Notice; objective test applicable to subsection 69(4) of the Act; whether the Worker unreasonably obstructed an examination by a medical practitioner within the meaning of section 91 of the Act; the scheme and operation of section 91 of the Act; presence of a support person at a medical examination under section 91 of the Act; whether there was unreasonable delay by the Employer in providing a further medical examination pursuant to section 91 of the Act; interest on arrears of weekly benefits – sections 89 and 109 of the Act; costs in cases with mixed outcomes.

Return To Work Act sections 69, 89, 88, 91 and 109

Dickin v NT TAB Pty Ltd [2003] NTSC 119

Newton v Masonic Homes Inc [2009] NTSC 51

Joanne Claire Catford v Laminex [2021] NTLC 004 paras 37., 46. to 49. And 56.

Ryan v Regent Enterprises Pty Ltd (1991) 3 WAR 552

Re Twaddle and Comcare (2001) 65 ALD 794

Cretazzo v Lombardi (1975) 13 SASR 4 at 12

Monie v Commonwealth of Australia (No. 2) [2008] NSWCA 15 at [63] to [66]

REPRESENTATION:

Counsel:

Worker: Mr Ben O'Loughlin

Employer: Mr Wade Roper

Solicitors:

Worker: Piper Ellis Lawyers

Employer: Minter Ellison

Decision category classification: A

Decision ID number: 031

Number of paragraphs: 133

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

No. 2021-00206-LC

BETWEEN

ALIREZA LAJEVARDI

WORKER

AND

PERFORMANCE SERVICES PTY LTD

EMPLOYER

REASONS FOR DECISION

(Delivered 15 November 2021)

ACTING JUDGE JOHN NEILL

Background

1. Alireza Lajevardi ("the Worker") was born on 21 August 1979 and he is currently 42 years of age.
2. On or around 9 September 2017 the Worker suffered injury ("the injury") when he was assaulted while working as a security guard in the course of his employment with Performance Services Pty Ltd ("the Employer").
3. The Worker made a claim in respect of the injury pursuant to the *Return To Work Act* ("the Act"). In his Work Health claim form the Worker provided the history that he was "king hit" and thereafter taken to the Royal Darwin Hospital. He recorded that the parts of his body affected by the injury were "*head, neck, shoulder, hip, left knee*" and he recorded that the most serious of these injuries were "*head, left knee*". The first medical certificate provided together with the claim form recorded a diagnosis that the Worker had suffered a concussion following an assault, together with left knee pain.
4. The Employer by its Work Health insurer QBE initially deferred its response to the Worker's claim but subsequently accepted the claim by letter dated 4 October 2017. That letter of acceptance stated that it was accompanied by a Notice advising that liability for the claim had been accepted, however no such Notice was provided as part of the documentary evidence before the Court. That letter does not itself identify the nature of the injury which the Employer was advising it had accepted. Thereafter, the Employer paid the Worker compensation in accordance with the Act.
5. I heard the matter for two days on 21 and 22 October 2021. With the consent of the parties I received a Trial Book containing the evidence relied on at the hearing, as exhibit W2.

Except where otherwise stated, all the documents subsequently referred to in these Reasons are to be found in the Trial Book and all were admitted as evidence before me.

6. Professor Mark Walterfang became the Worker's treating psychiatrist. He diagnosed the Worker as suffering from "*post traumatic stress disorder and major depressive episode*". Professor Walterfang also recorded a history and diagnosis arrived at by a Professor Olver, that the Worker had suffered "*significant polymodal symptoms consistent with a postconcussive syndrome*", and Professor Walterfang went on to describe the Worker as having suffered a "*significant work-related brain injury*". By 2018 the Worker was using a wheelchair, however the need for this and its relationship to the injury was not explained.
7. There was no issue raised in this proceeding or at the hearing about the precise nature of the injury. I heard no evidence or submissions as to whether the Employer had accepted that the injury included a physical brain injury, whether postconcussive syndrome or otherwise. I heard no evidence or submissions as to whether the Employer had accepted that the Worker had suffered psychiatric illness as a sequela of the injury, whether post traumatic stress disorder and/or major depressive episode, or otherwise. It is not necessary for me in these Reasons to make any finding or ruling as to what was or is involved in the Worker's injury as accepted by the Employer or arising out of the work-related assault.

The Medical Examination

8. By letter dated 4 March 2020 the Employer's Darwin lawyers Minter Ellison wrote to interstate forensic psychiatrist Dr Antonella Ventura and requested that she prepare a medico-legal report in respect of the Worker. That letter was accompanied by a large number of medical records and medical reports and also a chronology of unspecified provenance. Dr Ventura was asked to provide a medico-legal report in respect of the Worker on the basis of that material, without her first examining him.
9. Dr Ventura provided her report dated 24 March 2020 to the Employer's lawyers. Dr Ventura reviewed the documentation provided to her, and she stated at page 8.9 of that report: "*... I am unable to offer a psychiatric diagnosis suffered by Mr Lajevardi as a result of the injury of 9 September 2017*". She concluded on page 10.3 as follows: "*In my opinion given the documents provided to me Mr Lajevardi does not require treatment for a psychiatric disorder*".
10. Seven months later, the Work Health insurer QBE wrote directly to the Worker by letter dated 27 October 2020 advising it had made an appointment for him to be examined by Dr Ventura in Darwin on 16 November 2020 at 1:00 PM. The Worker attended to keep that appointment, together with his partner Ms Moya Buckley. Upon arrival, the Worker and Ms Buckley were informed by staff that Dr Ventura would not permit Ms Buckley to accompany the Worker during the medico-legal psychiatric examination. Reluctantly, the Worker proceeded to attend the examination with Dr Ventura, not accompanied by Ms Buckley.
11. At a point in the course of the examination, the Worker became upset and raised his voice and made some statements to Dr Ventura which she subsequently reported she found aggressive and abusive. Dr Ventura terminated the examination.
12. Dr Ventura's version of events is set out in a letter dated 18 November 2020 she wrote to the Employer's lawyers Minter Ellison, entitled "Record of Events Following Termination of Assessment". She reported that the Worker shouted "*inappropriate abusive and sexualised comments*".

The Cancellation of Weekly Benefits

13. By a Notice of Decision and Rights of Appeal dated 19 November 2020 ("the Notice") the Employer advised the Worker that it was cancelling payments of weekly benefits to him pursuant to section 69 of the Act. The reason for this decision was stated to be that the Worker had "... *unreasonably refused to have, and/or unreasonably obstructed, an examination by a medical practitioner, provided and paid for by the Employer*". The Notice went on to state that: "*At approximately 1:30 PM, you became verbally abusive and aggressive to the extent that Dr Ventura was forced to terminate the examination*". The Notice concluded: "... *pursuant to section 91(2) of the Act your weekly benefits are cancelled until such time as you attend an examination arranged pursuant to section 91. The cancellation will be effective 14 days from your receipt of this notice*".
14. Payments of weekly benefits were in fact ceased 14 days after the service of the Notice on the Worker, in early December 2020. Payments of weekly benefits were not resumed until on or shortly after 14 September 2021, more than nine months later, after the Worker had been examined by a different psychiatrist provided and paid for by the Employer.

Pleadings and Procedural Issues

15. The Worker has appealed from the Notice. This was not a "mere appeal" because the Worker chose to prepare his pleadings to include issues going beyond the mere background and the cancellation of weekly benefits and a challenge to the validity of the Notice. As a consequence, the Worker was *dux litis* at the hearing.
16. In the Worker's Further Amended Statement of Claim dated 24 September 2021 he pleads in paragraph 7 that the Notice was invalid. He then goes on to plead in paragraph 8 that the Employer, following the cancellation of weekly benefits, caused unreasonable delay in resuming payments of weekly benefits and the Worker therefore claims interest pursuant to section 109 of the Act. He then goes on to plead in paragraphs 9 to 16 inclusive that a further examination could have and should have taken place much earlier than the one which eventually did take place in September 2021.
17. The Employer by its Further Amended Notice of Defence filed 1 October 2021 denies the Worker's pleading of invalidity of the Notice, and generally traverses the Worker's pleading as to the timeliness of the eventual further examination and resumption of payment of weekly benefits.
18. The Employer by its Counterclaim pleads its position that the Worker unreasonably obstructed the medical examination with Dr Ventura pursuant to section 91 of the Act. The Employer goes on to plead the facts and circumstances of arrangements it made to organise a subsequent further examination, and why it says its delay in so doing was reasonable in those circumstances.

The Recording

19. The Worker secretly recorded his interaction with staff at the location where the medical examination with Dr Ventura was to take place on 16 November 2020. He secretly recorded the examination by Dr Ventura and his interaction with her. He informed the solicitor with the original carriage of his matter that he had done this and that the recording was available for her consideration. Neither he nor that solicitor could remember in October

2021 the date when he provided that information, but his then solicitor could recall his telling her of the recording. She could be certain therefore that this occurred before the next solicitor Ms Grimster took over carriage of the file on behalf of the Worker, in March 2021.

20. The solicitor with the original carriage of the matter chose not to receive the recording nor to look at it until she could first consider and advise the Worker of the legal implications generally and criminal implications specifically, of this covert recording. Unfortunately, the original solicitor did not “get around to” doing anything further about this. No advice concerning the recording was provided to the Worker until September 2021. Ms Grimster who took over carriage of the matter on behalf of the Worker in March 2021 was not aware of the existence of the recording until around September 2021.
21. This relevant background emerged at the hearing and much of it appears in a document created only at the time of the hearing by the Worker’s original solicitor, and it was received as exhibit W 6.
22. The recording was neither discovered nor provided to the solicitor for the Employer until September 2021. Clearly, this recording was an important document. The Employer/insurer and its legal advisers made their decisions concerning not only the cancellation of payments of weekly benefits to the Worker but also how to manage the organisation of a further medical examination of the Worker and with which medical practitioner, and any resumption of weekly payments to the Worker, all without awareness of the recording or its contents. The Employer had available to it Dr Ventura’s report dated 18 November 2020, however the recording was necessarily the better evidence of what had happened at the examination on 16 November 2020.
23. The recording was played to the Court at the commencement of the hearing with the consent of the parties, before the evidence of the Worker, and it was received as exhibit W 1. A transcript of its contents was received as an *aide memoire*.

The Issues

24. The first issue is the validity of the Notice. I deal with this as a preliminary issue, before going on to deal with the other issues which all arise both in the context of the Notice and also in the context of the balance of the Worker’s Statement of Claim and of the Employer’s Counterclaim.
25. The second issue is whether the behaviour of the Worker at the examination on 16 November 2020 in all the circumstances amounted to an unreasonable obstruction of the medical examination by Dr Ventura, within the meaning of subsection 91(2) of the Act.
26. The third issue will involve a consideration of the scheme and the operation of section 91 of the Act, and the meaning and effect of the concluding words of subsection 91(2), namely: “... *an employer may cancel... the compensation payable to the worker under Subdivision B of Division 3 until the examination takes place*”.
27. The fourth issue will involve a consideration of whether it is reasonable for a worker generally, and this Worker in the circumstances of this matter specifically, to insist on being accompanied by a specified person as a pre-condition to attending such a medical examination.

28. The fifth issue will involve an analysis of the interactions between the Worker and the Employer with respect to organising a further medical examination after the first examination was terminated and before the eventual resumption of payments of weekly benefits some nine months later, in the light of the operation of section 91 of the Act.
29. The sixth issue will be the question of interest on any arrears of weekly benefits. This will involve a consideration of the automatic statutory operation of section 89 of the Act, and any possible operation of section 109 of the Act, in the event that the Court decides that a resumption of payments of weekly benefits should have occurred earlier than September 2021.
30. The seventh and last issue will be the question of costs, in all the circumstances of this matter.

The First Issue – the Validity of the Notice

Subsection 69(4)

31. The Worker has pleaded in Particular a. of paragraph 7. of his Further Amended Statement Of Claim that the Notice was invalid in that it failed to comply with subsection 69(4) of the Act. Sub Particular a.iii. of the pleading goes on to complain that “... *the Cancellation failed to identify how the Worker was being unreasonable*”.
32. Subsection 69(4) of the Act provides as follows:

“For the purposes of subsection (1)(b), the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced”.
33. In *Dickin v NT TAB Pty Ltd (“Dickin”)* [2003] NTSC 119 in paragraph [18] Justice Angel of the NT Supreme Court considered subsection 69(4) of the Act and said:

“If I may be pardoned for saying so, section 69(4) Work Health Act means what it says. A notice must unambiguously spell out why a current payment regime should change in clear terms that a lay reader can fully and readily understand (emphasis added)”.
34. A differently expressed statement of the law appears in *Newton v Masonic Homes Inc (“Newton”)* [2009] NTSC 51 where Justice Mildren of the NT Supreme Court said at paragraph [16] in respect of subsection 69(4) of the Act:

“In my opinion, the test is an objective one, (emphasis added) and does not depend on the level of education or intelligence of the worker. Nor is it invalid if written in English where the worker is unable to read, either at all, or in the English language. An objective test recognises that there will be many occasions where workers will need to consult a solicitor before being able to fully understand why the compensation is being reduced or cancelled, particularly as the provisions of the Act are complex and likely to be difficult for a layman to comprehend”.
35. Both judges arrived at this conclusion of an objective test involving a notional lay person, notwithstanding the words in the subsection that it is “... *the worker to whom the notice is given*” who is to “... *understand fully why the amount of compensation is being cancelled or*

reduced". This might be thought to identify a subjective test, but that is not the interpretation by Justices Angel and Mildren in their respective Decisions.

36. In *Joanne Claire Catford v Laminex* [2021] NTLC 004 ("*Catford*") starting at paragraph 24. I considered various aspects of the validity of a notice pursuant to section 69 of the Act. Starting at paragraph 46. I considered the operation of subsection 69(4) of the Act. In paragraph 49. I concluded that the statements in *Dickin* and in *Newton* are both precedents binding on this Court. I concluded that those statements taken together established that a notice "... *must unambiguously spell out why a current payment regime should change in clear terms that an average lay person can fully and readily understand... but in order to achieve this the notice need not take into account any disadvantage or disability which might derogate from the capacities or comprehension of the specific worker to whom the notice is directed. The test is an objective test and therefore it is not necessary for particular workers to give evidence of their understanding of the notices in specific cases*".
37. In the present case I find that the Notice consists of two documents. These are a covering letter dated 19 November 2020 and the five pages of the Notice dated 19 November 2020. I am satisfied that the covering letter does not in any way deal with the reasons for the Notice. It is limited to advising the Worker about his options in the light of the Notice.
38. On its first page the Notice advises the Worker that the Employer:
- "Cancels payments of weekly benefits to you pursuant to section 69 of the Return To Work Act.*
- "The reasons for this decision are:*
- "1. You have unreasonably refused to have, and/or unreasonably obstructed, an examination by a medical practitioner, provided and paid for by the Employer.*
- "Particulars*
- a) to d) - not relevant.*
- e) Pursuant to section 91 of the Return To Work Act, your Employer made arrangements for you to attend a medical examination with Dr Antonella Ventura, psychiatrist, on 16 November 2020.*
- f) At 1:00 pm on 16 September 2020 you attended and commenced the examination with Dr Ventura.*
- g) At approximately 1:30 pm, you became verbally abusive and aggressive to the extent that Dr Ventura was forced to terminate the examination.*
- h) Your Employer considers that you have unreasonably refused to have and/or unreasonably obstructed the examination".*
39. In view of the conclusion I reached in *Catford* which I have reproduced in paragraph 36. above, any impact of the injury on the Worker which might have derogated from his capacity to understand the contents of the Notice, is irrelevant. The test is whether an average lay person could fully and readily understand from the Notice why the Worker's then current payment regime was to be changed.
40. However, the conclusion I reached in *Catford* also means that the Worker's actual knowledge of what took place at the examination on 16 November 2020 is equally irrelevant. It means that his recording of what took place at that examination and the availability of that

recording to him at all subsequent times to refresh his memory, is irrelevant. This is because the Notice must speak for itself to the notional average lay person. It means that the reasons for the cancellation or reduction must be readily found within the four corners of the Notice itself in clear terms that an average lay person can understand.

41. Statements e) and f) in the Particulars in the Notice set the scene. The statement in Particular g) of the Notice states that the Worker “... *became verbally abusive and aggressive to the extent that Dr Ventura was forced to terminate the examination*”. No particulars are provided anywhere in the Notice of precisely what constituted the verbal abuse and/or the aggression which jointly are said to have “*forced*” Dr Ventura to terminate the examination.
42. The language in Particular g) is sufficient to enable an average lay person to understand that the Worker was alleged to have spoken abusively and/or acted aggressively during the course of the medical examination to such an extent that Dr Ventura had no option but to terminate the examination. This is not an allegation of merely abusive language or aggressive behaviour; it goes further, alleging that the abusive language and/or aggressive behaviour was such as necessarily to require Dr Ventura to terminate the examination.
43. In these circumstances, identification and particularisation of the said abusive language and of the said aggressive behaviour are precisely the “*sufficient detail*” referred to in subsection 69(4) of the Act required “...*to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced*”. This detail had to appear in the Notice itself, with sufficient clarity to enable an average lay person fully to understand why the amount of compensation was being cancelled.
44. I am satisfied and I find that the reasons set out in the Notice did not provide this detail. Therefore the Notice did not provide sufficient detail to enable an average lay person to understand fully why the amount of compensation was being cancelled.
45. I am satisfied and I find that the Notice did not comply with the requirements of subsection 69(4) of the Act.

Subsections 69(1)(b)(iii), (iv) and (v)

46. The first of these requires a statement: “*to the effect that, if mediation is unsuccessful in resolving the dispute, the worker may appeal to the Court against the decision to cancel or reduce compensation*”. The second requires a statement: “*to the effect that, if the worker wishes to appeal, the worker must lodge the appeal with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2)*”. The third requires a statement: “*to the effect that the worker may only appeal against the decision if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful*”.
47. Page 3 of the Notice states: “*Mediation is a requirement before an application can be made to the Work Health Court*”. Page 5 of the Notice states: “*the Mediation process will conclude in you receiving a Certificate of Mediation. Then, if you wish to contest the decision in the Work Health Court you must make an application to the Court **within 28 days of receiving a Certificate of Mediation***”.
48. The clear point of distinction between the requirements in subsections 69(1)(b)(iii), (iv) and (v) and the statements actually set out in this Notice is the claim in the Notice that the mediation process will conclude in the Worker’s receiving a Certificate of Mediation and then, and by implication only then, the Worker can make an application to the Court. This

goes further than the required statements and is in any event an incorrect statement of the law – I refer to and adopt my analysis of precisely the same statements set out in *Catford* at paragraph 37.

49. The Worker has pleaded in Particular b. of paragraph 7. of his Further Amended Statement Of Claim that the Notice was invalid in that it “...*wrongly stated that the Worker was required to ‘complete the mediation process’ before making an application to the Work Health Court*”. I am satisfied this pleading sufficiently raises the same issue that I dealt with in *Catford* in respect of the misleading statement in the Notice that a Certificate of Mediation must first issue before a Worker can make an application to the Court.
50. Accordingly, I am satisfied and I find that the statements required under these subsections and which purport to have been provided in the Notice in this case when considered together include an incorrect statement of the Worker’s rights and obligations. This is not cured by prefacing the statutory requirements with the words “*to the effect that...*”. I am satisfied and I find that the Notice does not comply with subsections 69(1)(b)(iii), (iv) and (v) of the Act.
51. I have found that the Notice does not comply with subsection 69(4) of the Act or with subsections 69(1)(b)(iii), (iv) and (v) of the Act. For the reasons I set out in paragraph 56. In *Catford*, I am satisfied that a notice which does not comply with either or both of these requirements, is invalid.
52. I rule that the Notice is invalid.

The Second Issue – Unreasonable Obstruction

53. The Worker gave evidence that at times in the course of the medical examination on 16 November 2020 he thought Dr Ventura was being judgmental and sceptical. He gave the example of Dr Ventura’s asking him how long he had been married and his reply that he could not remember. Dr Ventura then said: “*You don’t remember how long you’ve been with your wife?*”. The Worker said he felt that Dr Ventura was doubting him, and possibly mocking him, when she said this.
54. The recording exhibit W 1 picked up Dr Ventura’s tone of voice when she said: “*You don’t remember how long you’ve been with your wife?*”. To my ear, Dr Ventura’s tone was one of incredulity when she asked this question. It did not seem to me to be a tone likely to foster rapport with an interview subject.
55. The Worker gave the further example of questions by Dr Ventura about his getting his pilot’s licence. Dr Ventura asked him what he did to become a pilot and he replied that he went to Flight school. Dr Ventura asked him: “*Did you actually get your licence?*”. The Worker replied: “*Yeah*”. Dr Ventura apparently saw the need to clarify this further and she asked: “*So you got your, er, pilot licence?*”. A series of questions followed establishing that the Worker got his pilot’s licence in Iran.
56. The Worker said he felt that Dr Ventura was doubting him in this exchange, and that he felt belittled by this. Whether or not the Worker felt belittled by this is one thing, but in reading the transcript and listening to the recording I could see nothing in the questions or their repetition or the tone of voice in which they were asked that was objectively exceptionable or objectionable.

57. Dr Ventura went on to ask the Worker questions about how he spent his days. The Worker started to explain about problems he had with sleeping, about his headaches, why he needed his wheelchair and the pain he experienced in his left knee. Dr Ventura abruptly interrupted him with a question on a completely unrelated topic. Dr Ventura asked him: *"Why do you shave your arms?"*. The Worker responded: *"Sorry?"*. Dr Ventura again asked him: *"Why did you shave your arms?"*. The examination went rapidly downhill from here.
58. The Worker said: *"Because I don't like hair"*. Dr Ventura then said: *"Okay. So it's for cosmetic reasons. There isn't a medical reason for it?"*. The Worker replied: *"No, no. You see the spots, I'm not using needles or anything"*. Dr Ventura said: *"Yeah, no?"*. The Worker said: *"No."* Dr Ventura observed: *"They don't look like needle marks"*.
59. At this point the Worker raised the volume of his voice considerably, and his tone became angry and accusatory. He said: *"Why do you ask about my hair? Like why do you shave your face? It's like, stupid question it is"*. Dr Ventura sounded taken aback by the Worker's tone, and she said: *"Excuse me?"*. The Worker retorted in the same loud and angry tone as before: *"Excuse you. It's a stupid question"*.
60. Dr Ventura replied: *"No, it's not a stupid question, 'cause I am ..."* but the Worker cut her off forcefully, saying: *"It is. Well it's none of your business. Do I ask you why you shave your legs or vagina? Why do you shave your head?"*.
61. Dr Ventura said: *"I'm not asking stupid questions ..."* but the Worker cut across her, again, shouting: *"It's none of your business why I shave my arms"*. Dr Ventura left the room at this point and the Worker continued shouting: *"Stupid idiot! Arsehole!"*.
62. Dr Ventura came back to the door to the examination room a few seconds later and told the Worker *"... I will need to terminate this. I will not put up with any..."* which the Worker interrupted by shouting: *"Fuck off!"*.
63. I find that the Worker's tone of voice, its volume, his cutting Dr Ventura off when she tried to explain her question about his shaving his arms, his labelling her questions on this subject "stupid", his intrusive, offensive, abusive and overall disrespectful reference to the doctor's shaving her vagina, and his resort to swearing, all together constituted behaviour ("the behaviour") that was verbally aggressive and abusive to Dr Ventura. This made it undesirable and impracticable for Dr Ventura to have continued with the examination on that day. I am satisfied and I find that it would have been extremely difficult if not impossible to re-establish the mutual rapport necessary to carry out such an examination later that same day.
64. The Worker gave evidence at the hearing that he felt that Dr Ventura was on the side of the insurer QBE and that she was not interested in his difficulties. He felt that he was the object of her disregard and ridicule.
65. Having listened to the recording of the examination, including this exchange, I can understand that the Worker might have felt affronted by the interruption with the apparently irrelevant question about why he shaved his arms. He had been engaged in explaining to a stranger the considerable difficulties he experienced in his daily life, when he was interrupted by this sudden change of subject. I can understand that he might have felt Dr Ventura was not truly interested in and was being dismissive of his difficulties.
66. Similarly, I can understand that the Worker might have been unhappy with Dr Ventura's response and tone of voice after he told her he could not remember how long he had been married.

67. The psychiatric medical evidence before me in the Trial Book does not suggest that the Worker was so incapacitated by his symptoms of psychiatric illness that he was unable to control himself when stressed. That psychiatric medical evidence does not suggest that the Worker's behaviour in the way he spoke to Dr Ventura at the examination, even in the circumstances as he perceived them, was inevitable. Indeed, the Worker's treating psychiatrist Professor Walterfang observed in his report dated 22 December 2020 in which he noted the Worker's behaviour at the examination by Dr Ventura, as follows:

"It unfortunately continues to prove difficult for AI to take responsibility for his behaviour, as he tends to retain his external levels of control, and project responsibility for his difficulties and woes on to others".

68. Even if the Worker did feel affronted or belittled by the way he perceived Dr Ventura was conducting the examination, this could not justify the behaviour. It could not make the behaviour "reasonable".

69. I am satisfied and I find that the Worker by the behaviour in his dealings with Dr Ventura during the examination on 16 November 2020 unreasonably obstructed that examination.

The Third Issue – Section 91 of the Act

70. Section 91 of the Act provides as follows:

"Medical examinations

"(1) An employer may require a worker who has made a claim for compensation to submit at reasonable intervals to an examination by a medical practitioner provided and paid for by the employer.

"(1A) Before each appointment for an examination under subsection (1), the employer must notify the medical practitioner who is treating the worker to the injury to which the claim relates of the name and contact details of the medical practitioner who will be examining the worker.

"(1B) The employer must give the worker's treating medical practitioner a copy of the report of the medical practitioner who examined the worker.

"(2) Subject to section 69, where a worker unreasonably refuses to have, or unreasonably obstructs, an examination under subsection (1), an employer may cancel or reduce the compensation payable to the worker under Subdivision B of Division 3 until the examination takes place".

71. It is apparent from the last clause in subsection 91(2) that a cancellation or reduction of compensation payable to a worker who unreasonably refuses to have or unreasonably obstructs a medical examination, is not intended to be a permanent outcome. That cancellation or reduction is to last only "until the examination takes place".

72. The reference to "the examination" in the final clause of subsection 91(2) is a reference to the "...examination by a medical practitioner provided and paid for by the employer" in subparagraph 91(1) of the Act.

73. I am satisfied and I rule that the purpose of the scheme established by section 91 of the Act is to further reasonable medical examinations of injured workers on behalf of employers, not to punish recalcitrant workers.

74. For these reasons, I am satisfied and I rule that when an employer, pursuant to subsection 91(2) of the Act, cancels or reduces the compensation payable to a worker who has unreasonably refused to have, or has unreasonably obstructed, an examination, that employer must then offer that worker a further opportunity to undergo an examination by a medical practitioner provided and paid for by the employer, within the meaning of section 91(1) of the Act.
75. I am satisfied and I rule that it is the employer and not the recalcitrant worker who is required to initiate this further examination.
76. I am satisfied and I rule that an employer in these circumstances must initiate this further examination as soon as reasonably practicable.
77. What is reasonably practicable will depend on the circumstances of each case. In this matter, it is notorious that we have only a small number of medical specialists resident in the Northern Territory, and other medical specialists regularly visit from interstate to treat Northern Territory patients. These medical specialists are rarely available to examine and provide medico-legal reports in respect of workers, unless they are their patients and not always even then.
78. For this reason, businesses such as mlcoa provide a range of medical specialists who travel to the Northern Territory, among other places, for the purpose of examining patients and providing medico-legal reports. Necessarily, medico-legal doctors of the appropriate specialties are not always available in Darwin and workers and employers often need to wait until appropriate specialists travel here. Alternatively, those seeking a medico-legal assessment might determine that in the circumstances it is appropriate to incur the expense of having a worker and sometimes an accompanying person travel interstate in order to achieve an earlier examination and report.

The Fourth Issue – An Accompanying Person at the Examination?

79. The insurer QBE had written to the Worker by letter dated 27 October 2020 advising him of the appointment it had organised for his examination by Dr Ventura on 16 November 2020. At page 2.7 of this letter, the insurer advised:

“Support persons are welcome to attend. A support person is there to provide support to you but cannot speak on your behalf. At the discretion of the examining specialist your support person may be asked to leave for portions of the appointment”.
80. The Worker requested that his partner Moya Buckley be permitted to accompany him at the examination by Dr Ventura. However, when the Worker and Ms Buckley arrived for the appointment on 16 November 2020 Dr Ventura advised she would not permit this, and the Worker attended the appointment without Ms Buckley or anybody else as a support person.
81. Following the termination of that appointment, the Worker’s solicitor wrote by email dated 30 November 2020 to the Employer’s solicitor advising: *“I am instructed my client is content to attend another IME (independent medical examination), and will fully cooperate with the IME process... Mr Lajervardi is limited by his psychiatric conditions. He requests his partner Moya attend the next IME appointment with him as support person, which has always been permitted before. Moya would of course be silent in this role, and not interrupt the process”.*

82. The Employer's solicitor advised by email dated 3 December 2020 that it had made a further appointment for the Worker to be examined by Dr Ventura in Darwin at 1 PM on 8 February 2021. The solicitor apologised and advised that they could not get an earlier appointment with Dr Ventura due to the Christmas/New Year period intervening.
83. The Employer's solicitor further advised by email dated 4 December 2020 to the effect that allowing Moya accompany the Worker at that February appointment would be a matter for Dr Ventura, but they would convey the Worker's request to her.
84. There is nothing in the Trial Book tendered in this proceeding indicating whether it was ever agreed that the Worker would be permitted to have Moya Buckley attend at the examination on 8 February 2021. There was no live evidence on this issue.
85. In any event, the Worker did not keep that appointment. The Worker's solicitor advised the Employer's solicitor by email dated 8 February 2021 that he had suffered some psychological crisis the day before and was unfit to attend. The Worker gave evidence at the hearing that he was unfit psychologically to keep the appointment on 8 February 2021, and for that reason he had engaged in a therapeutic teleconference with his treating psychiatrist Dr Walterfang on the same afternoon as the missed appointment.
86. The Employer's solicitor wrote to the Worker's solicitor by email dated 5 May 2021 advising of a further appointment for the Worker to be examined by Dr Ventura, on 24 May 2021. The Worker's solicitor responded by email dated 7 May 2021 advising that the Worker would attend the appointment "... on the basis that Ms Moya Buckley will attend as his support person and remain present throughout the examination".
87. The Employer's solicitor wrote to the Worker's solicitor by email dated 13 May 2021, advising that the appointment with Dr Ventura on 24 May 2021 had been cancelled.
88. Dr Ventura gave evidence at the hearing that it was her normal practice not to permit accompanying persons to be present when she carried out a psychiatric examination of a person. She explained that the nature of a psychiatric examination and assessment often required the asking of very personal questions, including questions about details of relationships with close family members, particularly spouses and partners. Sometimes these questions would involve taking a psychosexual history, including any criminal history. Dr Ventura said she had found that the presence of an accompanying person in these categories was liable to inhibit the patient in giving full and frank answers to these sorts of questions.
89. In *Ryan v Regent Enterprises Pty Ltd* (1991) 3 WAR 552 ("Ryan") the Full Court of the Supreme Court of Western Australia held:

"It is generally reasonable for a person required to submit to a medical examination by a doctor chosen by a third party to request that she be accompanied by a doctor of her own choice or a lay person, such as a close friend or a member of her family. A person who agrees to submit to a medical examination on such a condition has not refused to submit to it or obstructed it. Such a condition may, however, be made unreasonably, and thereby constitute a refusal or obstruction, by factors such as inconvenience, delay or expense".
90. In *Ryan*, the examining specialist was an orthopaedic surgeon and the medical condition was a purely physical condition.

91. In *Re Twaddel and Comcare* (2001) 65 ALD 794, a Decision of a Senior Member of the Administrative Appeals Tribunal, the applicant/worker refused to attend a psychiatric medical examination because the psychiatrist involved would not permit her companion to attend with her. The Tribunal considered the approach in *Ryan*. It held in the case before it that there was an obstruction of a medical examination, but that it was not unreasonable. This was because there was evidence before the Tribunal that the applicant/worker had a history of panic/anxiety attacks, and further, that she distrusted medical-legal psychiatrists because she considered that they had misunderstood and misrepresented her in the past.
92. In the matter before me the Worker gave evidence of his anxiety and reluctance to attend a psychiatric examination provided and paid for by the Employer/insurer without the support of his partner Ms Moya Buckley. He gave evidence of his concern that Dr Ventura was on the side of the insurer.
93. The psychiatric reports of the Worker's treating doctor Professor Mark Walterfang respectively dated 12 June 2018, 4 September 2018 and 12 February 2019 and which predate the examination on 16 November 2020, all identified the Worker's then relevant diagnoses and symptoms. The Worker was definitively diagnosed as suffering from Post-Traumatic Stress Disorder and Major Depressive Episode. Professor Walterfang stated at page 2.5 in his report of 12 June 2018 that when these two syndromes are in coexistence, "*the ongoing symptomatology of one tends to magnify the symptoms of the other*".
94. In his report of 4 September 2018, Professor Walterfang expressed the opinion that the Worker was then not able to return to any form of work. He expressed the view that the Worker's prognosis was then "*quite guarded*".
95. In his report dated 12 February 2019 to the insurer QBE, Professor Walterfang recommended some forms of treatment and rehabilitation, and he concluded: "*I have asked Al and his partner Moya to look at some concrete short-term rehabilitation goals, as I'm concerned that he is now apparently oxygen dependent and wheelchair bound, which suggests that he is moving away rather than towards independence*".
96. I understand Dr Ventura's reasoning for declining to permit persons whom she examines to be accompanied by a support person. However, she was describing a therapeutic state of affairs where a psychiatrist is examining a patient.
97. In a medico-legal situation pursuant to section 91 of the Act, the worker is not a patient and the examining medical specialist is not a treating doctor. The usual rules as to confidentiality between doctor and patient do not apply and this is made clear to the workers who are being examined in that situation. It is well understood that the examining doctor will not go on to treat the worker being examined.
98. A medico-legal examination organised by the opposing party is almost always going to be an uncomfortable and potentially unpleasant experience for a worker. It is not surprising that the worker undergoing such an examination might want a person to be present to provide moral support.
99. For these reasons, a degree of compromise is necessarily inherent in a medico-legal examination pursuant to section 91 of the Act. A worker who attends such an examination may believe, as did the Worker in this proceeding, that the examining specialist is in the camp of the employer/insurer, even though this is very unlikely to be the case. The

relationship between the examining doctor and the worker being examined should be a respectful relationship, but it is not a doctor/patient relationship.

100. The Decision in *Ryan* is not binding on this Court and can be distinguished in any event because the medical specialist in *Ryan* was an orthopaedic surgeon whereas the specialist in this proceeding was a psychiatrist. Even so, I find *Ryan* a persuasive authority.
101. Where there is evidence, as in this case, that the worker being examined is anxious and particularly wishes the support of accompanying person then in my view it is not unreasonable for the worker to make that a condition of his or her attendance at a medical examination pursuant to section 91 of the Act. Neither the employer/insurer nor the examining medico-legal specialist has an automatic right of veto. A good reason must exist in each individual case for refusing an accompanying person, not simply a general rule of practice.
102. I am satisfied and I find that in the circumstances of this proceeding it was not unreasonable for the Worker to seek to make it a condition of his attendance at each of the future medical examinations organised by the Employer in February 2021 and May 2021 that he be accompanied by his partner Ms Moya Buckley as a support person.

The Fifth Issue – the Timing of the Resumption of Payments

103. The medical examination on 16 November 2020 was terminated and payments of weekly benefits to the Worker were cancelled in early December 2020. These payments were not resumed until on or after 14 September 2021, a period in excess of nine months. The Worker went without any income by way of weekly benefits over the whole of this period.
104. The following relevant timeline applied after the termination of the medical examination on 16 November 2020:
 - 104.1. 19 November 2020 – the Employer advised by Notice of Decision that payments of weekly benefits to the Worker would be cancelled in 14 days' time because the Worker had unreasonably obstructed the medical examination with Dr Ventura.
 - 104.2. 30 November 2020 – email letter from the solicitor for the Worker to the solicitor for the Employer advising the Worker will attend another medical examination and will fully cooperate but he requests that his partner Ms Moya Buckley be permitted to attend the next appointment with him as a support person.
 - 104.3. 3 December 2020 – email letter from the solicitor for the Worker to the solicitor for the Employer requesting a date for a further medical examination and a response to the request concerning Ms Moya Buckley.
 - 104.4. 3 December 2020 – email letter from the solicitor for Employer responding to the solicitor for the Worker and providing a copy of Dr Ventura's Record of Events at the examination dated 18 November 2020, and advising of a further appointment in Darwin with Dr Ventura on 8 February 2021, in two months' time, and apologising for the delay because of the Christmas/New Year period. The solicitor for the Employer will make enquiries as to whether the Worker will be permitted to have Ms Buckley with him at that appointment as a support person.
 - 104.5. 3 December 2020 – email letter from the solicitor for the Worker to the solicitor for the Employer acknowledging the new appointment with Dr Ventura but seeking an earlier appointment if possible, advising that the Worker would like an

appointment with a different psychiatrist, not Dr Ventura, and providing her instructions from the Worker for the behaviour at the examination on 16 November 2020.

- 104.6. 3 December 2020 – email letter from the solicitor for the Employer to the solicitor for the Worker in response. This letter noted the poor behaviour of the Worker at the last appointment, stated that this was not the first time the Worker had behaved badly and alleged similar previous episodes at the offices of QBE and at the Royal Darwin Hospital. The solicitor for the Employer went on to say:
- “My client insists that he complete the IME with Dr Ventura and should not be rewarded for bad behaviour (emphasis added)”.*
- This letter went on to advise that the solicitor for the Employer would seek instructions whether Ms Buckley would be permitted to attend the further medical examination.
- 104.7. 4 December 2020 – email letter from the solicitor for the Employer to the solicitor for the Worker advising that it would be a matter for Dr Ventura whether Ms Buckley would be permitted to attend the further medical examination, but that the solicitor would convey the Worker’s request to her.
- 104.8. 15 January 2021 – Certificate of Mediation issued in respect of the dispute concerning the cancellation of weekly payments to the Worker. The Certificate records “No Change”.
- 104.9. 8 February 2021 – email letter from the solicitor for the Worker to the solicitor for the Employer advising that the Worker will not be able to keep the medical appointment with Dr Ventura organised for that day because he suffered a psychological breakdown over the weekend and has an appointment to consult his psychiatrist Dr Walterfang on the same afternoon.
- 104.10. 9 April 2021 – Telephone conversation between the solicitor for the Employer and the solicitor for the Worker. The solicitor for the Employer confirmed a further medical examination of the Worker would be required before payments of weekly benefits would be reinstated.
- 104.11. 30 April 2021 – email from the solicitor for the Worker to the solicitor for the Employer requesting that he identify what further information the Employer is seeking from an independent medical examination.
- 104.12. 30 April 2021 – telephone discussion between the solicitors for the parties. The solicitor for the Employer suggested that the Worker might like to organise his own independent medical examination. The solicitor for the Worker responded that cost would be a problem. The solicitor for the worker advised she would look into it further if the solicitor for the Employer could advise what further information the Employer was seeking from an independent medical examination.
- 104.13. 5 May 2021 – email letter from the solicitor for the Employer to the solicitor for the Worker advising: *“Dr Ventura has agreed to a further IME appointment for this worker, notwithstanding his failure to proceed with/attend on prior occasions”.* The letter advised of a medical appointment of the Worker with Dr Ventura on 24 May 2021.

- 104.14. 7 May 2021 – email letter from the solicitor for the Worker to the solicitor for the Employer advising that the Worker will keep the appointment with Dr Ventura on 24 May 2021 provided that he can be accompanied by his partner Ms Moya Buckley.
- 104.15. 13 May 2021 – telephone conversation between the solicitors for the parties in which the solicitor for the Employer advised that the proposed medical examination on 24 May 2021 had been cancelled. The solicitor for the Worker renewed her request that the solicitor for the Employer advise what further information the Employer required from a medical examination before it might reinstate payments of weekly benefits to the Worker, so that the Worker might consider undertaking the expense of his own independent medical examination to provide to the Employer.
- 104.16. 13 May 2021 – further email letter from the solicitor for the Employer to the solicitor for the Worker confirming that the appointment for the medical examination of the Worker by Dr Ventura on 24 May 2021 had been cancelled.
- 104.17. 13 May 2021 – email letter from the solicitor for the Worker to the solicitor for the Employer stating that she “understands” that the Employer would consider an independent medical examination to be obtained by the Worker as leading to a renewal of payments of weekly benefits. The solicitor for the Worker advised it was still not clear what the Employer required from such a medical examination and requested she be provided with questions the Employer was seeking to have answered, so that she might advise the Worker.
- 104.18. 21 May 2021 – telephone conversation between the solicitors for the parties in which the solicitor for the Employer indicated that he had a schedule of questions relevant to an independent medical examination but until he had instructions from the Employer to send that he could not do so. He was seeking those instructions.
- 104.19. 16 June 2021 – email letter from the solicitor for the Worker to the solicitor for the Employer listing a history of their communications between 9 April 2021 and 21 May 2021 and again requesting that the Employer identify what information/opinion it sought from a psychiatrist for the purpose of the Worker’s ongoing claim, and a resumption of payments of weekly benefits.
- 104.20. 28 June 2021 – email letter from the solicitor for the Employer to the solicitor for the Worker enclosing a schedule of questions for a psychiatric independent medical examination to be organised by the Worker. However, the letter continued that the Employer reserved its right to have the Worker examined by an independent medical examiner of its own choosing and that this was Dr Ventura. It advised that even if the Worker did obtain his own independent medical assessment from a psychiatrist that would not cause the insurer to reinstate weekly payments under the Act, and it would not be a waiver of the Employer’s requirement that the Worker be examined by Dr Ventura.
- 104.21. 26 August 2021 – email letter from the solicitor for the Employer to the solicitor for the Worker advising of an appointment in Darwin for the Worker to be examined by a different psychiatrist, Dr Samson Roberts, on 13 September 2021. The letter advised that the Worker would be permitted to have one support

person present in the room, and that it would not be permissible to record the examination.

- 104.22. 14 September 2021 – email letter from the solicitor for the Employer to the solicitor for the Worker advising that because the Worker had kept the appointment with Dr Roberts on 13 September 2021 his entitlements to weekly benefits would be reinstated “*with immediate effect*”.
105. There was no evidence before me as to whether Dr Ventura or the Employer/insurer on her behalf had ever agreed after 16 November 2020 to allow the Worker to attend a medical examination with Dr Ventura accompanied by his partner Ms Moya Buckley, either for the examination organised on 8 February 2021 or the examination organised on 24 May 2021.
106. There was no evidence before me as to why the examination of the Worker by Dr Ventura organised for 24 May 2021 was cancelled.
107. There was no evidence before me as to why the Employer/insurer changed its mind and ultimately organised a medical examination of the Worker by a psychiatrist other than Dr Ventura.
108. On the basis of the evidence set out in the foregoing history, and in the absence of any evidence before me that Dr Ventura would have refused to permit Ms Buckley to attend the appointment with the Worker on 8 February 2021, I am satisfied and I find that the Employer made reasonable efforts up to and including 8 February 2021 to meet its obligations pursuant to section 91 of the Act in respect of organising a further medical examination of the Worker to be provided and paid for by the Employer, as soon as practicable.
109. On the evidence before me, including the evidence of the Worker at the hearing, I am satisfied and I find that the Worker’s attendance at the appointment with Dr Ventura organised on 8 February 2021 was frustrated by the Worker’s illness on that day, and not by any refusal on the part of the Worker to have that examination or by any unreasonable obstruction by him of that examination.
110. Accordingly, from 8 February 2021 the Employer was required to organise a further medical examination of the Worker pursuant to section 91 of the Act as soon as reasonably practicable.
111. On the basis of the Employer’s insistence on having the Worker further examined solely by Dr Ventura, as reported by the solicitor for the Employer in its email letter to the solicitor for the Worker on 3 December 2020 and set out in paragraph 104.6 above, and on the basis of the Employer’s eventual change of heart on this issue, I am satisfied and I find that the Employer’s approach to the further examination of the Worker by a different psychiatrist was contaminated at least in part by an unreasonable consideration. That was that the Employer did not wish the Worker to be examined by a different psychiatrist because that would see the Worker “rewarded” for his “*bad behaviour*”. From this I infer that the Employer/insurer might otherwise have been prepared to have the Worker further examined by a different psychiatrist earlier than it did.
112. This approach by the Employer is contrary to my finding in paragraph 73 above that the scheme of section 91 of the Act is to further medical examinations of workers, not to punish a recalcitrant worker.

113. In the absence of any evidence before me as to why the Employer cancelled the further medical examination by Dr Ventura on 24 May 2021, and noting the further examination eventually organised by the Employer with Dr Roberts was not until 13 September 2021, some seven months after the frustrated examination on 8 February 2021, I am satisfied and I find that the Employer after 8 February 2021 did not organise a further medical examination of the Worker pursuant to section 91 of the Act as soon as reasonably practicable.
114. On the basis of my rulings in paragraphs 71 to 76 above as to the Employer's obligations under section 91 of the Act, I find that it is the Employer in the circumstances of this proceeding who bears the onus of establishing when it could have organised a further psychiatric examination of the Worker as soon as reasonably practicable after 8 February 2021.
115. There was no evidence before me as to what medico-legal psychiatrists other than Dr Ventura, provided by mlcoa or otherwise, came to Darwin and might have been available to examine the Worker on behalf of the Employer, in the weeks and months after 8 February 2021.
116. There was no evidence before me as to whether the Employer could have organised a medico-legal psychiatrist other than Dr Ventura to travel to Darwin to examine the Worker, and possibly others, on behalf of the Employer in the weeks and months after 8 February 2021.
117. There was no evidence before me whether after 8 February 2021 the Employer ever considered having the Worker and Ms Moya Buckley travel together interstate in order for the Worker to be examined by an independent psychiatrist.
118. Doing the best I can in the absence of this type of evidence from the Employer, I am satisfied and I find that the Employer could have and should have organised a further examination of the Worker by a psychiatrist provided and paid for by the Employer, within one month of 8 February 2021 – that is by 8 March 2021.
119. I am satisfied and I find that the Employer should have resumed payments of weekly benefits to the Worker from the day after this notional appointment – that is from 9 March 2021. I find that weekly benefits were payable by the Employer to the Worker on and after 9 March 2021.

The Sixth Issue – Interest

120. Section 88 of the Act provides that payments of weekly benefits should be made before the expiration of seven days after the end of the week in respect of which it is payable, unless otherwise agreed in writing by a worker. Accordingly, the first resumed payment should have been made to the Worker on 16 March 2021.
121. Section 89 of the Act provides that interest is payable from the date when the weekly payment ought to have been made. The relevant rate of section 89 interest is provided in the Regulations.
122. I find that interest pursuant to section 89 of the Act is payable on arrears of weekly benefits payable to the Worker and calculated from 16 March 2021 to the date of payment.

123. Section 109(1) of the Act provides:

“Unreasonable delay in settlement of compensation

“(1) If, in a proceeding before it, the Court is satisfied that the employer has caused unreasonable delay in accepting a claim for or paying compensation, it must:

(a) where it awards the 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; and

(b) if, in its opinion, the employer would otherwise be entitled to have costs awarded to him or her – order the cost be not awarded to him or her.

“(2) – not relevant.

“(3) Where the Court orders that interest be paid under subsection (1) or (2), it may, in addition, order that punitive damages of an amount not exceeding 100% of such interest be paid by the employer to the person to whom compensation is awarded or to whom the weekly or other payment due under this Act is payable”.

124. On the basis of my findings in paragraphs 111 to 119 above, I am satisfied and I find that the Employer did cause unreasonable delay in paying compensation to the Worker over the period 9 March 2021 to the date when it recommenced payments of weekly benefits, around 14 September 2021.
125. I determine that the rate of interest payable by the Employer pursuant to subsection 109(1) of the Act in respect of the arrears of weekly benefits payable over this period will be 6.10% per annum, on the basis of the published current interest rates on Supreme Court judgment debts.
126. On the basis of my rulings in paragraphs 71 to 76 of these Reasons, and my findings in paragraphs 111 to 119 of these Reasons, I am satisfied that punitive interest within the meaning of subsection 109(3) of the Act should also be payable by the Employer in respect of those arrears of weekly benefits. I determine that the punitive interest also at 6.10% per annum be payable in respect of those arrears.

The Seventh Issue – Costs

127. The Worker was successful on the issue of the validity of the Notice although I note that this was on highly technical grounds. Even so, it is fundamentally important that employers do not cancel or reduce payments of weekly benefits once commenced, except strictly in accordance with the Act. I take into account that in this matter the issue raised in the invalid Notice was the same issue on which the Worker was in fact overall unsuccessful, namely the unreasonable obstruction of the medical examination. The Employer raised this in its Counterclaim and it was successful on this issue.
128. The Worker’s case at the hearing was that he did not unreasonably obstruct the medical examination. This position was maintained throughout the hearing and in final submissions. On the evidence in this case, I am satisfied and I find that this was never a reasonably tenable position.
129. On the other hand, the Worker’s case that the Employer should only cancel or reduce compensation payable to him until a further medical examination could take place, and that the Employer failed to attend to this as soon as reasonably practicable, has been successful.

The Worker went without the weekly payments to which he was entitled under the Act for a significant period as a consequence of the Employer's failure to attend to its obligations pursuant to section 91 of the Act.

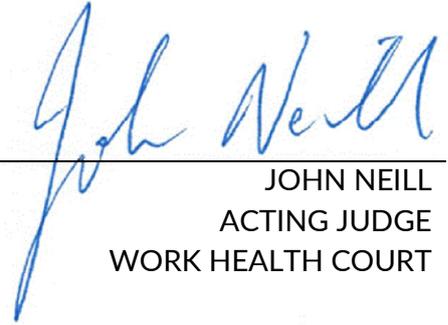
130. It is, generally speaking, undesirable that there should be mixed costs ordered in cases with mixed outcomes, such as in this case. Courts do not usually apportion costs between issues, but act on the outcome of the proceedings as a whole, without attempting to differentiate between particular issues on which the successful party may not have succeeded – *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12. However, the court must strike a balance between permitting litigants to canvass all issues, while not rewarding them for unreasonable conduct or encouraging the agitation of unnecessary issues. A court will generally only deprive the successful party of the costs relating to an issue on which was unsuccessful when that issue was clearly dominant or separable - *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [63] to [66].
131. In the present case I am satisfied that the issue of whether the Worker had unreasonably obstructed the medical examination was both a dominant issue, and clearly separable from the issue of the Employer's obligation to take steps to organise a further examination as soon as reasonably practicable, and whether it had done so.
132. There was never any requirement for the Worker to maintain that he had not unreasonably obstructed the examination. He could have limited his case to the issue of the Employer's unreasonable delay. I am satisfied and I rule that this is a proper case for the making of costs orders to reflect these mixed outcomes.

Orders

133. I make the following Orders:
 - 133.1. The Employer pay arrears of weekly benefits to or on behalf of the Worker from and including 9 March 2021 to the date when payments of weekly benefits to or on behalf of the Worker were recommenced.
 - 133.2. The Employer pay interest pursuant to section 89 of the Act on the arrears of weekly benefits calculated on and from 16 March 2021 to the date when such arrears are received by or on behalf of the Worker.
 - 133.3. The Employer pay interest pursuant to subsection 109(1) of the Act on the arrears of weekly benefits at the rate of 6.10% per annum calculated on and from 16 March 2021 to the date when such arrears are received by or on behalf of the Worker.
 - 133.4. The Employer additionally pay interest pursuant to subsection 109(3) of the Act on the arrears of weekly benefits at the rate of 6.10% per annum calculated on and from 16 March 2021 to the date when such arrears are received by or on behalf of the Worker.
 - 133.5. The Employer pay the Worker's costs of and incidental to the proceeding after 6 May 2021 when the proceeding was allocated the hearing dates 21 and 22 October 2021, to be taxed in default of agreement at 100% of the Supreme Court scale and certified fit for counsel at all Directions Hearings, except where otherwise ordered.

133.6. The parties pay their own costs of and incidental to the proceeding up to and including 6 May 2021.

Dated this 15th day of November 2021



JOHN NEILL
ACTING JUDGE
WORK HEALTH COURT