CITATION: *Cooper v NT Link* [2012] NTMC 012

PARTIES:	BRUCE COOPER
	v
	NT LINK PTY LTD
TITLE OF COURT:	Work Health
JURISDICTION:	Work Health - Darwin
FILE NO(s):	21041913
DELIVERED ON:	2 May 2012
DELIVERED AT:	Alice Springs
HEARING DATE(s):	27 February - 1 March 2012
JUDGMENT OF:	J M R Neill

CATCHWORDS:

Workers Rehabilitation and Compensation Act -- cancellation of payments of weekly benefits; whether the Worker's lumbar spine condition was part of his claim accepted by the Employer; whether the Worker's present condition of left shoulder bursitis is a *sequela* of the work injury; evidentiary and legal onus of proof; pleadings in a "mere appeal"; the merits of the cancellation - whether the Worker had ceased to be incapacitated for work by virtue of the work injury as at the date of the section 69(1) Notice of Decision, or whether the Worker has otherwise ceased to be so incapacitated as alleged in the Employer's Counterclaim; remedies - interest and indemnity costs.

REPRESENTATION:

Counsel:

Worker:	Mr Mark Johnson
Employer:	Mr Stuart Cole

Solicitors:

Worker:	ALC Lawyers
Employer:	Minter Ellison Lawyers

Judgment category classification:	B
Judgment ID number:	[2012] NTMC 012
Number of paragraphs:	135

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

No. 21041913

BETWEEN:

BRUCE COOPER
Worker

AND:

NT LINK PTY LTD
Employer

REASONS FOR JUDGMENT

(Delivered 2 May 2012)

Mr NEILL SM:

1. The Worker Bruce Alan Cooper was born on 9 June 1958 and is presently 53 years of age.

2. Mr Cooper commenced work in Darwin with the Employer as a carpenter, on 25 May 2010. His normal weekly earnings in that employment have been agreed in the sum of $1,280 gross.

3. Mr Cooper had an accident in the course of that employment on 22 June 2010 ("the work accident"). The Employer does not dispute this nor that Mr Cooper sustained injuries in the work accident. The precise nature of those injuries is in dispute.

4. Mr Cooper made a claim ("the claim") under the *Workers Rehabilitation and Compensation Act* ("the Act") on 25 June 2010. The claim was made up of three documents – (i) both the Worker's and the Employer's completed parts of the Work Health claim form (Exhibit W9); (ii) an attached Incident Report/Investigation form dated 22 June 2010 (Exhibit W8); and (iii) a prescribed medical certificate dated 25 June 2010 (part of Exhibit W19).

5. The claim identified the injuries suffered by Mr Cooper in the accident on 22 June 2010 variously as follows: (i) head and shoulder (ii) concussion (iii) torn ligament (iv) skull (v) strain (vi) went down hole hitting left side of the wall with shoulder and head (vii) left-sided neck and upper back pain (viii) difficult to move his neck, also lift left arm (ix) aberrations (*sic* – I believe this is meant to be “abrasions” and I discuss this later in these Reasons) left arm, left shoulder.

6. The Employer by its Work Health insurer the TIO accepted the claim by letter dated 6 August 2010 (Exhibit W10). The heading to that letter referred to the injury as "neck strain". The letter made no other mention of the nature of the injury in the claim being accepted.

7. The Employer thereafter paid compensation to or on behalf of Mr Cooper until payments of weekly benefits were cancelled approximately 5 months later. Mr Cooper was examined for the Work Health insurer by consultant orthopaedic specialist Dr John Watson on 19 October 2010. Dr Watson provided a report dated 21 October 2010 (Exhibit W16) to the insurer. Prior to that examination on 19 October 2010 the Employer received from Mr Cooper or his treating medical practitioners 8 medical certificates including the first medical certificate dated 25 June 2010.

8. The Employer cancelled payments of weekly benefits to Mr Cooper by a Notice of Decision and Rights of Appeal dated 2 November 2010 (“Notice of Decision”) - Exhibit W11. This document was accompanied by a medical certificate of Dr Watson pursuant to section 69(3) of the Act and dated 27 October 2010 (“s. 69(3) certificate”) - Exhibit W12. These two documents and a covering letter dated 2 November 2010 from the TIO - part of Exhibit W17 - were received by Mr Cooper on 5 November 2010 - registered post receipt, also part of Exhibit W17. The TIO letter dated 2 November 2010 made no reference to Dr Watson's report. It was agreed by counsel for the parties in their submissions before me on 1 March 2012 that Dr Watson's report Exhibit W16 was not provided to Mr Cooper along with the Notice of Decision and the s.69(3) certificate.

9. Payments of weekly benefits to Mr Cooper ceased 14 days later, after 19 November 2010. Mr Cooper sought a mediation of the dispute created by the cancellation of payments of weekly benefits. That mediation did not resolve the dispute. He then commenced these proceedings.

THE PLEADINGS

10. The Employer's Notice of Decision states "Dr John Watson is of the opinion that you are fit to perform your pre-injury duties as a carpenter". There is no such statement by Dr Watson in the s.69(3) certificate which accompanied the Notice of Decision. We have to look to Dr Watson's medical report dated 21 October 2010 for this opinion, and we find versions of it on pages 6 and 7.

11. From this it is plain that Dr Watson's report was in the contemplation of the draughtsman of the Notice of Decision. It could therefore be argued the failure to provide Mr Cooper with a copy of Dr Watson's report had the effect that the Notice of Decision, without Dr Watson’s report, did not provide sufficient detail to enable Mr Cooper to understand why the payments of weekly compensation were being cancelled, as required by subsection 69(4) of the Act. If so, that cancellation would have been invalid.

12. The Worker’s original Statement of Claim filed 5 April 2011 did not plead the Employer’s Notice of Decision was invalid but it did seek as a remedy a declaration that this was the case. During the course of the hearing I invited Mr Johnson, counsel for Mr Cooper, to consider whether he wished to apply to amend the Statement of Claim so as clearly to plead any invalidity of the Notice of Decision, among other amendments then under consideration. He elected not to make that amendment and indeed withdrew the remedy seeking the declaration of invalidity from Mr Cooper’s Amended Statement of Claim dated and filed 1 March 2012. Thus the invalidity issue was neither pleaded nor pursued at the hearing and it therefore does not arise for my determination.

13. In both his original Statement of Claim filed 5 April 2011 and his Amended Statement of Claim filed 1 March 2012 Mr Cooper pleaded that he sustained an injury to his lumbar spine in the work accident on 22 June 2010 - paragraph 3. He particularised this as "aggravation of degenerative changes in lumbar spine

and L4/5 vertebrae disc lesion" - paragraph 4. He pleaded nothing about the injuries to his head, neck, left shoulder/arm or upper back identified in the claim.

14. The treating GP Dr Mylne gave evidence at the hearing of a different left shoulder condition, namely bursitis, presently restricting Mr Cooper's use of his left shoulder/arm. He gave evidence there might be a connection between the work injury and this condition of bursitis. This bursitis condition had not been pleaded and Mr Cooper by his counsel Mr Johnson did not then seek to plead it, even though he amended Mr Cooper's Statement of Claim after Dr Mylne had given this evidence. Mr Johnson did not make submissions at the end of the hearing in respect of the bursitis condition.

15. Mr Cooper pleaded that at all times since the accident he had been and continued to be totally or alternatively partially incapacitated for work because of "his injuries" – that is, because of the pleaded injuries which as I noted above are limited to his lumbar spine - paragraphs 13 and 13A.

16. Mr Cooper sought a review of the Employer's decision to cancel payments of weekly benefits -- paragraph 14. No extraneous issues were introduced. The case was pleaded and run for the Worker on the basis it was a "mere appeal".

17. Mr Cooper's counsel was aware of the issue of *dux litis* in the proceedings and he elected as a matter of convenience to have the Worker go first, without thereby conceding any onus of proof.

18. The Notice of Decision stated in its first and fourth dot points that Mr Cooper was fit to perform pre injury duties and no longer had any incapacity with respect to his work injury. Dr Watson's accompanying s.69(3) certificate stated Mr Cooper had ceased to be incapacitated for work.

19. The Employer must justify its interference with the *status quo* by its cancellation of payments of weekly benefits. The Employer carries the onus of establishing the change of circumstances warranting this cancellation – see *Ju Ju Nominees P/L v Carmichael* [1999] NTSC 20 per Martin CJ at paragraph 15.

20. In relation to the Notice of Decision, the Employer assumed the burden of proving that Mr Cooper was not incapacitated at all.

21. Mr Cole for the Employer accepted this position, with one important reservation. His submission was that the Employer had accepted the claim for injury only to Mr Cooper's neck, possibly to his head, upper back and left shoulder/arm as well, but it had never accepted any claim for injury to his lumbar spine. Mr Cole submitted that Mr Cooper bore the onus of establishing any injury to his lumbar spine in or as a later consequence of the accident at work on 22 June 2010.

22. Mr Johnson in closing submissions on 1 March 2012 clarified Mr Cooper's position. He submitted the injury to Mr Cooper's lumbar spine was directly caused by the work accident and it was not a later consequence of the accident or of other injuries suffered in that accident.

23. The Employer by its Defence pleaded that it did not admit Mr Cooper suffered any injury to his lumbar spine in the accident - paragraphs 3 and 4 of the Defence. It did not admit it had accepted Mr Cooper's claim for compensation in respect of any lumbar spine injury - paragraph 8. It denied that Mr Cooper continued to be either totally or partially incapacitated for work by virtue of the work injury sustained on 22 June 2010 - paragraph 13.

24. The Employer maintained these positions in its Counterclaim, independently of the Notice of Decision.

25. In addition, the Employer pleaded in the alternative that “the Worker is able to earn an amount to be determined by the Court” – paragraph 2 of the Counterclaim. That is, the Employer here pleaded the alternative position that if Mr Cooper was still incapacitated by the work injury then any such incapacity was partial rather than total.

26. In relation to paragraph 2 of its Counterclaim, the Employer assumed the burden of proving the monetary value of any partial capacity to earn, in accordance with the Act – see *Northern Cement Pty Ltd v Ioasa* (SC (NT) 17 June 1994, unreported) per Martin J at page 12 and followed by Bailey J in

Normandy Mining Pty Ltd v Peter Horner [2000] NTSC 79 in paragraphs [28] and [29]. As it happened, the Employer did not adduce any evidence of potential earnings at this hearing.

27. The Employer's Defence did not plead any pre-existing or subsequently occurring injury or event to account for Mr Cooper's lumbar spine condition, or any other condition affecting his capacity to work. The Employer limited its position pleaded in its Defence to a flat denial of any ongoing incapacity. The Counterclaim went further, pleading in the alternative that any present incapacity was no longer due to the claimed injury - paragraph 1(b). This pleading was not specific to the lumbar spine injury. I refused an application made during the hearing to allow the Employer to amend its Defence specifically to plead a denial rather than a non-admission that Mr Cooper suffered any lumbar spine injury. At the same time I also refused to allow an amendment to plead in the alternative that any injury to Mr Cooper's lumbar spine did not arise out of or in the course of his employment.

28. Finally, dispute arises out of the remedies sought. Mr Cooper in paragraph 14.5 of his Amended Statement of Claim sought interest on arrears of weekly benefits pursuant to either or both of section 89 and section 109 of the Act. In paragraph 14.6 he sought costs on the indemnity basis. The Employer traversed these claims in paragraph 14 of its Defence.

THE ISSUES

First Issue - Did the Employer's acceptance of Mr Cooper's claim include acceptance of an injury to his lumbar spine, and who bears the onus ("the lumbar spine")?

Second Issue – Did the Employer's acceptance of Mr Cooper's claim include acceptance of the subsequently arising condition of bursitis in his left shoulder and who bears the onus ("the bursitis")?

Third Issue - What is the effect of Mr Cooper's Statement of Claim not pleading any injury other than to his lumbar spine ("pleading injuries")?

Fourth Issue - Has the Employer on the balance of probabilities established any change of circumstances warranting the cancellation of payments of weekly benefits as at 2 November 2010 pursuant to the Notice of Decision, or then or later warranting either a cancellation of or a reduction in payments of weekly benefits, pursuant to its Counterclaim ("the merits")?

Fifth Issue – If Mr Cooper is entitled to any arrears of payments of weekly benefits is he entitled to be paid any and if so what interest on those arrears ("interest")?

Sixth Issue – If Mr Cooper is wholly or largely successful in these proceedings should he be entitled to his costs on the indemnity basis ("indemnity costs")?

<u>FIRST ISSUE</u> – the Lumbar Spine

29. In *Susan Elizabeth Evans v Northern Territory of Australia* (unreported – Magistrate Trigg of the Work Health Court delivered 31 January 1996) His Honour said at page 12.2 to 12.9 as follows:

> "*The question here is what does "compensation claimed" mean? Or, in other words, what is the Employer deemed to have accepted? In my view, the Employer is deemed to have accepted the prerequisites to an entitlement to compensation under the Act, being that "a worker has suffered an injury within or outside the Territory". It is clear from the format of the various claim forms that it is not intended (nor is it necessary) for the claimant to specify precisely the exact nature of the injury, and clearly this may be impossible in a large number of cases…The "injury" requires general description only in the claim form. In a non-disease injury it is generally linked to a particular incident on a particular day at a particular place. Thus, the Employer in that case is deemed to admit liability for all compensation to which the claimant is entitled under the Act for that general injury and its* sequelae. ***In my view, it is not open to doubt that the Employer cannot pass the onus of proving liability for* sequelae *of injury back on to a worker if payments of compensation are continuing*** *(*emphasis added*). For example, if a worker breaks his leg and (whilst still receiving*

compensation payments for that injury) develops an infection ***as a consequence of the break*** *(*emphasis added*) the Employer cannot turn around and say that they only admitted liability for the original break as there was no mention of any infection in the claim form and therefore the worker has the onus of proving the Employer's liability for the infection afresh. Such a result would, in my view, defeat the clear aims of the Act. It is different in the case where the worker (for example) returned to full work (as opposed to a return on restricted duties) and subsequently becomes incapacitated for work (due to a* sequela *to the original injury) as, in my view, in that case the worker should put in another claim (as every aggravation etc. is itself an injury) leaving it to the Employer to exercise its various options under section 85 of the Act*".

30. I respectfully endorse and adopt that analysis, while emphasising that there must be some evidence to show a connection between the claim accepted and the injury claimed.

31. In *Ju Ju Nominees Pty Ltd v Carmichael* (above) at paragraph [19] Martin CJ said:

> "*The Employer's insurer's acceptance of liability noted the injury as being "lower back pain" and the date of the injury "November 1990". The nature of the injury was not specified, only a symptom. By accepting liability and commencing payment of weekly compensation, the Employer admitted that the Worker had suffered an injury which had materially contributed to his incapacity for work (section 53)".*

32. Magistrate Trigg of the Work Health Court revisited the issue in *Sharon Louise Spellman v Returned Services League of Australia Alice Springs Sub-branch Incorporated* [2004] NTMC 087. He noted his comments in *Evans* quoted by me in paragraph 29 above. He went on to say in paragraphs [25] and [26]:

> "[25] *I see no reason to depart from what I said that case. However, it needs to be borne in mind that every 'aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury' is*

itself an injury under the Act. The issue I was dealing with in Evans *was whether a new claim form was necessary every time an 'injury' changed or progressed. I decided then that it was not. However, whether a new claim form is necessary will depend upon the facts of each case. Further, in my view, the onus of proving that a physical or mental consequence is itself part of the original injury (and by this I mean that there is a causal link between the original work injury and the consequence that is now being considered without any '*novus actus'*) would be upon the worker in each case. In some cases this would be an easy task, but in others it may not be. In the example postulated in* Evans *case, it involved an infection to the same leg and in the area of the injury. That would be a very easy connection to prove. In the instant case, we are dealing with an injury to the opposite limb to the claimed work injury.*

"[26] That does not mean that there cannot be a causal connection, but the onus is on the worker to prove on the balance of probabilities that there is. If the worker fails in this regard, then if it is to be compensable it must be a new injury, and therefore the notice and claim provisions of the Act would apply to it".

33. I find that the Employer's acceptance of the claim was an acceptance of liability pursuant to the Act for all Mr Cooper's injuries and their consequences arising from the work accident on 22 June 2010. The Employer cannot limit its liability by purporting to accept the claim for a neck injury only, as it appears to have intended by its letter of 6 August 2010.

34. However, it is still necessary for the Court to determine what was included in that acceptance of liability. Where does the onus lie in this determination?

35. In *Evans* (above), Trigg SM said at page 13.8: "*The claim for compensation is not, in my view, to be considered as if it were a pleading*". He found in that case that the claim read as a whole included an attachment, namely a death certificate and Coroner's findings and that the necessary connection could be found in these – pages 14.8 to 15. 5. Mr Cooper says he suffered a spinal injury

in the work accident. The spinal injury or any version of it however described is not mentioned directly or indirectly in Mr Cooper's claim, nor can its occurrence be derived by inference, having regard solely to the contents of the documents comprising the claim.

36. If for example Mr Cooper were to allege he had developed dental decay as a consequence of the accident or of the injuries sustained in that accident, that would be unlikely, perhaps even absurdly unlikely. It cannot be that an Employer by accepting a claim under the Act will thereby be obliged to **disprove** the relatedness of every conceivable medical condition suffered by the Worker whose claim has been accepted. The Court must consider evidence on this issue in the event of a dispute, as in this case.

37. I am assisted here by the examination by Mildren J of questions of onus of proof in his Decision delivered on 29 March 2012 in *Betty Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21 paragraphs [25] and [26]. I set those out as follows:

> "[25] *In* Napper and Anor v Bultitude and Anor *Gray J decided that the plaintiffs bore the onus of proving that there was no double compensation because the ability to call evidence on this topic rested with the plaintiffs. The defendants were not a party to the proceedings which had resulted in a settlement, and the defendants were not aware of the details of the settlement. In other words, it is possible that Gray J decided the issue relying on the rule expressed by Bayley J in* R v Turner*: 'If a negative averment be made by one party, which is particularly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative'.*
>
> *"[26] However, as Cross points out, the rule expressed by Bayley J is a rule of statutory interpretation confined to cases where the affirmative or negative averments are peculiarly within the knowledge of a person charged with an offence. As to the general law, the position is, to quote Lord Mansfield CJ in* Blatch v Archer*: ' It is certainly a maxim that all*

evidence is to be weighed according to the proof which it was in the power of one side to have produced, and the power of the other to have contradicted'.

Thus there is no reversal of the legal onus of proof, but a plaintiff's knowledge of essential facts may lessen the amount of evidence required to be led by the defendant to discharge an evidential burden borne by the defendant, or vice versa. It may be that only slight evidence will be enough to discharge the evidentiary burden, but it is clear that the legal burden has not shifted. The same reasoning applies and underlies the principle in Jones v Dunkel and Another*: see the discussion in* Bellia v Colonial Sugar Refining Co Ltd. *The observation of Gray J in* Napper and Anor v Bultitude and Anor *must be seen in this light".*

38. I rule that Mr Cooper bears an evidentiary onus to establish on the balance of probabilities that the injury to his lumbar spine was related to the work accident.

The Evidence

39. Exhibit W19 includes five medical certificates from Mr Cooper's treating general practitioners in Darwin including the original certificate dated 25 June 2010, all available to the Employer/insurer before Mr Cooper was examined by Dr Watson for the Employer on 19 October 2010 and before service of the Notice of Decision on 5 November 2010.

40. The first certificate dated 25 June 2010 is from a general practitioner Dr Arulanandam and was based on 2 examinations, the first on 22 June 2010 the date of the accident, and the second on 25 June 2010. The doctor recorded: "he has left side of neck and upper back pain. He finds it difficult to move his neck, also lift left arm… minor abrasions (literally "aberrations")… left arm, shoulder… he stepped into the hole… hit left side of neck, shoulder hit the wall, right leg upwards, left leg into the hole... Clinical findings/diagnosis - patient complained of neck pain and click inside neck… no spine tenderness, neck stable no movement - shoulder joints no tenderness - tenderness and

muscle spasm over left side of neck, upper back (scapular region)… neck movements and left shoulder movements constricted due to pain… patient has soft tissue injury with muscle sprain and spasm".

41. This certificate did not record any complaints by Mr Cooper specifically relating to his lumbar spine. However, the doctor's separate notes dated 22 June 2010 – part of Exhibit W18 - recorded "tingling over right forearm **and leg** (emphasis added)". The record of tingling associated with a leg is evidence of a complaint by Mr Cooper on the day of the work accident of a symptom which may have been referred from his lumbar spine.

42. The doctor's notes of 22 June 2010 further recorded "abberations (*sic*) over left both lower limbs-, back back (*sic*) and shoulders…". I had trouble making sense of the word "aberrations" in this context and also in the context of its use in the medical certificate dated 25 June 2005. In addition I found the use of the preposition "over" inapt. One might conceivably have "aberrations" <u>of</u> or <u>in</u> a part of the body but not <u>over</u> that part. Serendipitously, while using the Dragon dictation system to draft these Reasons I found that dictating the word "abrasions" produced on screen the word "aberrations". I conclude that the doctor too used some voice recognition system to dictate her notes and her certificate and did not identify this error; alternatively she may have used such a system to dictate her notes on 22 June 2010 and the error was then inadvertently reproduced in the certificate on 25 June 2010. In the context of this accident and of these notes and this certificate, I am satisfied the doctor intended to record "abrasions" rather than "aberrations".

43. The double use of the word "back" in the absence of other evidence is likely also to have been a typographical error, and of no significance in the history. This particular entry may relate only to the upper back about shoulder height or it may include the lower back – I cannot be satisfied either way. I do note from this entry that Mr Cooper complained on the day of the accident and injury of symptoms ranging from his head to his lower limbs.

44. This first certificate certified Mr Cooper totally unfit for work from 22 June 2010 until 30 June 2010.

45. The second certificate is from the same doctor and is dated 2 July 2010.This certificate referred to Mr Cooper's attempt to return to "modified work yesterday", that is on 1 July 2010. It recorded: "pain aggravated, difficulty in moving the neck. Also complained of tingling in both legs".

46. There is nothing in this certificate which specifically refers to Mr Cooper's lumbar spine. However the record of tingling in both legs is further evidence of a complaint by Mr Cooper, this time on 2 July 2010, 10 days after the work accident, of a symptom which may have been referred from his lumbar spine. Mr Cooper gave evidence at the hearing of his attempt to return to work with the Employer for one day at this time and he said that the attempt aggravated his symptoms, including pain in his lumbar spine – transcript 27 February 2012 pages 96.9, 97.1. The Employer may not have been aware of this at around the time of Mr Cooper’s return to work but it was aware of the fact of his return to work for that single day, and this second certificate put it on notice of his complaint the following day of the tingling in both legs.

47. That certificate certified Mr Cooper unfit for work from 1 July 2010 to 9 July 2010.

48. The third certificate is also from the same doctor and is dated 7 July 2010, 15 days after the accident. This recorded complaints by Mr Cooper relevant to his neck, left shoulder and left arm. It reported an aggravation of pain, non-specific as to location, when Mr Cooper tried to help push a car shortly before that appointment. It reported: "no tingling in limbs".

49. In this certificate the doctor omitted to certify Mr Cooper either fit or unfit for work for any period.

50. The fourth of these medical certificates is from a Dr Britz at the same medical practice and is dated 26 July 2010, nearly 5 weeks after the accident. This recorded: "pain worse since hitting speed bump in the Philippines… pain now radiating down spine. Panadeine forte effective when normal pain but ineffective when pain exacerbated".

51. These references to an exacerbation or worsening of pain are non-specific as to location. They could be taken to refer to the previous complaints of pain in the neck, upper back and left shoulder, or to the radiation of pain down the spine, or to both. However, the reference to "pain now radiating down spine" is different. That is evidence of a complaint by Mr Cooper to the doctor of pain lower in his spine than in previous complaints, and the Employer was now on notice of this.

52. Dr Britz certified Mr Cooper totally unfit for work from 15 July 2010 to 9 August 2010.

53. Both the car pushing incident and the Philippines speed bump incident were the subject of cross-examination of Mr Cooper by Mr Cole for the Employer. Mr Cooper made no relevant concessions, and the Employer called no evidence on the subject. The Employer did not plead any *novus actus interveniens* and I specifically declined in the course of the hearing to allow an amendment to the Employer's Defence or Counterclaim to plead that the lumbar spine injury did not arise out of or in the course of employment -- see paragraph 27 above.

54. In any event, the burden of proving that any subsequent incident is a *novus actus interveniens* and thus is the sole cause of any subsequent incapacity would rest upon the Employer – see *George Starr v NT of A* (unreported) a Decision of Mildren J of the Northern Territory Supreme Court delivered 23 October 1998 at page 10.3. There was no expert opinion in this case to the effect that either the car pushing incident or the Philippines incident was significant so as to introduce a *novus actus interveniens*. The Employer could not discharge this onus even if a *novus actus interveniens* had been pleaded.

55. The fifth of these medical certificates is also by Dr Britz and is dated 9 August 2010. In this certificate Dr Britz added the following: "has bought a neck and back brace. Finds the neck brace irritating but is happy with the back brace. Reports that all small jolts exacerbate the pain".

56. This is evidence that by 9 August 2010, 7 weeks after the accident, Mr Cooper was specifically seeking relief for symptoms in his back, and the Employer was now on notice of this.

57. Dr Britz certified Mr Cooper totally unfit for work from 9 August 2010 to 20 September 2010.

58. Mr Cooper left Darwin in August 2010 to return to his original home on the Sunshine Coast in Queensland. There he consulted general practitioner Dr Thomas Mylne at the North Shore Medical Centre. Exhibit W20 is made up of four medical certificates from Dr Mylne created prior to service of the Notice of Decision on 5 November 2010 on Mr Cooper.

59. Dr Mylne's first certificate is dated 18 August 2010. In this certificate he recorded as follows: "diagnosis: cervical and lumbar back pain for investigation and management after fall from height". He sought a CT scan of Mr Cooper’s lumbar spine.

60. Mr Cooper was unequivocally reporting and complaining of lumbar spine symptoms to his GP as at 18 August 2010, two months after the accident and the Employer was now on notice of this.

61. Dr Mylne certified Mr Cooper totally incapacitated for work from 18 August 2010 to 18 September 2010.

62. A CT scan report prepared by radiologist Dr M. Coates addressed to Dr Mylne and dated 20 August 2010 was received as Exhibit W14. This reported: “No fractures identified. Generalised annular bulging L4/5 with left subarticular recess stenosis. Right L5/S1 foraminal stenosis in conjunction with transitional anatomy”.

63. Dr Watson’s report Exhibit W18 at page 4.6 comments on this report Exhibit W14. This means that Exhibit W14 was provided to Dr Watson by the insurer. Accordingly the Employer was on notice of the contents of this report at some time between its date 20 August and Dr Watson’s examination of Mr Cooper on 19 October 2010.

64. The second of Dr Mylne’s certificates, dated 26 August 2010, provided a diagnosis of “mechanical neck and back pain” with the history “fell off ladder into a hole”. He referred him for physiotherapy.

65. Dr Mylne certified Mr Cooper totally unfit for work from 26 August 2010 to 26 September 2010.

66. The third of Dr Mylne's medical certificates was dated 27 September 2010. This too diagnosed "mechanical neck and back pain". Dr Mylne recorded "neck and back muscular contraction and tenderness".

67. Dr Mylne certified Mr Cooper totally unfit for work from 26 September 2010 to 26 October 2010.

68. Dr Mylne next saw Mr Cooper on 25 October 2010, the last medical attendance before service of the Notice of Decision on 5 November 2010. He provided a medical certificate of that date in which he diagnosed "Mechanical neck and back pain. Lumbar L4/5 disc bulge".

69. Dr Mylne certified Mr Cooper totally unfit for work from 26 October 2010 to 26 November 2010 – that is, to a date after 2 November 2010, the date of the Notice of Decision.

70. The foregoing evidence is reliable in that it records Mr Cooper's complaints before he was aware of impending or actual cancellation of payments of his weekly benefits.

71. Mr Cooper gave evidence at the hearing tested under cross examination. I found him a credible and reasonably careful witness. I return to this later in these Reasons.

72. He explained he did not make an immediate specific complaint about any lumbar spine symptoms because he "…had neck and shoulder pain which overruled everything else…" – transcript 27 February 2012 page 91.3. He said that he did have back pain. He said "I experienced minor lower back pain two days after that or thereabouts, minor lower back pain from the accident. But as a builder, you know, a fall like that or lifting something can give you minor back pain. It was not at the priority of my injuries by any means" – transcript page 91.4.

73. Mr Cooper was asked: "It's the sort of back pain you'd had before, you didn't think anything of it?" and he replied: "No, because my neck and shoulder pain was – was way exceeding" – transcript page 91.5.

74. Mr Cooper denied he hadn't reported to Dr Arulanandam on or about 7 July 2010 that he had lumbar spine problems. He said "I disagree. I mentioned it, and I believe that she said 'That could be referred pain'".

75. Finally, I turn to other evidence of the Employer's probable awareness of a lumbar spine injury. Dr Watson's report refers to a letter of referral from the insurer, the TIO, but this letter was not tendered in these proceedings so we do not know what history of injury, symptoms and treatment was supplied by the Employer/insurer to Dr Watson prior to his examination of Mr Cooper on 19 October 2010. We do not know whether the Employer/insurer by that letter acknowledged or alternatively questioned that Mr Cooper had suffered some injury to his lumbar spine in the work accident.

76. The medical certificates discussed above show the Employer was on notice before Dr Watson's involvement, of the possible and actual lumbar spine symptoms as reported by Mr Cooper. Dr Watson in his report did not comment on the relatedness or lack thereof of the work accident and the lumbar spine injury. It is probable he would have commented if he had been asked to do so. I conclude that he was not asked to do so.

77. Dr Watson had available to him the information and material provided by the Employer/insurer in its referral, the history he elicited from Mr Cooper, and the results of his examination of Mr Cooper. In his report Dr Watson appeared to accept the fact of an injury to both Mr Cooper's cervical and lumbar spine in the work accident on 22 June 2010. He did not in any way suggest Mr Cooper's lumbar spine injury was caused or aggravated by any event occurring after the work accident. To the contrary, his diagnosis was that Mr Cooper appeared to have suffered a soft tissue injury to both the cervical and lumbar spine in the work accident on 22 June 2010 – Exhibit W16 page 3.6. In Dr Watson's opinion, this soft tissue injury had resolved by the time he examined Mr Cooper

on 19 October 2010 - page 6.2 - but Dr Watson did not question that it had existed earlier or that it was related to the work accident.

78. The Notice of Cancellation referred to Dr Watson's report. It limited itself to two grounds - that Mr Cooper had been certified fit for his pre-injury duties as a carpenter and that he no longer had any incapacity from his work injury of 22 June 2010. It did not raise any issue that the back injury was not part of the work injury.

79. I find on the balance of probabilities that Mr Cooper did suffer an injury to his lumbar spine in the work accident on 22 June 2010, in addition to injuries to his head, neck, upper back and left shoulder/arm.

80. Accordingly, I find that the Employer's acceptance of the claim included acceptance of an injury to Mr Cooper's lumbar spine, and the Employer bears both the legal and evidentiary onus of justifying its cancellation of payments of weekly benefits in respect of Mr Cooper's lumbar spine injury as well as in respect of the injuries to his head, neck, upper back and left shoulder/arm ("the work injuries").

SECOND ISSUE – the Bursitis

81. Mr Cooper's treating general practitioner in Queensland is Dr Thomas Mylne. He gave evidence at the hearing on 28 February 2012. Dr Mylne first recorded a complaint by Mr Cooper in his notes of 27 January 2012 of a resurgence of left shoulder pain -- transcript 28th of February 2012 page 143.8. He recorded Mr Cooper's complaint that this had been increasing over the preceding month -- that is back to December 2011. On his next examination of Mr Cooper on 15 February 2012, Dr Mylne recorded a positive diagnosis of bursitis -- transcript page 144.2.

82. Dr Mylne gave evidence that Mr Cooper still had left shoulder pain from the work accident but in addition he now had increasing left shoulder pain, namely the different condition of bursitis -- transcript page 143.9.

83. I asked Dr Mylne whether the work injury affecting the left shoulder was causally related to the bursitis. He gave evidence the bursitis could "possibly" arise from muscle degeneration through disuse because of the work-related left shoulder pain but he concluded: "…so there could be a causal link there but there's no way for me to know" -- transcript page 145.1 to 145.2. I gained the impression that neither counsel for the parties had previously been alerted to this possible connection.

84. In cross-examination by Mr Cole for the Employer, Dr Mylne said of the bursitis condition: "It's quite a common shoulder condition and it can arise from a number of causes…". He agreed that sometimes it arises spontaneously -- transcript page 145.3.

85. Once again Mr Cooper bears the evidentiary onus of establishing a connection between the work accident and the bursitis.

86. With the First Issue the evidence on the balance of probabilities is Mr Cooper suffered symptoms related to his lumbar spine shortly after the work accident. There is a temporal connection. With this Second Issue the position is different. The evidence is Mr Cooper first became aware of the symptoms of the condition of bursitis in about December 2011, one year and five months after the work accident, and one year and one month after the cancellation of payments of weekly benefits. There is no temporal connection.

87. The foregoing evidence of Dr Mylne identifies a possible connection between the work injuries and the bursitis. It does not establish a connection on the balance of probabilities between the work accident and the bursitis.

88. It is not necessary for me to make a formal finding that the bursitis is or is not a *sequela* of the work accident, and I make no such finding. Rather, I note that if the bursitis is a *sequela* then Mr Cooper will need to prove that. It would be a new injury, being an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury…" – see the definition of "injury" in section 3 of the Act. It will be necessary for Mr Cooper to make a fresh claim under the Act if he wishes to pursue compensation for this condition of bursitis. Mr Cooper was not incapacitated to any degree by the bursitis before December

2011, at the earliest. There would be no time limit affecting the making of any such claim – see *George Starr v N.T. of A.* (above) at page 8.3.

89. I find that the Employer's acceptance of Mr Cooper's claim did not include acceptance of the subsequently arising condition of bursitis in his left shoulder.

THIRD ISSUE – Pleading Injuries

90. Mr Cooper's pleadings were limited to his lumbar spine. He pleaded nothing about injuries to his head, neck, left shoulder/arm or upper back, all of which had been raised in the claim accepted by the Employer.

91. Even so, the Employer bears the onus of establishing the change of circumstances warranting the cancellation of payments of weekly compensation in respect of all the injuries sustained in the work accident, not merely the lumbar spine injury as pleaded. In *JH Constructions Pty Ltd v Philip Davis* (unreported - delivered 3 November 1989) Chief Justice Asche of the Northern Territory Supreme Court said at pages 11 to 12:

> "*In the Territory legislation, it is true that under section 69(d), it is the worker who must seek the review rather than the employer, but he does that by way of appeal under section 111 (*now section 104*); that is, he does no more than refer the matter to the court for a determination,* ***but he is not thereby undertaking any onus of proof*** (emphasis added)**.**
>
> *The section does not suggest that he must prove he remains incapacitated or that his appeal to the Court is an application of that nature. It merely invokes the aid of the Court which determines the matter on normal principles, bearing in mind that the process had been commenced, not by the worker, but by the employer maintaining that the employer has sufficient reasons for cancelling or reducing payments, and that is the case which must be established".*

And at page 13:

> *"I agree however with Mr Hiley that it would be oppressive and unfair if the employer could simply allege that the worker was no longer incapacitated and leave it to the worker to establish time and again his continued entitlement*".

This statement of the law was approved by the Northern Territory Court of Appeal per Martin CJ in *Ju Ju Nominees* (above) in paragraph [56].

92. I find that Mr Cooper's failure to plead any injury other than to his lumbar spine in what was a mere appeal from the decision of the Employer to cancel payments of weekly benefits in no way relieves or reduces the Employer's onus to justify its cancellation of payments of weekly benefits in respect of all of the accepted work injuries.

FOURTH ISSUE – the Merits

93. On the basis of the foregoing analysis the Employer bears both the legal and evidentiary burdens of justifying its cancellation of payments of weekly benefits to Mr Cooper for the work injuries. It bears these burdens in respect of both its Notice of Decision and its Counterclaim.

94. Mr Cooper was examined on behalf of the Employer by consultant orthopaedic surgeon Dr John Watson. There is no doubt that Dr Watson is an appropriately qualified expert. Dr Watson told us the entire examination including taking a history and physically examining Mr Cooper took approximately 35 minutes. This was the only contact Dr Watson ever had with Mr Cooper. He was never Mr Cooper's treating medical practitioner. On the basis of this examination and of mostly unspecified material (other than two radiology reports) provided to him by the Employer's insurer, he prepared his report Exhibit W16. In this he concluded Mr Cooper had suffered soft tissue injuries to his neck and shoulder and lumbar spine in the work accident but that these injuries had fully resolved and Mr Cooper at the time of the examination was fit to return to his pre-injury duties as a carpenter.

95. Dr Watson told us nothing about his understanding of Mr Cooper's duties as a carpenter but this was not relevant to his assessment of the situation because in his opinion Mr Cooper was no longer suffering any symptoms attributable to the work accident. Dr Watson's opinion based on his physical examination of Mr Cooper was that Mr Cooper did not display any symptoms attributable to that accident. Dr Watson said the two radiology reports of Mr Cooper's spine in his opinion showed only degenerative changes which had existed before Mr Cooper suffered the work accident. He said none of these degenerative changes shown on radiology was caused by or exacerbated by the work accident. He rejected the idea that previously asymptomatic degenerative changes in Mr Cooper's cervical and lumbar spine had been made symptomatic by the work accident or that any symptoms from that cause were persisting.

96. Dr Watson was cross-examined on these opinions. He was not shaken in cross-examination. He declined to say that Mr Cooper's complaints about persisting neck and lower back pain were due to malingering - transcript 29 February 2012 page 45.5.

97. Mr Cooper was examined on his own behalf by Dr Thomas Sheehan who described himself as a medico-legal consultant with a special interest in orthopaedic medicine, the musculoskeletal system, occupational health and safety and rehabilitation medicine. Mr Cole for the Employer took no issue with Dr Sheehan's expertise -- transcript 28 February 2012 page 117.1. Dr Sheehan provided a report dated 15 March 2011 to Mr Cooper's lawyers and that report became Exhibit W2 in these proceedings. Dr Sheehan also had available to him the two radiology reports which had been made available to Dr Watson.

98. Dr Sheehan never treated Mr Cooper. Like Dr Watson, Dr Sheehan was involved on a purely medico-legal basis. He too saw Mr Cooper on one occasion only. He too took a history from Mr Cooper and conducted a physical examination of him.

99. At the hearing Dr Sheehan expressed the opinion that the physical trauma suffered by Mr Cooper in the work accident aggravated pre-existing and until

then asymptomatic degenerative changes in Mr Cooper's cervical spine. He expressed the view that once degenerative disc disease is rendered symptomatic it is frequently very difficult to treat successfully and Mr Cooper's prognosis for his neck discomfort "is less than good" -- Exhibit W2 page 5.1.

100. Dr Sheehan expressed the further opinion that Mr Cooper badly injured his lumbar spine in the work accident, that he sustained an L4/5 disc lesion at that time, that in addition he aggravated pre-existing and until then asymptomatic degenerative changes in his lower back, and Mr Cooper's prognosis regarding his lower back was "far from good" -- exhibit W2 page 5.3.

101. Dr Sheehan was cross-examined on these opinions. He was not shaken in cross-examination.

102. Each of these two experts expressed firm opinions based in part on their physical examinations of Mr Cooper and in part on the two radiology reports before them. Neither explained how the contents of those reports supported their very different opinions. Each of them was satisfied that the results of their physical examinations of Mr Cooper supported their particular opinions.

103. Accordingly, I had before me diametrically opposed opinions from two experts, each of whom was involved with Mr Cooper for purely medico-legal purposes and each of whom had seen him quite briefly on one occasion only.

104. I am unable to identify any basis on which to prefer the opinion of Dr Watson over that of Dr Sheehan, or *vice versa*. If I had no other medical evidence before me then the Employer would have failed to discharge its onus. However, there was further medical evidence before me.

105. Mr Cooper's treating general practitioner Dr Thomas Mylne gave evidence he had treated Mr Cooper over about 18 months from 18 August 2010 to the date of his giving evidence on 28 February 2012. His notes became Exhibit W3 and they record that he saw Mr Cooper about 22 times over that period.

106. Mr Cooper first presented to him on 18 August 2010 complaining of pain in the neck and in his lumbar spine. Dr Mylne examined him and noted a reduced

range of motion in both the cervical and lumbar spine and that he had tender paraspinal muscles of his cervical spine. He was also tender at the L/5 area in his lumbar spine. In Dr Mylne's opinion, Mr Cooper was in no condition to work at that time -- transcript 28 February 2012 pages 135.9 and 136.1.

107. Dr Mylne expressed the opinion that Mr Cooper's back and neck pain was a chronic pain condition he had developed from the work accident -- transcript page 139.2. He went on to describe it further as "a chronic back pain which is mechanical in nature" -- page 139.6. In Dr Mylne's opinion, Mr Cooper was not fit to return to work in October 2010 as had been certified by Dr Watson -- transcript page 139.5.

108. Dr Mylne gave evidence that Mr Cooper continued to be incapacitated for work at all times up until his last consultation on 15 February 2012 shortly before Dr Mylne gave evidence -- transcript page 144.5. This incapacity was continuing. He also expressed his belief based on the great deal of contact he had had with Mr Cooper that he was not malingering -- transcript page 143.5. He confirmed he was prescribing medications for Mr Cooper including a patch to deliver a morphine-like painkiller.

109. Dr Mylne was cross-examined and he did not resile from his opinions.

110. Evidence was also called from Mr Cooper's treating physiotherapist Mr Gavin Corica. While I accept that Mr Corica is an expert as a physiotherapist, he did go beyond his expertise in advancing the theory that he could measure Mr Cooper's objective pain levels by recording his pulse rate as Mr Cooper undertook various activities. Mr Corica was unable to identify any publications or other support for this theory. He was unable to explain why variations in pulse rate might not be equally attributable to exertion and/or anxiety as to an increase in pain levels. I do not accept this evidence that such variations in pulse rates are objective and reliable indicators of a patient’s pain levels.

111. Mr Corica's evidence did raise the possibility that Mr Cooper had exaggerated his symptoms and incapacity to carry out various tasks in the course of a detailed physiotherapy assessment. Mr Cole made much of this in his concluding submissions. I accept that Mr Cooper more probably than not did

exaggerate his symptoms and his incapacity in the course of the detailed physiotherapy assessment conducted by Mr Corica but I note this occurred after payments of weekly benefits had been cancelled and in my view it probably reflected Mr Cooper's need at that time to optimise his incapacity in the context of an assessment which he hoped would lead to a resumption of payments of his weekly benefits. Mr Corica gave evidence in chief that he decided to carry out that assessment because of the cancellation of Mr Cooper’s "work cover" benefits -- transcript 29 February 2012 page 6.5. Taking all the evidence of the medical practitioners and of Mr Cooper as a whole, I do not find any consistent exaggeration of this kind.

112. Mr Cooper gave evidence himself. He was tested in cross-examination. In general I found his evidence to be credible and no more self-serving or exaggerated than I would expect from any Worker in his position. Importantly, he gave evidence that before the work accident on 22 June 2010 he had never suffered a serious injury nor had he had any significant problems with his spine. He had suffered minor back pain and joint pain from time to time which he said was to be expected in his work as a builder -- transcript 28 February 2012 page 91.4. However since the work accident he had consistently suffered significant pain in his neck and lower back. He did not believe he was presently able to return to any sort of regular physical work because while he might get through the first day he would not be able to go back the next day. He did not think that he would be able to work more than three hours each day -- transcript page 72.2.

113. On the basis of the evidence of the treating general practitioner Dr Mylne, the physiotherapist Mr Corica and of Mr Cooper himself, all tested in cross-examination, I am satisfied on the balance of probabilities that Mr Cooper continues to suffer from pain in his neck and lower back and that he continues to be effectively totally incapacitated for work. The Employer has failed to discharge its onus with respect to either the Notice of Decision or the Counterclaim.

114. The Employer’s Counterclaim encompasses the possibility that if Mr Cooper was still incapacitated at the date of cancellation of payments of weekly

benefits, he subsequently ceased to be incapacitated or at least he subsequently became less incapacitated. However, there was no evidence of that before me. The Employer's evidence from Dr Watson both live and in his report Exhibit W16, and the Employer's case as run at the hearing, was solely to the effect that all incapacity arising from the work accident had ceased by the date of the cancellation. Neither Mr Cooper's evidence nor medical evidence tendered or called in his case supported the scenario of any improvement in Mr Cooper's capacity for work after the date of the cancellation.

115. I find on the balance of probabilities that Mr Cooper was and has continued to be totally incapacitated for work because of the work injuries at all times at and since the cancellation of payments of weekly benefits. Mr Cooper is entitled to be paid weekly benefits calculated on the basis of total incapacity at all times from the cancellation to the present and continuing.

Calculation of Arrears

116. Normal weekly earnings - $1,280

Date of injury – 22 June 2010

Date from when payments of weekly benefits to commence – 23 June 2010

Date payments of weekly benefits ceased – 19 November 2010

Date of end of first 26 weeks from and including 23 June 2010 (182 days) – 21 December 2010 inclusive

End date of calculations – Wednesday 2 May 2012

First period – balance of first 26 weeks – 20 November 2010 to 21 December 2010 inclusive = 32 days. $1,280 divided by 7 days x 32 days = **$5,851.43**

Second period – 22 December 2010 to 31 December 2010 inclusive = 10 days. 75% of $1,280 = $960. $960 divided by 7 days x 10 days = **$1,371.43**

Third period – 1 January 2011 to 31 December 2011 inclusive = 365 days. **Indexation** - $1,280 x $1,245.30 (awe 2011) divided by $1,153.50 (awe 2010)

= $1,381.87. 75% of $1,381.87 = $1,036.40. $1,036.40 divided by 7 days x 365 days = **$54,040.86**

Fourth period – 1 January 2012 to 2 May 2012 inclusive = 123 days. **Indexation** - $1,280 x $1,341.20 (awe 2012) divided by $1,153.50 (awe 2010) = $1,488.28. 75% of $1,488.28 = $1,116.21. $1,116.21 divided by 7 days x 123 days = **$19,613.40**

TOTAL ARREARS - <u>$80,877.12</u>

This figure of $80,877.12 is a gross figure and is subject to payment of income tax.

<u>FIFTH ISSUE</u> – Interest

117. I have found that Mr Cooper is entitled to be paid arrears of weekly benefits which accrued from immediately after their cancellation effective after 19 November 2010 until 2 May 2012. He seeks interest on those arrears.

118. "*There is no power, similar to section 84(1) of the Supreme Court Act, to award interest on the amount of an award from the date the cause of action arose until judgement*" – see *Wendy Pengilly v Northern Territory of Australia* [2004] NTSC 1 per Mildren J at paragraph [8]. In the absence of any general entitlement to interest I turn to consider the specific sections which deal with awarding interest, namely sections 89 and 109 of the Act.

119. I find that Mr Cooper has no entitlement to interest on arrears of payments of weekly benefits pursuant to section 89 of the Act. This is because there has been no challenge to the validity of the cancellation of these payments, merely to the merits of that cancellation. In *Passmore v Plewright* [1997] 118 NTR 11, a joint Decision of the Northern Territory Court of Appeal, the analysis was that Section 89 interest only applied where there first existed a liability to pay weekly benefits and those weekly benefits were not paid. If payments of weekly benefits have been validly cancelled, as has not been disputed in this case, then during the period of that valid cancellation there is no liability to

make payments and there is accordingly no entitlement to section 89 interest on arrears of weekly benefits which accrued over that period.

120. Section 109(1) of the Act deals with "unreasonable delay" in accepting a claim for or in paying compensation. Section 109(2) of the Act deals with a failure to make payments due to a person by the Employer "…in a regular manner or in accordance with the normal manner of payment…". Following a valid cancellation no payments were due to be paid to Mr Cooper and therefore section 109(2) has no application in this case. This leaves section 109(1).

121. In this case the Employer cancelled payments of weekly benefits to Mr Cooper in accordance with section 69 of the Act, which exists for that very purpose. For section 109(1) to apply, I would have to be satisfied that the Employer's cancellation and/or the Employer's ongoing failure to resume payments of weekly benefits were unreasonable in some way.

122. In *MIM Exploration v Henry Allan Robertson* (unreported), a Decision of Acting Justice Gray of the Northern Territory Supreme Court delivered on 30 July 1998, Gray AJ held that there was "*…a* bone fide *issue as to the incapacity of the Worker which was the subject of substantial argument and lengthy reasons for judgement…"* and for that reason it had not been unreasonable for the Employer to litigate the disputed claim. He allowed an appeal from the Work Health Court which had awarded interest pursuant to section 109(1) of the Act.

123. In the present case the Employer had received both a detailed report and a section 69(3) certificate from a consultant orthopaedic surgeon to the effect that Mr Cooper was fit to resume his pre-injury duties as a carpenter, and was no longer incapacitated for work. It was not unreasonable for the Employer in accordance with the Act to contest its obligation to make ongoing payments of weekly benefits to Mr Cooper in the light of that opinion, even where it was aware there existed contrary opinion in the form of medical certificates certifying total incapacity, being issued by Mr Cooper's treating general practitioner at that time.

124. The subsequent availability to the Employer of the notes and records of Mr Cooper's treating general practitioners, of Mr Cooper's treating physiotherapist, and of the report of Mr Cooper's medico-legal specialist Dr Sheehan, does not in my view change the reasonableness of the Employer’s position. The mere fact that a substantial body of expert opinion in support of Mr Cooper's ongoing total incapacity for work emerged between cancellation of payments of weekly benefits and the hearing of these proceedings does not of itself establish that the Employer was unreasonable in maintaining that cancellation. I would have to be satisfied both that the effect of that substantial body of expert opinion was conclusive or nearly so of Mr Cooper’s ongoing work-related incapacity and that the Employer’s delay in responding positively to that opinion was unreasonable.

125. There is no evidence before me to establish the date or dates on which this further material became available to the Employer. It has been necessary for me in this case to hear and read and weigh the whole of the evidence to arrive at a determination of the merits on the balance of probabilities of the Employer's cancellation of payments of weekly benefits to Mr Cooper.

126. I find that Mr Cooper is not entitled to be paid interest pursuant to section 109(1) of the *Workers Rehabilitation and Compensation Act* or at all, accruing at any time on the arrears of weekly benefits he is entitled to receive from the Employer.

<u>SIXTH ISSUE</u> – Indemnity Costs

127. Mr Cooper has been wholly successful in these proceedings in that I have found that his lumbar spinal injury is part of his work injury and that he is entitled to be paid arrears of weekly benefits from the date of cancellation of their payments and to continue to receive payments of weekly benefits in accordance with the Act. He seeks his costs of the proceedings and he seeks them on the indemnity basis rather than on the more usual standard basis.

128. Mr Cooper by his counsel made submissions on this issue at the conclusion of the hearing before me. These are set out on page 69 of the transcript for 1 March 2012. In essence, Mr Johnson for Mr Cooper submitted that the

Employer's persistence in denying that the lumbar spine injury was part of the work injury took up so much time at the hearing and was so unmeritorious as to have costs consequences.

129. Persistence in pursuing an unmeritorious case or even just an unmeritorious issue can have such costs consequences – see *Cathy Yuk Chu Lin v Katamon Pty Ltd and Frank Hung Chi Lam* Nos 29 and 30 of 1995 Northern Territory Supreme Court delivered 31 May 1995 by Kearney J. He said at paragraph 13:

> "*I consider, in general, that indemnity costs should be awarded in cases which are clearly exceptional in nature; for example where the conduct of the losing party has involved some unmeritorious deliberate or high-handed conduct, an element of deliberate wrongdoing, which warrants an award of costs over and above the normal standard basis, because it is unjust in the circumstances that the successful party should have to bear any part of the legal costs he has reasonably incurred*".

130. In the present case I can find no conduct on the part of the Employer answering any of these descriptions. It is true that the Employer by its counsel argued that the lumbar spine injury did not arise in the work accident and I found on the evidence before me that it did. Nevertheless, the Employer's position was arguable and it required me to make a detailed assessment of the evidence before I ruled against it.

131. There is one further consideration. When awarding costs I am required pursuant to rule 23.03(3) of the Work Health Court Rules to have regard to the matters referred to in section 110 of the Act. That section 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*".

132. In my view, this section is not limited in its effect to allowing costs for efforts in attempting to come to an agreement about the matter in dispute. The Court is required to take those efforts into account when awarding costs of any sort and not just for possibly including the costs of those efforts as part of costs awarded to a party. The Court may make other sorts of costs orders on the basis of such efforts. The Court's discretion to award costs must be exercised judicially but is otherwise unfettered – see rule 23.03(1) of the Work Health Court Rules. In the right circumstances, the Court might make an order for indemnity costs wholly or partly on the basis of such efforts.

133. In this case, there is no evidence before me in relation to any such efforts.

134. I rule that Mr Cooper is to have his costs, but on the standard rather than the indemnity basis.

ORDERS

135. I make the following Orders:

1) subject to payment of any statutory charges, the Employer by 18 May 2012 pay to the Worker arrears of weekly benefits calculated over the period 20 November 2010 to 2 May 2012 inclusive in the sum of $80,877.12.

2) From and including 3 May 2012, the Employer pay to the Worker weekly benefits in accordance with the Act.

3) The Employer pay to or on behalf of the Worker all medical and like expenses pursuant to section 73 of the Act not yet paid by the Employer which the Worker has incurred in respect of the work injuries prior to the date of these Orders, and the parties have liberty to apply in respect of any such past expenses.

4) In accordance with the Act the Employer pay to or on behalf of the Worker all medical and like expenses pursuant to section 73 of the Act which he might incur in respect of the work injuries from the date of these Orders.

5) The Employer pay the Worker's costs of and incidental to the proceedings and of the dispute giving rise to the proceedings at 100% of the Supreme Court scale to be taxed in default of agreement.

Dated this 2nd day of May 2012.

____

JOHN NEILL
STIPENDIARY MAGISTRATE