CITATION: *Rothwell v BAE Systems* [2011] NTMC 039

PARTIES:	MARK EDWIN ROTHWELL
	v
	BAE SYSTEMS AUSTRALIA LTD
TITLE OF COURT:	Work Health
JURISDICTION:	Work Health - Alice Springs
FILE NO:	20917242
DELIVERED ON:	27 September 2011
DELIVERED AT:	Alice Springs
HEARING DATE(s):	5 - 6 September 2011
JUDGMENT OF:	J M R Neill

CATCHWORDS:

Workers Rehabilitation and Compensation Act and Work Health Court Rules and Supreme Court Rules; compensation for past gratuitous attendant care services – s.78; interest on past compensation – s.3, 4, 87, 89 and 109; costs other than on the standard basis – Work Health Court rule 23.03, Supreme Court Rule 26.11 (3) and Order 63.

REPRESENTATION:

Counsel:

Worker:	Mr A. Lindsay
Employer:	Mr S.Walsh QC

Solicitors:

Worker:	Povey Stirk
Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	[2011] NTMC 039
Number of paragraphs:	107

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

No. 20917242

BETWEEN:

MARK EDWIN ROTHWELL
Worker

AND:

BAE SYSTEMS AUSTALIA LTD
Employer

REASONS FOR JUDGMENT

(Delivered 27 September 2011)

Mr J NEILL SM:

1. Mark Rothwell was born on 7 June 1950 and is presently aged 61 years. At all material times he was employed by the Employer in these proceedings.

2. On 28 May 2007 Mr Rothwell experienced a sudden bleeding into his brain. This happened on a working day when he was at his usual workplace. It was subsequently discovered that he had been suffering undiagnosed and untreated high blood pressure. He was taken by ambulance to the Alice Springs Hospital where his condition deteriorated that same day and he was evacuated to the Royal Adelaide Hospital. Ultimately he was left with severe and permanent cognitive and physical disabilities due to brain damage. Because of the cognitive disability adult guardians under the *Adult Guardianship Act* were appointed for him on 18 July 2007.

3. Mr Rothwell made a claim under the *Workers Rehabilitation and Compensation Act* ("the Act") on 20 November 2007. The Employer on 28 November 2007 deferred its response pursuant to subsection 85(1)(b) of the Act. It subsequently disputed Mr Rothwell's claim by a Notice of Decision and Rights of Appeal dated 29 January 2008.

4. On 22 May 2009 Mr Rothwell commenced these proceedings. His wife Barbara Rothwell was appointed his litigation guardian on 24 August 2010.

5. The Employer defended the proceedings and denied liability for Mr Rothwell's claim until 24 August 2011 when by its solicitor it consented to an Order in the following terms:

> "The Worker suffered an injury, namely a ruptured blood vessel in the brain, which resulted in or materially contributed to his incapacity and is entitled to compensation pursuant to the Workers Rehabilitation and Compensation Act."

6. This became an Order of the Court on 29 August 2011. The proceedings had been listed for hearing before the Work Health Court for 5 days from 5 September 2001. The parties were able to resolve most of the issues remaining between them by 5 September 2011, so that evidence and submissions as to the still unresolved issues were able to be completed in a little over 1 hearing day, concluding early on 6 September 2011. Medical records and reports and other documents were tendered by consent, and Mr Rothwell's wife Barbara gave live evidence as to the attendant care services she and her family had been providing for her husband, their extent and why they were required, and the financial and health effects on Mr Rothwell and his family of the Employer's delay in accepting his claim. She was not cross-examined and I accept her evidence in its entirety.

7. On 6 September 2011 I made formal Orders in respect of the resolved issues. The Employer accepted all Mr Rothwell's claims for ongoing compensation and most of his claims for past compensation. I reserved my decision on the 3 issues still in dispute. These 3 issues are:

   A. Can Mr Rothwell be paid compensation by the Employer for the value of past attendant care services provided for him even though he does not have to pay for them (past gratuitous attendant care services)?

B. Was it unreasonable for the Employer to delay accepting Mr Rothwell's claim after any and if so what date, and does the Employer's delay warrant punishment and/or deterrence (interest on past benefits)?

C. Should the Employer pay Mr Rothwell's legal costs at a higher rate than the standard basis (solicitor and client costs)?

Issues B. and C. have come up in proceedings before the Work Health Court before, although usually as afterthoughts to whatever were the main issues before the Court. This time they are central issues. To the best of my knowledge, issue A. has never previously been considered by this Court.

A. PAST GRATUITOUS ATTENDANT CARE SERVICES

8. If Mr Rothwell has any entitlement to compensation for the provision of past gratuitous attendant care services then that must be found in the Act. The Act is a code and there is no separate common law entitlement.

9. The entitlement to attendant care services is to be found in ss.78(1) which appears in Division 4 of Part V of the Act. This provides:

> "**78 Other rehabilitation**
>
> (1) **Subject to this section**, in addition to any other compensation under this Part, an employer shall pay the **costs incurred** for such home modifications, vehicle modifications and household and **attendant care services** as are reasonable and necessary **for the purpose of this Division for a worker** who suffers or is likely to suffer a permanent or long-term incapacity (emphasis added)."

10. It is not disputed that Mr Rothwell has suffered a permanent incapacity. The meaning and effect of the words "costs incurred" is in dispute.

11. The evidence of Mrs Barbara Rothwell was that she and various of their 11 children provided attendant care services for Mr Rothwell over all the periods when he was not an in-patient in a hospital or rehabilitation centre, from about

29 September 2008 (Alice Springs Hospital admission and discharge record – Exhibit W5). She also provided such services while her husband was an in-patient at Alice Springs Hospital from 22 May 2008 to 29 September 2008. This care involved a significant number of hours each day every day to feed him, clean him (he is doubly incontinent), dress him, prepare his meals and help him to eat, provide physiotherapy and help him exercise his limbs, and the whole range of personal services necessitated by Mr Rothwell's severe physical and cognitive disabilities arising from the work injury. These services were provided by these family members gratuitously – that is they provided such services to their husband/father without any contract or other binding arrangement to reimburse them for the value of the services provided. They provided such services freely, out of natural love and affection.

12. The Employer contends that the words "costs incurred" in ss.78(1) of the Act should be given their apparent meaning – that is, there must exist costs and they must have been incurred. The Employer says it would be artificial to extend the apparent meaning of these words to include the value of services where there exists no enforceable obligation requiring Mr Rothwell to pay the providers for the attendant care services they provided.

13. Mr Rothwell contends that the structure of the subsection and the surrounding sections in the relevant Division of the Act not only permits a broader interpretation of "costs incurred", it demands a broader interpretation. Without it, the subsection and indeed the Division would be riddled with inconsistencies.

14. The parties have agreed that if a statutory basis is found for Mr Rothwell to recover the value of past gratuitous attendant care services then that value in the present case for the period commencing 22 May 2008 up to 6 September 2011 is to be $274,680.00, and there is no dispute that the services provided were reasonable and necessary.

15. Subsection 78(2) of the Act is directed to determining what are reasonable and necessary home modifications, vehicle modifications and household and attendant care services in a particular case, for the purpose of ss.78(1). I set out parts of ss.78(2) below:

"(2) Without limiting the matters which may be taken into account in determining what are reasonable and necessary home modifications, vehicle modifications and household and attendant care services in a particular case, there shall be taken into account:

(a) in relation to home modifications:

(i) the cost, and the relevant benefit to the worker, of the **proposed** modifications;

(ii) the difficulties faced by him or her in:

(A) gaining access to;

(B) enjoying reasonable freedom of movement in; or

(C) living independently in,

his or her home without the **proposed** modifications;

(iii), (iv), (v) and (vi) – not reproduced.

(b) in relation to vehicle modifications:

(i) the cost and relevant benefit to the worker of the **proposed** modifications;

(ii) the difficulty faced by him or her in:

(A) driving or operating;

(B) gaining access to; or

(C) enjoying freedom and safety of movement in,

the vehicle without the **proposed** modifications (emphasis added);

(iii) and (iv) – not reproduced.

(c) in relation to household services – not reproduced.

(d) in relation to attendant care services – not reproduced."

16. It is immediately apparent that in determining the reasonableness and necessity of "costs incurred" for the purposes of ss.78(1), ss.78(2)(a)(i) and (ii) and ss.78(2)(b)(i) and (ii) specifically refer to "proposed modifications". That is, modifications which are proposed but not yet implemented, and in respect of which the costs necessarily have not yet been incurred. This cannot be reconciled with a narrow interpretation limiting an Employer's reimbursement obligation to costs in the sense of expenses already incurred and paid, or at least payable in a legally binding sense. This is one ambiguity in s.78 of the Act.

17. Subsection 78(3) of the Act illustrates the same difficulty with the interpretation contended for by the Employer. It provides: "An employer shall not be liable to pay the **costs incurred** for home modifications except where the worker for whose benefit the modifications are **or are to be** carried out is severely impaired in his or her mobility or ability to live independently within the home (emphasis added)".

18. The heading "Other Rehabilitation" to s.78 does not itself form part of the Act because the section was not enacted after 1 July 2006 nor was the heading itself amended after that date – see ss.55 (2) of the *Interpretation Act*.

19. Nevertheless, it is permissible to use extrinsic material, such as a section heading, in interpreting a provision of an Act in circumstances where the provision is ambiguous or obscure, or where the ordinary meaning conveyed by the text of the provision, taking into account its context in this Act and the purpose or object underlying the Act leads to a result that is manifestly absurd, or is unreasonable – see ss.62B(1)(b) of the *Interpretation Act*, and also ss.62B(2)(a) specifically as to the case of a section heading.

20. I have found there is ambiguity in s.78 – see paragraphs 16 and 17 above. Accordingly, I may have regard to the section heading "Other Rehabilitation" when I come to interpret s.78 of the Act. I do so, and I find that attendant care services are "rehabilitation" for the purpose of Division 4 of Part V of the Act.

21. Section 62A of the *Interpretation Act* requires a purposive approach to statutory interpretation:

> "**62A Regard to be had to purpose or object of Act**
>
> In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object"

22. Division 4 of the Act includes sections 75 to 78 inclusive. It starts with s75 which I set out below:

> "**75 Purpose**
>
> (1) The purpose of this Division is to **ensure** the rehabilitation of an injured worker following an injury (emphasis added).
>
> (2) For the purposes of subsection (1), rehabilitation means the process **necessary to ensure**, as far as is practicable, having regard to community standards from time to time, that an injured worker is **restored** to the **same physical, economic and social condition in which the worker was before**."

23. Rehabilitation is one of the major purposes of the Act. In Maddolozzo v Maddick (1992) 84 NTRR 27 in paragraph 22, Mildren J identified this specific purpose when he said:

> "Unlike the former Act, an employer whose employee suffers a compensable injury is required by the Act to take a real interest in his employee's welfare. S.61 of the Act, now repealed and replaced by s.75A of the Act, requires an employer to provide suitable employment to an injured worker or find suitable work with another employer for him and to participate in efforts to retrain the employee. The focus of the Act cover a wide range: Part IV of the Act deals with occupational health and safety, **and there is also a heavy emphasis on the**

rehabilitation of injured workers, not merely on providing a scheme for mere monetary compensation (emphasis added)."

24. In addition to the rehabilitation purpose generally of the Act and the specific rehabilitation purpose identified in ss75(1) in Division 4 of Part V of the Act, we must take into account the fact that it is beneficial legislation. Mildren J said of this Act in *Thompson v GEMCO Ltd* [2003] NTCA 05 at page 8.9 as follows:

> "**There is no doubt that this legislation is beneficial legislation, and therefore the provisions of the Act must be beneficially construed so as to provide the most complete remedy of the situation with which they are intended to deal and which are consistent with the actual language employed and to which its words are fairly open**(emphasis added)… This approach is not confined to cases of ambiguity; see *Woodroffe v NT of A* (2000) 10 NTLR 52 at 62. There is also the principle of statutory interpretation which deals with the absurdity of consequences of the literal interpretation. This rule is particularly significant bearing in mind **the purposive approach which the Courts are now obliged to adopt** (emphasis added)."

Mildren J went on to quote with approval from *Tickle Industries Pty Ltd v Hann & Richardson* (1974) 2 ALR 281 where at 289 Barwick CJ said:

> "It is…. a sound rule of statutory construction that a meaning of the language employed by the legislature which would produce an unjust or capricious result is to be avoided. Unless the statutory language is intractable, an intention to produce by its legislation an unjust or capricious result should not be attributed to the legislature."

25. It is not inconsistent with the actual language employed in the words "costs incurred" in ss78(1) of the Act when considered in the light of the wording which I have identified in parts of ss78(2) and (3), in the light of the definition of "rehabilitation" in ss75(2) of the Act when applied to ss78(1), in the light of the purpose of the Division of the Act where ss78(1) is located and also the purpose of the Act as a whole, and in the light of the beneficial nature of the Act, to interpret "costs incurred" to include reasonable and necessary attendant

care services provided for but not paid for or payable by Mr Rothwell. Similarly, that statutory language is not intractable so as to exclude that interpretation. I also note the words "for the purpose of this Division" in ss78 (1) of the Act, which clearly import ss75(1) and (2) into any interpretation of s78.

26. The interpretation contended for by the Employer would not promote the rehabilitation purpose of the Act or of the relevant Division of the Act. It would not provide for the most complete remedy of the situation with which the Act and that Division are intended to deal. To accept the interpretation contended for by the Employer would in my view produce an unjust or capricious result. I respectfully endorse the view of Kilner–Brown J expressed in the case of *Housecroft v Burnett* [1986] 1 All ER 332 at 339 to which Mr Rothwell's counsel Mr Lindsay referred the Court, as follows:

> "That is not how human beings work; it would be a blot on the law to allow recovery where the wife had held the husband to contract, but to deny it if she behaves like an ordinary decent human being."

I am aware that case was not dealing with the statutory scheme we are considering in this case, however the observation remains pertinent to the foregoing interpretation considerations.

27. I find on the uncontested evidence of Barbara Rothwell that attendant care services of the sort provided for Mr Rothwell by her and other family members prior to 6 September 2011 were an essential part of his rehabilitation directed to recovering and maintaining his health generally, and his flexibility and his capacity to stand and transfer himself from bed to chair to car etc – his physical condition – and to keep him clean and content and as involved as possible with his family and to continue to live at home – his social condition. I find that the extent of these services provided was consistent with community standards operating over the period in question, and not indicative of an unduly high standard. I do not accept the Employer's submission that the expression "community standards" as used in ss75(2) means the standards of a person lacking the financial resources of a Worker entitled to rehabilitation benefits under the Act. To the contrary, I find that "community standards" in this context

must refer to, and is to be applied in the case of, a Worker entitled to such financial support.

28. I find that s78 of the Act is to be given a broad meaning consistent with the stated purpose of Division 4 in Part V of the Act, and the words "costs incurred" are to be beneficially construed to provide a complete remedy as to the provision of reasonable and necessary rehabilitation services, including attendant care services. Their construction is not to be limited to an already existing and enforceable economic obligation but is capable of including attendant care services already provided on a gratuitous basis, provided that they were reasonable and necessary for the purposes of Division 4 of Part V of the Act.

29. It is agreed between the parties that the gratuitous attendant care services provided by Mr Rothwell's family were reasonable and necessary for the purpose of Division 4 of Part V of the Act – see paragraph 14 above. Accordingly, I find that the Employer is required to compensate Mr Rothwell for the value of those past gratuitous attendant care services.

B. THE WORKER'S ENTITLEMENT TO INTEREST

30. Mr Rothwell seeks interest on the value of the past gratuitous services which I have found above are payable and which accrued from 22 May 2008, when Mrs Rothwell started to provide those services at Alice Springs Hospital, up until 6 September 2011 in the agreed sum of $274,680.00. He also seeks interest on the arrears of weekly benefits agreed payable to him in the sum of $370,698.00, having accrued over the period 29 May 2007 to 9 September 2011 inclusive.

31. He seeks such interest at the rate of 20% per annum pursuant to or by way of analogy with the rate prescribed by regulation for s.89 interest on weekly benefits payable under the Act. In the alternative, he seeks interest at such rate or rates as the Court might determine.

32. The Employer disputes that Mr Rothwell has any entitlement to payment of interest, and in the alternative disputes that 20% would be an appropriate rate of interest. If interest is to be payable at all, the Employer says it should be calculated on the basis of relevant commercial rates.

(i) Section 89 Interest

33. It was not disputed by Mr Rothwell at the hearing that the entitlement to interest payable on past weekly benefits pursuant to s.89 of the Act arises only where a Worker first has the entitlement to be paid those weekly benefits – see *Passmore v Plewright* [1997] 118 NTR 28. Such an entitlement would become established where an Employer has accepted a Worker's claim, or where it is deemed to have accepted the claim, or where it has failed validly to dispute the claim, or where the Court has ordered such compensation is payable, or where an Employer subsequently accepts the claim at a later time, after having first validly disputed it.

34. In this case it is not disputed that the Employer validly disputed Mr Rothwell's claim by delivering a Notice of Decision and Rights of Appeal on or shortly after 29 January 2008. It is also common ground that the Employer subsequently accepted the claim and Mr Rothwell's entitlement to payment of weekly benefits by the consent order dated by the Employer 24 August 2011 and formally made on 29 August 2011. The parties agreed in writing how payments of weekly benefits are to be made, thereby complying with s.88 of the Act. I made Orders on 6 September 2011 reflecting that agreement. Accordingly, s.89 interest might theoretically apply to future arrears of weekly benefits but only if the Employer does not comply with its payment obligations pursuant to the Orders of 6 September 2011.

35. There is a circumstance in this case where s.89 interest does apply to past weekly benefits. The Employer gave notice of its deferral of Mr Rothwell's claim pursuant to s85(1)(b) of the Act, on 28 November 2007. That required it to dispute the claim, if it wished to do so, within 56 days – see ss85(4)(a) of the Act. The Employer subsequently disputed the claim by a Notice of Decision and Rights of Appeal dated 29 January 2008 which obviously was delivered on or after that date. 29 January 2008 is 62 days after 28 November 2007 and therefore outside the prescribed 56 days.

36. Accordingly, as at 24 January 2008 (the 57th day after 28 November 2007) the Employer was deemed pursuant to s87 of the Act to have accepted liability for

compensation payable under Sub Divisions B and D of Division 3 of Part V of the Act. That acceptance of liability came to an end pursuant to ss87(a) of the Act 14 days after the Employer notified Mr Rothwell of its decision to dispute the claim. That is 14 days after 29 January 2008, which is after 12 February 2008.

37. I find that the Employer's deemed acceptance of liability for compensation payable to Mr Rothwell under Sub Divisions B and D of the Act covers the period from the deemed acceptance of the claim on and including 24 January 2008 to and including 12 February 2008.

38. Sub Division B of Division 3 referred to in s87 of the Act includes s64 – weekly compensation for the first 26 weeks of incapacity – and s65 – weekly compensation from the expiry of the first 26 weeks of incapacity and thereafter. I find that Mr Rothwell is entitled to payment of interest pursuant to s89 of the Act at the rate of 20% per annum on weekly benefits payable to him over the period from and including 24 January 2008 to and including 12 February 2008, a period of 20 days.

39. I find that any payments under Sub Division D of Division 3 referred to in s87 of the Act which were incurred between 24 January 2008 and 12 February 2008 inclusive, are also subject to s89 interest at 20% per annum. Sub Division D of Division 3 is limited to benefits payable to Mr Rothwell pursuant to s73 of the Act, and in this case I find the relevant benefits might include (a) medical, surgical and rehabilitation treatment; (b) hospitalisation and hospital treatment; and (c) travelling, or being transported to and from any place for the purpose of medical, surgical and rehabilitation treatment, hospitalisation or hospital treatment. Subsection (e) of s73 (personal attendance) is not involved because I find on the evidence before me that Mr Rothwell was a hospital inpatient or at the Hampstead Rehabilitation Centre over the whole period 24 January 2008 to 12 February 2008.

40. There is another circumstance where s89 interest might apply in this case. Because the Employer on Wednesday 28 November 2007 deferred its response to Mr Rothwell's claim it was obliged to commence payment of weekly benefits to

him within 3 working days, no later than on Monday 3 December 2007, until and including notification on 29 January 2008 that the claim was disputed – see ss85(4)(b). The evidence before me does not establish whether such weekly benefits were or were not paid or the dates of any payments. Accordingly I am not in a position to make any orders as to s89 interest on any late payments of weekly benefits over this period. The parties have liberty to apply in respect of s89 interest on weekly benefits over this period if that should prove necessary.

(ii) Section 109 Interest

41. Mr Rothwell claims interest on the sum of $274,680 for the past gratuitous services and on the sum of $370,698 for the past weekly benefits, pursuant to s.109 of the Act. The Employer disputes any such entitlement.

42. Section 109 provides as follows:

> "**109 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 an amount of compensation against the employer – order that interest on that amount at a rate specified by it be paid by the employer to the person to whom compensation is awarded; and
>
> (b) if, in its opinion, the employer would otherwise be entitled to have costs awarded to him or her – order that costs be not awarded to him or her.
>
> (2) Where a weekly or other payment due under this Act to a person by an employer has not been made in a regular manner or in accordance with the normal manner of payment, the Court **must**, on an application in the prescribed form made to it by the person, order that interest at a rate specified by it be paid by the employer to

the person in respect of the amount and period for which the weekly or other payment was or is delayed.

(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 (emphasis added)."

43. The scheme of this section requires that the Court be satisfied, on the balance of probabilities, that the Employer has caused unreasonable delay in accepting a claim for, or paying, compensation. If so satisfied, then the Court **must** order the Employer pay interest on the compensation awarded, and the amount of that interest is within the Court's discretion.

44. In the present case where the Employer validly disputed the claim, the focus is on any unreasonable delay in subsequently accepting it, pursuant to ss109(1). Subsection 109(2) has limited application in this case because it applies to cases where compensation is already payable and there is delay in paying it. Subsection (2) may have some application in this case to (i) payment of weekly benefits while the Employer's response to the claim was deferred, and/or (ii) the period of the deemed acceptance of liability for the specified compensation, between 24 January 2008 and 12 February 2008. It is possible to award interest against an Employer pursuant to both s.89 and s.109 of the Act – see *Pengilly v NT of A* (No 3) [2004] NTSC per Mildren J at paragraph 7. Indeed, if the court finds a payment due was not made in a regular manner or in accordance with the normal manner of payment then ss109(2) provides it **must** order payment of interest pursuant to that subsection.

45. There have been Decisions concerning ss109(2) and (3) – see *Pengilly* (above) and also *Wormald International (Aust) Pty Ltd v Barry Leslie Aherne* NTSC 59. I have been able to find only two Decisions which concern ss109(1) of the Act. The first is by Acting Justice Gray of the NT Supreme Court in *MIM Exploration*

v Henry Allan Robertson, delivered on 30 July 1998 (unreported). In that case Gray AJ held that there was "a bona 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 was not unreasonable for the Employer to litigate the disputed claim. He allowed the appeal from the Work Health Court which had awarded interest pursuant to both s.109(1) and s.109(3). The second is *Boland v NTA* [2009 NTMC 019 by Oliver SM in paragraphs 37 and 38. Magistrate Oliver allowed s.109(1) interest at 15% per annum on the cost of a rehabilitation report which the Employer had reneged on paying.

46. In the present case Mr Rothwell contends that from an early stage the Employer was in possession of information from which it knew, or ought to have known, that he had suffered a compensable injury under the Act, but it nevertheless delayed accepting the claim from that time until 24 August 2011. He contends this delay was unreasonable.

47. The Employer contends that the delay was not unreasonable, on 2 grounds. The first ground was that it had a defence based on the concept of "disease" under the Act, namely the interpretation of subsections 4(6A) and (8) of the Act. Although the Employer conceded its awareness of High Court of Australia Decisions which establish that the occurrence of a physical injury in the course of employment eliminates the need for consideration of the concept of underlying disease, it submitted the position might be, or might have been, different in the Northern Territory. It said this was so because there had been no judicial consideration of subsections 4(6A) and (8) in the Act in this context until June 2011, leaving the issue open to argument at least until then – see *Keating v Global Insulation Contractors* [2011] NTMC 02 per Morris SM. However, the Employer did not submit any analysis of subsections 4(6A) and (8) which might have distinguished the position in the NT from the interstate positions considered by the High Court.

48. The Employer's second ground is that the medical information available did not exclude the alternative hypothesis that Mr Rothwell's incapacity resulted from a medical cause other than the bleeding in his brain suffered at work on 28 May 2007. The Employer relied on s53(1) of the Act to highlight the necessity of

linking the work injury to the incapacity. If some other medical cause arose after the particular bleeding to the Worker's brain on 28 May 2007 when he was at work, and if that other medical cause was the true cause of or material contribution to Mr Rothwell's subsequent severe incapacity, then the Employer says it was justified at all material times in continuing to dispute the claim.

First Ground

49. Mr Rothwell's pleadings included "disease" in the alternative to "injury" – see paragraphs 3 and 4 of both the original Statement of Claim filed 22 May 2009 and of the Amended Statement of Claim filed 17 August 2011. However, his case was run on the basis that he suffered a physical injury in the sense of a sudden physiological change, namely the onset of bleeding into his brain while he was at work.

50. The parties acknowledged their awareness at all material times of the High Court Decision in *Kennedy Cleaning v Petkoska* [2000] 200 CLR 286. That Decision includes a discussion of an injury by way of a sudden physiological change which occurred at work where that injury was also the culmination of some disease process which may or may not have had any connection with work – see paragraphs 36 to 46 of the joint judgement of all 7 Justices of the Court. The case establishes that the mere fact of a connection in some way between the sudden physiological change and an underlying disease process does not of itself prevent its classification as an injury in the physical sense. A bleeding into the brain might ultimately be due to high blood pressure, arteriosclerosis, arteriovenous malformation or any other congenital or degenerative cause but it is still a rupture, a physical event, and as such it is "…something quite distinct from the defect, disorder or morbid condition, which enables it to occur…" – *Kennedy Cleaning*, paragraph 36.

51. The definition of "injury" in s.3 of the Act says that it "includes" a disease. That does not mean that every physical injury which might have a connection to an underlying disease process requires a consideration of ss.4(6A) and (8) of the Act. The provisions of ss.4(6A) and (8) are limited to disease. They only come to be considered where there is no injury but disease. If the injury satisfies the

s.3 definition in the sense of a physical event occurring at work then there is no requirement to go on and consider the further issue of disease – see *Kennedy Cleaning* at paragraph 39. There is nothing in ss.4(6A) or (8) of the Act which requires, or even suggests, any different approach.

52. In *Keating* (above) Morris SM considered this very issue in her Decision delivered on 20 June 2011 in paragraphs 17 to 25 inclusive. With respect, I concur with Her Honour's reasoning, concluding in paragraph 25.

53. The relevant part of the Decision in *Keating* did not break new legal ground. It considered and followed the Decision of the High Court in *Kennedy Cleaning* on the statutory relationship between injury and disease. It concluded, rightly in my respectful opinion, that there is nothing in the NT Act, including ss.4(6A) and (8), to lead to any different outcome from what has been established law in Australia since at least 31 August 2000, the date of the Decision of the High Court of Australia in *Kennedy Cleaning*.

54. Accordingly, I do not accept the Employer's first ground for justifying its delay in accepting the Worker's claim.

Second Ground

(i) Section 4(1)(f)

55. Mr Rothwell contended that any further injury by way of any new bleeding into his brain he might have suffered at either Alice Springs Hospital on 28 May 2007 or Royal Adelaide Hospital following that date was nevertheless an injury arising out of or in the course of his employment, by virtue of ss4(1)(f) of the Act. Accordingly he contended that even if the Employer's hypothesis was correct of a new and separate bleeding event after he was no longer at work, the Employer was still required to compensate him. Its failure to accept his claim was therefore unreasonable.

56. Ss4(1)(e) and (f) of the Act provide as follows:

> "4(1) Without limiting the generality of the meaning of the expression, an injury to a worker shall be taken to arise out of or in the

course of his or her employment if the injury occurs while he or she:

(e) is travelling by the shortest convenient route between:

(i) his or her place of residence or his or her workplace; and

(ii) any other place for the purpose of obtaining a medical certificate, receiving medical, surgical or hospital advice, attention or treatment, or receiving a payment of compensation in connection with an injury for which he or she is entitled to receive compensation or for the purpose of submitting to a medical examination required by or under this Act; or

(f) is in attendance at a place referred to in paragraph (e)(ii) for a purpose so referred to".

57. I do not accept Mr Rothwell's contention. I find that the words "…in connection with an injury for which he or she is entitled to receive compensation…" in ss.4(1)(e)(ii) limit the relevant effect of ss.4(1)(e) and (f) to claims where the entitlement to receive compensation already exists. That is, to claims which have been accepted or deemed to be accepted, or have been invalidly disputed, or where the Court has determined the Worker's entitlement. None of those situations existed at the relevant time - Mr Rothwell did not even make his claim until 20 November 2007, nearly 6 months after the work injury and the following days in hospital when the hypothetical further injury might have occurred.

(ii) Unreasonable Delay

58. Mr Rothwell made his claim under the Act on 20 November 2007. That was accompanied by a prescribed medical certificate from a doctor at Alice Springs Hospital. That certificate described "sudden onset of dizziness, nausea and slowly evolving headache. Collapsed". The certificate stated that these signs were of "uncertain cause". It went on: "noted to have signs suggesting subarachnoid haemorrhage".

59. A subarachnoid haemorrhage is a bleeding into a specific part of the brain. It is well established law in Australia that such a bleed, if of sudden onset at work, is an injury for workers' compensation purposes, whatever its cause – see *Kennedy Cleaning* (above). However, the certificate here did no more than suggest that diagnosis and clearly the Employer needed to investigate that before deciding its position.

60. By notice dated 28 November 2007 the Employer deferred accepting liability for the compensation, pursuant to s.85 (1)(b) of the Act. The purpose of that option is to permit further investigation of the claim. I have no evidence before me of anything the Employer did by way of investigation of the claim between 28 November 2007 and 29 January 2008 when it disputed the claim. I do have before me however as part of Exhibit W1 a copy of a letter dated 18 February 2008, just outside the deferral period, from the Employer's solicitor Hunt & Hunt to neurologist Professor Richard J Burns seeking his report. That letter sought Professor Burns' opinion as to what probably happened to Mr Rothwell at work on 28 May 2007, what probably happened to him outside work later that day, and the probable causes.

61. Professor Burns provided a report dated 6 March 2008. He expressed the opinions (i) that it was "highly likely that his neurologic illness began at work with the vertigo nausea and falling or fainting episode…." P.21.6 of Exhibit W1. He expressed the opinion that "… the most likely diagnosis is intraventricular haemorrhage with secondary subarachnoid haemorrhage" p.22.6 Exhibit W1.

62. It may be thought in the light of *Kennedy Cleaning* (above) that Professor Burns' opinions in his report of 6 March 2008 resolved the question, and that the Employer should then have accepted Mr Rothwell's claim. However the Employer was not yet satisfied that this injury identified by Professor Burns was causative of Mr Rothwell's ultimate severe impairment and/or incapacity after 28 May 2007.

63. By letter dated 30 June 2008, nearly 4 months after Processor Burns' first report, Hunt & Hunt again wrote to Professor Burns seeking his further report. That was provided, dated 15 July 2008 – also part of Exhibit W1. In that second report,

Professor Burns stated "… his illness began suddenly" p.37.7 Exhibit W1, thus further establishing the occurrence of a sudden physiological change in the Worker on 28 May 2007. Professor Burns said the subsequent CT head scan at Alice Springs Hospital on the same date "showed subarachnoid bleed and blood in the third and fourth ventricles." Professor Burns said at p.38.1 in Exhibit W1 " **I assume** (my emphasis) that his deterioration while in Alice Springs Hospital was due to continued bleeding with blood in the ventricular system, which can impair consciousness and result in hydrocephalus". He concluded at p.38.2 "**It seems highly probable then that his illness did begin at work** (my emphasis)".

64. This assumption by Professor Burns that the work injury continued to bleed and thus directly caused Mr Rothwell's subsequent severe impairment and incapacity, falls short of a positive opinion on the balance of probabilities that this is what in fact happened. The Employer's alternative hypothesis was thus put in doubt, but not definitely excluded. Professor Burns concluded his second report with a recommendation as follows:

> "I would strongly recommend that you seek the opinion of the neurosurgeon at the Royal Adelaide Hospital who cared for Mr Rothwell, or the opinion of Mr Brian Brophy, Head of Neurosurgery at the Royal Adelaide Hospital, who would be in a position to review his Royal Adelaide Hospital files including all the neuroradiology, possibly with the help of a neuroradiologist. There is, of course, no guarantee that even with this type of review one will be in a better position to provide a more definite diagnosis" p.39.3 Exhibit W1.

65. The Employer wrote to Mr Brophy as recommended by Professor Burns, promptly this time, by letter dated 13 August 2008. That letter relevantly suggested: "On the limited facts presently available it is difficult to determine precisely when the Worker's brain haemorrhage occurred. Given the worsening of his symptoms **in hospital** (my emphasis), it may be arguable that the haemorrhage occurred or progressed when he was no longer at work." P.41.6 Exhibit W1

66. This passage highlights the Employer's continuing denial of Mr Rothwell's claim. The Employer hoped to establish that he had in effect suffered 2 or more injuries, one at work on 28 May 2007 when he experienced bleeding into the brain causing nausea and fainting, and one or more separate injuries in the form of new bleeding into the brain when he was no longer at work and was an inpatient at Alice Springs Hospital and/or at Royal Adelaide Hospital. The medical evidence in the hospital notes (Exhibit W5) was that Mr Rothwell was alert and coherent upon admission to the Alice Springs Hospital. Much later it was reported he had a Glasgow Coma Scale score of 15 upon admission, the highest score indicating full alertness – report of Professor Brian Chambers 14 May 2011 – Exhibit W3. it is apparent that Mr Chambers learned of the Glasgow Coma Scale score from the Alice Springs Hospital notes (Exhibit W5) which he records were provided to him as part of his brief. However there is no evidence before me to show the Employer was aware of the Glasgow Coma Scale score, any earlier than its receipt of Mr Chambers' report dated 14 May 2011. Even so, the 2 reports of Professor Burns had not satisfied the Employer that its further injury hypothesis was not available.

67. Mr Brophy provided a report dated 25 August 2008. He diagnosed the injury as a rupture of a deep perforating vessel in the paraventricular region of the fourth ventricule of Mr Rothwell's brain, which occurred in the bathroom at the workplace on 28 May 2007 – p.43.7 Exhibit W1. However, he too was equivocal as to whether this rupture continued to bleed and thus caused the Worker's long term severe impairment and incapacity, on the balance of probabilities. He said at p.43.8 Exhibit W1:

> "His deterioration **may have been** (my emphasis) the result of a re-bleed as we know that a significant percentage of primary intracerebral haemorrhages extend in the course of the hours following the ictus."

This statement needed further clarification as to its probability if the Employer wanted to be able to rely on its alternative hypothesis. On the evidence before me, the Employer did not seek any such clarification or further medical opinion until Hunt & Hunt next wrote to Mr Brophy on 23 June 2010, nearly 2 years later. Mr Brophy replied in a report dated 28 June 2008, which did not address the

alternative hypothesis. There is no evidence before me that the Employer sought any further medical opinion, until 6 April 2011 when the Employer's solicitor telephoned Mr Brophy.

68. In that period, the Employer on 31 August 2009 filed its first Defence in the proceedings before the Work Health Court. In paragraph 3(a) of that Defence, the Employer positively denied that blood vessels in Mr Rothwell's brain ruptured at the time of his collapse at work. This is clearly contrary to the opinion expressed by Professor Burns in his report of 15 July 2008, and even more clearly contrary to the opinion of Mr Brophy in his report of 25 August 2008. There is no evidence before the Court that the Employer came into possession of any contrary medical opinion between 25 August 2008 and 31 August 2009, or at any time.

69. The question of the unreasonableness of the Employer's delay at any time in accepting Mr Rothwell's claim is to be determined on the balance of probabilities. The existence of a theoretically arguable case but without evidence capable of proving that case on the balance of probabilities would not alone be a reasonable basis for delaying accepting the claim.

70. The only evidence the Employer had in support of its alternative hypothesis was Mr Rothwell's high Glasgow Coma Scale score upon admission to the Alice Springs Hospital on 28 May 2007, followed by the deterioration in his condition over the next few hours. However, that was merely indicative rather than probative of the hypothesis. It was not in anyway inconsistent with continuing bleeding into Mr Rothwell's brain from the rupture at work, as appears from the opinions of Professor Burns and Mr Brophy quoted above.

71. I accept the Employer's submission that ss.53(1)(b) and (c) of the Act mean it is not enough for a Worker simply to have suffered an injury. He must also have suffered an impairment and/or incapacity caused by or materially contributed to by that injury.

72. Mr Rothwell suffered an injury at work on 28 May 2007 when there was a sudden bleeding into his brain, he collapsed, and was taken to hospital by ambulance and admitted as an inpatient. "Incapacity" is defined in s3 of the Act

to mean "an inability or limited ability to undertake paid work because of an injury". I find that Mr Rothwell did suffer an injury at work on 28 May 2007, namely sudden bleeding into his brain, and that his collapse and hospitalisation on 28 May 2007 did constitute an "incapacity" within the meaning of the Act, and that this incapacity was because of the injury.

73. "Impairment" is defined in s3 of the Act to mean "a temporary or permanent bodily or mental abnormality or loss caused by an injury". I find that Mr Rothwell's collapse at work on 28 May 2007 following a sudden bleeding into his brain and his consequent hospitalisation that day also constituted an "impairment" within the meaning of the Act and that this impairment was caused by the injury.

74. However, the extent and/or duration of both this incapacity and this impairment might have been quite limited, if the Employer's alternative hypothesis was correct that a new and separate bleeding into his brain occurred when Mr Rothwell was no longer at work. I find there was no sufficient evidence in support of the alternative hypothesis at any time. It would always have been open to the Employer to continue to investigate its alternative hypothesis after accepting the claim. If it was subsequently able to substantiate that hypothesis it would have been open to it to cease paying compensation in accordance with the Act.

75. I find that it was unreasonable for the Employer to delay accepting Mr Rothwell's claim after it received and considered reliable evidence that Mr Rothwell had most probably suffered a rupture of a blood vessel or vessels in his brain while at the workplace on 28 May 2007. I find that the Employer received that evidence in the form of Professor Burns' report dated 15 July 2008, in the passage I quoted above. The first report of Professor Burns was less definite on this issue and I am satisfied on the evidence I have identified that the Employer's efforts to investigate and clarify all the circumstances of Mr Rothwell's injury were reasonable and sufficiently timely up to receipt of Professor Burns' report dated 15 July 2008. I do not have evidence of the date the Employer received that report. I shall assume it was received within 7 days. I find that it was unreasonable for the Employer not to have considered that

report, taken advice and then accepted Mr Rothwell's claim within a further 28 days, that is by 19 August 2008.

76. It follows that pursuant to ss.109(1) I must order the Employer pay interest on all compensation due to Mr Rothwell over the period from 19 August 2008 to the date of my orders on 6 September 2011, including the amount for the past gratuitous attendant care services.

(iii) Section 109(3) Punitive Damages

77. Unlike ss.109(1) and (2), ss.109(3) does not contain the word "must". It contains instead the word "may'. Any award pursuant to this subsection is discretionary.

78. Subsection 109(3) provides for an amount to be awarded in addition to interest already awarded pursuant to subsections (1) or (2), apparently for the purpose of punishment - the additional amount is described in the subsection as "punitive damages". If awarded, it is to be calculated at up to but not exceeding the rate of interest awarded pursuant to subsections (1) and/or (2).

79. Punitive damages are also known as exemplary damages. They are awarded in tort quite distinctly from compensatory damages. In *Lamb v Cotogno* (1987) 74 ALR 188 at pages 191-192 the High Court said: "Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like. Exemplary damages, on the other hand, go beyond compensation and are awarded "as a punishment to the guilty, to deter from any such proceeding for the future and as to proof of the detestation of the jury to the action itself " ".

80. In *Gary Mark Lackersteen v Melvin Lawrence Jones ; Kenneth Graeme Smith and the NT of A* - No 596 of 1983 heard 26 August 1983 Asche CJ of the NT Supreme Court approved this distinction and warned that "…care should be taken to avoid "double dipping" where the circumstances permitting either category overlap" – page 31.3. He went on at page 32.3 to say "In awarding exemplary damages or what are sometimes called vindictive damages the court should not itself be vindictive. If the principle is "rather like imposing a fine…to hit the defendant hard if he has disregarded the rights of others"(per Devlin J. as

he then was – in *Loudon v Ryder* (1953)2 QB 202 at 209) or "to punish or deter"(per Lord Devlin in *Rookes v Barnard*) or " a penalty for a wrong committed in such circumstances or in such manner as to warrant the Court's signal disapproval of the Defendant's conduct" (per Taylor J. in *Uren v John Fairfax and Sons Pty Ltd* at page 131) then there should be limits to the penalty or fine."

81. The question before me in this case is therefore whether the Employer has at any time disregarded the rights of Mr Rothwell or behaved wrongly in any manner so as to warrant this Court's "signal disapproval", and to deserve punishment and deterrence?

82. I have found earlier in these Reasons that the Employer had unreasonably delayed its acceptance of Mr Rothwell's claim by 19 August 2008. That alone does not warrant an award of punitive damages against the Employer. However, there is more. The Employer took nearly 4 months to seek Professor Burns' second report. It did not seek to clarify any aspect of Mr Brophy's report of 25 August 2008 until it next wrote to him seeking a further report by letter dated 23 June 2010, 22 months after his first report. In the interim on 31 August 2009 it had filed its first Defence to Mr Rothwell's Statement of Claim, specifically denying that he had suffered a ruptured blood vessel in his brain at work on 28 May 2007. On the evidence before me, this denial was not based on any medical evidence or opinion known to the Employer. On the contrary, it was clearly inconsistent with the opinions in the 2 reports of Professor Burns and the report of Mr Brophy dated 25 August 2008.

83. The Employer by its Work Health insurer through its experience in receiving and managing Work Health claims and because of its financial resources, was at all times up to and subsequent to 15 July 2008 in a better position than Mr Rothwell to pursue specialist opinion as to the injury at work on 28 May 2007, the alternative hypothesis, and any medical imperatives as to Mr Rothwell's medical and care needs. It did not do so for nearly 2 years after 25 August 2008, inexplicably halting the investigations it had been pursuing from February 2008. Those investigations were plainly not complete following receipt of the report of

Mr Brophy dated 25 August 2008, unless the Employer had chosen to rely on that report and accept Mr Rothwell's claim. As we know, it did not do so.

84. Mr Rothwell at the hearing sought s.109 interest. This was actively pursued by Mr Rothwell's counsel in his written and live submissions at the hearing. The Employer in its written submissions and orally before me on 5 and 6 September 2011 did not seek to explain either its failure to seek any further opinion from Mr Brophy for some 22 months, or its pleaded denial, contrary to clear and unanimous expert medical opinion, of the rupture of a blood vessel in Mr Rothwell's brain at work on 28 May 2007.

85. In all these circumstances I am satisfied that the Employer through both action and inaction behaved reprehensibly in failing to pursue its investigations or to accept Mr Rothwell's claim, also by 19 August 2008. It also behaved reprehensibly in pleading its denial of the injury at work as set out above. I find that it is appropriate to award s.109(3) punitive damages against the Employer to punish it and, more importantly in the Work Health context, to deter it from such behaviour in the future.

<u>The Rate Of Interest – Ss109(1)</u>

86. Ss109(1) does not prescribe a rate of interest. The rate is within the Court's discretion – it can be anything from 1% to an unspecified upper limit, theoretically well in excess of 100%. Of course, the discretion must be exercised judicially.

87. This very wide discretion is in contrast with s89 which prescribes the interest rate determined by the regulations from time to time. That rate has been unchanged at 20% per annum since 1 January 1987, at all times to date in excess of commercial interest rates. At various times, such as now, that rate of 20% has been very much in excess of commercial rates.

88. I am aware of a view or at least a practice whereby the exercise of this Court's discretion in determining the rate of s109 interest is linked to commercial rates from time to time, either as a starting point or otherwise. This effectively rules out awards of interest much greater than commercial rates, and has imposed a *de*

facto upper limit of 20%. I can see no warrant in the language of the section or the purpose of the Act to import any such upper limit. I am aware of Decisions of Judicial Registrars of this Court to this effect and I respectfully disagree with the fetter on discretion apparent in that approach.

89. In relation to s.109(1) interest on past weekly benefits in this case, there is an analogy with s.89 interest. Mr Rothwell has been unreasonably kept out of his weekly benefits since 19 August 2008. In *Wormald International (Aust) Pty Ltd v Barry Leslie Aherne* (unreported) delivered 23 June 1995, Mildren J considered the rate of interest to be allowed pursuant to ss.109(2). He stated at page 3.8 "As to the rate, I consider having regard to s.89 of the Act, that the appropriate rate was 20 per centum per annum". I shall allow interest at 20% per annum.

90. In relation to past gratuitous attendant care services the analogy is not so clear. Mr Rothwell never actually expended the agreed sum of $274,680. Should s.109 interest not be awarded at all? If it is awarded, should it be at a lower rate, in recognition of this history? Of course, his family members most certainly did provide the services in question.

91. The High Court of Australia considered this question in the context of different but not broader legislation, in the matter of *Grincelis v House* [2000] 201 CLR 321. There the severely injured plaintiff Mr Andrew Grincelis was awarded an amount for past gratuitous personal services provided by his parents. The majority of the High court was satisfied that interest should be awarded on that sum, even though it had never in fact been expended and would never have to be. It allowed a commercial rate of interest on the amount, just as it had for past actual expenditures – paragraph 14.

92. On the basis of this approach, I am satisfied that the appropriate s109(1) rate I should allow on past gratuitous attendant care services in this case should be no different from the s109(1) rate allowed on the past weekly benefits from 19 August 2008 – that is 20% per annum.

The Rate of Interest – Section 109(3)

93. The uncontested evidence was that Mrs Rothwell had been about to return to full time work at about the time Mr Rothwell suffered his injury. She was not able to do so and she has never done so since. She has devoted herself to her husband's care. She spent a great deal of time attending on him when he was in hospital and in rehabilitation, and even more time each day after he was discharged home on 29 September 2008. She has lost potential earnings over this period.

94. Her evidence was that she and her large family suffered financially as a result of Mr Rothwell's ceasing to work and his not receiving weekly benefits and medical and attendant care services under the Act. At different times the family received his accumulated leave and sick pay. They received payments under Mr Rothwell's superannuation and the insurance policy attached to it. However, all too soon all such sources of financial assistance were exhausted and the family was reduced to caring for Mr Rothwell at home supported solely by Social Security payments plus assistance from those children old enough to work and assist the family. The evidence was that this was insufficient properly to meet all Mr Rothwell's care needs, or to meet the family's needs.

95. The evidence of Mrs Barbara Rothwell was that because the claim was disputed and because she and their 11 children could not afford to pay for attendant care services for Mr Rothwell, his physical condition deteriorated from the time he was discharged from the Hampstead Rehabilitation Centre to the Alice Springs Hospital on 22 May 2008, where he remained until 29 September 2008. He was not during that time receiving the number of hours of physiotherapy necessitated by his physical disabilities. As a result he developed contractures in his limbs from which he has not and will never fully recover. He has a permanently reduced capacity to stand and to remain standing, and to transfer himself from his bed to his wheelchair or to a chair at the table, or to assist in toileting and showering himself. This reduced capacity is greater than it would have been if he had received ongoing physiotherapy services as required.

96. I note that there were only 3 months between Mr Rothwell's discharge from the Hampstead Rehabilitation Centre on 22 May 2008 and 19 August 2008, the date

from when I have found s.109(3) interest should apply. About one third of the financial damage to Mr Rothwell and his family had been incurred by then – May 2007 to August 2008 is less than half of the period September 2008 to September 2011. However only a small part of his contracture problems are likely to have become established over those 3 months.

97. I am satisfied that in these circumstances to achieve not only the punitive purpose but more importantly the deterrent purpose of punitive damages I should award s.109(3) damages at 100% of the amount allowed for s109(1) damages on both the past weekly benefits and the past gratuitous attendant care services.

C. SOLICITOR AND CLIENT COSTS

98. Mr Rothwell seeks his legal costs on the solicitor and client basis to provide him with a true indemnity for those costs. He contends he and his family should not be penalised by having to pay any part of his legal costs, in the light of the Employer's behaviour. The Employer concedes that Mr Rothwell is entitled to his costs of the proceedings but only on the "standard basis" as defined in Order 63 of the Supreme Court Rules.

99. Rule 23.02 of the Work Health Court Rules imports Order 63 of the Supreme Court Rules into the Work Health jurisdiction, subject to the Act, the Rules and any Practice Directions. Order 63 of the Supreme Court Rules deals with costs.

100. Rule 23.03 of the Work Health Court Rules provides as follows:

> **"23.03 Power and discretion of Court**
>
> (1) Subject to the Act, these Rules and any other law in force in the Territory, the costs of and incidental to a proceeding are in the Court's discretion and the Court has the power to determine by whom, to whom, to what extent and on what basis the costs are to be paid.
>
> (2) The Court may exercise its power and discretion in relation to costs at any stage of a proceeding or after the conclusion of a proceeding.

(3) In exercising its discretion under this rule in relation to a proceeding commenced under section 104 of the Act, the Court must have regard to the matters referred to in section 110 of the Act."

101. I am satisfied that by Rules 23.02 and 23.03(1), the Work Health Court has the power both pursuant to and independently of Order 63 of the Supreme Court Rules to determine the basis on which costs are to be paid.

102. Payment of costs on the solicitor and client basis has its roots in the common law. It is not referred to in Order 63 of the Supreme Court Rules. I note it is specifically referred to in Rule 26.11(3) of the Supreme Court Rules as a basis on which costs might be ordered in some circumstances of a written settlement offer by a plaintiff. From this I conclude that nothing in Order 63 is intended to exclude a costs order on the solicitor and client basis.

103. The law establishes that costs will normally be allowed only on the standard basis, unless there is something warranting a departure from this basis. Examples of this include "a wilful disregard of the facts or clearly established law"- see *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd* ([1986] 81 ALR 397 at 400-401. In *Botany Municipal Council v Secretary Department of Arts, Sport, Environment, Tourism And Territories* (1992) 34 FCR 412 at 415 Gummow J said that a costs order of this sort was not limited by the relevant Federal Court legislation to the case of "an ethically or morally delinquent party".

104. In *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No 2)* (1993) 46 IR 301 at 303 French J (as he then was) said it was not necessary to find "… a collateral purpose or some species of fraud be established. It is sufficient, in my opinion, to enliven the discretion to award such costs that, for whatever reason, a party persists in what should on proper consideration be seen as a hopeless case".

105. In the Northern Territory these cases and this issue were considered by the Supreme Court in *Cathy Yuk Chu Lin v Katamon Pty Ltd and Frank Hung Chi Lam* Nos 29 and 30 of 1995 delivered 31 May 1995, Kearney J said at paragraph

9 that "Subject to the express wording in r63.27 this latter basis (the indemnity basis) is akin to what was formerly called costs on a "solicitor and own client" basis". He went on to say in para 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".

106. For the reasons I have earlier identified for awarding interest on compensation pursuant to both ss109(1) and (3) of the Act, I am satisfied that the Employer at different times (i) displayed a wilful disregard of the facts by continuing for an excessively long period not to accept the claim through reliance on an alternative hypothesis which lacked any adequate evidence to support it; and in denying in its Defence that Mr Rothwell had suffered a rupture of a blood vessel in his brain on 28 May 2007; (ii) a wilful disregard of the law in maintaining its defence based on the concept of "disease"; (iii) unmeritorious/ high-handed conduct in failing to pursue any further opinion from Mr Brophy or other medical specialist for 22 months while still denying Mr Rothwell's claim, in all the circumstances.

107. Mr Rothwell will have his costs on the solicitor client basis over the period on and from 19 August 2008.

ORDERS

1. Subject to statutory clearances and deductions, the Employer within 21 days shall pay:

   (a) the agreed sum of $274,680.00 being the Worker's entitlement to past attendant care services pursuant to s.78 of the Act calculated over the period 22 May 2008 to 6 September 2011;

(b) interest pursuant to ss.109(1) of the Act on that sum of $274,680.00 calculated over the period 19 August 2008 inclusive to 6 September 2011 inclusive, at the rate of 20 per centum per annum;

(c) interest pursuant to s.89 of the Act on the Worker's entitlements pursuant to s.87 of the Act which accrued from 24 January 2008 inclusive to 12 February 2008 inclusive calculated at the rate of 20 per centum per annum;

(d) interest pursuant to ss.109(1) of the Act on the Worker's entitlement to past weekly benefits pursuant to s.65 of the Act which accrued over the period 19 August 2008 inclusive to 9 September 208 inclusive, calculated at the rate of 20 per centum per annum;

(e) punitive damages pursuant to ss.109(3) of the Act in respect of the past attendant care services agreed in the sum of $274,680.00, fixed at 100% of the amount of interest calculated in accordance with Order 1 (b) of these Orders;

(f) punitive damages pursuant to ss.109(3) of the Act in respect of the Worker's past weekly benefits which accrued over the period 19 August 2008 to 9 September 2001, fixed at 100% of the amount calculated in accordance with Order 1 (d) of these Orders.

2. The issue of whether to pay the amounts calculated in accordance with Orders 1 (a) to (f) of these Orders to the Public Trustee or otherwise is adjourned before Neill SM on 14 October 2011 at 9am or on such earlier time and date as the parties might arrange with the Registrar and the parties have liberty to appear by video conferencing or by telephone on that occasion.

3. The Employer shall pay the Worker's costs of and incidental to the proceedings and to the claim and mediation process prior to commencing the proceedings up to and including 18 August 2008, to be taxed in default of agreement on the standard basis at 100% of the Supreme Court Scale.

4. The Employer shall pay the Worker's costs of and incidental to the proceedings on and after 19 July 2008, to be taxed in default of agreement on the solicitor and client basis.

Dated this 27th day of September 2011.

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John Neill

STIPENDIARY MAGISTRATE