

RELEASED

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Workers' Compensation and Rehabilitation Act 2003 - s. 550 - Appeal to commission

Kylie Michelle Reed AND Q-COMP and Coles Group Limited (WC/2008/43)

COMMISSIONER THOMPSON

21 September 2009

Appeal under s. 550 *Workers' Compensation and Rehabilitation Act 2003* - Further Directions Order - New medical evidence - Witness list - Vacating of hearing dates - Settlement (excluding Q-COMP) - Application for costs - Witness evidence - Submissions - Costs awarded (lesser amount).

DECISION

Background

An Appeal pursuant to s. 550 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act) was filed with the Industrial Registrar on 27 May 2008 by Kylie Michelle Reed against a decision of the Review Unit, Q-COMP dated 30 April 2008.

On 27 June 2008 in matter WC/2008/46, Deputy President Swan granted an application from Coles Group Limited, the employer of Kylie Reed and a self-insurer in accordance with the Act, leave to appear and be heard in WC/2008/43.

A Further Directions Order was issued on 5 December 2008 requiring compliance by the parties in the following areas:

1. That the Appellant supply to the Respondents by 4.00 pm on Thursday 11 December 2008, a list of documents in their possession or under their control relevant to a matter in issue in the proceedings.
2. That the Respondents supply to the Applicant, by 4.00 pm on Thursday 11 December 2008, a list of documents in their possession or under their control relevant to a matter in issue in the proceedings.
3. That the Appellant supply to the Respondents, by 4.00 pm on Thursday 18 December 2008, copies of those documents contained in the list disclosed which the Respondents request and for which the Appellant has no legal claim to privilege. Copies of documents already provided to the Respondents in the Review or Appeal process need not be further copied and provided to the Respondents pursuant to this Direction.
4. That the Respondents supply to the Appellant, by 4.00 pm on Thursday 18 December 2008, copies of those documents contained in the list disclosed which the Appellant requests and for which the Respondents have no legal claim to privilege. Copies of documents already provided to the Respondents in the Review or Appeal process need not be further copied and provided to the Respondents pursuant to this Direction.
5. That the Appellant and the Respondents file in the Industrial Registry and serve on the other party a list of the names of all witnesses to be called by them in the hearing, by 4.00 pm on Monday 19 January 2009.
6. That each party list all relevant documents that the party wants to adduce as evidence in the hearing and, if such documents have not already been provided to the other party during the discovery process, supply them to the other party, by 4.00 pm on Monday 19 January 2009.

The Further Directions Order further provided for a mention of the matter to be held on 5 February 2009 followed by the hearing of the Appeal on 19 and 20 February 2009.

Prior to the issuing of the Further Directions Order on 5 December 2008, conferences under s. 552A of the Act were held before Commissioner Asbury on 7 August and 5 November 2008 for the purpose of assisting the hearing process.

On 5 February 2009, the matter came on for mention before the Commission as constituted where matters were considered in respect of the conduct of the hearing as it related to the Coles Group Limited.

Further, in the course of the hearing, at page 1-5, line 17 of transcript, Mr P.D. O'Neill of Counsel, appearing for Q-COMP, made the following comment:

"There have been some further developments, though, Commissioner, recently this week which, unfortunately, it looks as though are going to result in the matter having to be adjourned.

Those matters are that we have received from the appellant this week two further medical reports, one of those being from a psychiatrist. There hasn't been, to date, any psychiatric evidence in the claim and today - that was forwarded on the 3rd of February and today we received a file note of an attendance upon a Dr Peter Landsberg, a rheumatologist, once again, no previous notice from the appellant of there being an intention of calling this particular expert and we're advised that there was an intention of calling this doctor to give some evidence.

This evidence is particularly important in relation to whether there's some sort of underlying condition or not. Dr Landsberg says that that's not the case and so Q-Comp, and I believe my learned friend's client, will be seeking to have the appellant independently examined by a psychiatrist and also a further updated report obtained from a Dr Alex Klestov, a rheumatologist who has seen the appellant in the past.

That being so, it looks as though the matter will have to be adjourned off to allow that to occur."

Mr M.E. Holmes, a solicitor representing Kylie Reed, at page 1-6, line 20 of transcript, made submissions in respect of the additional witness:

"Yes, the only new additional witness is Dr Landsberg who's only recently first seen our client for treatment purposes only, late in December and also in January and so, given the issues raised by some of the other orthopaedic surgeons who have expressed opinions in this case, we thought it prudent to obtain his opinion to see whether he'd be of any assistance in resolving the issues in this Appeal and we were only able to speak to Dr Landsberg yesterday for the first time and immediately I gave notice of that to the respondents.

We don't oppose an adjournment of the claim. They're entitled to meet the evidence that we're putting up before it - sorry, before the respondents and the Commissioner."

Correspondence was forwarded to the Industrial Registrar by Q-COMP on 10 August 2009 advising that Murphy Schmidt Solicitors, acting for Kylie Reed, and HWL Ebsworth Lawyers, acting for Coles Group Limited, had advised Q-COMP that a settlement had been negotiated on the basis that the Appeal be discontinued with each party bearing their own costs.

The correspondence went on to indicate that Q-COMP would be seeking a portion of their costs thrown away due to the adjournment of the hearing on 19 and 20 February 2009 and requested that the matter be listed for a cost argument.

The matter was listed in Brisbane on 28 August 2009.

Applicant (Q-COMP)

An affidavit was filed in the proceeding from Tanya Louise Sayer, an Appeals Officer with Q-COMP, who had been authorised to provide evidence on the carriage and conduct of the Appeal subject to the substantive matter before the Commission.

The evidence went, in the first instance, to circumstances from the lodgement of the Notice of Appeal on 27 May 2008 until 20 January 2009 when Q-COMP received the First Respondent's (Kylie Reed) list of witnesses dated 19 January 2009. On that list, there was no mention of Dr Landsberg, Rheumatologist.

Arrangements were made for witness conferences to occur in preparation for the hearing and on 5 February 2009, Q-COMP was advised for the first time of the intention to call and rely upon Dr Landsberg as a witness.

On the same day (5 February 2009) the matter came on for mention before the Commission where the hearing dates for 19-20 February 2009 were vacated.

Q-COMP, as a consequence of the short time frame between the date of mention (5 February 2009) and the vacated hearing dates were obliged to pay Counsel a fee in respect of the vacated dates.

In the period following 5 February 2009, Q-COMP, together with Coles Group Limited, arranged for additional medical reports to be obtained from a Rheumatologist and Psychiatrist.

At that time the actual costs incurred were said to be in the region of \$8,000.00.

Whilst some further witness conferences were conducted by Counsel on behalf of Q-COMP, the next exchange between the parties occurred on or about 17 July 2009 when the solicitors for Kylie Reed informed Q-COMP that a resolution of the matter had been negotiated on the basis that the Appeal be discontinued with no order of costs.

On 22 July 2009, Tanya Sayer forwarded correspondence to the Solicitor representing Kylie Reed in which verbal advice of 20 July 2009 that Q-COMP would be seeking to recover a portion of the costs thrown away as a result of the vacated dates of 19 and 20 February 2009 was confirmed.

Reasons relied upon by Q-COMP in the recovery of costs were set out in the correspondence along with an offer to consent to the discontinuance of the matter on the basis that some \$3,000.00 of costs were recovered.

On 30 July 2009, Q-COMP received correspondence from Claire Boyle of Murphy Schmidt (on behalf of Kylie Reed) setting out reasons as to why no offer of costs would be forthcoming.

Submissions on behalf of the applicant suggested that the Commission had a wide power with respect to costs under the provisions of s. 558(3) of the Act.

In addition, the *Workers' Compensation and Rehabilitation Regulations 2003* (WCRR) at r. 113 governs the awarding of such costs within the jurisdiction of the Commission.

In providing background to the application, Q-COMP went to the advice received that a negotiated outcome had been reached between the other parties in a process that had excluded Q-COMP.

In respect of actual costs incurred to date in the preparation of the substantive matter, it was said that whilst in excess of \$8,000 had been expended, the amount sought through this application was that of a \$3,000.00 contribution towards the costs.

The costs available under Scale "E" of the Magistrates Court Scale were said to be in the region of \$5,600.00.

In support of the application, the Commission was taken to the statutory role of Q-COMP and the obligation to defend Appeals of the nature currently before the Commission.

That obligation necessitated incurring costs from the public purse with reliance being placed upon a comment from Deputy President Bloomfield in *Cuttler v Q-COMP* (WC/2008/14) 190 QGIG 9 where he stated:

"However, the Commission also has a duty to act in the public interest and to take into account not only the interests of an appellant such as Mr Cuttler but also someone like Q-Comp which, in a sense, is guardian of the public purse. Money it expends in defending matters like this, in coming down to the Commission time and time again, is wasted money from the taxpayers' point of view."

Whilst the observations of the Deputy President were made in the context of an application to dismiss an Appeal pursuant to s. 331 of the *Industrial Relations Act 1999* it was said that they should apply with equal force to the present case.

The usual approach in this jurisdiction for Workers' Compensation matters is for costs to follow the event and in this matter the conduct of Q-COMP has been such that it would not disentitle it from receiving an award of costs to at least partially offset the substantial costs that had been incurred in performing their statutory role.

The costs sought went to the preparation for the original trial.

The assertion by the solicitor of Kylie Reed that s. 335 of the *Industrial Relations Act 1999* had relevance to the application for costs was erroneous.

The Commission was requested to make an award of an amount of costs deemed to be appropriate in the circumstances.

Authorities relied upon included:

- *Hill v Q-COMP* (WC/2008/17) - Vice President Linnane - 190 QGIG 7
- *Johnstone v WorkCover Queensland* (C/2000/55) - President Hall - 165 QGIG 789
- *Dalrymple Bay Coal Terminal Pty Ltd v WorkCover Queensland* (C/2000/1) - President Hall - 163 QGIG 82
- *Alzheimer's Association of Queensland Inc v Q-COMP* (MAG 150693/05(5))

Kylie Reed

An affidavit tendered in proceedings from Claire Ann Boyle, a solicitor with Murphy Schmidt Solicitors, who had conduct of Kylie Reed's Appeal, provided evidence of medical examinations undertaken of Kylie Reed by a number of medical practitioners.

Attached to the affidavit were the following reports:

- Dr Ken Cutbush - 19 June 2007
- Dr Ken Cutbush - 18 July 2007
- Dr Mark Robinson - 10 August 2007
- Dr Mark Robinson - 21 August 2007
- Dr Michael Leong - 22 January 2009
- Dr Peter Landsberg - 4 February 2009.

Ms Boyle's evidence confirmed that a settlement was secured with Coles Group Limited in respect of the appellant's injuries, including the injuries which were the subject of the Appeal.

Submissions on behalf of Kylie Reed indicated that she was a worker aggrieved by a decision of Q-COMP not to accept that she sustained "bilateral epicondylitis and chronic pain syndrome". Various medical specialists had confirmed she was suffering such a condition therefore resulting in the Appeal against the Q-COMP decision.

Subsequently she secured a settlement on favourable terms with the self-insurer, Coles Group Limited, therefore discontinuing her Appeal against the decision of Q-COMP.

The settlement, which followed a number of conferences and mentions, was in respect of all Ms Reed's injuries, including injuries subject of the Appeal.

It was not contested that the Commission has a discretion to award costs in a proceeding.

Prior to the lodgement of the Appeal, there was medical evidence to support the physical injuries aspect of the claim.

At a time after the lodgement of the Appeal, a report was obtained from Dr Michael Leong, Psychiatrist, which was said to state that Kylie Reed suffered a condition "as a result of the alleged injuries sustained whilst working at Coles".

On consideration of the supporting medical evidence, it was clear that Kylie Reed had reasonable prospects of succeeding in her Appeal.

As to whether the Commission should issue an adverse costs order, it was submitted that given the favourable medical evidence in Kylie Reed's possession her Appeal was, at the very least, "reasonably arguable" with no "abnormal unfair aspect" surfacing at any stage during the course of the Appeal.

A general principle in relation to the discontinuance of an application is that provided no injustice will be caused to a respondent, an applicant should, in ordinary circumstances, be allowed to discontinue an application.

The Commission was taken to authorities said to support the position being argued on behalf of Kylie Reed.

In *Goldman v Data General Australia Pty Ltd* (1993) 144 QGIG 379 it was stated:

"No one with a reasonably arguable case need to be deterred from proceeding by fear of the consequences of the costs unless some abnormal unfair aspect enters into the conduct of the proceedings."

In *Headline Distribution Pty Ltd v Quinn* (2006) 181 QGIG 213, Deputy President Bloomfield stated:

"No impediment should be placed in the path of any applicant who wishes to discontinue an application if they reach the conclusion that the ultimate benefit to be achieved by pursuing the matter to trial does not justify that course of action."

In conclusion, it was stated that the discontinuance of the Appeal following the securing of a favourable settlement of her common law claim had saved further costs being incurred by the parties including Q-COMP.

Other authorities relied upon included:

- *Albert Smith & Son Pty Ltd v Fellows* (2005) 180 QGIG 115
- *AEG Interstate Transport (Nominees) Pty Ltd v Q-COMP* (2006) 183 QGIG 790.

Conclusion

The conduct of the Appeal from its lodgement on 27 May 2008 up until the issuing of a Further Directions Order on 5 December 2008 was, in the main, unspectacular.

In the case of Q-COMP, it was business as usual as they prepared to defend against the Appeal. The evidence of Tanya Sayer went to Q-COMP's arrangements relating to witness conferences and of receiving a list of witnesses on 19 January 2009 who were to give evidence in support of the Appeal.

There was no reference on the 19 January 2009 witness list of Dr Landsberg or the intention to adduce evidence from him in the proceedings.

The Further Directions Order of 5 December 2008 provided for a Mention on 5 February 2009. The purpose of such a Mention is generally for the reason of ensuring that the parties have complied with Directions and there are not issues that are likely to impede on the hearing of a matter.

At the Mention on 5 February 2009, Counsel for Q-COMP placed on record information received at the last minute from the Appellant of an intention to call further expert medical evidence from a witness whose name was not amongst those on the 19 January 2009 witness list.

Despite Q-COMP being ready to go to hearing on the allocated days of 19 and 20 February 2009, they were left with little option other than to vacate the days due to the actions of the Appellant.

In essence, it is the costs thrown away on the vacated days that is the catalyst of the claim.

Argument was advanced on behalf of Kylie Reed that Q-COMP could have in the period between 5 February 2009 and 19 February 2009 arranged their own medical response to the evidence likely to be offered by the Rheumatologist on behalf of Kylie Reed.

The Commission is doubtful, to say the least, that Q-COMP could have adequately arranged for medical evidence in such a short window of time.

On the issue of the settlement of the matter negotiated between Kylie Reed and Coles Group Limited, the Commission accepts that such an outcome had benefits for all the parties in respect of costs not being incurred in the matter advancing to hearing.

The fact that Q-COMP had been excluded from the settlement negotiations meant that there was not an opportunity for the issue of their costs to be dealt with as would have been the case had they been a party to those negotiations.

The lateness of the decision to seek to introduce medical evidence from Dr Landsberg is a matter that solely falls at the feet of Kylie Reed.

It is the opinion of the Commission that the application by Q-COMP for costs up to and including 19 and 20 February 2009 is a claim that, in principal, should succeed.

In respect of the quantum sought, the Commission has been exposed to three levels of costs associated with the Appeal firstly from the evidence of Tanya Sayer which went to actual costs expended and an assessment in accordance with the Uniform Civil Procedures Rules, Schedule 3, Scale E.

Secondly, in the proceedings it was put that Q-COMP had sought to recover an amount of \$3,000.00 towards the costs of preparation.

Whilst it was argued on behalf of Kylie Reed that the discretion of the Commission as it related to the awarding of costs should not be enlivened, there was also a position advanced that if their argument was not accepted then the amount claimed was excessive in the circumstances.

There was no argument advanced in respect of the capacity, or otherwise, to pay.

The Commission, having found that a case for costs had been made, must now put its mind to the issue of quantum.

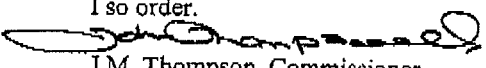
As a consequence of the settlement arrangement between the parties (excluding Q-COMP), all parties undoubtedly had their potential exposure to further costs removed due to the discontinuance of the Appeal.

The parties (excluding Q-COMP), in settling the matter, also appeared to have reached an understanding on costs.

In all of the circumstances, I am not convinced that an award should be made to reflect the amount of \$3,000.00 sought by Q-COMP, however I do believe that the events on or around 5 February 2009, as they related to the involvement of Dr Landsberg, did have the effect of negatively impacting on Q-COMP.

To that extent, Kylie Reed is ordered to pay the amount of \$980.00 to Q-COMP as a contribution towards the costs incurred in their preparation to defend the finding of the Q-COMP Review Unit.

I so order.


J.M. Thompson, Commissioner.

Hearing Details:

2009 5 February (Mention)
28 August (Costs Hearing)

Appearances:

Mr M. Forbes, of Murphy Schmidt Solicitors, for Ms K.M. Reed.
Mr P.B. O'Neill, of Counsel, instructed by Q-COMP.
Ms R. Pohio, of HWL Ebsworth, for Coles Group Limited.

Released: 21 SEP 2009