

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

[2023] NZACC 41

ACR 203/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	JOSEPH WERNHAM Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	NEW ZEALAND POLICE Second Respondent

Hearing: On the papers

Submissions: H Armstrong for the Appellant
J Maltby for the Second Respondent

Judgment: 21 March 2023

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for costs, Part 14 District Court Rules 2014]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 13 August 2021. The Reviewer quashed the decision of the New Zealand Police (“the Police”), dated 11 March 2021, declining Mr Wernham’s claim for cover for a work-related gradual process injury (“WRGPI”). This decision was on the basis that further investigation was necessary. The Reviewer directed the Police to reinvestigate the claim and issue a new decision. On 11 August 2022, the Court directed, by consent, that:

- (1) the Reviewer's decision be varied so that it did not quash the Police's original decline decision and direct Police to issue a new decision at the conclusion of its investigation, and that the Police's original decline decision stands; and
- (2) the issue of whether Mr Wernham has cover for a WRGPI be resolved in the current appeal.

[2] On 9 February 2022, Judge Spiller allowed the appeal, and the review decision dated 13 August 2021 (as varied by consent) was set aside. The Court stated that Mr Wernham was entitled to costs. If these could not be agreed within one month, Judge Spiller would determine the issue following the filing of memoranda. In the event, costs were not agreed between the parties.

[3] Mr Wernham seeks scale 3C costs of \$40,467 plus expert witness disbursements of \$12,074.99 (comprising \$7,474.00 for Dr Walls and \$4,600 for Professor 't Mannetje). The Police submits that Mr Wernham is entitled to scale 2B costs of \$13,370 and disbursements not exceeding \$5,000.

Relevant law

[4] Rule 14.1(1) of the District Court Rules 2014 provides that the award of costs is at the discretion of the Court if they relate to costs of a proceeding, or incidental to a proceeding, or a step in a proceeding.

[5] Rule 14.3 provides for the categorisation of proceedings in relation to costs:

Category 1 proceedings Proceedings of a straightforward nature able to be conducted by counsel considered junior.

Category 2 proceedings Proceedings of average complexity requiring counsel of skill and experience considered average.

Category 3 proceedings Proceedings that because of their complexity or significance require counsel to have special skill and experience.

[6] Schedule 14.5(2) of the Rules provides for sub-categories A, B and C of the above categories, according to estimated time allocations. Rule 14.5(2) provides that

a determination of what is a reasonable time for a step in a proceeding must be made by reference to:

- (a) to band A, if a comparatively small amount of time for the particular step is considered reasonable;
- (b) to band B, if a normal amount of time for the particular step is considered reasonable; or
- (c) to band C, if a comparatively large amount of time is considered reasonable.

[7] Rule 14.12 provides for disbursements, including expert witness costs. A disbursement may only be included in a costs award to the extent that:

- (1) the disbursement was approved by the Court for the purposes of the proceeding, or specific to and necessary for the conduct of the proceeding; and
- (2) reasonable in amount.

[8] In *Dickson-Johansen*,¹ Judge Powell stated:

[15] ... It is clearly not appropriate for this Court to sanction the reimbursement of costs simply because they have been rendered to a claimant. In addition the Court is not only ill suited to determining what might be reasonable costs in a particular instance having regard to the economics of private legal practice, but any such attempt would impose a significant burden on judicial resources should every decision on costs require the careful consideration of this Court.

[9] In *McPhail*,² Judge Henare stated:

[56] Rating this case according to its complexity within categories 1 to 3, I conclude this is not an appeal of significant complexity. Of course, that does not prevent a party selecting as its counsel a lawyer of above average skill. But a party which chooses to have counsel of superior skill cannot expect the other party to pay for the additional costs which such higher skill quite reasonably commands.

[10] In *Coogan*,³ McGuire DCJ stated:

[9] This jurisdiction involves many cases where the present limits of medical knowledge leave the question of whether an injury has occurred by accident or

¹ *Dickson-Johansen v Accident Compensation Corporation* [2018] NZACC 36.

² *McPhail v Accident Compensation Corporation* [2022] NZACC 59.

³ *Coogan v Accident Compensation Corporation* [2021] NZACC 168.

misadventure in the realms of the unknown. As medical advances continue, more light is being shone on these cases where formerly the causation issue would have remained a mystery.

[10] In my view the fact that an appellant or the Corporation is able to find new empirical medical evidence, representing an advance over what was known before, does not automatically mean that complexity for the purposes of establishing a costs category is established.

...

[19] Although in this case it is accepted that reasonably extensive discussions were had with Dr Jefferis because her research had advanced medical knowledge, I do not discern any particular complexity about those discussions. Accordingly, I find that this is a category 2 case.

...

[38] I conclude that because this case broke new ground with the evidence of Dr Jefferis, rather more was needed of her in preparing and providing evidence for this case than is routinely required of medical experts who may render accounts in the region of \$3,000 to \$5,000. I conclude that in all of the circumstances a reasonable claim for disbursements in her case would be of the amount of A\$18,612 as per her invoice of February 2021. That amount was plainly going to be acceptable to her. The revised invoice of A\$27,637.90, in my view, does not meet the criteria of Rule 14.12(2) in that in the context of that rule the increased amount was not reasonable.

[39] I note that such a view accords with the reasoning in *Progressive Enterprises Ltd v North Shore City Council* [[2005] NZHC 475], where Baragwanath J adopted Mr Beck's submission:

[27] ... If full reimbursement of expert witness fees is a correct approach to the matter, then there is a perverse incentive for parties to try and have as much as possible of the work involved in litigation carried out by experts other than lawyers.

Discussion

Costs

[11] Ms Armstrong submits that category 3 (\$2820) and band C are appropriate, and Ms Maltby submits that category 2 (\$1910) and band B appropriate.

[12] As noted above, category 3 proceedings are those that, because of their complexity or significance, require counsel to have special skill and experience; and category 2 proceedings are those of average complexity requiring counsel of skill and experience considered average.

[13] This Court notes that Mr Wernham's appeal was essentially a District Court appeal of a work-related gradual process injury, involving established legal tests and consideration of factual and expert evidence. Neither party instructed senior counsel, and the appeal related to an individual claim and was not of broad public significance. The Court therefore finds that the proceedings are appropriately assigned to category 2.

[14] Also as noted above, band C applies if a comparatively large amount of time is considered reasonable, and band B applies if a normal amount of time for the particular step is considered reasonable. This Court finds that aspects of Mr Wernham's appeal reasonably required a comparatively large amount of time and therefore should be assigned to band C. The issues in the appeal involved the preparation and presentation of a large quantity of conflicting expert evidence on whether Mr Wernham was sufficiently exposed to chemicals capable of causing bladder cancer, in the course of his work investigating clandestine drug laboratories. The hearing involved the oral presentation of three expert witnesses. However, the Court accepts that some steps in the proceedings were of a routine nature, and so should be assigned to band B.

[15] This Court is prepared to accept the specific claims made by Mr Wernham, with three exceptions.

[16] First, the Court notes that, whereas two days were claimed for the appearance of principal counsel at the hearing, the hearing in fact ran for 1.75 days.

[17] Second, the Court does not accept that the hearing justified certification for second counsel, particularly as Mr Wernham was represented by experienced lead counsel (Ms Armstrong), written evidence and a common bundle were filed in advance of the hearing, and counsel agreed that witnesses would not be led through their evidence.

[18] Third, the Court finds that only a limited time should be assigned to the preparation of the briefs for the witnesses at the hearing, in view of the overlap with the evidence previously provided by these witnesses.

[19] In light of the above considerations, the Court allows the following schedule of costs on category 2 (\$1910):

Commencement of Appeal (2.0, band C):	\$3820.00;
Preparation on Appeal (1.0, band C):	\$1,910.00;
Submissions (1.0, band C):	\$5,730.00;
Appearance (1.75):	\$3,342.50;
Preparation of 2 briefs (0.5, band B)	\$955.00;
Preparation of Bundle (0.4, band B)	\$764.00;
Memoranda to Court (.25 x 10, band B)	\$4775.00;
Case conference (0.3 x 2, band B)	\$1,146.00;
Total costs:	<u>\$22,442.50</u>

Disbursements

[20] This Court acknowledges that Mr Wernham has provided receipts from the expert witnesses Dr Walls (\$7,474.99) and Professor 't Mannetje (\$4,600). This Court is prepared to allow these disbursements, subject to the deduction of \$379.60 for rebuttal of Dr Monigatti's file review comments pre-dating the review hearing. The Court therefore allows disbursements of \$7,095.39 for Dr Walls and \$4,600 for Professor 't Mannetje, totalling \$11,695.39.

Conclusion

[21] This Court directs that the Police pay Mr Wernham costs of \$22,442.50 and disbursements of \$11,695.39.



P R Spiller
District Court Judge

Solicitors: Armstrong Thompson, for the Appellant
Buddle Findlay, for the Second Respondent