



[3] On 19 December 2022, Mr Gee for the Corporation submitted a memorandum that costs be awarded up to \$1,158.88.

[4] On 23 December 2022, Ms Koloni stated that the only issue outstanding was the level of complexity of the appeal. Ms Koloni noted that she had asked the Corporation for a copy of Mr Gee's invoice for costs and on that basis she would be providing the Corporation with a parallel invoice.

[5] On 13 February 2023, Ms Koloni made an Official Information Act request to the Corporation for a copy of Mr Gee's invoices in relation to the appellant's matters.

[6] On 17 February 2023, the Court directed that unless, by 23 February 2023, the Court heard further from Ms Koloni in relation to the matter of costs, the Court would make a decision based on the available material.

[7] On 2 March 2023, Ms Koloni noted that she was awaiting a response to her Official Information Act request to the Corporation for a copy of Mr Gee's invoices in relation to the appellant's matters.

[8] On 6 March 2023, the Court directed that, by 13 March 2023, the Litigation section of the Corporation provide the information requested by Ms Koloni or advise when this information would be provided.

[9] On 15 March 2023, Mr Gee advised that the Corporation had provided the requested information to Ms Koloni pursuant to the Official Information Act, with redactions to maintain legal professional privilege under section 9(2)(h) of the Act, and redactions of bank account numbers to prevent the disclosure or use of this information for improper gain or advantage under section 9(2)(k) of the Act.

[10] On 16 March 2023, Ms Koloni confirmed that she had received invoices but that they were heavily redacted. She asked for the invoices to be unredacted.

[11] The Court directed the convening of a telephone conference.

[12] At the telephone conference held on 17 March 2023, Ms Koloni noted that she based her claim for costs and disbursements on the District Court Rules 2014, and that the work she did in this appeal justified her claim in full. Mr Gee advised that the Corporation's assessment of costs, also based on the District Court Rules, and having regard to the High Court decision in *Carey*, was a correct reflection of the complexity and time required for the appeal. The Court noted that it had sufficient material to proceed to make a decision.

### **Relevant law**

[13] 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.

[14] Rule 14.3(1) 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.

[15] Schedule 5 provides that the following are the appropriate daily recovery rates for the categories of the proceedings referred to in rule 14.3:

Category 1 proceedings	\$1,270 per day
Category 2 proceedings	\$1,910 per day
Category 3 proceedings	\$2,820 per day

[16] 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) band A, if a comparatively small amount of time for the particular step is considered reasonable; or
- (b) band B, if a normal amount of time for the particular step is considered reasonable; or

(c) band C, if a comparatively large amount of time is considered reasonable.

[17] Schedule 5 provides for the time allocations for each step in general civil proceedings, according to categories A, B and C.

[18] Rule 14.12(2) provides that a disbursement may only be included in a costs award to the extent that the disbursement was approved by the Court for the purposes of the proceeding, specific to and necessary for the conduct of the proceeding, and (2) reasonable in amount.

[19] In *Dickson-Johansen*,<sup>2</sup> Powell DCJ 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.

[20] In *McPhail*,<sup>3</sup> Henare DCJ 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.

[21] In *Coogan*,<sup>4</sup> 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 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.

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<sup>2</sup> *Dickson-Johansen v Accident Compensation Corporation* [2018] NZACC 36.

<sup>3</sup> *McPhail v Accident Compensation Corporation* [2022] NZACC 59.

<sup>4</sup> *Coogan v Accident Compensation Corporation* [2021] NZACC 168.

[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:

... 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.

[22] In *Carey*,<sup>5</sup> Grice J stated:

[91] Non-lawyer advocates will vary in their expertise and experience. The Judge should not have to go into detail in each case analysing expertise and experience and then move on to consider the assistance, which has or has not been provided. Instead a Judge should be entitled to start with a percentage based on the scale costs. If the Judge has been assisted by the non-lawyer representative in a straightforward case, it would, as a guideline, generally be appropriate to set a daily rate set at 50 per cent of the daily lawyer rate based on category 1. Under the District Court Rules, category 1 relates to "proceedings of a straightforward nature able to be conducted by counsel considered junior".

...

[96] ...

- (a) The level of qualification and skill of the advocate in ACC law would be a factor to the extent that was evident. The Judge should not be required to scrutinise the qualifications and experience of the non-lawyer representative. If a level of assistance was provided, the appropriate daily rate percentage for the non-lawyer advocate would be 50 per cent of the scheduled daily rate.

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<sup>5</sup> *Accident Compensation Corporation v Carey* [2021] NZHC 748.

[120] [Substitution of 50% of Category 1 instead of Category 2 costs] reflects that [the representative] was of reasonable assistance to the Court in a straightforward appeal that was successful.

### **Discussion**

[23] Ms Koloni, in her submissions, correctly states that the decision as to costs and disbursements to be awarded to the appellant must be based on the District Court Rules 2014. The Court adds that it is bound by higher court interpretations of the Rules. Ms Koloni has also referred to how much Mr Gee for the Corporation has been paid for his work as counsel in the appellant's proceedings. However, how much the Corporation chooses to pay its counsel is not relevant to the legal principles as found in the District Court Rules as interpreted by the higher courts.

[24] Ms Koloni submits that category 3 (\$2820) and band C are appropriate, and Mr Gee submits that category 1 (\$1910) and band A are appropriate.

[25] In terms of the appropriate category of costs, this Court notes that the appellant's appeal was primarily focussed on whether he met the statutory criteria for cover for a personal injury that is a work-related mental injury, involving established legal tests and consideration of factual and expert evidence. The proceedings were more than those of category 1, being more than of a straightforward nature, and they were at the margins of success or failure. However, the proceedings were not those of category 3, as they did not, because of their complexity or significance, require counsel to have special skill and experience. Neither party instructed senior counsel, and the appeal related to an individual claim and was not of broad public significance. The Court finds that the proceedings are appropriately assigned to category 2, in that they were of average complexity requiring counsel of skill and experience considered average.

[26] In terms of the reasonable time to be allocated to each step in the proceedings, this Court notes that the appeal proceedings involved the preparation, analysis and presentation of a quantity of expert and factual evidence as to whether the appellant met the requirements for a work-related mental injury. The Court assesses that the reasonable time required in this appeal was more than that of band A, that is, a comparatively small amount of time for the particular steps. However, the Court

assesses that the reasonable time required was less than that of band C, that is, a comparatively large amount of time for the particular steps. The Court finds that the reasonable time required in this case was that of band B, that is, a normal amount of time for the particular steps.

[27] In allocating band B (rather than band C), this Court bears in mind that a significant amount of time in the proceedings was spent on issues raised on behalf of the appellant that had no merit. The appeal proceedings covered two appeals, only one of which was successful.

[28] In *Carey*,<sup>6</sup> the High Court stated that, if a level of assistance was provided by a non-lawyer advocate, the appropriate daily rate percentage for the non-lawyer advocate would be 50 per cent of the scheduled daily rate. Ms Koloni is a non-lawyer advocate, and this Court finds that it is appropriate that the High Court's guidelines be applied to the appellant's case.

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

21 Commencement of Appeal (0.5):	\$955.00;
9.8, 23 Memorandum, Case conference (0.25):	\$477.50;
9.9.23 Appearance, Case conference (0.3):	\$573.00;
24 Preparation on Appeal (0.5):	\$955.00;
24A Submissions (1.5):	\$2,865.00;
10.1 Preparation of affidavit (0.4):	\$764.00;
25 Appearance (0.5):	\$955.00;
<b>Total costs:</b>	<b><u>\$7,544.50</u></b>
Less 50 percent:	<u>\$3,772.25</u>

#### *Disbursements*

[30] This Court notes that Ms Koloni has claimed has disbursements of \$200 for office photocopying, emails and texts. No receipts or other documents were

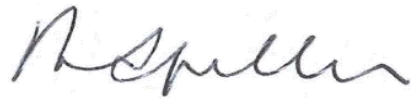
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<sup>6</sup> Above note 5, at [96].

provided in support. However, in view of the small sum being claimed, and the reasonable likelihood that disbursements in the nature of photocopying and fees in support of electronic communications were incurred, the amount of \$200 is allowed.

**Conclusion**

[31] This Court directs that the Corporation pay the appellant costs of \$3,772.25 and disbursements of \$200.

A handwritten signature in cursive script, appearing to read "P R Spiller".

P R Spiller  
District Court Judge