



Workplace Injury Commission

DETERMINATION AND REASONS FOR DETERMINATION

CITATION: [2024] VWIC 3
ARBITRATION REFERENCE NUMBER XXXX

PARTIES

WORKER [Worker's name] (The Worker)
WORKSAFE AGENT [Agent's name] (The Agent)
EMPLOYER [Employer's name] (The Employer)

ARBITRATION OFFICER Katie Valentine
DATE OF HEARING 11 April 2024
DATE OF DETERMINATION 14 May 2024

DETERMINATION

1. I determine that the Agent's decision dated 20 April 2023 under review is confirmed. This means that the decision is not in favour of the Worker.
2. I certify that each party is bound by this result.

REASONS FOR DETERMINATION

DISPUTE REFERRED TO ARBITRATION

1. This arbitration is about whether the Agent's approval for dental services as set out in the treatment plan dated 18 April 2023 was for the reasonable costs of those services.
2. On 2 December 2022, the Worker lodged a claim for compensation for injuries to his mouth and teeth that occurred on 18 November 2022 as a result of 'emergency repair to excavator, crow bar being used had flu[n]g upwards striking mouth damaging lip and teeth'.
3. On 12 January 2023, the Agent advised the Worker it had accepted the claim.
4. The Worker required extensive dental treatment immediately following the injury. Part of that treatment involved an assessment of the injured tooth provided by prosthodontist, Dr [G], who provided a treatment plan on 18 April 2023, quoting \$1,600 for this assessment.
5. On 20 April 2023, the Agent approved payment of \$939.29 for that treatment.
6. The Worker lodged an application for conciliation appealing the Agent's decision not to pay for the entire cost of the treatment. The parties could not reach agreement and on 10 January 2024, a Conciliation Officer issued a Genuine Dispute Certificate.
7. On 13 January 2024, the Worker lodged a referral for arbitration.
8. On 20 January 2024, the Worker lodged an application with the Workers Compensation Independent Review Service (WCIRS). The arbitration was adjourned to enable this review. On 19 March 2024, WCIRS provided its review outcome that confirmed the Agent's decision.
9. On 11 April 2024, an initial arbitration hearing was held by video conference attended by the Worker, a Worker Assistant and a representative of the Agent.
10. In making this determination, I have considered all the material included in the Arbitration Book (pages 1-24), and Schedule B of the Arbitration Book (pages 25-182); and the evidence and submissions presented at the arbitration hearing.

ISSUES

11. The relevant legislation in this matter is the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (the Act).
12. The sole issue to be determined in this dispute is whether the amount the Agent paid for the Worker's dental services was a 'reasonable cost'.

Preliminary Matters

Jurisdiction

13. At the hearing, the Worker advised that all the invoices between 18 November 2022 and 21 June 2023 are the subject of the dispute at arbitration.

14. The outcome certificate refers only to the Agent's decision dated 20 April 2023 as the subject of the dispute. This decision only refers to dental services as set out in the treatment plan dated 18 April 2023.
15. Section 301C of the Act provides that a claimant can only refer a dispute to arbitration if a Genuine Dispute Certificate has been issued by conciliation with respect to liability for the payment of compensation referred to in subsection 297(1) or (2).
16. The parties made submissions about whether other decisions were in WIC's jurisdiction to arbitrate within this dispute.
17. On 18 April 2024, I issued a decision that WIC has the jurisdiction to make a determination only in relation to the invoice listed in the Agent's notice of 20 April 2023.

Hearing 'on the papers'

18. In the Pre-hearing information forms, both parties requested a hearing based on the evidence before me following the initial hearing (a hearing on the papers). I agree there is no need for a further hearing, and it is appropriate to determine the dispute on the papers.

CONSIDERATION OF ISSUES

Burden and standard of proof

19. The Worker must show that, on the balance of probabilities, he has an entitlement to compensation; see *Small v Maffra Waste Disposal* [2021] VMC 017.

Was the amount the Agent paid for the Worker's dental services a 'reasonable cost'?

Worker's submissions

20. The Worker submits in the Referral for Arbitration Form (unedited):

i believe the medicare dental payment scheme is so far away from realistic prices that its a joke. i didn't plan on getting injured by a flying steel crowbar across my face while working, but it just so happened to be that way, my supervisor at work reassured me don't worry work cover will fix you up not a worry so we all believed, 12 months later and almost \$4000 out of pockets silly me for beleiving in the system that is meant to help us get back to work, im not asking for a pay out, all ive wanted from day 1 is the money i have payed myself to be reimbursed so myself and my family can move on life is hard enough without stressing over this injury, after asking my employer to help with the cost ive been told to move on about it, resulting in being out of a job just fantastic don't you say. thanks for your time.

21. At the hearing, the Worker gave affirmed oral evidence as follows:
 - a. Once the tooth was broken in his jaw, he required treatment quickly to try to save the tooth and the nerve. After that, he developed an infection and also had to avoid any movement in his jaw.
 - b. The Worker was given several Agent notices that made him aware that there may be a gap in fees. The first time that he was aware that there may be a gap in fees was in the notice dated 12 January 2023 that approved the claim.

- c. The Worker telephoned a couple of dentists to find out if they would charge a lesser amount for the item numbers already quoted, however they would not charge less so he did not change dental practitioners.
- d. In relation to the impact of the gap fees on him, the Worker stated that he found it financially hard as he had to redraw money on his house in order to pay for it. He also said that his casual employment with the Employer was terminated, which he believes occurred because of the injury and the fact that he 'persisted'.
- e. He agreed the suburb in which he lives is not remote or interstate.

22. The Worker also submitted:

- a. The Agent's notices do not detail the schedule fee details that it is expected to provide.
- b. Given the need for expedited treatment, the Worker had received several treatments and paid for them himself by the time the claim was accepted on 12 January 2023.
- c. Section 226 of the Act requires the Agent to reimburse the Worker for payments that he had already made himself and for which it is liable.
- d. The first time the Agent's gap fee is referred to is in the Agent's notice of 20 April 2023.
- e. The Worker seeks full reimbursement of his out-of-pocket expenses.

Agent's submissions

23. The Agent submits that:

- a. The Worker had been advised several times in writing that there was a potential gap in treatment costs; yet he still chose to proceed with the treatment.
- b. The Worker was advised in the Agent's notice dated 12 January 2023 that there would be a gap in the fees and that payment of the reasonable costs of medical and like services does not necessarily mean payment of the full costs.
- c. The Agent adhered to the legislation and policies in determining payments, including by full reimbursement of some gap fees prior to acceptance of the claim.
- d. The Worker's claim fails to satisfy the criteria outlined in part 4.1.3 of the WorkSafe Claims Manual (the Claims Manual) for exceptional circumstances warranting reimbursement of out-of-pocket expenses. The treatment does not meet the criteria for an atypical procedure such as one performed by a specialist surgeon. The Claims Manual states that even if there is no provider who could charge cheaper fees it doesn't mean that the Worker is entitled to the full out-of-pocket expenses.
- e. The Worker's argument regarding outdated fees fails to acknowledge that the schedule of fees reflects the reasonable costs of services and is based on consultation with several providers and industry peak bodies.
- f. In making my determination, I should consider the findings in *Burton v AMT Industries* [2021] VMC 11.

The relevant legislation

24. Paragraph 224(1)(a) of the Act provides that where a worker is entitled to compensation, the Agent is liable to pay the reasonable costs of medical and like services received because of the injury, including dental services, defined in section 3 as a 'medical service'.
25. Paragraph 223(2)(a) defines "reasonable costs" as an amount determined by the Agent as a reasonable cost having regard to:
- (i) the service or provision actually rendered; and*
 - (ii) the necessity of the service or provision in the circumstances; and*
 - (iii) any guidelines made by the Authority ... in respect of services or provisions of that kind ...*

The Claims Manual

26. The Claims Manual includes 'information to assist Agents make decisions in line with the legislation'.
27. Part 4.1.1 states that 'WorkSafe will only pay the reasonable costs of a service or treatment, in line with the fee schedule.' It states:

WorkSafe can pay for the reasonable costs of a medical and like expense where:

...

- *The service is reasonable, necessary and appropriate in the worker's individual circumstances*
- *The particular service meets WorkSafe criteria/guidelines and is approved by WorkSafe*
- *Prior approval has been given by the Agent, where required*
- *The principles of the Clinical Framework for the Delivery of Health Services to workers are adhered to.*

28. Part 4.1.2 states:

Every service must be considered on its individual circumstances and merits. The Agent must consider all available information to determine if the service is necessary and appropriate in light of the specific requirement of a particular policy.

29. Part 4.1.2 also states that Agents should consider reports from the Worker's treating health practitioners, Independent Medical Examiners; any recommendations made by Medical Advisors and the Clinical Panel; and any other relevant information.

30. Part 4.5.9 states:

WorkSafe can pay the reasonable costs of dental services (including oral and maxillofacial surgery) reasonably required as a result of a work-related injury or illness.

...

Refer to policy for Dental Services including information about:

- *Who can provide dental services*
- *What WorkSafe will and will not pay*
- *Fee Schedule for Dental Services*

31. The Dental Services Policy states relevantly:

How much WorkSafe will pay

WorkSafe will pay the reasonable costs of dental services, as detailed in Dental services fee schedule.

32. The Dental Services Fee Schedule sets out the fees WorkSafe will pay for specified item numbers.

Considerations

33. I am satisfied that the Claims Manual is a 'guideline' as stated in paragraph 223(2)(a)(iii) of the Act; following *Lim v Iconic Hotels Pty Ltd* [2022] VMC 21 at [50]-[87].
34. The Worker saw Dr [G] on 18 April 2023 who provided a letter detailing the history of the injury, treatment to date and explaining the need to assess 'tooth 22' to determine if it was structurally restorable. This assessment of tooth 22 was a treatment set out in the treatment plan dated 18 April 2023.
35. The following table sets out the amounts the Worker was charged, reimbursed and the amount he was out of pocket:

Item	Description	Fee charged \$	Dental Services Fee Schedule amount \$	Agent agreed to pay \$	Worker out of pocket \$
DT627	Preliminary restoration for crown	600	211.59	301.80	298.20
DT631	Provisional crown	300	None	300.00	-
DT232	Provisional crown	500	360.86	360.86	139.14
Total		1400		962.66	437.34

36. The amount for item DT631 differs from the treatment plan amounts. The parties confirmed that although quoted \$500, when the treatment was undertaken, the Worker was charged \$300, as shown in the tax invoice dated 8 May 2023 and the Clinical Panel notes that Dr [G]'s practice advised that the fee for item DT631 was \$300.
37. The WorkSafe Clinical Panel recommended payment of \$300 for item DT631, because although item is not on the WorkSafe Dental Services Fee Schedule, it is a valid ADA (presumably the Australian Dental Association) item number. It considered the item number and fee was appropriate.
38. The Agent otherwise reimbursed the Worker the amount in the Dental Services Fee Schedule for item DT232 and more than the Dental Services Fee Schedule for item DT627. The Worker was out of pocket a total of \$437.34.
39. The Worker agrees with the Agent that on 12 January 2023, the Agent informed him that there would be out-of-pocket fees for dental treatment. This letter relevantly states:

[Agent] accepts you have a teeth and mouth injury that is related to your employment which entitles you to receive weekly payments and the reasonable costs of treatment.

40. Attached to this letter was a document entitled 'Your claim information sheet' that states relevantly:

**Payment of the reasonable costs of medical and like services does not necessarily mean payment of the full costs. Sometimes there may be a gap between what the provider charges*

you and what we can pay as the reasonable costs of the service under WorkSafe Scheduled Fees.

41. Part 4.1.3 of the Claims Manual states that in exceptional circumstances a worker's out-of-pocket expenses may be reimbursed if:

...

- *The service was provided before claim lodgement/liability acceptance; or*
- *the worker was genuinely unaware of the schedule of fees; or*
- *the worker does not have any other choice of provider due to living in a remote area,*
Or
- *the service was provided by an interstate provider (apart from interstate hospital and interstate surgery costs); and*
- *the service is for a work-related injury or illness,*
- *it is necessary and appropriate in the worker's individual circumstances; and*
- *the principles of the Clinical Framework for the Delivery of Health Services have been adhered to.*

Reimbursement for the out-of-pocket expenses will only apply for services provided up until the date the worker was made aware that WorkSafe Schedule of Fees applies.

42. I am not satisfied that there were exceptional circumstances for reimbursing the Worker's out-of-pocket expenses for the treatment. This is because:

- a. the service was provided after the claim was accepted;
- b. the Worker does not live in a remote area; and
- c. the Worker was aware of the schedule of fees from 12 January 2023 and the treatment was quoted after this on 18 April 2023.

43. Applying the reasoning of Magistrate Wright in *Burton v AMT Industries*, there is no evidence that this treatment was of a particularly specialised nature that required the expertise of that particular treating health practitioner.

44. I note the Worker submits that he obtained quotes from a couple of other dentists but could not obtain services for any lower fees than those charged by his treating dentist. He did not seek quotes from other prosthodontists. He also submits that the fees are outdated, and it is not possible to obtain services at a lower charge. However, the Worker's inability to obtain treatment at a lower price does not of itself enable the Worker to be reimbursed fees above the Dental Services Fee Schedule.

45. The Worker assistant submits that subsection 226(2) of the Act requires the Agent to reimburse the Worker the full amount that he paid for his dental costs. However, I do not agree that is what that provision provides; rather it concerns who is to be reimbursed - i.e., the person who made the payment.

46. I also do not consider the schedule fee itself needs to be stated in the Agent's notice for the Worker to have been made aware that he could be out-of-pocket.

Conclusion

47. Considering the above, I therefore find that the reasonable costs in this case are the amounts set out in the Dental Services Fee Schedule and the amount the Agent paid for

the Worker's dental treatment as set out in the treatment plan on 18 April 2023 was a 'reasonable cost'.

Determination

48. I determine that the Agent's decision dated 20 April 2023 under review is confirmed. This means that the decision is not in favour of the Worker.

49. I certify that each party is bound by this result.

[Signed]

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Katie Valentine
Arbitration Officer