PARTIES:	DISABILITY SERVICES OF CENTRAL AUSTRALIA v BEVERLEY REGAN
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPELLATE
FILE NO:	AP 7/98
DELIVERED:	9 April 1999
HEARING DATES:	21 May 1998
JUDGMENT OF:	MILDREN, THOMAS & PRIESTLEY JJ

REPRESENTATION:

Counsel:

Appellant:	J Tippett
Respondent:	J Waters QC

Solicitors:

Appellant:	Ward Kellor
Respondent:	Caroline Scicluna

Judgment category classification:	C
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP7/98

BETWEEN:

DISABILITY SERVICES OF CENTRAL AUSTRALIA
Appellant

AND:

BEVERLEY REGAN
Respondent

CORAM: MILDREN, THOMAS AND PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 9 April 1999)

MILDREN J*:*

[1] In this case, the appellant succeeded at first instance before the Work Health Court. The respondent successfully appealed to the Supreme Court, the result of which was to reinstate the worker's entitlement to receive compensation. On appeal to this court by the appellant, this Court ordered a new trial on a fresh ground raised by the respondent by way of notice of contention at the suggestion of the Court during the course of argument. Some of the other points raised on the appeal to this Court by the appellant were resolved in the appellant's favour; some were not. The end result of the appeals is that the respondent has succeeded in setting aside the judgment ordered against her and has won a new trial.

[2] It is well established that a successful party on an appeal may be refused costs if the appeal has succeeded on a ground which the party did not raise in the Court below: see Williams, *Civil Procedure, Victoria*, I 64.24.5, and the authorities therein referred to. In this Court it could be said that both parties to the appeal to this Court were successful. The appellant was not finally ordered to pay compensation, and the respondent was not finally shut out from her claim, but that overall the respondent succeeded in obtaining a new trial.

[3] Where both parties to an appeal are successful, the usual order is that no costs are awarded: see the authorities cited in Williams, *supra*, at 1.64.24.20.

[4] There is nothing before us to show that the point on which the respondent ultimately won a new trial, was the result of any fault by the respondent or her counsel at the trial before the Work Health Court.

[5] In the unusual circumstances of this case, I would make the following orders as to costs:

1. that there be no costs of the appeal to this Court;
2. that the appellant pay the respondent's costs of the appeal from the Work Health Court to the Supreme Court to be taxed;
3. that the costs of the first hearing in the Work Health Court abide the outcome of the new trial.

THOMAS J:

[1] On 31 July 1998, this Court published its reasons for holding that the decision of the Work Health Court could not stand and that there must be a new trial.

[2] On 7 December 1998 and 10 December 1998, Mr Tippett, counsel for the appellant/employer and Mr Waters QC, counsel for the respondent/worker, forwarded written submissions on the question of costs. It is not in dispute that where an order is made on appeal that there is to be a new trial, it is the general rule that the costs of the first trial abide the outcome of the second trial (Williams, Civil Procedure Victoria, Butterworths – 1.64.24.25).

[3] The worker was ultimately successful before the Court of Appeal in obtaining a new trial before the Work Health Court.

[4] Mr Tippett argues that the respondent succeeded upon a Notice of Contention that was introduced during the course of submissions on the appeal at the suggestion of the Court. Mr Tippett states that as counsel for the appellant he immediately conceded the substance of the Notice of Contention and very little time was spent on this point. There had been no cross appeal or Notice of Contention filed in accordance with the rules. The appellant was successful on all its arguments except that raised in the Notice of Contention. Accordingly, the appellant employer seeks an order that the respondent pay the appellant's costs of the appeal before Justice Angel together with the costs of the appeal before this Court.

[5] I do not accept this argument. Neither do I agree with the submission by counsel for the appellant/employer that in the alternative there should be an order apportioning costs. These proceedings did not involve separate or distinct claims or cross claims. There was one issue which was whether the worker was entitled to continue receipt of compensation either on the grounds disputed by the s69 Notice or as widened by the worker's pleadings.

[6] On the appeal before Angel J, the employer failed. His Honour found the learned Chief Stipendiary Magistrate in the Work Health Court was in error and that if the employer challenged whether there was an injury at all it should have proceeded with a substantive application and should not have raised that issue in answer to the worker's application. Further, his Honour concluded that the learned Chief Stipendiary Magistrate applied the wrong test and all that needed to be shown was a temporal connection between the "injury" and the "work".

[7] This Court also found the decision of the Work Health Court to be in error, although for different reasons. These reasons are set out in the decision of Mildren J with which Thomas and Priestley JJ agreed.

[8] The worker was successful in both the appeal before Angel J and subsequently before the Court of Appeal. Before the Court of Appeal the worker obtained an order for a new trial.

[9] The general rule is that costs should follow the event. The court may be justified in departing from the usual orders in relation to costs where the

justice of the case so requires or where there may be some special or unusual feature in the case to justify the court in departing from the usual course (*Re Wilcox; Ex Parte Venture Industries Pty Ltd & Others* (1996) 141 ALR 727 at 733), or because of "exceptional or special" circumstances: see *Oshlach v Richmond River Council* (1998) HCA 11 at paras 135 and 143 per Kirby J.

[10] There are no exceptional or special circumstances in this case to justify the Court departing from the general principle.

[11] I would order that the appellant/employer pay the respondent/worker's costs of the appeal before Angel J and before the Court of Appeal.

PRIESTLEY J:

[1] On the question of appropriate costs orders, I agree with those proposed by Mildren J, for the reasons he gives.