FD:
FD:
DT:D
DN: 99/91A
STY:
PANEL: McIntosh-Janis; Robillard; Jago
DDATE:281191
ACT: Ss: 3(1), 81(c), 74(1) R.S.O. 1970
KEYW: Jurisdiction, Tribunal (costs); Jurisdiction, Board (costs); Statutory interpretation (necessary implication); Words and phrases (benefits, s. 3(1)).
SUM: The employer's appeal from a decision awarding the worker entitlement to benefits was dismissed. The worker then requested that the Panel direct that the employer pay the costs of the worker's response to the appeal. The only issue in this case was the Tribunal's power to order the payment of costs.

There is no provision in the Act either expressly granting the Tribunal the power to award costs or expressly prohibiting it from awarding costs. The Act had expressly granted the Board the power to award costs until 1973, when that section was repealed.

Section 81(c) of the Act enables the Board (and by virtue of s. 86m, the Tribunal) to allow claimants travelling and living allowances. The Panel rejected the argument that the inclusion of this specific provision, that governs very limited specified available costs, should be interpreted as an exhaustive listing of all costs to which a party is entitled. It did not, in itself, preclude an implication of a power in the Tribunal to order costs to a successful party of record.

The term "benefits" in s. 3(1) is not broad enough to include the right to the payment of costs. The failure to pay costs would not involve a breach by the Board of any requirement of the Act.

The courts have tended to adopt a restrictive view of the power of administrative tribunals to award costs generally. They have tended to require express and unambiguous statutory language conferring the power to award costs before upholding awards of costs granted by administrative tribunals.

The removal in 1973 of the express statutory power to order costs indicated that the Board, and by implication the Tribunal, does not now have the statutory power to order that costs be payable to a party. The Legislature has expressly granted other administrative tribunals the power to order costs in their enabling statutes. If it had intended the Tribunal to have such authority, it would have done the same in the Act.

Even in the absence of express statutory provisions, an administrative tribunal has all those powers which, by implication, are reasonably necessary for the accomplishment of its intended statutory objective. There was no evidence of practical necessity for implying a general costs power in the Tribunal. The Tribunal, since its inception in 1985, and the Board since the 1973 statutory amendment, had held innumerable hearings without exercising any jurisdiction in respect of costs.

It would be counterproductive to the no-fault statutory insurance scheme under the Act to import into it a "winner/loser" concept, with its punitive elements, by implying a power in the Tribunal to order costs. Such a power could have a serious chilling effect on parties exercising their legitimate rights of appeal.

The Tribunal does not have the power to order one party in an appeal to pay the other party's costs incurred in preparing for the appeal. [25 pages]
PDCON:

TYPE: A
DIST:
DECON: Decision No. 46 (1986), 3 W.C.A.T.R. 33 refd to; Decision No. 64 (1986), 2 W.C.A.T.R. 19 refd to; Decision No. 174 (1986), 2 W.C.A.T.R. 96 refd to; Decision No. 206A (1988), 9 W.C.A.T.R. 4 distd; Decision No. 434 (1987), 4 W.C.A.T.R. 183 refd to; Decision No. 99/91 (1991), 18 W.C.A.T.R. 293 refd to; Pension Assessment Appeals Leading Case Interim Report (1986), 7 W.C.A.T.R. 365 refd to; Decision Nos. 374/87 refd to, 678/87 refd to; 1041/89 refd to; 729/90I refd to
CCON: Reference re National Energy Board Act, (1987), 19 Admin. L.R. 301 (Fed. CA.) apld; Bell Canada v. C.R.T.C., (1986), 17 Admin L.R. 205 (S.C.C.) consd; Regional Municipality of Hamilton-Wentworth v. Hamilton-Wentworth Save the Valley Committee, (1985), 15 Admin. L.R. 86 (Ont. Div. Ct.) consd; Franko v. Kornatz, (1982), 29 C.P.C. 38 (Ont. H.C.J.) consd; Repac Construction & Materials, [1976] O.L.R.B. Rep. October 610 (O.L.R.B.) consd
IDATE:
HDATE: 070291
TCO: D. Revington
KEYPER: A. Hill; D. Cameletti
XREF:
COMMENTS:
TEXT:

WORKERS' COMPENSATION APPEALS TRIBUNAL

DECISION NO. 99/91A

This appeal was initially heard in Sault Ste. Marie on February 7, 1991, by a Tribunal Panel consisting of:

F.W. McIntosh-Janis: Vice-Chairman,
W.D. Jago : Member representative of employers,
M. Robillard : Member representative of workers.

Submissions on the costs issue were completed on July 22, 1991.

THE APPEAL PROCEEDINGS

Decision No. 99/91 (March 19, 1991) dealt with the employer's appeal from a WCB decision which accepted that the worker's head injury in September 1984 was causally related to his compensable accident on August 10, 1984. After hearing all the evidence and submissions of the parties, we dismissed the employer's appeal and confirmed the worker's entitlement to benefits related to injuries from his skull fracture incurred on September 3, 1984. The reasons for that decision are found in Decision No. 99/91. At the close of that decision we stated:

> At the end of the hearing, the worker's representative requested that we direct the employer to pay the costs of the worker's response to the employer's appeal. This request raised legal issues concerning our power to make such an order but neither counsel was in a position to make detailed legal submissions concerning this issue. Therefore, we will deal with the issue of our power, if any, to award costs in a future Addendum to this decision, after the parties and Tribunal counsel have been given an opportunity to make more detailed submissions on this issue.

This decision is the Addendum which deals with the costs issue.

A. Hill, barrister and solicitor, continued to act as the worker's representative. D. Cameletti, barrister and solicitor, continued to act as the employer's representative. D. Revington of the Tribunal Counsel Office acted as our counsel throughout the process of obtaining post-hearing submissions on the costs issue.

THE EVIDENCE

By memo dated February 18, 1991, we wrote to Tribunal counsel and requested detailed legal submissions concerning the following points:

1. the power, if any, of this Tribunal to order the payment of costs; and

2. if we found that we did have the power to order costs, the factors which the Tribunal should take into account in exercising its discretion to award costs.

We instructed Tribunal counsel to prepare these submissions and then forward them to counsel for both parties in order to give them an opportunity to make written submissions and reply. We also instructed Tribunal counsel to offer the Board the opportunity to make submissions.

In considering the worker's request that we direct the employer to pay costs, we reviewed Tribunal counsel's detailed memorandum and Addendum to his memorandum, as well as a case book of authorities; a letter from G. Perry, General Counsel to the WCB dated May 23, 1991, outlining the Board's submissions; the worker representative's written submissions under cover of letter dated June 25, 1991; the employer representative's written submissions, attachments and authorities provided under cover of letter dated June 28, 1991; and the employer representative's reply to the worker's submissions under cover of letter dated July 12, 1991. Neither the worker's representative nor Tribunal counsel made reply submissions.

THE NATURE OF THE CASE

This decision deals only with the Tribunal's power, if any, to order the payment of costs.

THE PANEL'S REASONS

(i) Tribunal counsel's submissions

There is no general section in the Act either expressly granting a power to award costs or expressly prohibiting the Tribunal from awarding costs. Reference was made to section 81(c) of the Act which provides:

> **81** The Board has power ...
>
> (c) to allow to a worker, spouse, child or dependant of a deceased worker or his witnesses travelling and living expenses and other allowances and such expenses and allowances shall be paid out of the accident fund as part of the administrative expenses of the Board ...

(Section 81(c) applies to the Tribunal by virtue of section 86m of the Act.) Tribunal counsel submitted that a specific provision governing specified costs could be interpreted as an exhaustive listing of all costs to which any party could be entitled. In other words, no costs could be recovered other than the expenses noted in section 81(c).

In view of the absence of any express power to award costs, Tribunal counsel considered that the question was whether the general power to control the Tribunal's own practice and procedure as found in section 86k of the Act and the power to deal with the real merits and justice of the case as mandated by section 80(1) (as it applies to the Tribunal pursuant to section 86m of the Act) implicitly allow the awarding of costs when read with section 3(1) of the Act which outlines the general right of a worker to benefits under the Act. These provisions are as follows:

> **3(1)** Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the worker and the worker's dependants are entitled to benefits in the manner and to the extent provided under this Act.
>
> **80(1)** Any decision of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent but shall give full opportunity for a hearing.
>
> **86k** The Appeals Tribunal shall determine its own practice and procedure and may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers in respect thereto, and may prescribe such forms as it considers necessary.

Tribunal counsel first reviewed prior Tribunal decisions dealing with the issue of the Tribunal's power to order costs. Although the matter has not been dealt with extensively in any prior Tribunal decisions, in Decision No. 374/87[1] the employer had argued that the Panel had jurisdiction to award costs pursuant to section 21(2), which allows the Tribunal to make "such further or other order as may be just". The Panel held that the Act "does not give the Tribunal a general power to award costs. This is consistent with the non-adversarial nature of our proceedings." In Decision No. 729/90I[2], in response to the worker representative's request for an order awarding costs incurred in pursuing a court action, the Panel stated: "This Tribunal has no power to award costs." No reasons were given for this statement. In the Pension Assessment Appeals Leading Case Interim Report[3], the Panel stated that the Tribunal's power to award costs was "problematic".

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[1] March 9, 1988
[2] November 5, 1990
[3] (March 1986), 7 W.C.A.T.R. 365 at p. 376

Tribunal counsel then turned to a more detailed analysis of Decision No. 206A[4], which found that the Board was implicitly authorized to make interest payments under the Act. Much of the Panel's decision to find an implied power to pay interest turned on the worker's entitlement under section 3(1) to "benefits" which the Panel considered were intended to replace or supplement the worker's wages. It was pointed out that an undue delay in payment would cause an actual financial loss to a worker.

Tribunal counsel pointed out that Decision No. 206A relied on the following factors:

1. the absence of any express section in the Act prohibiting interest;

2. sections 3(1) and 80(1) implying jurisdiction;

3. the trend of legal decisions to allow interest without specific legislation; and

4. the fairness concern of workers not being reimbursed for financial loss and the Board and employers being unjustly enriched as a result.

Tribunal counsel then turned to a more detailed exploration of some of these factors as they might apply to the issue of the Tribunal's power, if any, to order the payment of costs.

Reference was first made to the legal jurisprudence in the area, much of which deals with intervenor funding by administrative tribunals.

In Reference re: National Energy Board Act[5], on final argument and before the decision on the merits, some of the intervenors asked for an award of costs payable by the applicant pipeline company in their favour. The National Energy Board referred the issue of its jurisdiction to award costs to the Federal Court of Appeal.

Despite a section in the National Energy Board Act providing that the Board was a "court of record" and had, "with respect to ... other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record", the Federal Court of Appeal held that these powers did not, either explicitly or implicitly, give the power to award costs. The court held that the test was really whether there was a "practical necessity for the exercise of the power to enable the regulatory body to attain the objects expressly prescribed by Parliament"[6]. Here, the court found no evidence of a necessity for implying a costs power. The Board had held numerous hearings since its creation without

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[4] (1988), 9 W.C.A.T.R. 4

[5] (1987), 19 Admin. L.R. 301 (Fed. C.A.), leave to appeal to the Supreme Court of Canada refused at 23 Admin. L.R. xxi (Note)

[6] p. 314

having to exercise any jurisdiction to award costs, so the court was not persuaded it was necessary in this case. It was also pointed out that both the federal and provincial governments had in numerous instances given explicit costs powers to administrative tribunals. The court stated: "From this I think it possible to infer that in the absence of an express statutory provision conferring the power to award costs, such powers should not be implied."[7] The court also noted that the Board's specific authority to award costs in three separate sections dealing with three distinctly different factual situations strengthened argument that costs were not to be implied for this type of hearing.

Tribunal counsel also referred us to the case of Bell Canada v. Consumers' Association of Canada[8]. In that case the Canadian Radio-Television and Telecommunications Commission, at the conclusion of a hearing, awarded costs to some intervenors pursuant to a provision in the National Transportation Act dealing with an award of "costs". This award was appealed on the grounds that it was contrary to the principle of "indemnification" as required in an award of court costs because the award was not limited to costs actually incurred. Although the award was not overturned, the Supreme Court of Canada held that "costs" (the term used in the statute) were indeed limited to "legal costs" for indemnification or compensation.

Finally, Tribunal counsel referred us to Regional Municipality of Hamilton-Wentworth v. Hamilton-Wentworth Save the Valley Committee[9]. A Joint Board made an order of costs to two intervenor groups in advance of the commencement of the hearing, purportedly pursuant to section 7 of the Consolidated Hearings Act. This section gave the Board authority over its own practice and procedure and also the power "to award costs of a proceeding". The Ontario Divisional Court granted an application for judicial review and quashed the order of costs. It held that the legislation did not authorize the Board to award costs beyond those traditionally awarded by the court. The court held that the Joint Board here was clearly attempting to fund intervention in advance of a hearing, a practice not encompassed by a normal court order for "costs".

Tribunal counsel considered that, although these decisions dealt largely with intervenor funding and not party and party costs, they indicated a more restrictive interpretation of an administrative tribunal's power to award costs. Tribunal counsel submitted that it could be concluded from these cases that there was not judicial support for broadening the scope of administrative tribunals' costs powers. In fact, the trend seemed to be in the opposite direction.

Turning to the final factor outlined in Decision No. 206A, namely, the concern for fairness, Tribunal counsel referred us to the fundamental principle that costs as between parties in a civil dispute served as an

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[7] p. 314

[8] (1986), 17 Admin. L.R. 205 (S.C.C.)

[9] (1985), 15 Admin. L.R. 86 (Ont. Div. Ct.), leave to appeal to Ontario Court of Appeal refused 17 O.M.B.R. 511 (Ont. C.A.).

indemnity to the person entitled to them, and were not imposed as a punishment on the person who must pay them. He submitted that an award of costs was based on the presumption that the parties to an action control that action and can therefore be held accountable for their conduct. Due to the Tribunal's large role in controlling an appeal, much of the rationale for awarding costs was therefore taken away. He also pointed out that one of the main reasons for awarding costs in the judicial system was to discourage unnecessary litigation and promote settlement between the parties. He submitted that, because section 16 of the Workers' Compensation Act specifically prohibits the parties coming to any agreement on their own and the fact that workers' compensation matters cannot be settled by the parties, an award of costs would not discourage unnecessary litigation and could not promote settlement in the workers' compensation appeals system.

Tribunal counsel also referred to the possible deterrent to a party bringing an appeal and the possibility that proceedings would become more legalistic as the parties sought to protect their potential exposure to costs. With respect to the Tribunal's power to protect the integrity of its own proceedings and the possible deterrent of costs to inappropriate behaviours, Tribunal counsel pointed out that most punitive sections in the Act come within the jurisdiction of the provincial courts, not the Board or Tribunal[10].

Tribunal counsel also noted the approach of the Ontario Labour Relations Board (OLRB). Other than awarding costs in cases of an adjournment to convenience another party, the OLRB has been very reluctant to award costs.

Tribunal counsel referred us to the express statutory power given to the Workers' Compensation Board of British Columbia to award costs. Section 100 of the British Columbia Act[11] provides:

> 100 The Board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses to which he has been put to by reason of or incidental to the contest, and an order of the Board for the payment by an employer or by a worker of a sum so awarded, when filed in a manner provided for the filing of certificates by section 45(2), becomes a judgment of the court in which it is filed and may be enforced accordingly.

In the Addendum to his memo, Tribunal counsel advised us that, although this section was first enacted in 1979, it was implemented for the first time to award costs against an employer in a decision dated January 30, 1991. In that decision, the British Columbia Board referred to the Rehabilitation Services and Claims Manual which stated:

> The Commissioners considered that an award under section 100 might be made on an appeal but only in unusual cases. The section is limited to cases where the worker or

[10] For example, see sections 77(8), 99(3) and 101(2).
[11] R.S.B.C. 1979, c. 437

> employer abuses his rights under the Act. For instance, the worker or employer may put the opposite party to the expense of an appeal for no good reason. In other words, it may appear that an appeal was pursued simply because the right of appeal existed and without any substantial grounds on which the position could be argued.
>
> (emphasis added)

In the case in issue, the Board considered the employer's conduct to be "irresponsible" in putting "the respondent to the expense of responding to the appeal and, in particular, of preparing for an oral hearing, only to appear at the hearing to repudiate the basis for their appeal". The Board considered the case before it to be "a highly unusual case", constituting an abuse by the employer of his right to an appeal in not notifying the respondent or the Board of the apparent change in position prior to the oral hearing. The employer's conduct necessitated the convening of an unnecessary oral hearing.

Tribunal counsel concluded his submissions as follows:

> There is no express authority to award costs in the Workers' Compensation Act. There may be an implied authority. The trend of judicial decisions does not support a broad interpretation of costs jurisdiction for administrative tribunals.
>
> It is true that parties to an appeal may suffer real financial loss from which, even if successful on appeal, they will not be reimbursed. The Tribunal also has an interest in the protection of the integrity of its procedures, and a costs power could act as a deterrent to inappropriate behaviour.
>
> However, the Tribunal has viewed its process traditionally as non-adversarial. Awarding costs is not in accordance with the promotion of a non-adversarial system. There are also a number of practical problems with awarding costs.

(ii) The WCB's submissions

The Board submits that it lacks the jurisdiction to order legal costs to a party in proceedings before it.

General Counsel of the WCB submitted that, according to the National Energy Board case, the doctrine of jurisdiction by necessary implication can be applied only if:

1. the implied jurisdiction is required as a matter of practical necessity to permit the agency to accomplish its mandate; and

2. the question of the implied jurisdiction to perform an act must not be one which Parliament and the Legislatures have addressed in other legislation.

It would appear that it is the Board's position that there is no practical necessity for the Board (and by implication the Tribunal) to order costs in order to accomplish its mandate.

General Counsel of the WCB also submitted that the legislative history of the Act added further weight to the position that the Board and the Tribunal lacked the jurisdiction to order legal costs. It was pointed out that prior to 1973 the Board had the express statutory authority to order costs to be paid by a party to a proceeding in front of the Board. Section 61 of the Workmen's Compensation Act[12] stated:

> **61** The Board may award such sum as it may deem reasonable to the successful party to a contested claim for compensation or to any other contested matter as compensation for the expenses he has been put to by reason of or incidental to the contest and an order of the Board for the payment by an employer of any sum so awarded when filed in the manner provided by section 63 shall become a judgment of the Court in which it is filed and may be enforced accordingly.

Section 61 of the Ontario Act remained largely unchanged until 1963 when the section was repealed and re-enacted in the following form[13]:

> **74(1)** The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be taxed.
>
> **(2)** The Board may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.
>
> **(3)** The Board may prescribe a scale under which such costs shall be taxed.
>
> **(4)** In this section, the costs may include the costs of the Board, regard being had to the time and expense of the Board.

Section 74 was repealed in 1973[14]. General Counsel to the WCB submitted:

> The removal of the Board's express statutory authority to order costs to be paid indicates that the Board no longer has the authority to order legal costs payable to one party in an appeal.

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[12] S.O. 1914, c. 25
[13] S.O. 1962-63, c. 145, s. 8
[14] S.O. 1973, c. 173, s. 8

(iii) The worker's submissions

The majority of the worker representative's submissions dealt with the factors which the Tribunal should take into account in exercising its discretion to order costs. On the threshold issue of the Tribunal's power, if any, to order costs, the worker's representative submitted briefly:

> ... sections 81 and 86 of the Act provides [sic] sufficient legislative authority for an award of costs or an award of compensation analogous to costs in favour of the employee/respondent under the circumstances of this matter. ... It is our respectful submission that the Appeal Tribunal has a residual power under Sections 81 and 86 to set its own procedure and govern its own proceedings. This includes the power to require one party to pay the appeal expense, legal costs and disbursements, of the other party.

Section 81 outlines the Board's (and, by virtue of section 86m, the Tribunal's) various powers in six subsections. The worker's representative did not cite any particular subsection in support of his position. Section 86 deals with a provincial grant from the Province's Consolidated Revenue Fund not exceeding $100,000.00 to assist the Board in defraying the expenses incurred in the administration of the Act. As we cannot see how that could relate to the issue before us, we assume that the worker's representative is referring to sections 86a to 86o of the Act, which constitute the Tribunal and outline its various powers. Again, however, the worker's representative has not given us any specific guidance as to which section he considers as supporting his position.

(iv) The employer's submissions

The employer submits that the Tribunal does not have the jurisdiction to order costs and, in the alternative, if the Tribunal does have the authority to order costs, it should not exercise its discretion to do so in this case.

To a large extent, the employer's representative has adopted the WCB's position that the Tribunal does not have the legal jurisdiction to award costs. Reference was made to the lack of any explicit power in the Act, in contrast with the situation in the past where the Legislature had specifically conveyed upon workers' compensation tribunals the express statutory authority to award costs. In view of the repeal of that authority, the employer's representative submitted:

> Accordingly, the Panel is asked to draw the conclusion that since the Ontario Legislature has not bestowed any specific costs power on any Workers' Compensation Administrative Tribunal since 1973, the Legislature has decided that neither the Board nor the Appeals Tribunal is to have the express statutory authority to award costs in any proceedings before it.

> The Panel is also asked to draw the conclusion that, if the Legislature had intended the Tribunal to have the authority to award costs, it would have done so by way of incorporating the express statutory power that the Board held prior to the repeal of this power in the early 1970's and would not have done so by way of any implied or other method of granting such a power.

In addition to referring to the case law outlined in Tribunal counsel's submissions, the employer's representative drew our attention to the decision of the Ontario Supreme Court in Franko v. Kornatz[15]. A claim for legal costs was sought for legal fees incurred for proceedings in front of the WCB on a section 15 proceeding. (This was prior to the creation of the Appeals Tribunal, which now has the exclusive jurisdiction to deal with section 15 proceedings.) Fees for the section 15 proceedings were not allowed. In the course of the decision, Steele J. noted that the Board's express statutory authority to allow costs had been removed in 1974. The employer's representative submitted, on the basis of this case, that "if the courts do not allow costs for Workers' Compensation proceedings when necessary in a legal action, neither should this Tribunal".

Reference was also made to the fact that a number of statutes in Ontario expressly grant a power to administrative tribunals to award costs. It was submitted: "The absence of such a power in comparison to other provincial legislation leads to the conclusion that it [the Tribunal] does not have any such power to award costs."

In reference to Tribunal counsel's submissions dealing with Decision No. 206A, the employer's representative submitted:

> ... the issue forcing [sic] the Tribunal in Decision 206A is distinguishable because there is a strong judicial trend toward permitting the awarding of interest on amounts of money even without specifying enabling legislation.
>
> By contrast to this, there is virtually no judicial support for permitting an Administrative Tribunal to award costs without legislative authority...

In the employer's reply submissions, the only additional point made concerning the threshold issue of whether the Tribunal has the power to order costs was a comment that, in the employer's view, "the worker's submissions completely fail to deal with the issue of jurisdiction".

(v) The Panel's detailed conclusions

(a) Introduction

In determining whether we have the power to order the payment of costs, we will first outline our understanding of the meaning of the term "costs" as the worker's representative has framed his request for costs. Because there is no

[15] (1982), 29 C.P.C. 38

express power in the Act granting the Tribunal the power to order costs, the power, if it exists, must be present by implication. We will consider whether the express inclusion of section 81(c) in the Act precludes any further implication of a power to order costs. We will then ask whether the implication of a costs power is warranted when viewed against the judicial trend concerning administrative tribunals' costs powers and against the legislative trends, with reference to both specific provisions relating to Ontario workers' compensation and general provisions relating to administrative tribunals regardless of their subject matter. Finally, we will consider the arguments relating to practical necessity, especially in light of the non-adversarial nature of workers' compensation in Ontario.

(b) The worker's request and the meaning of "costs"

Before beginning our discussion of whether the Tribunal has the jurisdiction to award costs, we think it worthwhile to outline our understanding of the meaning of the term "costs" as the worker's representative has framed his request for costs.

Let us first look at who is making the application for costs.

In the National Energy Board case the intervenors' application for costs was made at the conclusion of the hearing and before the decision on the merits, irrespective of the outcome on the merits, presumably on the theory that public participation should be facilitated through the funding of intervenors. A similar situation occurred in the Bell Canada case. The timing of the intervenors' application in the Hamilton-Wentworth case was quite different; there the application was made before the proceedings commenced. However, the purpose was again to facilitate public participation.

In the case before us, the encouragement of public participation is not an issue. The applicant for costs is the worker, a "party of record". He was directly interested in the appeal which was brought by the employer: the benefits which the Board had awarded him were in jeopardy if the employer succeeded in its appeal. We are not dealing here with an application by an intervenor or an interested party for funding to facilitate their participation in Tribunal proceedings. We are dealing with an application by one of the parties to the proceedings.

Let us now turn to what the worker is requesting.

The term "costs" seems to be the subject of much misunderstanding when used in relation to administrative tribunals. In court, costs usually "follow the event", in the sense of being ordered to be paid by the "losing" party to the "winning" party after the determination of the merits of the case. As stated in the National Energy Board case: "The jurisprudence establishes that the principal purpose of costs is the indemnification of the successful party in a proceeding"[16]. The court model of costs is premised on a clear winner and a clear loser and, once the loser is identified, he is ordered to pay the winner's allowable expenses and services incurred relevant to the case or proceeding.

[16] P. 310

Much of the case law concerning an administrative tribunal's power to award costs deals with the problems arising from the fact that the proceedings before agencies differ significantly from the normal two-party adversarial proceedings before the courts where the term "costs" is clearly understood. The case law referred to in the submissions before us is representative of the confusion over the meaning of "costs". A close look at the cases reveals that the issue is rarely whether a tribunal has the power to award costs "to follow the event", the way the courts do. The issue usually arises when the enabling statute purports to grant the tribunal a power to award "costs", but fails to identify the meaning of that term with any degree of specificity. Anything other than normal "court costs" then becomes an issue.

Having reviewed some of the Ontario provincial legislation which grants administrative tribunals the power to award costs, we are not surprised that there is some confusion about what is intended. The language granting the power is often quite broad, leaving it up to the tribunal to determine what costs are to be covered. Some agencies are even permitted to recoup some of their own expenses incurred in arranging the hearings. In effect, they are given the power to levy a "user fee" - a concept quite foreign to the court system which is seen as a service generally available to the public.[17]

The "winner/loser" concept common in the court system is often missing in the legislation concerning administrative tribunals' and agencies' powers to award costs. Some of the statutes provide that it is the "proponent" of a certain project affecting the public interest which must pay the costs of others who have been allowed to participate and put forth their views.[18] Other statutes provide for orders against the institution before which the proceedings are brought to pay the costs of participation, especially in situations where it is determined that the proceedings were "vexatious" or "unwarranted".[19] The right to indemnification or compensation is often statutorily granted, but the source of the funds varies depending on the context.

In our view, the worker's application for "costs" raises none of the complex issues raised in much of the case law quoted to us. The application in this case is no different in substance than any ordinary application for costs in a court proceeding. Although the employer's representative raised concerns with the timing of the application (which was initially made at the end of the hearing of the merits but before any final decision as to entitlement had been made), we presume that the worker's representative was assuming his client's success against the employer's appeal when he applied for costs. We also note

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[17] See, for example, the Arbitrations Act, R.S.O. 1980, c. 25.

[18] See, for example, the Municipality of Metropolitan Toronto Act, R.S.O. 1980, c. 314, s. 92(5)(c) and the Intervenor Funding Project Act, 1988, S.O. 1988, c. 71, s. 20.

[19] See, for example, the Human Rights Code, 1981, S.O. 1981, c. 53, s. 40(6) and the Denture Therapists Act, R.S.O. 1980, c. 115, s. 11(6).

that no formal submissions were received until after the merits of the employer's appeal were decided. We interpret the worker's application as being no different from the well understood request for costs "to follow the event".

In summary, then, we have before us an application by a "successful" party of record (here, the worker) for reimbursement by the other party of record (the employer who brought the appeal) for the costs incurred by the applicant in preparing the response to the appeal which threatened the applicant's benefits. The worker is not applying merely under section 81(c) for his travelling and living expenses. His application is much broader, both in terms of who is to pay and what expenses are to be covered. Although no details were given in the written submissions, the comments made at the oral hearing before this Panel on February 7, 1991, indicate that the worker is applying for reimbursement by the employer (not the Accident Fund from which expenses under section 81(c) would be paid) of all the worker's expenses related to his counsel's legal fees, any expert fees for the preparation of evidence and other expenses incurred by him related to the appeal.

(c) Express enactment - the effect of section 81(c)

Tribunal counsel has suggested that the existence of section 81(c) in the Act implies the absence of any additional power in the Tribunal to order the reimbursement of a party's costs. (Section 81(c) empowers the Board and the Tribunal to allow certain persons the reimbursement of certain expenses incurred in participating in proceedings.) The rule of statutory interpretation referred to by Tribunal counsel has been interpreted to mean: "Express enactment shuts the door to further implication."[20] In other words, this specific provision governing specified costs available may be interpreted as an exhaustive listing of all costs to which any party is entitled.

While the argument put forward by Tribunal counsel has some merit, we do not find that the presence of section 81(c) in the Act definitively precludes the Tribunal from having the power which the worker's representative contends we have. The limited terms and scope of section 81(c) do not, in our view, support such a conclusion.

Section 81(c) is not a full list of the possible costs which a party might naturally incur in participating in proceedings before either the Board or the Tribunal. It is limited to "travelling and living expenses and other allowances". No express mention is made of a party's legal fees, expert fees or other expenses for the preparation of evidence.

An application for expenses under section 81(c) is also not available to all the parties of record before the Board or the Tribunal. The section speaks only of expenses incurred by "a worker, spouse, child or dependant of a deceased worker or his witnesses". An employer is not mentioned.

The unavailability of the payment of expenses under section 81(c) for an employer is not surprising, given the fact that the expenses ordered under the section are to be paid out of the Accident Fund, to which all Schedule 1

[20] p. 317 of the National Energy Board case

employers contribute. To permit an employer to claim expenses under the section would result in an employer taking funds from the collective pocket to which he contributes and putting them in his own individual pocket.

The payment of expenses claimed under section 81(c) is also not dependent on the claimant being "successful" in the proceedings. This is in contrast to the earlier statutory provisions in the Workers' Compensation Act which tied reimbursement to success. The August 1973 Report of the Task Force of the WCB (known as the "Starr Report") raised concerns with that system at p. 35 of the Report:

> It is important that appellants should not be penalized for living in areas distant from the centres in which hearings are conducted. The current system is inherently unfair in this regard as appellants are called upon to pay their own travel and living expenses. These expenses are only reimbursed in the case of a successful appeal. We suggest it would be more equitable if travel expenses were to be paid to all appellants regardless of the outcome of the appeal, unless in the Board's opinion, the appeal was groundless and amounted to an abuse of the appeal process. This would tend to force the Board to allow costs routinely, but give it a discretion to prevent a misuse of the process.
>
> (emphasis added)

It would appear that the Legislature's response to these concerns was to remove the element of success from the payment of expenses.

Section 81(c) is limited in terms of the people who can apply, the expenses which are covered, and the source of the payment of the expenses claimed. In addition, it lacks any link between success and the payment of the expenses, a concept implicit in the worker's claim for costs. Accordingly, we think it would be improper for us to infer that the presence of the section in the Act necessarily precludes the implication of a power in the Tribunal to order costs to a successful party of record.

(d) Decision No. 206A

In Decision No. 206A, the Panel dealt with the concept of "ordinary fairness". It is worth quoting the major passage concerning this concept in detail, with particular regard to certain parts of the passage:

> ... modern concepts of ordinary fairness would suggest that where without lawful excuse a wage earner is kept out of money to which he is clearly entitled under the Act, the subsequent remedy of such default should, as a matter of course, include interest on the unpaid amounts for the period of the default. It seems plainly wrong that employers should ultimately benefit at the worker's expense as a result of a Board failure to comply with the requirements of the Act. Such a result would not now be tolerated by employers in their own businesses in respect

> of a breach of a contractual obligation to pay them, and the Panel can think of no reason why the result should be different for workers in respect of a breach of a statutory obligation to pay workers.
>
> (emphasis added)

The Panel in Decision No. 206A considered that the worker was entitled to interest as it was "money to which he is clearly entitled under the Act" because of his entitlement to "benefits" under section 3(1). The Panel in Decision No. 206A discussed at some length the purpose of "compensation benefits" to which a worker is entitled under the Act: they are to replace or supplement the worker's wages. Therefore, an undue delay in payment would cause an actual financial loss to a worker. In the case before us, in Decision No. 99/91 we confirmed the Board's initial award of benefits to the worker. Any financial loss suffered by the worker was not related to any delay in the payment of benefits by the Board.

While the term "benefits" in section 3(1) might be broad enough to include the payment of interest to compensate for the Board's failure to comply in a timely way with the requirements of the Act, we do not consider that the term is broad enough to encompass an order that the employer pay the costs requested here.

The Panel in Decision No. 206A found that interest was due to a worker because of the Board's late payment of benefits - an act which the Panel considered to be "a Board failure to comply with the requirements of the Act" and a "breach of a statutory obligation to pay workers". There is no similar situation with the worker's request that we order the employer to pay his costs of preparing for an appeal. The issue of costs does not involve any statutory breach by the Board of any of the Act's requirements. Instead, the worker's representative asks us to, in effect, increase the employer's costs of exercising its statutory right of appeal.

(e) The judicial trend regarding the power to order costs

There appears to be a trend in the jurisprudence to allow interest despite the lack of specific legislation. Because of this judicial trend in favour of the power to award interest, the approach in Decision No. 206A was to assume that the power was there unless there was some clear indication in the statute to the contrary. The power to award interest was elevated to a rule of statutory interpretation. In Decision No. 206A the Panel stated at p. 11:

> These principles [i.e., applicable common law principles] now require that a statute be interpreted as implicitly requiring that interest be paid on delayed payments unless there is some clear indication to the contrary.

The Panel was accordingly looking for a section to rebut the statutory interpretation in favour of a power to award interest.

Such is clearly not the case with the possible power to order costs. Indeed, as pointed out by Tribunal counsel, the judicial trend seems to be in the opposite direction. The judicial comments on administrative tribunals or

agencies and their power to order costs have dealt almost exclusively with requests for intervenor funding at various stages of proceedings. The cases cited to us indicate a strong judicial trend against the implication of intervenor funding. Clear language in the statute appears necessary before a court will uphold such an order. Although these cases do not deal specifically with whether a tribunal has the implied power to award costs "to follow the event", we read the case law as also indicating the courts' restricted view of administrative tribunals' powers regarding costs generally and evidencing the courts' search for express and unambiguous powers in that regard before upholding such an order. The comments of Heald J. in the National Energy Board case are particularly worth noting:

> From this [the explicit granting of costs powers to some administrative tribunals] I think it possible to infer that in the absence of an express statutory provision conferring the power to award costs, such powers should not be implied.

Because of this lack of judicial trend in favour of a power to award costs, we are not looking for a section in the Act to indicate clearly that the power is not there. We are looking for indications in the statute that the power is there. As pointed out by the Court in the Hamilton-Wentworth case: "From the earliest times, it has been recognized that the power to award 'costs' must be found in a statute"[21].

(f) The legislative trend regarding the power to order costs

We also cannot ignore the legislative framework with respect to both workers' compensation matters specifically and other provincial administrative tribunals' powers generally.

Turning first to workers' compensation matters in Ontario specifically, the Board was originally given the specific authority to award costs. This power was repealed in 1973.

Section 18 of the Interpretation Act[22] provides that the amendment of an Act "shall be deemed not to be or to involve" a declaration that the law was to have been different from the law as it has become under the Act as amended. Accordingly, there is no presumption that an amendment changed the law, but it is open to us to conclude that it did.

We conclude that the law after the repeal of the Board's explicit power to order costs is quite different from the law as it was. We agree with the submissions of the WCB and the employer's representative that the removal in 1973 of the express statutory power to order costs indicates that the Board, and by implication also the Tribunal, do not now have the statutory authority to order costs payable to one party in an appeal.

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[21] p. 97

[22] R.S.O. 1980, c. 219

Turning now to other provincial tribunals' powers generally, there is no clear legislative trend in Ontario concerning the power to award costs. As noted by R.A. Macaulay in his September 1989 Review of Ontario's Regulatory Agencies, some provincial agencies or tribunals have no power to award costs; some have what appear to be very limited cost powers; some have what appeared, when they were first drafted, to be strong cost powers, including the power to recover the agency's expense in holding a hearing.

While the legislative provisions vary considerably, the express provisions in other administrative tribunals' enabling statutes granting them specific powers to order costs cause us to think that the Ontario Legislature, if it had intended that the Tribunal had the authority to order costs, would have done so by incorporating an express statutory power akin to that granted to other administrative tribunals.

(g) Power by implication - "Practical necessity"?

The general rule is that the Tribunal has no inherent jurisdiction. Rather, its jurisdiction is limited by its enabling statute, the Workers' Compensation Act. There is no dispute that there is no general section in the Act expressly granting the Tribunal the jurisdiction to award costs. However, as pointed out by Tribunal counsel, it has also been stated that the powers conferred by an enabling statute include not only the powers as are expressly granted "but also by implication, all powers which are reasonably necessary for the accomplishment of the objective intended to be secured"[23]

The Federal Court of Appeal in the National Energy Board case asked whether there was evidence of "practical necessity for the exercise of the power to enable the regulatory body to attain the objects expressly prescribed by Parliament"[24] In the case before us there is no evidence of practical necessity for implying a general costs power. While the WCB had such a power until 1973, since that time it has operated without such an explicit power. Similarly, the Tribunal has operated since its creation in 1985 without such an explicit power. Both the Board and the Tribunal, like the tribunal before the Court in the National Energy Board case, have held innumerable hearings and exercised the jurisdictions conferred upon them under the Act without purporting to exercise any alleged jurisdiction in respect of costs.

(h) When other tribunals do order costs

Tribunal counsel referred to the approach of the OLRB. The OLRB is not certain that it has the jurisdictional authority to grant cost awards. It appears to exercise any costs power as part of its general procedural jurisdiction, conferred by both section 91(2) of the Labour Relations Act[25] and

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[23] quoting 36 Halsbury's Laws of England (3rd ed.), cited in Re: Inter-Provincial Pipelines and National Energy Board (1977), 78 D.L.R. (3rd) 407

[24] p. 314

[25] R.S.O. 1980, c. 228

section 23 of the Statutory Powers Procedure Act[26] However, even accepting that it does have the power to do so, it will award costs only in very specific and limited circumstances. As stated in Repac Construction & Materials Limited[27]:

> The underlying purpose of The Labour Relations Act as set out in its Preamble, is to further harmonious relations between employers and employees through the collective bargaining process. The purpose is not well served by a procedure that usually requires the identification of a winner and a loser. The application of such a procedure, moreover, would be time-consuming, distracting the Board from its primary task of facilitating collective bargaining.
>
> The awarding of costs, therefore, should not be extended beyond the situation where a party is being compensated for the expenses that would result from an adjournment to convenience another party. To extend this procedure any further would introduce an unnecessarily punitive element into the Board's procedures.

The Labour Relations Act which created the OLRB appears to acknowledge the adversarial aspects of collective bargaining in its legislative language. Collective bargaining is not considered to be normally an amicable or co-operative endeavour (although it is also clear that the OLRB has been created in an attempt to foster "harmonious relations" between employers and employees). Throughout the Labour Relations Act there is evidence of a legislative assumption of very different and conflicting interests between employers and employees. Even in the face of legislative acknowledgement of a winner/loser mentality in collective bargaining, the OLRB is very reluctant to make the proceedings any more adversarial than they have to be.

Even in a jurisdiction like British Columbia where the Workers' Compensation Board has been given the express power to order costs, the power is used very sparingly. As outlined in the January 1991 decision discussed earlier, it has been interpreted as not intended to discourage people exercising legitimate rights of appeal under the Act.

(i) The non-adversarial nature of workers' compensation in Ontario

The non-adversarial nature of the Tribunal's process also leads us to believe that awarding costs without express legislative mandate is not intended.

The Tribunal's approach to non-adversarial adjudication is well summarized in the Statement of Mission, Goals and Commitments found in the Third Report 1987-88 in Appendix A at pp. i-ii:

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[26] R.S.O. 1980, c. 484

[27] [1976] OLRB Rep. October 610 at p. 612

> The process must be recognized as not being an "adversarial" process as that concept is generally understood in a common-law context.
>
> Unlike a court, the Tribunal is not engaged in resolving a contest between private parties. Appeals to the Tribunal represent a stage in the workers' compensation system's investigation of the statutory rights and benefits flowing from an industrial injury.
>
> It is a stage of the system's process that is invoked on the initiative of a worker or employer but in this stage, as in earlier stages of the process, it is the system and not the worker or the employer which has the burden of establishing what the Act does or does not provide with respect to any reported accident.
>
> The fact that it is the system which has the primary responsibility in this respect is reflected in the Board's and the Tribunal's explicit investigative mandates and their respective statutory obligations to decide cases on the basis of their "real merits and justice".

This non-adversarial approach has been cited by numerous Panels of the Tribunal in various situations.

For example, the desire to avoid an adversarial proceeding has caused a Panel to hold that a claimant in an industrial disease case does not bear the burden of collecting exposure evidence in support of his claim, nor is the employer expected to gather evidence to prove that work was not the cause of the condition. It is up to the Panel to decide what investigations need to be done. The costs of any further investigations are then borne by the Tribunal, not the parties.[28]

In determining the meaning of section 86o(3)(a) which provides that leave shall not be granted unless the Tribunal is faced with substantial new evidence unavailable at the time of the earlier hearing, the Panel stated that the provision should not be interpreted as strictly as similar wording considered in court decisions because of the fact that the "public interest at stake in workers' compensation matters ... might well cause ... [the] Tribunal to place more emphasis on getting the right answer than on finality of decision-making" and because of the investigative, non-adversarial nature of the workers' compensation proceedings.[29]

In an application by an employer under section 21 of the Act that the worker attend a medical examination by a physician of the employer's choice the Member representative of workers made it clear that the dispute on entitlement is between the worker and the Board, not the worker and the employer:

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[28] See Decision No. 46 (1986), 3 W.C.A.T.R. 33 at p. 37.
[29] See Decision No. 64 (1986), 2 W.C.A.T.R. 19 at p. 23.

> It is important to keep in mind that a fundamental principle of the workers' compensation system is to create an agency which is intended to remove polarization as between workers and employers in matters relating to disabilities arising from employment. That being the case, the nexus has developed between the claimant and the Board, rather than between the worker and employer.[30]

In another case involving an employer's request that a worker attend for a medical examination, the Member representative of workers emphasized the non-adversarial nature of a workers' compensation case when he stated:

> My views on this point are premised on the fact that workers' compensation is not adversarial as between a worker and an employer. In contrast, for example, to proceedings before the Labour Relations Board, where the Board is sitting in judgment between two opposing parties, in the workers' compensation system, the task of the WCB is to decide what is right not who is right. ... the dispute is virtually always between the worker and the Board, or the employer and the Board, not between the worker and the employer.[31]

Another example of the Tribunal's insistence on a process as non-adversarial as possible is the Tribunal's practice in ordering reimbursement of a party's costs of obtaining medical reports not requested by the Tribunal. Often in preparing for an appeal a party (usually the worker but also sometimes the employer) obtains a medical report from either a treating physician or a specialist concerning the worker's condition and its possible connection to work. At the close of the hearing the party then requests that the Tribunal reimburse the party for the costs of obtaining this report. In several published decisions, Panels of the Tribunal have made it clear that reimbursement will occur only in exceptional circumstances where the report was "critical or extremely useful [to the Panel] in its deliberations"[32]. The applicant's success in the appeal is not a consideration in determining whether reimbursement will be ordered: "The report need not support the final decision of the Panel ..."[33]. Even when reimbursement is granted, the money comes from the Accident Fund. Never is the "unsuccessful" party to the appeal ordered to pay the reimbursement.

All these cases show the non-adversarial trend in workers' compensation in Ontario. Does an order for the payment of costs fit within this framework? We think not.

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[30] See Decision No. 174 (1986), 2 W.C.A.T.R. 96 in the Addendum at p. 106.

[31] See Decision No. 434 (1986), 4 W.C.A.T.R. 183 in the dissent at p. 194.

[32] Decision No. 678/87 (March 1, 1988)

[33] Decision No. 1041/89 (June 1, 1990)

It has been said that an award of costs has as its primary purpose the indemnification or compensation of the party awarded the costs. However, the "punitive element" of costs cannot be ignored. The worker representative's submissions concerning costs indicate a focus on the employer's behaviour which clearly imports the concept of fault. The worker's representative characterizes the employer's conduct in this case "as inexcusable as it is inhumane".

In the Bell Canada case the court quoted the following portion of the decision in Ryan v. McGregor[34]:

> The fundamental principle is thus clearly stated ...:
>
> > "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them."

However, another passage in the Ryan case at the same page seems to imply a punitive element:

> The costs which are under discussion are in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought. The foundation of the power of the Common Law Courts to award costs was purely statutory. The Courts, to use the language of an old statute, were authorised to direct the unsuccessful litigant "to make recompense to the party unjustly vexed for the said unjust vexation."

L. Fox, the Annotator of the Bell Canada case in the Administrative Law Reports, feels that this passage suggests that a certain degree of fault attaches to an award of costs by a court against an unsuccessful party: "It recalls the medieval perception that litigation was an evil disruption of the social order and therefore should be discouraged."

This "winner/loser" aspect of an award of costs and the resultant punitive element of such an award do not lend themselves easily to the workers' compensation system as it exists in Ontario. As previously noted, at a Tribunal hearing the focus is on the correctness of the WCB's decision put in issue by either the worker or the employer. In entitlement cases such as the one brought before us by this employer, the issue is whether the Tribunal is satisfied that the worker is entitled to the benefits originally awarded by the Board and whether this award complies with the statutory requirements under the Act. While it is obviously to the benefit of both the worker and the employer to put forward the best case in favour of their respective positions, we think it would be counterproductive to the no-fault statutory insurance scheme under the Act to import a "winner/loser" concept by implying a power in the Tribunal

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[34] (1926), 58 O.L.R. 213 at p. 216

to order costs. In determining whether the Tribunal has an implied power to order costs, we cannot ignore the possible "chilling effect" such a power might have in deterring parties from bringing an appeal.

(vi) Summary of the Panel's conclusions

We have concluded that we do not have the jurisdiction to order one party in an appeal to pay the other party's costs incurred in preparing for the appeal.

There is no express power in the Act granting the Tribunal the power to order the payment of costs. Therefore, the power, if it does exist, must be present by implication.

We do not think that the presence of section 81(c) in the Act which permits the recovery by some persons of some expenses necessarily precludes the implication of a power in the Tribunal to order costs to a successful party of record. However, we see no ground to find that there is, in effect, a rule of statutory interpretation in favour of the implication of such a power.

We do not think that the concept of costs is encompassed by the term "compensation benefits" in section 3(1) of the Act.

There is no judicial trend in favour of implying a power to award costs. Indeed, the courts generally take a restricted view of administrative tribunals' powers regarding costs. They search for an express and unambiguous power, rather than imply one.

The removal in 1973 of the Board's express statutory power to order costs indicates to us that the Board, and by implication now also the Tribunal, do not now have authority to order costs payable by one party to the other party in an appeal.

The Ontario Legislature has expressly provided other administrative tribunals with the specific power to order costs. This also causes us to think that the Legislature, if it had intended that the Tribunal had the authority to order costs, would have done so by either retaining the power which the Board expressly had prior to 1973 or incorporating an express statutory power akin to that granted to other administrative tribunals.

We see no "practical necessity" for implying a power to order the payment of costs. The non-adversarial nature of workers' compensation in Ontario leads us to believe that awarding costs without express legislative mandate is not intended. We think it would be counterproductive to the no-fault statutory insurance scheme under the Act to import a "winner/loser" concept and its resultant punitive elements by implying a power in the Tribunal to order costs in the absence of express statutory language. Such a power could have a serious "chilling effect" on parties exercising their legitimate rights of appeal. If such a power is to be given to the Tribunal, we think that the Legislature must do so expressly. We do not think we should find such a power by implication.

In view of our conclusions concerning our lack of jurisdiction to order costs as requested by the worker, there is no need for us to address the second issue upon which we sought submissions concerning the factors to be taken into account if we were to find that we did have an implied power to order the payment of costs.

THE DECISION

The worker's application for the payment of costs by the employer is denied.

DATED at Toronto, this 28th day of November, 1991.

SIGNED: F.W. McIntosh-Janis, W.D. Jago, M. Robillard.