[2015] AATA 467

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/2468 |
| Re |  |
|  | APPLICANT |
| And | ASP Ship Management |
|  | RESPONDENT |

# Decision

|  |  |
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| Tribunal | **Deputy President J W Constance** |
| Date | **30 June 2015** |
| Place | **Sydney** |

1. The reviewable decision, being the decision of ASP Ship Management Pty Ltd made 9 May 2014, is set aside;
2. The matter is remitted to the Respondent for reconsideration in accordance with the directions that:
3. subject to direction (2), from 17 February 2014 to the date of this decision, and as at the date of this decision, the amount of compensation payable to Mr Precup shall include the cost of the following medical treatment:

* eight *Coloplast* catheters per day;
* eight syringes of Lignocaine per day;
* one *Uro-safe* urine collection bag per day;
* eight lengths of connecting tubing per day; and

1. the amount of compensation payable to Mr Precup shall include the cost of eight *Uro-safe* urine collection bags per day prior to 10 February 2015.
2. It is directed that within 14 days of the date of this determination each party may apply to the Tribunal for orders in relation to costs. Should neither party apply in accordance with the preceding direction, the costs of the proceedings incurred by Mr Precup are to be paid by the Company.

...........................**[sgd]**.............................................

**Deputy President J W Constance**

Catchwords

COMPENSATION – seafarers - medical treatment – whether treatment reasonable to obtain in the circumstances – relevance of cost of different forms of the same treatment – compensation of such amount as is appropriate – decision set aside and remitted

Legislation

Seafarer’s Rehabilitation and Compensation Act 1992 (Cth) ss 3, 28

Cases

Comcare v. Lofts [2013] FCA 1197

Comcare Australia v Rope [2004] FCA 540

Re Jorgensen and Commonwealth of Australia (1991) 23 ALD 321

# REASONS FOR DECISION

**Deputy President J W Constance**

**30 June 2015**

# introduction

1. The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) provides compensation for seafarers and certain others who suffer injuries arising out of, or in the course of, their employment.
2. When a seafarer obtains medical treatment for an injury, *being treatment that it was reasonable for …* [him/her] *to obtain in the circumstances, compensation is payable for the cost of the medical treatment, of such amount as is appropriate, having regard to the nature of the treatment*: see section 28 of the Act. It is to be noted at the outset that the Act does **not** provide for payment of the cost of medical treatment without qualification.
3. *“Medical treatment”* is defined in section 3 of the Act. The relevant paragraph of that definition reads in part:

(f) the supply, replacement or repair of… a medical, surgical or other similar aid or appliance … .

1. Mr Precup is a marine engineer who has worked for various shipping companies in Australia and in Europe since he graduated in 1988. He was employed by ASP Ship Management Pty Ltd (“the Company”) in Australia in March 1998. He last attended work for the Company in 2005 as a result of serious physical injuries suffered by him at work earlier that year.
2. This case concerns the application of section 28 of the *Seafarers Rehabilitation and Compensation Act 1992* to determine whether Mr Precup is entitled to compensation for the cost of treatment aids he has obtained for his injuries. There is no dispute that the aids he has obtained related solely to injuries which are compensable under the Act.
3. For several years the Company paid substantial treatment costs which were incurred by Mr Precup. At times, difficulties arose by reason of late payment by the Company. This forced Mr Precup to change the supplier from whom he sourced the required products.
4. On 17 February 2014, the Company determined that in future it would limit the amount of compensation it would pay for treatment costs to a fixed amount per month. The fixed amount was significantly less than the costs being incurred by Mr Precup and which had been paid previously. On 9 May 2014, the Company affirmed this decision.
5. Under the Act, the decision made on 9 May 2014 is reviewable by this Tribunal. Mr Precup applied to the Tribunal for such a review on 13 May 2014.
6. For the reasons which follow, the decision under review will be set aside and the matter remitted to the Company for reconsideration in accordance with a direction that, as at the date of remittal, Mr Precup is entitled to be compensated for the cost of a defined quantity of specified aids per month.

# FACTS

1. Unless stated otherwise, the following facts are found on the basis of the evidence of Mr Precup. Understandably, he is passionate about achieving the best result possible to enable him to best manage the very significant consequences of his injury. Whilst at times this caused him to be anxious to argue his case, I am satisfied that Mr Precup is a reliable witness who gave his evidence honestly and to the best of his recollection. As will appear from these reasons, he is a man who is ready to act on the advice of his health professionals and to try alternative treatment regimes.
2. On 19 July 2005, Mr Precup injured his back in a fall while working on board a vessel. He ceased work on 3 August 2005 and has been unable to work since.
3. Following the accident, Mr Precup developed urinary and bowel incontinence. In October 2006, he was referred to Dr Winsor, Consultant Rehabilitation Specialist, who diagnosed his having suffered cauda equina lesion which had resulted in the incontinence. The cauda equine are the nerves at the lower end of the spine. At the time Mr Precup was experiencing about four episodes of urinary incontinence per day and was incontinent of the bowel about five days out of seven. He was required to wear adult nappies.
4. With the advice of Dr Winsor and assistance from Mr Arthur, Specialist Incontinence Nurse (to whom he was referred by Dr Winsor in November 2006), Mr Precup was able to develop a regime of treatment which enabled him to manage his condition in a manner socially acceptable to him. This involved, amongst other measures, self-catheterisation of the bladder several times per day and the use of a sheath condom attached by tubing to a urine collection bag. The bag used by Mr Precup is a vinyl bag with the brand name *Uro-safe.*
5. When the hearing of this matter commenced in December 2014, Mr Precup was using Lignocaine as an anaesthetic and infection control agent when inserting the catheter. Lignocaine also served as a lubricant to assist insertion of the catheter. In accordance with the manufacturer’s instructions, Mr Precup discarded the leg bag, associated tubing and the sheath after each episode of self-catheterisation. This had been recommended by both Dr Winsor and Mr Arthur as a means of minimising the risk of infection.
6. Prior to implementing this regime, Mr Precup experienced recurrent urinary tract infections and difficulties with leaking from the connection point of the sheath and the tubing. From 2010 until February 2015 Mr Precup did not suffer from any urinary tract infections. The circumstances in which he suffered the possible prelude to an infection in February 2015 will be referred to later in these reasons.
7. Since 2006, Mr Precup has acted on the advice of Dr Winsor and Mr Arthur in managing his condition. He consults both Dr Winsor and Mr Arthur regularly.
8. By arrangement with the Company’s insurer, Mr Precup ordered the necessary aids from a supplier which submitted its invoices to the insurer. These invoices were paid by the insurer on behalf of the Company. When the insurer failed to pay the invoices regularly, the supplier refused to supply further aids to Mr Precup. He then commenced purchasing the necessary items from a pharmacy, some of which were on prescription. Again, invoices were submitted to the insurer and paid by it. By 2013 and 2014, the cost of continence equipment, supplies and medication was approximately $35,000 per month. The continence aids were more expensive when purchased from the pharmacy compared to the previous supplier. In late 2014, enquiries undertaken by Mr Precup indicated that obtaining supplies directly from the supplier, Independence Australia, would significantly reduce the cost of the continence aids.
9. On 11 November 2013, Ms Wicks, Clinical Nurse Consultant Spinal/Continence, provided an assessment of Mr Precup’s regime at that time and proposed various changes. The relevant changes were:

* the cessation of the use of Lignocaine;
* the use of a hydrophilic catheter instead of the Coloplast catheter (at the time used by Mr Precup in conjunction with Lignocaine);
* the cleaning and reuse of a cheaper urine bag (brand name *Careline*) and connecting tubing; the bag and tubing to be discarded weekly;[[1]](#footnote-1)

1. On 17 February 2014, the Company determined that:

… pursuant to Section 28 (1) of the Seafarers Rehabilitation and Compensation Act 1992, the cost of pharmaceutical products that is for you reasonable to obtain in your circumstances to achieve faecal and urinary continence, is unlikely to exceed $4969.00 per month including GST. [The Company] will from this day pay up to that amount per month for pharmaceutical products in respect of the said treatment subject to provisions of invoices and those invoices being related to treatment which are reasonable for you to obtain in the circumstances.[[2]](#footnote-2)

This determination was affirmed by the Company on 12 May 2014.[[3]](#footnote-3)

1. Ms Wicks’ assessment was the basis for the Company’s determination that the appropriate amount of compensation payable to Mr Precup on a monthly basis was $4,969.00. It is to be noted that a number of changes, in addition to those listed above, were suggested in reducing the cost of the continence aids. However, these are not in issue in this matter.
2. Following the Company’s determination, Mr Precup consulted Dr Winsor and Mr Arthur and declined to change his regime in the manner suggested by Ms Wicks.
3. The Company has paid all invoices outstanding prior to 17 February 2014. Some of the invoices were paid after the hearing of this matter commenced. Mr Precup has continued to purchase the same aids as he has been using for the past four years and has incurred a significant personal debt in this regard. Payment of invoices issued after 17 February 2014 has been refused by the Company.

# The issues

1. The following issues arise for determination:
   1. of the continence aids in dispute, what are the aids in respect of which Mr Precup is entitled to compensation?
   2. what is the quantity of such aids in respect of which Mr Precup is entitled to compensation?

It is agreed between the parties that once these questions are determined, this matter should be remitted to the Company to determine the amount of compensation payable for the cost of the treatment.

1. This matter was part-heard on 19 and 22 December 2014. Mr Precup, Dr Winsor, Mr Arthur and Ms Wicks gave evidence on those days.

# evidence given on 19 and 22 December 2014

## The evidence of Mr Precup

1. Mr Precup said that when he commenced using the sheath, urine bag and tubing he was told by both Dr Winsor and Mr Arthur that these aids were for single use only and should be discarded once they were disconnected. He also observed that the manufacturers of the items described them as being for single use.
2. He has not experienced any difficulties with his present regime since it commenced in about 2010. He self-catheterises eight times per day using 3-4 mls of Lignocaine each time. He has not suffered any ill-effects from the Lignocaine. The amount recommended by the manufacturer is 20 ml. per application, but he has found that he does not need to inject this quantity. Mr Precup commenced using a *Coloplast* intermittent use catheter after seeking the advice of Dr Winsor and Mr Arthur.
3. In addition to the process of catheterisation Mr Precup wears a sheath attached to a collection bag by plastic tubing. He discards the sheath, bag and tubing each time he removes them to self-catheterise.
4. Mr Precup has been able to reduce the cost of the continence aids he requires to $17,966.96 per month by purchasing them from the supplier he previously dealt with rather than his local pharmacy. The supplier had previously declined to provide the aids he needed by reason of the Company’s failure to pay invoices in a timely manner.

## Documentary evidence as to the use of the continence aids

1. There is no dispute that both the catheters and the sheath are for single use only. It is in issue whether the bag and attached tubing can be re-used or should be discarded once disconnected from the sheath, which has been Mr Precup’s practice for several years.
2. The packaging of the *Uro-safe* bag states that the product is sterile and should not be resterilised; it also states that the product is fitted with an anti-reflux valve to prevent the back-flow of urine to reduce the possibility of infection.[[4]](#footnote-4) The packaging of the tubing indicates that it is sterile.[[5]](#footnote-5)
3. On 12 November 2014, Mr Precup emailed *ConvaTec,* the manufacturer of the *Careline* bag and tubing recommended by Ms Wicks. He sought the manufacturer’s advice as to possible re-use of the product.
4. On 13 November 2014, Mr Precup received the following response:

Thank you for your enquiry regarding our Careline Leg Bags.

…In the terms used by the Therapeutic Good [sic] Association which approve the use of medical devices each time you disconnect is a single use.

As these are single use products it is not recommended to clean and reuse them so your rehab specialist is correct. These products are single use as they are not manufactured to stand up to cleaning and reuse.[[6]](#footnote-6)

1. The *Australian regulatory guidelines for medical devices*  issued by the Department of Health and Ageing Therapeutic Goods Administration state that:

If a device is for single use

The manufacturer’s intention is that the device can only be used once and should then be disposed of. [[7]](#footnote-7)

## The evidence of Dr Winsor, Consultant Rehabilitation Physician

1. In addition to giving oral evidence Dr Winsor provided reports dated 24 March 2014,[[8]](#footnote-8) 17 July 2014,[[9]](#footnote-9) and 3 December 2014[[10]](#footnote-10). The Tribunal also has before it earlier reports from 2007 and 2010.
2. In the opinion of Dr Winsor, the proposal that the urine bag and tubing be reconnected after self-catheterisation increases the handling of the aids and therefore increases the risk of urinary tract infection. The fact that Mr Precup requires both frequent catheterisation and the use of an external urine collection system, which includes the use of a sheath, adds to the risk of infection.
3. The *Uro-safe* bag being used by Mr Precup is described by its manufacturer as a *“single use”* product. Nevertheless, cost considerations for some users may dictate the need for the bag and tubing to be washed and re-used.
4. Dr Winsor indicated that he would be prepared to make a recommendation to Mr Precup that he trial a regime of reusing the *Uro-safe* bags *“with such security as necessary, to avoid the possibility of infection”.[[11]](#footnote-11)* He suggested a trial based on changing the bag once per day.
5. In Mr Precup’s situation, the use of Lignocaine in conjunction with a *Coloplast* catheter is recommended. Dr Winsor reported on 24 March 2014 that “*Lignocaine gel contains an anaesthetic agent that reduces the discomfort of catheterisation as well as providing lubrication*”.[[12]](#footnote-12) Mr Precup has continually and consistently reported that he experiences discomfort when he passes or attempts to pass a catheter without anaesthetic gel. A water-based gel does not provide any numbing effect. Further, Mr Precup suffers neuropathic pain as a consequence of his spinal cord injury and is unlikely to tolerate the use of a hydrophilic catheter with a solely water-based gel.
6. Dr Winsor acknowledged that Lignocaine has an effect on cardiac conduction in high doses. However, the amount of Lignocaine used by Mr Precup on each occasion is considerably less than the maximum dose recommended by the manufacturer and is not of concern in relation to possible cardiac effects. The risk of his becoming sensitive or suffering an allergic reaction to the chemicals is slight. In 20 years of practice Dr Winsor has not seen a patient become sensitised to Lignocaine gel.

## The evidence of Ms Wicks, Clinical Nurse Consultant Spinal/Continence

1. Ms Wicks provided a report dated 1 July 2014,[[13]](#footnote-13) in addition to that dated 11 November 2013, and gave evidence.
2. In the opinion of Ms Wicks, the continued use of Lignocaine may be detrimental to Mr Precup’s health and should be discontinued. She recommended that Mr Precup use a hydrophilic catheter (brand name *Lofric*) which was pre-lubricated with water. Further, she was of the opinion that he should use a cheaper urine bag and tubing (brand name *Careline*) which could be cleaned daily and changed weekly.
3. In her opinion the combination of her prescribed method of using a *non-touch system* of catheter insertion, a clean sheath, the length of the male urethra which reduces the risk of infection, the non-return valve on the bag and the use of disinfectant wipes would mean that *“there wouldn’t be a risk of infection”.[[14]](#footnote-14)*
4. Ms Wicks described the *Uro-safe* bag being used by Mr Precup as an extended wear bag designed for ten day use. For this reason it is more expensive than alternative bags which are readily available. Less expensive bags can be washed with *Urosol* daily and re-used for a week.

# evidence given on 1 & 2 April 2015

1. As there was insufficient time available to complete the hearing on 22 December 2014 the hearing was resumed on 1 April 2015.

## Further evidence of Mr Precup

1. Mr Precup provided an additional statement dated 27 March 2015.[[15]](#footnote-15)
2. On 14 January 2015, Mr Precup voluntarily commenced a trial of the regime recommended by Ms Wicks. This involved the use of the *Lofric* catheter without Lignocaine, a Careline leg bag, the recommended sheath, wipes and *Urosol* detergent.
3. Mr Precup found the insertion of the catheter painful. On 19 January 2015 he experienced significant pain in the supra-pubic region extending to his penis. He attended his general practitioner, Dr Massolino, who advised him to return to using his previous treatment regime and to consult Dr Winsor as soon as possible. Dr Massolino prescribed a course of antibiotics and arranged for urine samples to be tested.
4. On 21 January 2015, Mr Precup consulted Dr Winsor who advised him to continue with the antibiotic treatment and to cease the use of the aids recommended by Ms Wicks. He was advised to return to the treatment regime he had previously followed. Dr Winsor further advised Mr Precup to try changing the *Uro-safe* urine bag once every 24 hours if further test results were clear; he advised that the sheath and connecting tube should continue to be changed each time Mr Precup self-catheterised.
5. On 10 February 2015, Mr Precup was advised that the results of a further urine test were normal and he commenced changing the urine bag on a daily basis, rather than each time he self-catheterised.
6. Mr Precup again consulted Dr Winsor on 25 February 2015. Dr Winsor advised him not to change the treatment regime he had in place at that time. At that consultation Dr Winsor prescribed 250 Lignocaine syringes. Mr Precup again consulted Dr Winsor on 25 March 2015. Dr Winsor advised him to continue with the regime he was using, being that which he had followed since 2010 save that he change the urine bag once per day rather than each time he self-catheterised.
7. In addition to the pain experienced when using the *Lofric* catheter, Mr Precup found that it involved more handling than the *Coloplast* catheter he used previously. The *Lofric* catheter emptied urine into an attached bag which was less convenient than the *Coloplast* catheter, which emptied directly into the toilet. Further, the connection to the sheath disconnected easily and leaked quite often. Mr Precup also found the tubing difficult to attach to the sheath. The cleaning of the bag and tubing as recommended by Ms Wicks took approximately 20 minutes per day.

## Evidence of Mr Arthur, Registered Nurse Consultant

1. Mr Arthur provided a report dated 19 March 2015[[16]](#footnote-16) and gave evidence. I also have before me an earlier report dated 20 November 2006.[[17]](#footnote-17)
2. Mr Arthur was initially consulted by Mr Precup in November 2006. Mr Precup consulted him on a weekly basis for at least two or three years and regularly thereafter, albeit not as frequently.
3. In the opinion of Mr Arthur, Mr Precup:

“... sought options in regard to his issues and …made very good choices, very educated choices on a range of options that were available to him and chose the options that worked best for him…. He was very receptive to any options. He would discuss with me issues or concerns or problems that he’d been having in terms of his continence and how it was working at the time. And if I was aware of alternate options that he may trial or daily programs that he may try, then he was very open to try anything that would assist in his continence management. [[18]](#footnote-18)

1. Mr Arthur said that prior to January 2015:

Mr Precup was managing his incontinence in a manner which was socially acceptable to him and was as I understand pain free from using the Lignocaine and the system he was using was working for him.[[19]](#footnote-19)

1. It was acknowledged by Mr Arthur that some people reuse urine bags and tubing by reason of financial necessity. However, in his view, it is not appropriate to reuse products that are designated single use by the manufacturer.

## Further evidence of Dr Winsor

1. Dr Winsor provided a further report dated 3 March 2015[[20]](#footnote-20) and gave evidence.
2. In the opinion of Dr Winsor, the cause of the pain experienced by Mr Precup was the relative stiffness of the *Lofric* catheter and the fact that he was not using anaesthetic gel. Supra-pubic pain in a person performing self-intermittent catheterisation is usually due to infection or trauma. The testing of the urine sample provided by Mr Precup indicated the possibility of a prelude to an infection.
3. Dr Winsor did not recommend any changes to the regime previously undertaken by Mr Precup, other than that he use just one bag in each 24 hours. He described this as *“a reasonable way to go and would reduce the costs.”[[21]](#footnote-21)* He formed this opinion notwithstanding the manufacturer’s recommendation that the product is for single use.

## Further evidence of Ms Wicks

1. Ms Wicks said that she recommended a catheter attached to a bag as there was less risk of infection with a closed system. So far as the difficulty Mr Precup had experienced with the connection of the Careline bag, she said that there was a graduated connector available which should overcome this problem. These connectors are reusable, but require cleaning.

## Evidence of Dr Rutkowski, Rehabilitation Physician

1. Dr Rutkowski assessed Mr Precup on 16 October 2014 at the request of the Company’s Solicitors. She provided a report dated 3 November 2014[[22]](#footnote-22) and gave evidence.
2. In the opinion of Dr Rutkowski, long-term use of Lignocaine should not be recommended, by reason of *“significant concerns for frequent and permanent usage.” [[23]](#footnote-23)* These include effects on the cardiovascular system.
3. Dr Rutkowski largely agreed with Ms Wicks’ recommendations.
4. In relation to the likelihood of urinary tract infections, Dr Rutkowski said that the profession *“sort of developed”* an acceptance of an average of 2.2 infections per year over the whole population of people with spinal cord injury. She said that this was not ideal and that she would like to report no infections.[[24]](#footnote-24) In her opinion, Mr Precup should have persisted with the trial of the *LoFric* catheter after he had been treated with the antibiotic. She disagreed with the advice given by Dr Winsor in this regard.

# consideration

1. Subsection 28(1) sets out three pre-conditions for the payment of compensation:

* the employee has suffered an injury (being an injury which is compensable under the Act);
* he/she has obtained medical treatment for the injury; and
* the treatment was reasonable for the employee to obtain in the circumstances.

Once these pre-conditions are met, compensation is payable for the cost of the medical treatment, but not necessarily in the amount of the cost actually incurred. The amount of compensation payable is qualified – it is *“such amount as is appropriate, having regard to the nature of the treatment.”*

## The application of subsection 28(1)

1. It is accepted that Mr Precup meets the first two preconditions listed above in that he suffers a compensable injury and has obtained medical treatment for that injury. What is in dispute is whether that treatment was reasonable for him to obtain, and ultimately, what is the appropriate amount of compensation.
2. In considering the final precondition in subsection 28(1**)** it is important to note that it is necessary to determine whether the treatment obtained was reasonable for the ***“injured worker”*** to obtain *“****in the circumstances”***. This wording imports a subjective (*i.e.* related to the individual employee) element into the assessment – it is necessary to consider what was reasonable for the particular worker to obtain. The assessment of what was reasonable is not to be made without reference to the needs of the injured worker, so far as those needs relate to the nature of the injury.[[25]](#footnote-25) The inclusion of the words *“in the circumstances”* supports the conclusion that the situation of the particular claimant is to be considered along with any other relevant circumstances. In Mr Precup’s case, it is necessary to look at the system of treatment and how any change may affect him.
3. In this application, it is argued by the Respondent that the Tribunal should take into account the availability of cheaper alternatives to the treatment currently undergone by Mr Precup in formulating an assessment of whether that treatment was reasonable. The test of reasonableness requires a cost-benefit analysis.
4. In my view, the relative cost of alternative items of equipment (as distinct from alternative modes of treatment) for the management of Mr Precup’s condition is not a relevant consideration in determining whether the preconditions have been met.[[26]](#footnote-26) Instead, it should be considered when determining the appropriate amount of the compensation payable. For example, *“treatment”* does not refer to the particular **brand** of collection bag – this is an issue for determination in relation to the amount of compensation payable.
5. The appropriateness test clearly directs a decision-maker’s attention towards considerations of the cost of treatment. The Act states that “...*compensation is payable for the cost of the medical treatment, of such amount as is appropriate, having regard to the nature of the treatment”.* The reference to “*cost of medical treatment*” requires consideration of the cost that has actually been incurred. Beyond the nature of the treatment, it is my view that questions of the sourcing of items from different manufacturers falls to be considered here.
6. For example, in *Sinclair and Comcare*,[[27]](#footnote-27) the Tribunal considered the question of the appropriate amount that should be paid to the Applicant by way of compensation for physiotherapy. The fact that the Applicant paid a higher fee for physiotherapy sessions compared to most suburban practitioners was properly considered by the Tribunal at the appropriateness stage.
7. In such cases, the fact that the same treatment could be provided at a lower rate does not mean that treatment was unreasonable for an employee to obtain. Under the scheme of compensation provided by the Act, an injured worker is free to have whatever treatment at whatever cost he or she determines. The Act provides for a determination of the amount of compensation which the **employer** must pay for that treatment. Subsection 28(1) is clear that the compensation payable is not necessarily equal to the actual cost incurred. It is qualified in that the compensation payable is only that amount which is **appropriate**, having regard to the nature of the treatment.
8. This is not to say that financial considerations may not arise when considering whether treatment was reasonable for an employee to obtain. The Federal Court has made it clear that a decision maker should consider the cost of treatment in assessing reasonableness. In *Comcare Australia v Rope[[28]](#footnote-28)* the Court said, in part:

… the reference in s 16(1) to treatment being ‘reasonable to obtain in the circumstances’ is a clear indication that, in this case, the tribunal was required to engage in a costs/benefit analysis in relation to PNI treatment. The Tribunal needed, among other things, to weigh the benefit of PNI treatment against the cost of obtaining it (given that the treatment was available only in Townsville), taking into account any other treatment available to Ms Rope.

1. In *Rope*, the dispute related to whether the type of treatment proposed was reasonable for Ms Rope to obtain in view of the cost of travel to obtain it. In this matter, it is not in dispute that the use of a catheter, a leg bag and associated tubing, and the procedure of anal irrigation are proper types of treatment. The dispute is concerned primarily with the amount which the Company should pay Mr Precup to compensate him for the cost of obtaining the necessary aids. These are matters to be considered under that part of the subsection dealing with the appropriate amount of compensation to be paid.
2. In contrast, the argument as to the use of Lignocaine raises questions as to whether it is a form of treatment which it is reasonable for Mr Precup to obtain in view of the possible risks to his health and the presence of alternative forms of treatment. It does not raise an issue merely of the appropriateness of different brands or forms of the same type of equipment, but a question of two different forms of treatment (the use of Lignocaine, as opposed to a water-based gel). In such circumstances the relative costs of the alternative forms of treatment is a relevant consideration in deciding whether the treatment undergone by Mr Precup was reasonable for him to obtain.
3. Should I be incorrect in my interpretation of section 28, on the facts of this matter the consideration of all questions of relative costs at the stage of determining whether the treatment was reasonable for Mr Precup to obtain, would have made no difference to my ultimate conclusion.

## The Company’s Position

1. It is not in dispute that Mr Precup has suffered a compensable injury and that the medical treatment in issue (the obtaining of the continence aids) was obtained for the injury.
2. The Company argues that Mr Precup is not entitled to compensation for some of the equipment he has obtained since the date of the reviewable decision (17 February 2014). In summary the reasoning behind this argument is:

* Mr Precup should not use *Uro-safe* bags and *Urocare* tubing but should use cheaper *Careline* bags and tubing which serve the same purpose;
* the bag and tubing should not be discarded each time they are disconnected from the sheath but should be discarded daily (initially it was argued that the equipment should be cleaned daily and discarded once per week, however during the hearing the Company indicated that discarding the bag and tubing every 24 hours was an acceptable form of treatment);
* Lignocaine should not be used to assist self-catheterisation;
* Mr Precup should not use a *Coloplast* catheter in conjunction with Lignocaine but he should use a hydrophilic catheter instead.

1. The argument against the use of Lignocaine was based on its significant cost and its possible detrimental effect on Mr Precup’s health. It was argued that the remaining items were not reasonable for Mr Precup to obtain as there are equally suitable cheaper alternatives available.
2. The Company accepts that prior to 17 February 2014, being the date of the determination that the Company would pay no more than a specified amount for treatment, the proper amount of compensation payable was the cost of all the aids Mr Precup had obtained. Further it is agreed that compensation was properly calculated using the price charged by the pharmacy from which Mr Precup sourced his supplies.
3. As a result of concessions made during the hearing it is only compensation for treatment made after the date of the initial determination which is in issue.

## Mr Precup’s treatment is based on professional advice and in accordance with manufacturers’ guidelines

1. I accept Mr Precup’s evidence that at all times he acted in consultation with, and on the advice of, Dr Winsor and Mr Arthur. He has sought their professional assistance over several years and with their guidance he has established a regime which provides the best outcomes for him, including being free of urinary tract infections for four years.
2. Having read the reports of Dr Winsor and Mr Arthur and having heard their evidence, I am satisfied that each of them is experienced in his respective field and has given professional and appropriate advice to Mr Precup. I do not accept the suggestion by Dr Rutkowski that Dr Winsor and Mr Arthur have been simply agreeing with Mr Precup’s opinions as to the appropriate treatment. In my view, her comment in this regard was completely unjustified. In considering the weight to be given to their opinions, I have taken into account that they have the advantage of having treated Mr Precup for almost ten years and have had the opportunity of gaining an understanding of his needs and the appropriate manner of addressing those needs. It was reasonable for Mr Precup to follow the treatment regime approved by them.
3. I have also taken into account that, in his existing regime (apart from the recent use of a leg bag for 24 hours), Mr Precup has followed the manufacturers’ instructions.

## Relevant circumstances

1. Mr Precup’s circumstances require special consideration in deciding whether it was reasonable for him to have obtained the treatment he has to date. These circumstances include:

* he suffers both bowel and urinary incontinence;
* each of these conditions is permanent;
* the management of one condition affects the management of the other;
* he retains sensation in his penis making catheterisation more difficult;
* he suffers neuropathic pain as a result of his injury;
* he continues to lead an active lifestyle;
* the regime he has followed for the past 4-5 years was developed over a number of years in conjunction with specialist advisers whom he trusts with decisions affecting his well-being;
* his existing treatment regime permits him to control his incontinence in a manner socially acceptable to him;
* the existing regime takes significant time to manage each day;
* he has confidence in his existing regime.

1. Both Counsel addressed me on the role of their respective clients in the events leading up to and immediately following the making of the decision to pay Mr Precup a defined sum of money each month. In particular, Counsel for the Company argued that Mr Precup should have given earlier consideration to discarding the urine bags less frequently. Counsel for Mr Precup argued that the Company should have engaged in more consultation with Mr Precup, Dr Winsor and Mr Arthur prior to making the reviewable decision.
2. I am satisfied that Mr Precup acted properly at all times. He has acted on the advice of eminently well-qualified health professionals, and used the continence aids in accordance with the manufacturers’ instructions and the advice of the Therapeutic Goods Administration. When advised to try alternative products and modes of treatment he has been prepared to do so.
3. I have not taken into account any evidence as to the claimed lack of consultation in this matter. However situations may arise when it would be reasonable for the Company to engage in consultation with Mr Precup and his advisers before making decisions to vary the treatment in respect of which it is prepared to pay compensation.

## *Coloplast* or hydrophilic catheter?

1. I am satisfied that Mr Precup found the *Coloplast* catheter easier to use than the hydrophilic catheter and, when used in conjunction with Lignocaine, was less painful to insert. This is of particular significance in light of Mr Precup’s evidence that it is necessary that he self-catheterise approximately eight times per day and the evidence of Dr Winsor that Mr Precup suffers neuropathic pain arising from his injury.
2. I regard the comparative risks of infection in following the different regimes as an important factor. Mr Precup was free of urinary tract infections for four years whilst using the regime developed with the advice of Dr Winsor and Mr Arthur. In contrast he developed pain, possibly as a prelude to an infection, within five days of using the hydrophilic catheter recommended by Dr Rutkowski and Ms Wicks. I am satisfied that he used the hydrophilic catheter correctly. I am satisfied that the method of inserting the hydrophilic catheter was more likely to cause the catheter to come in contact with a non-sterile surface than the way in which Mr Precup uses the *Coloplast* catheter and therefore more likely to cause infection.
3. I do not accept the evidence of Ms Wicks that there would not be a risk of infection.[[29]](#footnote-29) Mr Precup’s experience in February 2015 suggests otherwise. I prefer the evidence of Dr Winsor and Mr Arthur to that of Ms Wicks in this regard. Further, Dr Rutkowski gave evidence that there was an accepted risk of 2.2 infections per year over the whole population of people with a spinal cord injury. Whilst I note that Dr Rutkowski and some of the medical profession have come to regard this as an acceptable risk, I am satisfied that the regime preferred by Mr Precup (which involves the use of the *Coloplast* catheter) has reduced the risk of his suffering such infections very significantly.
4. At, and prior to, the date of this decision I am satisfied that the use of eight *Coloplast* catheters per day is treatment that is reasonable for Mr Precup to obtain. Compensation is payable for the cost incurred by Mr Precup in obtaining these aids.

## The use of Lignocaine

1. I prefer the opinion of Dr Winsor to that of Dr Rutkowski with respect to the risk to Mr Precup’s of his long-term use of Lignocaine. Dr Winsor has assessed the risk, taking into account that Mr Precup is using much less than the dose recommended by the manufacturer and has shown no adverse effects. Dr Rutkowski was unable to refer to any scientific study which suggested that the use of Lignocaine in the manner adopted by Mr Precup would have detrimental health effects.
2. This is a situation in which the cost of treatment is a factor to be taken into account in determining whether it is treatment which it was reasonable for an injured employee to obtain in the circumstances of the particular case. It is not simply a matter of comparing the cost of two alternative aids.
3. The cost of Lignocaine used by Mr Precup is significant, being $3848.00 per month. However the *Coloplast* catheters used by Mr Precup are less expensive than those recommended by Ms Wicks. This saving is to be considered along with the cost of Lignocaine in deciding the treatment for which Mr Precup should be compensated.
4. It is necessary to look at the cost of treatment with Lignocaine in light of the circumstances of Mr Precup’s medical condition. Unlike many spinal patients, Mr Precup has sensation in the penis and suffers from neuropathic pain. The use of Lignocaine eliminates the pain experienced by Mr Precup during catheterisation and its use may reduce the risk of infection. Having taken into account these factors, along with the cost of Lignocaine, I am satisfied that it is reasonable that Mr Precup continue to use Lignocaine as a means of treatment.
5. At present, Mr Precup discards more than three-quarters of each syringe of Lignocaine as he does not require the recommended quantity to be effective and it is not supplied in smaller quantities. Should Mr Precup be able to develop a safe way of using the whole of the contents of each syringe, the amount of Lignocaine which it would be reasonable for him to obtain may be reduced.
6. At, and prior to, the date of this decision I am satisfied that the use of eight syringes of Lignocaine per day is treatment that is reasonable for Mr Precup to obtain and that compensation is payable for the cost incurred by Mr Precup in obtaining this product.

## *Uro-safe* bag and tubing or *Careline* bag and tubing?

1. I am satisfied on the evidence of Mr Precup that the *Uro-safe* bag and the connecting tubing is less likely to leak whilst in use than the *Careline* bag recommended by Ms Wicks and Dr Rutkowski. This is an important factor in Mr Precup being able to achieve a socially acceptable regime of bladder control.
2. I also accept the evidence that the connection of the *Careline* bag and tubing to the sheath is more difficult than the connection of the *Uro-safe* bag and tubing.
3. Guided by the words of subsection 28(1) that the treatment is to be treatment that *“it is reasonable for the employee to obtain”*, it is necessary to take into account that the regime used by Mr Precup is one with which he is confident and which gives him a greater degree of socially acceptable continence than the alternative proposed on behalf of the Company. In addition, his existing regime is one which has been developed and tested over several years with the advice of Mr Precup’s specialist doctor and specialist nurse.
4. Mr Precup first learned of Dr Winsor’s view that he considered the reuse of the bag for a day was a reasonable process, taking into account the cost savings, during the hearing of this matter on 22 December 2014. After further consideration, Mr Precup trialled the use of the regime recommended by Ms Wicks. When he gave evidence on 1 April 2015, Dr Winsor confirmed this view and Mr Precup gave evidence that he had been continuing to discard the bag daily rather than after each catheterisation.
5. I am satisfied that since the start of February 2015, it is reasonable for Mr Precup to obtain treatment by way of *Uro-safe* urine bags at the rate of one per day. Prior to that time it was reasonable for Mr Precup to obtain the bags at the rate of eight per day.
6. In light of the advice of the manufacturer that the *Careline* bags *“are not manufactured to stand up* *to cleaning and re-use”* it is appropriate for the Company to pay compensation for the cost of the more-expensive *Uro-safe* bags.
7. Further, the continued purchase of tubing to connect to the bag at the rate of eight items per day is treatment which it is reasonable for Mr Precup to obtain. I make this finding on the basis of Mr Precup’s evidence that he experienced increased leakage problems with the connections to the *Careline* bag, and the evidence of Dr Winsor that re-use of the tubing increased the risk of infection.
8. I am satisfied that at the date of this decision, the use of one *Uro-safe* bag and eight lengths of connecting tubing per day is treatment that it is reasonable for Mr Precup to obtain. The use of eight *Uro-safe* bags per day was reasonable treatment for Mr Precup to obtain until the end of January 2015*.* Compensation is payable for the cost incurred by Mr Precup in obtaining this product.

## Saline solution or tap water?

1. It was conceded on behalf of the Company that anal irrigation was treatment which it was reasonable for Mr Precup to obtain. The issue is the appropriate amount of compensation which Mr Precup should receive for the cost of this treatment. The cost of saline solution is $350.00 per month compared with tap water of negligible cost.
2. It is the opinion of Dr Rutkowski that the use of tap water is preferable to the use of saline solution. Dr Winsor agreed that it was reasonable for Mr Precup to try this alternative.[[30]](#footnote-30)
3. On the basis of the evidence of Dr Winsor and Dr Rutkowski, I am satisfied that at the date of this decision Mr Precup is not entitled to payment of compensation for the cost of saline solution for anal irrigation. As this evidence became known to Mr Precup during the conduct of this application for review, he is entitled to await the outcome before adjusting the regime he has followed for some years, and which, until recently was funded by the Company. In those circumstances, Mr Precup is entitled to compensation for the cost of saline solution obtained prior to the date of this decision.

## Maintaining the supply of aids

1. In view of Mr Precup’s evidence that it can take up to two months to obtain delivery of ordered supplies[[31]](#footnote-31) it is reasonable for him to obtain supplies of aids two months in advance of the time he is reasonably likely to use them.

# conclusion

1. Regardless of the conclusions set out above, in my view the decision under review was incorrect. The decision-maker purported to set a monetary cap on the monthly amount payable to compensate Mr Precup for the ongoing treatment he requires. Clearly this is not what is intended by section 28.
2. In *Comcare v. Lofts [[32]](#footnote-32)* the Federal Court said:

…… s.16 operates on a claim for specific costs of medical treatment, whether in relation to the past or the future. The specificity is integral to the operation of the provision because of the need for Comcare (or the Tribunal on review) to determine whether the treatment costs are “reasonable’ and whether payment is “appropriate”. That determination cannot be made if particular costs are not claimed.

1. In the above decision, the Court was dealing with subsection 16(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) which is similar, but not identical, to subsection 28(1). However, the manner of determination of compensation is the same. The decision in *Comcare v. Lofts* is applicable in this matter. A decision is to be made on a claim for compensation for the cost of specified treatment rather than a determination that a particular sum per month is payable. A decision as to a particular amount, rather than with respect to particular treatment, makes no allowance for variations in the price of particular forms of treatment.
2. The Company must consider each claim made by Mr Precup on its merits, which include the relevant circumstances in which the treatment was obtained. This does not mean that the Company cannot inform Mr Precup that it will continue to pay compensation for recurring treatment at a particular rate until circumstances change. This is obviously the most efficient manner in which compensation can be determined and paid and would be to the benefit of both parties. In my view, in determining that the appropriate amount of compensation payable should change, a relevant consideration should be whether there has been prior consultation with Mr Precup and, if necessary, his medical advisers.

## Reviewable decision to be set aside and matter remitted to the decision-maker

1. The reviewable decision, being the decision of ASP Ship Management Pty Ltd made 9 May 2014, will be set aside.
2. The matter will be remitted for reconsideration in accordance with the directions that:

(a) subject to direction 2, from 17 February 2014 to the date of this decision, and as at the date of this decision, the amount of compensation payable to Mr Precup shall include the cost of the following medical treatment:

* eight *Coloplast* catheters per day;
* eight syringes of Lignocaine per day;
* one *Uro-safe* urine collection bag per day;
* eight lengths of connecting tubing per day; and

(b) the amount of compensation payable to Mr Precup shall include the cost of eight *Uro-safe* urine collection bags per day prior to 10 February 2015.

1. It will be directed that within 14 days of the date of this determination each party may apply to the Tribunal for orders in relation to costs. Should neither party apply in accordance with the preceding direction, the costs of the proceedings incurred by Mr Precup are to be paid by the Company.

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| I certify that the preceding 117 (one hundred and seventeen) paragraphs are a true copy of the reasons for the decision herein of Deputy President J W Constance |

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Associate

Dated 30 June 2015

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| --- | --- |
| Date(s) of hearing | **19 and 22 December 2014; 1 and 2 April 2015** |
| Date final submissions received | **2 April 2015** |
| Counsel for the Applicant | **L Grey** |
| Solicitors for the Applicant | **W.G. McNally Jones Staff** |
| Counsel for the Respondent | **J Lenczner** |
| Solicitors for the Respondent | **Holman Fenwick Willan** |

1. Exhibit R1 p.147. [↑](#footnote-ref-1)
2. Exhibit R1 p. 164 [↑](#footnote-ref-2)
3. Exhibit R1 p.183. [↑](#footnote-ref-3)
4. Exhibit A11. [↑](#footnote-ref-4)
5. Exhibit A10. [↑](#footnote-ref-5)
6. Exhibit A8. [↑](#footnote-ref-6)
7. Exhibit A15. [↑](#footnote-ref-7)
8. Exhibit R1, p-167. [↑](#footnote-ref-8)
9. Exhibit A13. [↑](#footnote-ref-9)
10. Exhibit A14. [↑](#footnote-ref-10)
11. Transcript 19/12/14 p-70. [↑](#footnote-ref-11)
12. Exhibit R1, page 167. [↑](#footnote-ref-12)
13. Exhibit R5. [↑](#footnote-ref-13)
14. Transcript 22/12/14 p-144. [↑](#footnote-ref-14)
15. Exhibit A16. [↑](#footnote-ref-15)
16. Exhibit A20. [↑](#footnote-ref-16)
17. Exhibit R1, page 14. [↑](#footnote-ref-17)
18. Transcript 01/04/15 p-221. [↑](#footnote-ref-18)
19. Transcript 01/04/15 p-232. [↑](#footnote-ref-19)
20. Exhibit A21. [↑](#footnote-ref-20)
21. Transcript 01/04/15 p-276. [↑](#footnote-ref-21)
22. Exhibit R7. [↑](#footnote-ref-22)
23. Exhibit R7 p.9. [↑](#footnote-ref-23)
24. Transcript 02/04/15 p-309. [↑](#footnote-ref-24)
25. See Re Jorgensen and Commonwealth of Australia (1991) 23 ALD 321at 325. [↑](#footnote-ref-25)
26. “... it will be common for the reasonableness of proposed medical treatment to be assessed in the light of alternative treatment options”: Comcare v Holt [2007] FCA 405, at para 25. [↑](#footnote-ref-26)
27. [2002] AATA 23. [↑](#footnote-ref-27)
28. [2004] FCA 540 at para.17. [↑](#footnote-ref-28)
29. Transcript 22/12/2014 p-144. [↑](#footnote-ref-29)
30. Ttranscript 19/12/14 p-82. [↑](#footnote-ref-30)
31. Transcript 01/04/2015. [↑](#footnote-ref-31)
32. [2013] FCA 1197 at para.74. [↑](#footnote-ref-32)