

**From:** Rebecca Sostarko [<mailto:rebecca@masterbuilders.com.au>]

**Sent:** Tuesday, 16 January 2018 12:38 PM

**To:** Chambers - Gostencnik DP

**Cc:** Shaun Schmitke; Sam McGregor

**Subject:** 2016/23 - 4 yearly review - Construction Awards

Dear Associate,

Please find attached correspondence from Master Builders Australia with regard to AM2016/23.

Kind regards,

**Rebecca Sostarko**

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**MASTER BUILDERS  
AUSTRALIA**

16 January 2018

Deputy President Gostencnik  
Fair Work Commission  
Level 10, Terrace Tower  
80 William Street  
EAST SYDNEY NSW 2011

via: [chambers.gostencnik.dp@fwc.gov.au](mailto:chambers.gostencnik.dp@fwc.gov.au)

Dear Deputy President,

**RE: AM2016/23 - 4 YEARLY AWARD REVIEW - CONSTRUCTION AWARDS**

We write in relation to the above matter and the *Building and Construction General On-Site Award 2010* (On-Site Award) in which Master Builders maintains an interest.

Master Builders has undertaken to provide the Commission with additional information as to our position regarding the following allowances and whether they are payable for 'all purposes'.

- Clause 19.5 – Mobile cranes capacity adjustment formula
- Clause 21.11 – Air-conditioning industry and refrigeration industry allowances

**Clause 19.5 – Mobile cranes capacity adjustment formula**

Master Builders submits that this allowance should not be payable for all purposes.

The Commission will be aware that during substantive proceedings Master Builders has made an application to vary clause 19.5<sup>1</sup>. That variation seeks to give effect to the comments of SDP Watson in an earlier 2 Yearly Review related decision<sup>2</sup>.

During the course of the current proceedings, Master Builders has submitted that clause 19.5 is a composite allowance, given each level of the allowance so triggered replaces and is payable instead of any earlier level. These levels are determined with reference to a weight test (i.e. a certain defined tonnage above a base threshold) that must be established before the appropriate allowance is paid.

As a result, we submit the allowance is paid for the operation of mobile cranes in circumstances where specific work is undertaken involving crane weight of particular levels determined by a test applicable to that specific instance of work.

This is apposite to the approach adopted elsewhere in the award where other disability allowances are payable only in circumstances where a necessary precondition is triggered. The convention is to

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<sup>1</sup> *Master Builder Australia submission – 4 Yearly Review of Modern Awards – Construction Awards – AM2016/23 – 2 December 2016 at para 8.*

<sup>2</sup> *[2013] FWC 4576 at para 45.*

pay such allowances only for the period in which an employee experiences the disability or performs work that triggers its operation, and these are not payable for all purposes. This is one of several reasons giving rise to the variation we have earlier sought to clause 19.5.

In addition, the On-Site Award is very clear insofar as specifying those allowances that are payable for all purposes and those that are not. For example the tool and employee protection allowance (20.1), underground allowance (21.3) and carpenter-diver allowance (21.7) are clearly identified as being payable on an all purposes basis. The mobile crane allowance is not identified in this way.

Lastly, that the allowance is now expressed in a percentage of a weekly amount ought not to convey an impression that it is payable for all purposes. The reference to 'weekly' amount arises from the predecessor NBCIA that restricted the engagement of employees undertaking particular types of work to weekly hire only. Relevantly, this included crane operators. This restriction was removed with the making of the modern award, meaning that those engaged on a part-time, daily hire or casual basis can also be eligible for the allowance and it would be payable for the time spent performing such work and not a standard weekly amount, evidencing it is not considered payable for all purposes.

In short, we submit clause 19.5 is an allowance payable for operating a crane in certain circumstances of disabilities (i.e where a particular tonnage threshold is met) and by operators classified under the On-Site Awards as being Level 5 (CW/EW5) and above, therefore it cannot be considered that the allowance is payable for all-purposes.

#### **Clause 21.11 – Air-conditioning and refrigeration industry allowances**

Master Builders submits that this allowance is not be payable for all purposes.

As noted earlier above with respect to the mobile crane allowance, the air-conditioning industry allowance is not identified as being payable for all purposes. Allowances that are payable on an all-purpose basis are clearly identified as such elsewhere in the Award and this allowance is not.

In addition, the allowance itself is payable in lieu of a series of other disability allowances including Insulation (22.2(a)), Hot work (22.2(b)), Cold work (22.2(c)), Confined space (22.2(d)), Wet work (22.2(g)), Dirty work (22.2(h)), Asbestos eradication (22.2(l) and Height work (22.2(q)). These allowances are for disabilities associated with work in particular conditions and are not payable for all purposes. As such, an allowance payable in lieu of such allowances should not be held to be payable for all purposes.

It is relevant to note that this allowance was the subject of Commission consideration in [2012] FWAFB 10080. In that matter, a Full Bench referenced clause 21.11 amongst a series of similar allowances that were described as *'disability allowances were payable to compensate for the disability associated with the work in particular conditions.'*<sup>3</sup>

Further, we would observe that this is the first instance where a party has raised the status of this particular allowance in the now eight years since the On-Site Award was made. We make this observation in the context of a Modern Award that has an extensive history of Commission consideration (particularly with reference to allowances) and many occasions in which it interested parties were open to make submissions on allowances and their status, and fix any errors.

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<sup>3</sup> At para 72

Should there be any other information required, or if the Commission requires any additional material, please do not hesitate to contact the undersigned on 02 6202 8888.

Yours sincerely,



Rebecca Sostarko  
**MASTER BUILDERS AUSTRALIA**