IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

[2021] NZACC 181 ACR 52/19

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 162 OF THE ACT
BETWEEN	SOSAIA TONGA Applicant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	ALLIANCE GROUP LIMITED Second Respondent

Appearances: Mr A Beck for the Applicant
Mr C Hlavac for the First Respondent
Mr P Winter for the Second Respondent

Hearing: On the Papers

Judgment: 8 November 2021

JUDGMENT OF JUDGE D J CLARK
[Leave to Appeal: s 162 Accident Compensation Act 2001]

Introduction

[1] There are two applications for leave to appeal to the High Court under s 162 of the Accident Compensation Act 2001 ("the Act") following the decision of His Honour Judge McGuire delivered on 29 October 2020.[1]

[2] The first application from Sosaia Tonga ("Tonga LTA"). This application deals with two issues, whether a 'deemed decision' should have been made and, whether costs should

[1] *Tonga v Accident Compensation Corporation and Alliance Group Limited* [2020] NZCC 137.

have been awarded. The second application for leave to appeal is from Alliance Group Limited ("Alliance LTA"). This application raises five questions of all law but all dealing with the issue of whether cover for a work-related injury should have been awarded.

Background

[3] The factual background to this matter has been thoroughly set out by Judge McGuire[2] and it is unnecessary to do any more than summarise as follows.

[4] Mr Tonga was born in Tonga in 1984 and at the age of eight suffered a significant cut to his right elbow, leaving a scar from the injury. In 2007 he came to New Zealand and worked as a boner for the second respondent in Pukeuri, near Oamaru.

[5] In May 2011, Mr Tonga injured his right elbow when he slipped and hit his elbow causing a small cut. The cut was attended to by a company nurse who reported no major issue as a result of the accident. No ACC claim was lodged.

[6] On 21 September 2016 Mr Tonga reported to the second respondent's company nurse that he was experiencing ongoing pain in his right elbow. Between September 2017 and March 2017 Mr Tonga received physiotherapy treatment on his elbow which was unsuccessful. Further examination of the elbow was undertaken by Mr Tonga's GP, Dr Ripley, and a radiologist, Dr J A Letts.

[7] Following the reports from Mr Tonga's physiotherapist and radiologist on 31 January 2017 Dr Ripley completed his own report summarising:

> Plan: ACC45, multiple injuries but really is overuse injury causing sprain elbow and forearm, note background changes on x-ray though which is more likely an accumulation of injuries.

[8] Dr Ripley completed an ACC 45 injury claim form providing an accident date as 31 January 2017 and a description of the accident as "boning multiple carcasses, overuse elbow/forearm". His diagnosis described the injury as a "sprain elbow/forearm – right".

[2] See paras [3]-[28].

[9] The second respondent, as Mr Tonga's accredited employer, wrote to Mr Tonga on 2 February 2017 advising:

> I wish to advise that Alliance Group Limited (AGL) is unsure if your current problems are directly related to a work related task or incident allegedly sustained at our plant and reported to AGL. We will be investigating this further by completing an accident investigation and obtaining medical information from your treating medical doctor to clarify the situation. Once this information is received, AGL may seek a specialist opinion as to AGL's acceptance or declining any ongoing responsibility for your current incapacity/problem.
>
> Section 57 of the Accident Compensation Act 2001 requires AGL to investigate your claim, organise for further information or issue a decision within 4 months of your claim lodgement date. If further information is unable to be provided within the timeframe an extension of time will be sought to a maximum of nine months.
>
> The ACC Act 2001 requires specific certain criteria that must be met before we can accept your claim. Due to the nature of your claim I require further information from ACC and previous employers to determine acceptance or declinature of this claim. This letter is to confirm that your claim has been placed on hold for 2 months to allow this information to be obtained. I have enclosed a questionnaire and consent form for you to complete and return to me as soon as possible …

[10] Mr Tonga completed the questionnaire on 2 February 2017 and on the same day the second respondent sought further information from Dr Ripley who responded on 13 February 2017 as follows:

> As to the question whether it is a gradual progress injury, I believe Sosaia injured his elbow during his work boning carcasses. It is likely a single wrong movement caused his injury but continuing to work through it probably has impeded his recovery. Hence my recommendation for light duties following his return to work after the initial period off.

[11] The second respondent then referred Mr Tonga's file to Dr John Haydon, an Occupational medical specialist. Viewing Mr Tonga's file, which included Dr Ripely's diagnosis of the injury, he noted that no specific accident had been described. He stated:

> In my opinion the history indicates that Mr Tonga has had the pain since the beginning of the season, and there was, as I understand it, no specific accident. In my opinion a sprain would normally have resulted from a specific event and I would normally expect a sprain to improve over time. So in my opinion it does not appear that the information available to me supports a diagnosis of sprain elbow/forearm.
>
> The x-ray reports describes "osteoarthritis changes involving the right elbow joint". In my opinion a diagnosis of osteoarthritis appears more likely than a sprain, given the x-ray findings and the duration of symptoms and examination findings.

[12] Dr Haydon then consider other possible causes, both primary and secondary. After reviewing these factors and relevant medical literature he concluded:

> In my opinion it does not appear likely that Mr Sosaia Tonga has developed right elbow osteoarthritis as a gradual process condition caused by his work as a boner.
>
> In my opinion he is young to have developed elbow osteoarthritis and it is not clear whether he has primary osteoarthritis or secondary osteoarthritis due to a past trauma or another cause.

[13] On 8 March 2017 the second respondent advised Mr Tonga that the pain to Mr Tonga's elbow was caused by osteoarthritic changes, which were caused by a previous trauma and whilst the work he undertook aggravated Mr Tonga's condition, it did not cause the same. On that basis the cover was declined.

[14] Mr Sara, acting for Mr Tonga sought a review of the decision. He also sought an opinion from John Matheson Orthopaedic Surgeon who over the course of 18 months wrote several reports on Mr Tonga's injury. Mr Matheson's final report was dated 1 November 2018, where he stated:

> From a review of the work record I can note only one previous reference to an injury of the right arm region which could have been to the right elbow area on the 07/05/08. However, this appeared to be an open wound injury rather than a significant force which would have caused a joint injury …
>
> Although I acknowledge that there was no likely significant work related injury to the right elbow prior to 02.05.2011, I stand by my interpretation of the most likely scenario is that the degenerative changes in the right elbow relate to the more long standing injury and that the event on the 02.05.2011 was exacerbated as pre-existing degenerative process.

[15] The review hearing was first heard on 17 October 2018 and concluded on 5 February 2019. Raised as part of the review hearing was an argument on behalf of Mr Tonga that Mr Tonga should have deemed cover under s 58 of the Act. The reviewer dismissed Mr Tonga's application for deemed cover, for work-related gradual process injury and, payment of his legal costs.

District Court Decision

[16] The three issues for determination by Judge McGuire were:

[a] Whether Mr Tonga was entitled to a deemed decision under s 58 of the Act;

[b] Whether Mr Tonga's accident caused injuries which entitled him to cover for a work-related injury; and

[c] Whether the reviewer was correct in declining to award costs on the basis that Mr Tonga's costs were not paid by him personally, but by the Meat Workers Union.[3]

[17] Judge McGuire determined that:

[a] Mr Tonga is not entitled to a deemed cover;

[b] Mr Tonga is entitled to cover for a work-related injury (overturning the reviewer's decision of 21 February 2019); and

[c] Mr Tonga is not entitled to an award of costs since they were met by the Meat Workers Union.[4]

Deemed Decision

[18] It was submitted that the second respondent had not made a decision required by s 56 of the Act in relation to the diagnosis made by Dr Ripley (sprain elbow/forearm right). Mr Beck, counsel for Mr Tonga, argued that because this was an acute injury a decision needed to be made within 21 days following Dr Ripley's diagnosis.

[19] Judge McGuire determined the second respondent's letter dated 2 February 2017, was an appropriate inquiry into whether the claimed injury was a possible work-related gradual process injury. The letter was part of the investigation to gather information before making a decision under ss 56 or 57 of the Act.

[20] Citing *Carter v Accident Compensation*,[5] Judge McGuire held that the second respondent was obligated to correctly categorise the claim as lodged and was not obliged to accept the claimant's own categorisation of the injury. By sending the letter the second

[3] Ibid at para 2.
[4] Ibid at para [87].
[5] *Carter v Accident Compensation* [2016] NZHC 1140.

respondent effectively extended the time to make its decision.[6] In the circumstances the Court rejected the argument that a deemed decision pursuant to s 58 of the Act should apply.

Work-Related Injury

[21] Judge McGuire considered the critical issue for determination was whether Mr Tonga suffered a work-related injury.[7] Relying on the evidence of Mr Matheson, Judge McGuire held:

> Given Mr Matheson's opinion set out above, I find that the accident in 2010 did more than bring the pre-existing degenerative changes to light, or that Mr Tonga's osteoarthritis became symptomatic as a consequence of that event. Accordingly, I find that on the balance of probabilities Mr Tonga has proven that the osteoarthritis in his right elbow is as a result of a gradual process, consequential on a personal injury for which Mr Tonga was plainly entitled to have cover, given the reporting and documentation of the injury in 2011.[8]

[22] On that basis, Judge McGuire overturned the reviewer's decision and allowed Mr Tonga's appeal.

Costs

[23] The final issue on appeal is costs.

[24] Judge McGuire considered firstly, s 148(2)(b) of the Act which governs the ability for the reviewer to award costs and secondly, the Accident Compensation (Review Costs and Appeals) Regulations 2002 ("the 2002 Regulations") which regulates the actual payment of the costs if awarded.

[25] Noting the "degree of specificity"[9] in the 2002 Regulations in terms of the costs that can be awarded and, in line with the authorities of *Q v Accident Compensation Corporation*[10] and *Campbell v Accident Compensation Corporation*,[11] where an award of costs were

---

[6] Supra at para [71].
[7] Ibid at para [72].
[8] Ibid at para [78]. I have treated the '2010' reference as a typographical error noting that counsel have not commented on the same.
[9] Ibid at [86].
[10] *Q v Accident Compensation Corporation* [2008] NZACC 61; see also *Lucas v Accident Compensation Corporation* [2000] 266; *Alliance Group Limited v Accident Rehabilitation and Compensation Insurance Corporation* [2000] 39.
[11] *Campbell v Accident Compensation Corporation* [2013] NZACC 197.

declined on the basis the claimants had not incurred costs, Judge McGuire agreed that Mr Tonga was unable to recover any costs. He did not consider there was any justification to depart from the existing authorities[12] and in doing so, rejected the submission from Mr Beck that these authorities were no longer good law given the 2017 amendment to the 2002 Regulations and the possible impact of the Supreme Court decision in *McGuire v Secretary for Justice.*[13]

Application for Leave to Appeal – Legal Principles

[26] The principles are clear. Section 162(1) of the 2001 Act states:

> "A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court."

[27] The application for leave will only be granted where there is a question of law capable of bona fide and serious argument. In *Gilmore v Accident Compensation Corporation*[14] Dunningham J stated:[15]

> Section 162 makes it clear that an appeal is only allowed on a question of law. A question of law does not arise where the Court has merely applied law, which it has correctly understood, to the facts of an individual case. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is the matter for the fact-finding Court unless clearly unsupportable. Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law. However, issues of fact should not be dressed up as questions of law.
>
> [Citations omitted]

The Questions of Law Posed

[28] The Tonga LTA raises the following questions of law:

[a] In relation to the issue of the deemed decision, Mr Beck argues that the Court failed to correctly interpret and apply the law (in terms of the second respondent failing to make a decision under s 56 of the Act);[16]

---

[12] Ibid at para 86.
[13] *McGuire v Secretary for Justice* [2018] NZSC 116.
[14] *Gilmore v Accident Compensation Corporation* [2016] NZHC 1594.
[15] At para [28]. See also *Bryson v Three Foot Six Ltd* [2005] NZSC 34; [2005] 3 NZLR 721 (SC); *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.
[16] See submissions of Mr Beck dated 25 November 2020 at paras [22] to [24].

[b] In relation to the issue of costs Mr Beck argues that the Court needed to interpret the current legislation (both the Act and the 2002 Regulations) in the context that the 2002 Regulations have been recently amended and that recent authorities such as *McGuire* favour a costs regime which allows for cost recovery "where legal work has in fact been carried out" and where the legislature mandates an award of costs.[17]

[29] Mr Winter raises the following questions of law in respect of the Alliance LTA:[18]

- The District Court erred in law by exceeding his jurisdiction and finding a head of cover that was not subject to primary decision or review; and
- The District Court erred in law in finding that cover effectively existed for the 2011 event, when in fact no cover was in place; and
- The District Court erred in law in finding that the cover existed under s 20[2][g] when no "consequential injury" claim had been filed by Mr Tonga, nor had it been subject to a primary decision in review; and
- The District Court erred in law by not properly construing or interpreting the **McDonald** [High Court] line of cases to the facts; and
- The District Court erred in law in his treatment, or lack thereof of the medical evidence.

[30] The first respondent opposes the Tonga LTA in relation to the determination for the deemed cover decision but neither supports nor opposes the issue regarding the cost award. It neither supports nor opposes the Alliance LTA.

[31] The second respondent opposes both issues arising under the Tonga LTA.

[32] Mr Tonga opposes the Alliance LTA.

Tonga Leave to Appeal

Deemed Decision

[33] Mr Beck's argument focuses on the claim lodged in January 2017 by Dr Ripley who diagnosed the injury as a "sprain elbow/forearm". On 13 February 2017, in response to a

[17] Ibid at paras [32] to [39].
[18] See submissions of Mr Winter dated 27 November 2020 at para [29].

query from the second respondent, Dr Ripley explained the injury as resulting from a single wrong movement. The claim at that point, in Mr Beck's submission, was lodged as an acute injury and not a gradual process claim, and therefore a decision under s 56 needed to be made. Mr Beck argues the second respondent failed to make a decision in respect of the acute injury under s 56 of the Act. The second respondent proceeded on the basis that it was (possibly) a gradual process injury claim and therefore a complicated claim under s 57 of the Act. What it did was to send a standard form letter without dealing with the merits of the (acute) claim. It needed to make a decision, within the statutory timeframe, under s 56 of the Act. Accordingly, by failing to do so, a deemed decision under s 58 should apply.

[34] Mr Hlavac for the first respondent refutes Mr Beck's arguments[19] stating it was open for Judge McGuire to reach the decision that he did, based on the evidence before him, and it is inappropriate for Mr Tonga to now attempt to adduce further evidence (in this case a similar letter which Mr Tonga received in February 2017) to support the assertion the second respondent did no more than send a standard letter. Sufficient evidence was before the Court at the time the decision was made by Judge McGuire. Mr Winter supports the position advanced by Mr Hlavac.

Analysis and Discussion

[35] The second respondent sent its letter on 2 February 2017 to Mr Tonga. Importantly that letter:

[a] Confirmed it had received the application for cover;

[b] Confirmed it had concerns whether cover should be granted;

[c] Advised further information was necessary, and that information was required before it would make its decision;

[d] Confirmed the timeframe to make its decision would be four months – the initial two months plus the time allowed (another two months) once time was extended;

[19] See paras 21 and 22 of his submissions dated 1 February 2021.

[e] Expressly confirmed that it was treating the claim for cover under s 57 and therefore a complicated claim.

[36] I agree with Mr Hlavac it was open to Judge McGuire to reach the conclusion he did on the evidence before him, namely, to conclude that the second respondent took the appropriate investigatory steps it did and to treat the claim as a complicated claim under s 57. The second respondent's letter of 2 February clearly outlined how it was responding to Mr Tonga's claim for cover and Judge McGuire correctly applied *Carter* in reaching the conclusion that he did. No question of law capable of bona fide and serious argument can be raised and the Tonga LTA in relation to the issue of the deemed decision is dismissed.

Costs

[37] Mr Beck's argument can be summarised as follows:

[a] There is no existing authority on point that has considered s 148 of the Act and the 2002 Regulations;

[b] The earlier authorities of *Lucas, Q* and *Campbell* need to be revisited in light of the 2017 amendment made to the regulations as all of the authorities referred to by the second respondent and the Court were decided under the previous legislative provisions;

[c] Section 148(1) has a mandatory requirement that costs must be awarded where there is a decision fully or partially in favour of the applicant;

[d] Neither the Act nor the 2002 Regulations state that costs can only be awarded if the applicant has personally met those costs, meaning costs incurred by a representative can be awarded.

[38] Mr Beck states that the main purpose of the (new) regulations is to remove the focus away from a "liability to pay" approach (ie where the claimant has to pay costs personally before he/she can claim them) to it being mandatory that legal costs must be paid to the

extent allowed under the 2002 Regulations.[20] In other words, the legislation, taken in its plain and literal sense, does not say costs can only be recovered if a claimant personally incurs them. Indeed, it is the opposite, costs are payable if the claimant is successful, or, where they are unsuccessful, payable at the discretion of the reviewer.

[39] Furthermore, he argues that the current legislation has never been analysed by the Courts and cases which determined costs under the previous regime are no longer good law. Recent cases such as *McGuire*[21] and *Innovative Landscapes (2015) Ltd v Popkin*[22] favour the recovery of costs where legal work has been carried out and it was irrelevant these cases were decided in different jurisdictions. The policy underlying these cases in terms of cost recovery should apply in the Accident Compensation jurisdiction given the intent and plain reading of the legislation. Weighing all of this up it is appropriate that the costs regime in the Accident Compensation jurisdiction should be considered by the High Court.

[40] Whilst acknowledging that a question of law arises, Mr Winter argues the existing law is clear and the question of law cannot be seriously argued in the High Court. The 2017 amendments do not support costs being paid to a party whose costs are being met (in this case) by the Union. Furthermore, costs awarded in other jurisdictions such as the employment jurisdiction can be distinguished because of the specific treatment of costs within the Accident Compensation legislative framework. Those cases which have considered an award of costs in these circumstances, and have rejected the same, remain good law.

Analysis and Discussion

[41] Section 148 of the Act states:

> **148 Costs on review**
>
> (1) The Corporation is responsible for meeting all the costs incurred by a reviewer in conducting a review.
>
> (2) Whether or not there is a hearing, the reviewer—

[20] See para [34] of his submissions dated 25 November 2020.
[21] Supra.
[22] *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 96.

(a) must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant:

(b) may award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review:

(c) may award any other person costs and expenses, if the reviewer makes a review decision in favour of the person.

(3) If a review application is made and the Corporation revises its decision fully or partly in favour of the applicant for review before a review is heard, whether before or after a reviewer is appointed and whether or not a review hearing has been scheduled, the Corporation must award costs and expenses on the same basis as a reviewer would under subs (2)(a).

(4) The award of costs and expenses under this section must be in accordance with regulations made for the purpose.

(5) If any costs and expenses are awarded against the Corporation under this section, the Corporation is liable to pay them within 28 days of the decision to award them.

[42] The level of costs that can be awarded is prescribed in the 2002 Regulations. Regulation 4 states:

Scale of costs and expenses on review

4 Awards of costs and expenses on review

(1) A reviewer's award under section 148 of the Act to an applicant for review or another person must be—

(a) only for the costs and expenses of an item described in column 1 of Schedule 1; and

(b) the only award to the applicant for review or other person for those costs and expenses.

(2) The amount of the reviewer's award for costs and expenses of an item described in column 1 of Schedule 1 must—

(a) not exceed the amount specified (opposite the description) in column 2 of that schedule; and

(b) be calculated in accordance with the rate (if any) specified (opposite the description) in column 3 of that schedule.

(3) Amounts and rates specified in Schedule 1 are inclusive of goods and services tax (if any).

[43] Mr Winter is correct in his submission that the previous decisions on the issue of costs are clear. Costs could not be awarded where those costs had not been incurred by the

claimant. A number of cases have considered the cost issue with one of the most recent being *Campbell v Accident Compensation Corporation.*[23] In *Campbell* Judge A Ongley was dealing with the award of costs and expenses in five appeals, all of which were consolidated and dealt with in his judgment.

[44] One of the important features of the judgment was that, unlike in the previous authorities, Judge Ongley was considering the cost issue under the Act and the 2002 Regulations. Some of the older authorities such as *Alliance* and *Lucas*[24] considered the costs issue under the Accident Rehabilitation and Compensation Insurance (Review Costs) Regulations 1992 ("the 1992 Regulations"). Regulation 3 of the 1992 Regulations state:

> **3. Costs Payable to Represented Applicant –**
>
> (1) Where an applicant is represented at a review hearing or a representative prepares and lodges the application or prepares the case for review hearing, the costs that may be awarded to the applicant under section 90(10) of the Act shall be the amount paid or payable by the applicant to his or her representative for one or more of the following:
>
> (a) Preparing and lodging the application for review, up to a maximum of $65;
>
> (b) Preparing the case for review hearing, up to a maximum of $130;
>
> (c) Appearing at a review hearing, up to a maximum of $85 for the first hour, $55 for the second hour, and $25 for the third and subsequent hours, not exceeding, in total, $270.
>
> (2) No costs shall be awarded to any applicant in respect of more than one representative.

[45] It is clear that pursuant to Regulation 3 the only costs that could be awarded were those which were *"paid or payable by the applicant to his or her representative".* Unsurprisingly Judge AW Middleton in *Alliance* and *Lucas* had little difficulty in concluding that costs could not be awarded unless there was a requirement by the applicant to pay those costs themselves.

[46] Mr Beck is right to submit that Regulation 3 was omitted in the 2002 Regulations. However, Judge Ongley in *Campbell* still held, relying on the authority of *Alliance* and *Lucas* that a person, represented by a trade union who did not incur costs themselves was not entitled to recover those costs under review.[25] In considering the provisions of s 148 Judge

---

[23] *Campbell v Accident Compensation Corporation* [2013] NZACC 197.
[24] Supra at note 10.
[25] *Campbell* supra at para [16] of the judgment.

Ongley was not persuaded that a "representative" was included in the wording of the section as a "person" entitled to seek costs. The reference to "any other person" in s 148(2)(c) did not include a representative but rather a "person in whose favour a review decision could be made" such as an employer.[26]

[47] What Judge Ongley did observe however is that in the narrow circumstances where the claimant would be liable to pay costs, or, have a contingent liability to pay his/her representative, a costs award could be made. It depended on the payment arrangements in existence between the claimant and his/her representative. Citing the cases of *Long v R*[27] and, *R v Rada Corporation Limited*[28] His Honour accepted that notwithstanding these cases were in different jurisdictions, a purposive approach could also apply to the Accident Compensation jurisdiction.[29] He stated in conclusion:

> [22] It seems therefore that there is an avenue by which applicants represented by AIST could claim costs and expenses in review proceedings, but only if the advocacy service agreement were to be modified. That would no doubt involve consideration of the conditions governing the trust under which the service is offered. As Mr McBride submitted, it is not a function of the Court to advise AIST how that should be done. Suffice to say that it might be.[30]

[48] Mr Beck argues that a purposive approach regardless of any legal arrangements between the claimant and whomever is paying the legal costs is warranted. He points to s 5 of the Interpretation Act 1999 in support of his submission that the purpose of the 2002 Regulations should be considered. If the purpose of the legislature is to now pay costs where legal representation is engaged, then it is inappropriate to limit payments if a third party has agreed to meet those costs and the claimant has no liability to pay those third-party costs.[31]

[49] Support for Mr Beck's arguments can be found in a number of different jurisdictions. He points to the cases of *McGuire* and *Innovative* as examples. In the case of *Tairua Marine Limited and Pacific Paradise Limited v Waikato regional Council and Thames-Coromandel*[32]

---

[26] Ibid at para [23].
[27] *Long v R* High Court Hamilton T43/94 1 September 1995.
[28] *R v Rada Corporation Limited* [1991] 2 NZLR 122.
[29] *Campbell* supra at para [19] and [20].
[30] Ibid at [21].
[31] Para [34] of Mr Beck's submissions.
[32] *Tairua Marine Limited and Pacific Paradise Limited v Waikato regional Council and Thames-Coromandel* HC AK CIV-2005-485-04 29 June 2006.

the High Court was asked whether the Environment Court had jurisdiction to award costs if those costs had not been incurred by the party claiming costs. Asher J stated:[33]

> [20] The *New Zealand Oxford Dictionary 2005* defines "incur" as "suffer, experience, or become subject to (something unpleasant) as a result of one's own behaviour etc." The word "incur" has been subjected to a considerable judicial examination in Canada in the insurance context. This was summed up in *Smith v Wawanesa Mutual Insurance Co.* It seems that there are judgments in Canada ranging from a narrow interpretation that an expense is not incurred until there is a legal liability to pay for it by a particular party, to a more liberal interpretation which adopts a purposive approach and do not involve the strict necessity of legal obligation.
>
> [21] In New Zealand a purposive approach was adopted by Barker J in *R v Rada Corporation Limited* where the decision of *R v Miller* was quoted. It was stated there:
>
> > I would hold … that costs are incurred by a party if he is responsible or liable for those costs, even though they are in fact paid by a third party, whether an employer, insurance company, motoring organisation or trade union, and even thought the third party is also liable for those costs. It is only if it has been agreed that the client shall in no circumstances be liable for the costs that they cease to be costs incurred by him, as happened in *Gundry v Sainsbury*.
>
> [22] In *Rada* the Court appeared to be prepared to entertain claims for costs reimbursement, where the costs had in fact been paid by third parties. An earlier decision to the contrary, *R v Reid* [1981] NZLR 758, was not followed.
>
> (Citations omitted)

[50] After considering the above Asher J concluded:[34]

> [23] I have no doubt that a purposive interpretation of s 205 should be applied. I consider that the intention of the legislation is to give the Court a broad ability to reimburse parties for the costs incurred in Environment Court litigation. It seems unlikely that it would be intended to allow matters of form to dictate costs orders. I consider that it would not be fatal to a costs claim for a cost incurred by a party to in fact have been paid by a third party. It will always be a matter for the Court's discretion, but it would seem to me that in that situation an order for costs could still be made.

[51] The issue of costs and the ability to recover them has then become a topical issue across different jurisdictions in recent years. Third party litigation funding is currently being considered by the Rules Committee. The Law Commission is also involved in significant work on this issue. Where on the face of it the relevant legislation appears to allow cost recovery and prescribe the amounts for legal costs to be recovered (separate from expenses) there is force in his argument the High Court should consider this issue further.

---

[33] Ibid at [20]-[22].
[34] Ibid at [23].

[52] I agree then, against this background, the right for a party to claim costs under s 148 of the Act who has no liability to pay legal costs because those costs are met by a third party is a question of law capable of bona fide and serious argument. I grant leave accordingly. As to the question to be determined, based on Mr Beck's arguments I frame the question to be determined as follows:

Whether a claimant on review, who has no liability to pay his/her own costs because those costs are met by a third party, is entitled to costs under s 148 of the Act and the 2002 Regulations.

Alliance Leave to Appeal

[53] Although there appears to be some overlap on each of the questions raised by the second respondent, I deal with each question separately unless otherwise stated.

Exceeding Jurisdiction

The District Court erred in law by exceeding his jurisdiction and finding a head of cover that was not subject to primary decision or review

[54] Mr Winter argues that Judge McGuire found a "completely different head of cover"[35] from what was before the reviewer and the second respondent. Cover was declined by the second respondent and the reviewer for a claim based on work-related gradual process injury and was limited to s 30 and s 20(2)(e) of the Act. Instead Judge McGuire held that Mr Tonga should be granted cover under s 20(2)(g) of the Act.

[55] Mr Winter points to a range of authorities[36] decided both prior to and after the Act came into force and argues that the Court's jurisdiction on appeal is limited to making a decision strictly on the issues before the reviewer. The Court will exceed its jurisdiction if it reaches a decision on material that may not have been before the reviewer and on which the reviewer did not base his or her decision.

---

[35] See Mr Winter's submissions dated 27 November 2020 para [32].

[36] *Accident Compensation Corporation v Lukes* [1992] NZAR 419; *Rasmussen v Accident Compensation Corporation* [2004] NZACC 340; *S v Accident Compensation Corporation* [2005] NZACC; *Bevan v Accident Compensation Corporation* [2020] NZACC 53.

[56] In response Mr Beck points to s 145 of the Act which states:

> **Review Decisions: Substance**
>
> 145(1) In making a decision on the review, the reviewer must:
>
> (a) Put aside the Corporation's decision and look at the matter afresh on the basis of the information provided at the review; and
>
> (b) Put aside the policy and procedure following by the Corporation and decide the matter only on the basis of the substantive merits under this Act.

[57] Given there was no such provision in the 1982 legislation, authorities prior to the Act coming into force in 2002, Mr Beck argues, are no longer good law. Instead, he prefers the High Court authority of *Martin v Accident Compensation Corporation*[37] where Young J stated:

> [33] The District Court Judges function on the rehearing, when dealing with the medical assessment is to take all the medical evidence, including that of the medical assessor and any other medical evidence into account in deciding whether or not the appellant is vocationally independent. In doing so, it will be inappropriate to give the medical assessor's opinion, simply by virtue of the fact that it is an opinion of the medical assessor, any pre-eminent position. In assessing the medical evidence, the reviewer and the District Court's job would be to apply additional approach to an analysis of the competing expert evidence. For example, how do the medical practitioner's particular qualification and experience relate to the claimant's disability? What is the quality of the medical report, including the thoroughness of the detail? There will be a range of other factors that will be relevant in individual cases.

[58] Whilst acknowledging that the Court was dealing with, in the *Martin* case, an issue on vocational independence, Mr Beck argues the reasoning equally applies to decisions in the current case.

Analysis and Discussion

[59] In *Hawke v Accident Compensation Corporation*[38] Wylie J stated:[39]

> It is trite law that appellate jurisdiction can only be conferred by statute. If a person desires to appeal, he or she can only do so if an applicable statute has given him or her that right, and only within the limits that the statute giving the right lays down …
>
> Normally an appeal is against the result to which the decision maker has come, and there is no right of appeal against the reasons for that decision, only the decision itself.

---

[37] *Martin v ACC* [2009] 3 NZR 701.
[38] *Hawke v Accident Compensation Corporation* [2015] NZCA 189.
[39] Ibid at [29] and [40].

> However ss 145(1)(a) and (b) place obligations on the reviewer to "look at the matter afresh", and "decide the matter", on the basis of its substantive merits.

[60] In *Williams v Accident Compensation Corporation*[40] Judge A N Maclean stated:[41]

> Counsel for the respondent pointed to a number of cases on the issue of jurisdictional boundaries on appeal supporting the proposition that the appeal should be restricted to the fracture question only not the broader concept of injury. The appellant argued for a broader view on the basis that as long as the Court was satisfied that an injury occurred and, whether it be a fracture, or something in the nature of a contusion or skin breakage, did not matter …
>
> The common theme from all cases seems to be that *an Appeal Court must ensure that it is essentially dealing with the same issues as were the subject of the original claim to the Corporation and decided upon by it, then in turn what the reviewer looked at*.
>
> (Emphasis mine)

[61] The position is that whilst the authorities cited by Mr Winter still apply, on appeal the District Court is required to hear the matter afresh and determine the substantive issues based upon the evidence which is before it. The substantive issue in this case was whether Mr Tonga was entitled to cover for a work-related gradual process injury.

[62] Whilst acknowledging that submissions during the appeal had focused on s 20(2)(g) of the Act, Judge McGuire reached a decision on the substantive issue that cover should be granted. That issue was the same issue before the reviewer and based on the medical evidence, the reviewer declined cover. Judge McGuire reached a different conclusion on the same issue, which he was entitled to do, based on the evidence before him. In doing so he did not exceed any jurisdictional boundary. No question of law then, capable of bona fide and serious argument, arises under this head.

Cover for the 2011 Event and Consequential Injury

The District Court erred in law in finding that cover effectively existed for the 2011 event, when in fact no cover was in place

[40] *Williams v Accident Compensation Corporation* [2015] NZACC 116
[41] Ibid at paras [7] and [9]

The District Court erred in law in finding that the cover existed under s 20[2][g] when no "consequential injury" claim had been filed by Mr Tonga, nor had it been subject to a primary decision in review

[63] I have considered the next two questions together as that is how counsel have dealt with them. These questions reference the second respondent's argument that Mr Tonga was not granted cover for personal injury for his 2011 accident because he never applied for cover at the time. Judge McGuire erred when he granted cover under s 20(2)(g) of the Act for the 2011 event.

[64] Mr Winter says the opportunity for the second respondent to undertake appropriate investigations in respect of the 2011 accident event was lost as a consequence of Mr Tonga not applying for cover at the time of his injury. Citing the authorities of *Smith v Accident Compensation Corporation,*[42] *Newton v Accident Compensation Corporation*[43] and, *Medwed v Accident Compensation Corporation*[44] he argues that Judge McGuire "exceeded his jurisdiction" by granting cover when these authorities state that cover for an injury must be in existence in the first place. A person must have cover before other matters such as "consequential injury" and/or before "other entitlements" can be considered.

[65] Mr Beck in response urges a substantive approach and not one based on technicalities (Mr Winter concedes that this argue could be seen in that light). Mr Beck also argues that the second respondent in raising an issue such is this is, in reality, challenging the factual findings of Judge McGuire which is not a question of law.

Analysis and Discussion

[66] I do not accept Mr Winter's submissions in relation to these two questions of law for the following reasons:

[a] The authorities cited by Mr Winter do not assist his arguments. These decisions are authority for the proposition that "there can be no entitlement where no cover

[42] *Smith v Accident Compensation Corporation* [2020] NZACC 107.
[43] *Newton v Accident Compensation Corporation* [2015] NZACC 22.
[44] *Medwed v Accident Compensation Corporation* [2009] NZACC 86.

has been granted in respect of the personal injury on which reliance is placed."[45] As an example, in *Smith* cover for surgery was declined because a direct link between the need for surgery and the claimant's covered injury could not be clinically established. The tear requiring surgery was from a pre-existing condition.

[b] In this case, Judge McGuire held that the medical evidence, on a balance of probabilities supported a finding that the original 2011 injury contributed to Mr Tonga's current condition. The link therefore was established, and Judge McGuire was entitled to make that finding.

[c] Finally, in terms of the argument that cover needed to be in place, or that Mr Tonga needed to apply for cover, the short answer is that that cover would have been in place if the second respondent had accepted Mr Tonga's claim. Mr Tonga sought cover which the second respondent rejected on the basis that cover for a work-related gradual process injury was not caused by the 2011 accident event but an unrelated trauma. Whilst the original claim may have been based on a sprain as the injury, the second respondent, as it was entitled to do, considered it as a gradual process injury but rejected the claim for cover. In the circumstances the second respondent cannot be the beneficiary of an argument claiming cover needs to be in place when it itself rejected the original claim for cover.

[67] For the above reasons I find that there are no question(s) of law which are bona fide and seriously arguable under this head.

The McDonald Line of Cases

The District Court erred in law by <u>not</u> properly construing or interpreting the McDonald [High Court] line of cases to the facts;

[68] Relying on *McDonald v Accident Compensation Corporation*[46] Mr Winter argues that Judge McGuire "erred in law by misinterpreting and misdirecting himself."[47] Read in

[45] See *Newton* supra at [23]
[46] *McDonald v Accident Compensation Corporation* [2002] NZAR 97.
[47] Mr Winter's submissions (supra) at para [57].

context, he argues the reports of Mr Matheson confirmed the 2011 accident exacerbated and/or accelerated a pre-existing degenerative condition but did not cause the personal injury.

[69] Mr Beck argues that all of the medical experts agreed the osteoarthritis was caused by a trauma event. It was open to the Court to reach a conclusion that the 2011 event was the material cause of the injury and not caused "wholly or substantially by disease or the aging process."[48]

Analysis and Discussion

[70] *McDonald*[49] is authority for the proposition that the disease cannot be the whole or the substantial cause of the personal injury. Furthermore, acceleration of an existing condition is not eligible for cover under the Act. Causation is the key and a link between the trauma and the personal injury which by definition, is covered under the Act, must be established. As Panckhurst J stated in *McDonald*:[50]

> It poses a single test: whether the disease is the whole or the substantial cause of the injury. If so, cover is unavailable regardless that the accident triggered (or accelerated) the progression of the disease.

[71] The experts who examined Mr Tonga were all of the view that the personal injury was caused by trauma and that there was no underlying degenerative condition unlinked to the trauma. The issue was to identify the relevant trauma event and Judge McGuire made a factual finding that it was the accident of May 2011. The present situation can therefore be distinguished from the *McDonald* line of authorities as, in this case there is expert evidence of a causal link between the personal injury and Mr Tonga's osteoarthritis. There is no medical evidence that the personal injury is caused wholly or substantially by a degenerative condition. In the circumstances no question of law, capable of bona fide and serious argument can be taken to the High Court under this head.

---

[48] Mr Beck's submissions (supra) at paras [26] and [28].

[49] See also the cases of *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 (HC), *Johnston v Accident Compensation Corporation* [2010] NZAR 673 and *Robertson v Accident Compensation Corporation* [2014] NZHC 762.

[50] Supra at para [30].

Lack of Proper Analysis of the Medical Evidence

The District Court erred in law in his treatment, or lack thereof of the medical evidence

[72] The final question posed by the second respondent directly challenges and criticises the factual findings of Judge McGuire. Mr Winter states Judge McGuire's analysis was "scant, somewhat inaccurate and lacking in proper medico-legal analysis."[51] Acknowledging the difficult hurdle the second defendant must overcome in terms of challenging a factual finding as an error of law[52] he nevertheless argues that Judge McGuire's finding that the 2011 event caused the osteoarthritis was "unsupportable" and "so clearly untenable" that the (decision) amounted to an "error of law."[53]

Analysis and Discussion

[73] *Martin*[54] is key to the approach to be taken by the District Court on an appeal. There is a very high threshold to overcome when arguing that a factual finding is an error of law. Disappointment with a decision which has gone against a party should not be confused with a failure to apply the law to the available evidence which a Judge has considered. Likewise, the hearing on an appeal is a rehearing and the Court is able to give weight to the available evidence and make findings of fact as it thinks fit. A party unhappy with a decision based on the evidence will always find it difficult to appeal a decision when there has been a clear finding of fact on the evidence.

[74] Judge McGuire in a straightforward way applied the legislative provisions to the medical evidence before him and, on a balance of probabilities, reached the conclusions that he did. Given that there was conflict in the medical evidence Judge McGuire was required to make a determination on that conflict which he did. In doing so he reached a decision different from the reviewer, but it was open for him to do so. I can see no error of law capable of bona fide and serious argument that would necessitate an appeal to the High Court.

---

[51] Mr Winter's submissions supra at para [68].
[52] See *Bryson v Three Foot Six Ltd* [2005] NZSC 34.
[53] Mr Winter's submissions at para [71].
[54] Supra at n 37.

Result

[75] Based on my findings I conclude:

[a] The Tonga LTA in respect of the deemed decision is dismissed;

[b] The Tonga LTA in respect of the issue of costs is granted;

[c] The Alliance LTA is respect of all questions of law raised is dismissed.

[76] Costs are reserved. If any party wishes to seek costs, then leave is granted to file memoranda.

_____
Judge D J Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 08/11/2021