

Introduction and overview

[1] These appeals, as well as those that have been heard before, arise from a motor vehicle collision on 5 March 2015, in which the appellant was injured. In that collision the appellant was the innocent victim. The appeals that have proceeded on this occasion are ACR 139/18; ACR 140/18 and ACR 336/18. Appeals ACR 338/18 and ACR 191/19 were not proceeded with and are dismissed.

[2] ACR 139/18 is an appeal from review decision 5672089 relating to alleged unreasonable delays by ACC in issuing various entitlement decisions.

[3] ACR 140/18 is an appeal from review decision 5671087 relating to a claim for reimbursement of a range of costs paid by the appellant. The claim was the subject of a decision of the respondent dated 11 December 2017.

[4] ACR 336/18 is an appeal from a concussion treatment decision of 8 June 2018 in which ACC advised the appellant that it was unable to help with the costs of attending a concussion clinic as the appellant did not have cover for a concussion injury.

Appeal ACR 139/18 (review 5672089)

[5] In the review decision of 12 April 2018, Reviewer, Mr Woodhouse noted:

Review 5672089 – proposed unreasonable delay in issuing an entitlement decision.

This review relates to a proposed delay in issuing various entitlement decisions. Following discussion, the parties agreed that ACC would proceed to issue entitlement decisions as requested, within a two month period. That has settled this dispute by agreement.

Appellant's notice of appeal in respect of ACR 139/18

[6] In the appellant's notice of appeal dated 13 April 2018, she appealed against the following aspects of the review decision:

... delaying in issuing entitlements, delay in treatment, assessments of complex and multiple injuries. It is to restore claimant's health and have rehabilitation. Return to driving return independence, return to study and part time work.

Attendant care, training independence, education support, transport independence. Invoices relate to assessment for appeal on decision 13/5/2016. Decision on Concussion Clinic.

[7] The grounds set out in the Notice of Appeal are as follows:

Dr Melanie Collins requested treatment Concussion Clinic auditory processing disorder, New Zealand Balance and Dizziness Centre. It's to restoring my health has been since 5/3/2015. Received no complex assessment on decision functional limitations, daily activities. Not valid reason for declining. No rehab and no further specialists' assessments.

[8] Under the heading, 'Relief Sought', the appellant says:

Decision for treatment injury cover granted.

Decision for Concussion Clinic.

Decision training for independence.

Decision for attendant care.

Decision that invoices are refunded.

Decision on IRP as per recommendations on assessments.

Appellant's submissions in respect of ACR 139/18

[9] At the hearing the appellant made these submissions:

- There has not been a plan so that she can achieve an injury outcome from 20 injuries.
- There was one delay after another with her injuries deteriorating.
- There is a need for ACC to focus on rehabilitation and there needs to be reassessments.
- The communication plan in operation with ACC has been a barrier to rehabilitation.
- A left foot injury is worse now.
- Her rehabilitation has been switched on and switched off.

- It is her wish to return to independence and to drive but there is always going to be a barrier from ACC. She notes that the orthotics that were directed to be provided following her appeals last year arrived three months prior to this hearing.
- She says that the communication plan with ACC is not working and that there should be a plan that links her case manager to her GP.
- She says that her own rehabilitation plan has goals focused on her left foot and her neck.

Respondent's submissions in relation to ACR 139/18

[10] Mr Mailand commenced his submissions by noting that the appellant's claim file arising from her accident of 5 March 2015 now extends to over 25,000 pages. He notes that she has sought more than 65 reviews and has filed more than 20 appeals. He says that many of her claims have been lodged by email and some are difficult to decipher. He also makes the broad submission that it is only at review when some clarity is gained as to what the appellant is seeking.

[11] Mr Mailand notes that entitlements under the Act can only proceed from injuries for which there is cover and he points out that in respect of ACR 336/18, even though cover had been declined for concussion the appellant still wished ACC to pay for a referral to a Concussion Clinic.

[12] Mr Mailand acknowledged ACC's obligation to meet injury related needs that are properly founded.

[13] Mr Mailand referred to the transcript of the review hearing dated 26 March 2018 that resulted in the review decision of 12 April 2018. At page 71 of the transcript the Reviewer Mr Woodhouse said:

... things shouldn't be missed, but I can see how they might, and I'm just wondering whether a sensible resolution of this dispute is Michelle saying she wants three decisions about training, transport and a Concussion Clinic referral. I'm wondering if you could both agree on a date that decisions will be issued.

[14] Then in his decision of 12 April 2018 (review 5672089) at page 12 the Reviewer noted:

... following discussion both parties agreed to an outcome for this review. That was that ACC issue a decision in relation to all four of these claimed entitlement requests (training for independence, transport for independence, concussion clinic referral and funding of orthotics) within two months. As is normally the case that will be a fresh reviewable decision should Ms Herbst disagree with the decision then issued.

[15] Mr Mailand then referred to the decisions that ACC made as a result, each of which were dated 8 June 2018. It is noted that the training for independence programme was approved; the transport for independence assessment was approved; the request for orthotics was not approved but would be looked at again post surgery and the referral to a Concussion Clinic was declined as the appellant did not have cover for concussion.

[16] Mr Mailand therefore submits that as ACC has issued these decisions there is no longer a live issue to be determined in respect of appeal ACR 139/18.

The appellant's reply in respect of appeal ACR 139/18

[17] Ms Herbst submitted that part of the problem was that her case manager "doesn't quite understand my injury". She submits that from now on ACC needs to start making better decisions and that the communication plan with her, requiring her to deal with her case manager in Wellington, has not worked. She said that her training for independence was not complete and that only three sessions had occurred. She said that the psychological service had not been completed and that there was no transport to access the pain service.

[18] She acknowledged that "I can't seem to focus on just one thing at a time" and that her new GP told her just to focus on three things namely her left foot, her neck and her back.

Appellant's submissions in respect of appeal ACR 140/18

[19] This is an appeal that arises from review decision 5671087 of 12 April 2018. It relates to a claim for reimbursement of a range of costs paid by the appellant that were the subject of a decision by ACC dated 11 December 2017.

[20] In her notice of appeal the appellant says:

Section 54, reasonable decisions on reasonable grounds in timely manner. 37 months unacceptable. Prior approval case manager or referral by GP. Not provided rehabilitation or entitlement decisions for multiple very serious injuries.

[21] Under the grounds for appeal the appellant says:

Reassessment of injury needs. IRP 13 weeks of injury or injuries not assessing spinal injuries or providing rehabilitation and all specialised assessments. As All invoices were requested and recommended by specialist Melanie Collins.

[22] She seeks a decision and direction that all invoices are funded.

[23] In oral submissions to the Court the appellant says she asked the Corporation for costs and asked the Corporation to issue decisions which it did not give. She refers to a claim for costs from the New Zealand Dizziness and Balance Centre Limited of \$1,255. She says she requested ACC to pay this as it was recommended by Dr Melanie Collins, an ENT specialist, as the appellant had dizziness.

[24] She says that ACC said:

We're not going to fund this at this time.

[25] The appellant acknowledged that there was no formal referral by Dr Collins and that she had approached the New Zealand Dizziness and Balance Centre Limited on Dr Collins' recommendation.

[26] She said she had just gone and got the assessments done towards her rehabilitation and restoring of her health.

[27] She said she got these assessments done because she wanted to improve following her accident. She acknowledges that ACC did tell her she required prior approval, but she notes that although she had cover she was not getting entitlements.

The respondent's submissions in respect of appeal ACR 140/18

[28] The decision of the respondent dated 11 December 2017 declined reimbursements for various pharmaceuticals, medical examinations, medical reports and other miscellaneous costs incurred by the appellant. Mr Mailand refers to an email from ACC to the appellant on 18 October 2016 where the case manager says:

If you wish ACC to fund assessments or treatment then it is not unreasonable to ask that you approach ACC before contacting providers. If you arrange appointments/treatments without prior approval you may be liable for the costs.

[29] In a later email of 16 December 2016, the case manager said:

Previously, I have emailed you and requested that you do not make medical appointments with specialists without prior approval. I wish to confirm that ACC will not pay any invoices without prior approval from ACC. If you continue to make appointments without ACC approval then you will be liable to the costs.

[30] The case manager sent a further email to the appellant on 20 February 2017:

As you continue to seek medical advice away from ACC, I would remind you that prior approval is required otherwise you may be liable to pay any costs you incur.

[31] Mr Mailand referred to the review decision of Mr Woodhouse of 19 November 2017 which had as its outcome, agreement that ACC would be given a period of 21 days to issue an entitlement decision as to whether they would reimburse for the invoices presented.

[32] On 11 December 2017 ACC issued a reimbursement decision approving some reimbursement of costs but declining others.

[33] Mr Mailand noted that some of the claims for costs were outside of the legislation. He gave an example being a claim for costs for replacement of a lost key.

[34] In other cases he said that ACC had been provided insufficient information regarding the reasons for the payment.

[35] There were a further category of costs claims and these included pharmaceutical items for conditions that were not covered.

[36] He notes that the matter went back to the Reviewer at a hearing on 26 March 2018.

[37] In his review decision issued on 12 April 2018, Mr Woodhouse said:

ACC has drawn a line in the sand at 18 October 2016, on the basis that notice had been provided to Ms Herbst of the need for prior approval, and declined reimbursement of claims for costs after that date, absent prior approval.

[38] Mr Woodhouse also observed:

I can understand that statutory intention with requiring prior approval to be given. ACC is entrusted with levy payer's funds, and there is an expectation that where those funds are expended, they are done so judiciously. Taking into consideration the range of factors ACC must consider with funding requests, as set out in clause 2 of Schedule 1, it would be difficult for ACC to evaluate whether any particular treatment request met those criteria, before the treatment was received, and the cost incurred, without an application for funding having been made prior.

[39] Mr Woodhouse also noted in his decision:

That ACC will issue fresh decisions with respect to the claims for which no information has been earlier provided.

Appellant's submissions in reply

[40] In respect of appeal ACR 140/18, Ms Herbst said that she had applied to ACC for rehabilitation on 31 March 2015 some three and a half weeks after the accident. She says the invoices relates to whiplash and post traumatic stress disorder for which she had cover. She says she needs physical, cognitive and other rehabilitation and that she cannot get better without the rehabilitation.

The appellant's submissions in respect of appeal ACR 336/18

[41] Ms Herbst advised that in respect of this appeal, her challenge was against the Reviewer's decision declining concussion treatment (review 5996588) and not the decision relating to loss of potential earnings.

[42] The decision dated 8 June 2018 advised that ACC was unable to help with the costs of attending a Concussion Clinic as the appellant did not have cover for a concussion injury.

[43] In her notice of appeal the appellant points out that she was granted cover for concussion and post concussion on 13 May 2016 and that concussion cover was revoked on 10 January 2018.

[44] When this matter went to a review hearing the issue was framed by the Reviewer Rachel Knight this way:

Was ACC correct not to help with the costs for Ms Herbst to attend a Concussion Clinic as notified in its decision of 8 June 2018.

[45] The appellant produced a letter from Dr McAuley, Neurologist with the Auckland District Health Board dated 16 February 2021 regarding concussion. The letter, addressed to the appellant's GP Dr Fonua, reads:

Your patient was seen in the Neurology Outpatient Clinic on 5 February 2021. She was accompanied by her advocate/support person.

It seems that the principle motivation for this referral is that the patient is seeking support to help her ongoing disagreement with ACC about coverage for her whiplash injury and post concussion syndrome.

She sustained a motor vehicle accident on 5 March 2015. Multiple injuries occurred including a whiplash injury and a head injury. She was briefly knocked out at the time.

Since then there have been a number of persisting symptoms. These have included memory issues, chronic fatigue, intermittent nausea, intermittent diplopia which appears to be of a monocular type, impairment of balance and feelings of dizziness, muscle spasms at the back of her neck, chronic headache, chronic neck pain, difficulty with communication and urinary incontinence.

...

I performed a limited neurological examination. Full general examination was not performed. The skull was normal. Neck movements were restricted with discomfort. Movement of the neck prompted an exacerbation of her bifrontal headache. The cranial nerves were normal. In particular the optic fundi were normal. Ocular motility was normal. There was no diplopia. There was no facial weakness or asymmetry and her speech was normal. Motor function in the limbs was normal. Sensory examination was not performed. The tendon reflexes were normal and symmetrical with flexor plantar responses. The patient's gait was normal. She could stand steadily on a narrow base with her eyes closed and could tandem walk slowly.

I would agree that the patient seems to have sustained a cervical injury probably of whiplash nature and a head injury complicated by the post concussion syndrome as a result of her motor vehicle accident in 2015. The early management of this was probably less than ideal. The patient feels that she did not have adequate rehabilitation at that time and is seeking further rehabilitation by the auspices of ACC.

I mentioned that the patient could appeal the ACC's decision. She told me that this process had been initiated. I suggested that the opinions from the neurologist, neuropsychologist and the three neurosurgeons she has seen should be used as evidence to support her appeal. It might be to her advantage to seek a newer, more comprehensive neurological assessment in the private sector that could be presented as well at the time of her appeal.

[46] On the basis of this report the appellant submits that she should have concussion cover from ACC. She notes she has cover for whiplash and post traumatic stress disorder.

[47] The appellant says she wants physical and cognitive rehabilitation for her whiplash/concussion injury.

The respondent's submissions in respect of appeal ACR 336/18

[48] Mr Mailand refers to s 67 of the Accident Compensation Act 2001 which declares that a person has entitlements if they have cover for a personal injury.

[49] Here Mr Mailand says that ACC made a decision on 8 June 2018 declining cover for concussion. He submits that this appeal is an attempt to get around the decision of the Court on 26 August 2020¹ which found that the appellant had failed to establish on the balance of probabilities that the respondent's decision revoking cover for concussion was wrong.

¹ *Herbst v Accident Compensation Corporation* [2020] NZACC 111.

The appellant's reply in respect of appeal ACR 336/18

[50] In reply, the appellant says that she still has persisting symptoms and regardless of ACC's decision relating to concussion she still should have treatment for her symptoms of post traumatic stress disorder and whiplash. She says:

I should have got rehabilitation with the cover that I had.

Decision in respect of appeals ACR 139/18 and ACR 336/18

[51] The complaint by the appellant here is of delays in issuing various entitlement decisions. In a strictly temporal sense, there is plainly force in this submission. However, there are many unusual features in this case that have resulted in much longer timeframes for some decisions to be made. Mr Mailand notes that ACC's file now extends to over 25,000 pages. As at July last year the appellant had some 160 medical professional consultations since the accident equating to 1 every 11 days over 5 years.

[52] There is a communication plan in place between the appellant and ACC which allows the appellant to communicate with her case manager in Wellington only at specified times.

[53] However, Mr Mailand refers to page 12 of the Reviewer's decision (5672089), of 12 April 2018 where he says:

... following discussion both parties agreed on an outcome for this review. That was that ACC issue a decision in relation to all four of these claimed entitlement requests (training for independence. Transport for independence. Concussion Clinic referral and funding of orthotics) within two months. As is normally the case that will be a fresh reviewable decision should Ms Herbst disagree with the decisions then issued.

[54] The respondent duly issued decisions on 8 June 2018 in accordance with this agreement. Mr Mailand therefore submits that there remains no live issue to be determined in respect of ACR 139/18.

[55] What appears to be a prime focus of the appellant's concern is the decision of 8 June 2018 declining referral to a Concussion Clinic, the subject of appeal ACR 336/18.

[56] This was declined because the appellant did not have cover for concussion. Mr Mailand also refers to the appeal decision of 26 August 2020² in which I found that the appellant had not established on the balance of probabilities that she had suffered concussion or had post concussion syndrome and that therefore ACC's decision of 10 January 2018 revoking cover for concussion with no loss of consciousness, was correct.

[57] However, Mr Mailand's primary submission on this appeal is that because fresh decisions of the respondent were issued on 8 June 2018 (giving rise to review and appeal rights) there is no longer a live issue to be determined.

[58] I find that submission is correct. The agreement made before the Reviewer was intended to ensure that fresh decisions were made based on the information available, including any new information coming to hand.

[59] Two of the decisions made by ACC on 8 June 2018 as to entitlements were in favour of the appellant.

[60] For those decisions that were declined, fresh review and appeal rights accrued to the appellant. I therefore accept Mr Mailand's submission that there is no longer a live issue to be determined in respect of appeal ACR 139/18.

[61] I acknowledge the letter from Dr McAuley, neurologist, dated 16 February 2021, produced by the appellant and set out in full at paragraph [45]. The appellant was seeking support as the doctor put it:

...to help her ongoing disagreement with ACC about coverage for her whiplash injury and a post concussion syndrome.

[62] While Dr McAuley suggested that it might be to the appellant's advantage to seek a newer, more comprehensive neurological assessment, she herself said;

...the patient seems to have sustained a cervical injury probably of whiplash nature and a head injury complicated by the post concussion syndrome as a result of her motor vehicle accident...

² *Herbst v Accident Compensation Corporation* [2020] NZACC 112.

[63] Dr McAuley's opinion is to be respected but it does not purport to be definitive and she herself suggests further assessment.

[64] Weighed against the specialist reports relied on,³ Dr McAuley's letter does not alter the conclusions reached in that judgment.

[65] In that judgment, at paragraph [168], I noted Dr Finucane, Neuropsychiatrist's view that it would be appropriate for the appellant to engage in psychological therapy and while he noted that the two other neuropsychiatrists:

... do not concur on the issue of concussion and post concussion syndrome, they agree on the therapeutic inputs that the appellant needs.

[66] The appellant does have cover for whiplash and PTSD and while completely the province of appropriately qualified medical specialists there plainly are agreed therapeutic inputs that the appellant needs.

[67] It is open to the appellant's GP, if he/she sincerely believes there are these unmet rehabilitative needs in respect of these conditions to request that ACC make an appropriate referral.

[68] However, it must follow for the foregoing reasons that appeals ACR 139/18 and ACR 336/18 are dismissed.

[69] In respect of appeal ACR 140/18 relating to a claim for reimbursement for a range of costs paid by the appellant, Mr Mailand refers to cl 4 of Schedule 1 to the Accident Compensation Act 2001 which provides that:

The Corporation is not required to pay the costs of the claimant's treatment unless the Corporation has given its prior agreement to the treatment.

[70] Subsection (2) of cl 4 sets out a list of circumstances in which prior approval for treatment is not required including where in the treatment provider's reasonable clinical judgement the need for treatment is urgent.

³ See *Herbst*, above n 2.

[71] It was not disputed that the appellant was advised by ACC on 18 October 2016, 16 December 2016 and 20 February 2017, of the need for prior approval in respect of treatments and assessments, if the appellant wished ACC to pay the costs of these.

[72] As the Reviewer Mr Woodhouse noted:

I can understand that statutory intention with requiring prior approval to be given. ACC is entrusted with levy payer's funds, and there is an expectation that where those funds are expended, they are done so judiciously.

[73] In this case the appellant makes no claim of obtaining prior approval. Her position is that she had medical assessments done in the course of rehabilitation and restoring her health. She does not deny being advised by ACC that she needed prior approval.

[74] Clause 4 of Schedule 1 of the Accident Compensation Act 2001 provides that unless the Corporation has given its prior agreement to treatment it is not required to pay the costs.

[75] The appellant does not argue that any of her costs come within the "urgent treatment" or other exception.

[76] I adopt what the Reviewer Mr Woodhouse has said that the statutory intention with requiring prior approval is that being entrusted with levy payers' funds the expectation is that those funds will be expended judiciously.

[77] Outside the stated exceptions, I have otherwise no power to direct that ACC reimburse payments made by claimants who have not obtained prior approval.

[78] Accordingly appeal ACR 140/18 must also be dismissed.

Other matters

[79] Ms Herbst was an innocent victim in a motor vehicle collision on 5 March 2015 in which she received significant injuries. Six years later, the accident and its aftermath completely dominate her life. The accident and its aftermath have become her life. So much so, that those who would, cannot help.

[80] Examples include an attempt at conciliation with her legal representation funded by ACC ending in failure.

[81] At this hearing mention was made of “three way” telephone conference discussions between the appellant, her GP and her ACC case manager, to problem solve and to advance matters. I understand these too have ended due to her GP, in the appellant’s words, being “overwhelmed”.

[82] During the hearing the appellant presciently said “I can’t seem to focus on just one thing at a time”. She also said that her GP advised her to concentrate on only three things at a time, her left foot, her neck and her back.

[83] Most telling is the sorry history of the injury sustained to her left foot accident set out in *Herbst v ACC*.⁴

[84] The injury sustained was a significant Lis-franc injury. She underwent surgery on 1 December 2015. Further ACC approved surgery was scheduled to take place to remove metal inserted in her left foot.

[85] This surgery has not taken place.

[86] In October 2016 a “non-union” was discovered in the appellant’s left foot meaning that the initial surgery had failed.

[87] Repeat fusion surgery has been approved. It has been scheduled. However, the appellant has so far declined to have it, ostensibly because a number of preconditions sought by her have not been met to her satisfaction.

[88] These include modifications to her dwelling, residential convalescence care and home care.

⁴ *Herbst v Accident Compensation Corporation* [2020] NZACC 109.

[89] In my decision of 26 August 2020, I noted:⁵

It is common ground that the appellant needs remedial surgery on her left foot and frankly this needs to occur sooner rather than later. Indeed in her submissions the appellant confirms “for now I must concentrate on surgery”.

[90] Almost eight months later, the long overdue corrective surgery is no closer due to the appellant’s “preconditions” not being met to her satisfaction.

[91] Four and a half years have now lapsed since the failure of the first surgery was discovered.

[92] The appellant is almost 50 years old. Those wasted four and a half years mean that with the aging process the appellant will now necessarily be not as resilient and not recover as quickly as she would have, had she had the remedial surgery in late 2016.

[93] I have elsewhere described the appellant as a very intelligent and articulate person. She has tertiary professional qualifications.

[94] The tragedy is that her life appears to have become consumed by her disputes with ACC.

[95] Mr Mailand gave a broad assurance on behalf of ACC that necessary supports for the appellant’s convalescence and recovery would follow her surgery.

[96] I do fervently hope that as the next first step, Ms Herbst agrees to have the long overdue remedial surgery without any further delay on her part.

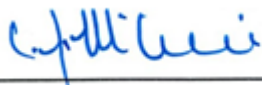
[97] To do so would be a major step forward towards having a life once again after her motor vehicle crash injury.

⁵ *Herbst*, above n 4, at [67].

Results of appeals

[98] To summarise the outcome of these appeals:

- [a] Appeals ACR 338/18 and ACR 191/19 were not proceeded with and are dismissed.
- [b] Appeals ACR 139/18; ACR 140/18 and ACR 336/18 are dismissed.
- [c] There is no issue as to costs.



Judge C J McGuire
District Court Judge

Solicitors: Medico Law, Auckland for the respondent