

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 137 ACR 061/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	DARRON WHEELER Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 15 July 2022
Held at: Hamilton/Kirikiroa

Appearances: The Appellant is self-represented
S Churstain for the respondent

Judgment: 19 July 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Social Rehabilitation - Transport for independence – ss 81, 84 and Schedule 1,
Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 5 February 2021. The Reviewer dismissed an application for review of the Corporation’s decision dated 8 October 2020 declining to purchase a mobility scooter and provide a tricycle.

Background

[2] Mr Wheeler was born in 1974. He worked in a variety of fields, most recently as a self-employed exterior waterproofer.

[3] On 17 August 2019, Mr Wheeler injured his right foot when one of his dogs, weighing approximately 30 kilogrammes, jumped onto his foot from a height of about one metre.

[4] On 10 September 2019, an initial x-ray was taken of Mr Wheeler's foot. Dr Logan Fletcher reported that the x-ray showed no acute fracture or bony injury.

[5] On 10 September 2019, the Corporation granted Mr Wheeler cover for fracture of one or more phalanges of his right foot.

[6] On 1 November 2019, Mr Wheeler saw Mr Christopher Dawe, Orthopaedic Surgeon, who referred Mr Wheeler to an MRI for injury to the right foot.

[7] On 26 November 2019, an MRI was taken by Dr Amanda Ragg. The scan identified a second metatarsal head subchondral fracture without collapse.

[8] On 27 November 2019, Mr Dawe reported that Mr Wheeler had a fracture which would account for the symptoms relating to the injury on 17 August 2019.

[9] On 22 January 2020, a further x-ray and CT of the foot was taken by Dr Kunaal Raipal, Consultant Radiologist. His findings were:

XRAY FINDINGS:

There is flattening of the head of the 2nd metatarsal with subchondral cystic change. No definite articular surface collapse is seen.

CT IMPRESSION:

Minor flattening of the second metatarsal head with associated subchondral cystic change with no evidence of articular surface collapse.

[10] On 23 January 2020, based on CT and X-ray findings, Mr Dawe recommended surgery (osteotomy to shorten second metatarsal), and sought funding from the Corporation. The specific diagnosis was:

Subchondral fracture right 2nd metatarsal head with deformity of the metatarsal head. And anticipated return to work post-surgery of 2-3 months.

[11] On 3 March 2020, Mr Joe Brownlee, Orthopaedic Surgeon, provided the Corporation with clinical comment, stating that the condition “does not have a traumatic basis”.

[12] On 13 March 2020, Mr Dawe responded to Mr Brownlee’s comment:

... I am of the opinion that this is a traumatic avascular necrosis of the 2nd metatarsal head following an injury on 17.08.2019 rather than due to the more insidious onset of Freiberg's infraction.

[13] On 6 April 2020, the Corporation agreed to fund surgery.

[14] On 14 May 2020, surgery on Mr Wheeler’s right foot was undertaken by Mr Dawe.

[15] On 3 July 2020, Mr Dawe noted that Mr Wheeler’s right forefoot was comfortable and that he was getting back to normal activities.

[16] On 24 July 2020, a repeat CT scan was carried out by Mr Guy Mason, Radiologist. The scan showed:

At this stage there is no significant bony union of the osteotomy of the 2nd metatarsal head.

Some fragmentation and lucency of the articular surface centrally.

[17] In September 2020, Mr Wheeler made a number of requests for aids and appliances which he felt would assist him. These included a recliner chair, a mobility scooter, a ride-on lawnmower, a Can-Am motorcycle, and a Volkswagon van.

[18] On 1 September 2020 the Corporation approved home and community support. The same day the Corporation noted Mr Wheeler’s request for a recliner chair and mobility scooter and submitted a request for a Social Rehabilitation Needs Assessment (“SRNA”).

[19] On 3 September 2020, Mr Wheeler underwent a bone grafting and internal fixation non-union osteotomy right second metatarsal surgery, conducted by Mr Dawe.

[20] On 7 September 2020, a SRNA was conducted by Ms Shelly Martin, Occupational Therapist. Ms Martin recommended that the Corporation provide a recliner chair, home help, and a mobility scooter for Mr Wheeler's social rehabilitation. Ms Martin's report stated:

Due to his injury Darron is currently non weight bearing for 4 weeks on his right foot. As a result of a bone graft in his right foot, he has pain and swelling and has been advised to elevate his foot whenever possible. Darron is currently mobilising on his knee scooter and sometimes his crutches, however he finds the crutches difficult to use. Darron reports he would like to access the community and has requested a mobility scooter to assist with walking and taking his dogs for a walk or visiting his parents who live locally.

Due to the above barriers the following is recommended:

ACC Equipment:

ACC to consider the provision of a rental mobility scooter.

[21] The expected outcome of funding those items was to support non-weight bearing and reduce lower back pain as a result of Mr Wheeler being required to be seated for an extended period of time and him to be independent with mobilising in the community. The expected outcome, if the assistance was not provided, was described as:

Darron reports feelings of low mood due to the length of time he has been dealing with this injury. He has also developed back pain as a result of sitting for extended periods of time.

[22] On 8 September 2020, an invoice for hire (at \$840) of a mobility scooter, for a 6ft, 125 kg individual, was obtained by the Corporation. It arranged hire of a Heartland S17 Cutie Model.

[23] On 14 September 2020, Ms Martin reported to the Corporation:

Darron was talking about doing a paper or pamphlet run with the scooter. He wanted to get out and see his family as well. I suggested the rental as I knew he would not need a permanent scooter. However the recall date will do the same as rental. Darren said that getting outside and walking his dogs would have a positive impact on his mental wellbeing as he feels like he is stuck in the house.

The knee scooter would not allow him to mobilise the distance he would like to be able to mobilise independently. There were no warning signs that made me concerned that he would become reliant on the scooter for mobilising. I was very clear with him that the expectation is that he will be walking again.

[24] On 1 October 2020, Mr Wheeler wrote to the Corporation requesting that it provide him with a 2020 Can-Am Spyder F3-S trike motorcycle and a 2020 Volkswagen Multivan Highline 4Motion Van.

[25] On 5 October 2020, Mr Wheeler advised the Corporation that he was very pleased with the mobility scooter, however, he was unable to go to other places with it. He advised that the scooter provided to him had a maximum capacity of 130 kilograms and was too small for his needs. The Corporation advised that the mobility scooter that Mr Wheeler requested was not available for hire, it was for purchase only and that the Corporation would need clinical advice on the request.

[26] On 6 October 2020, the Corporation sought advice on Mr Wheeler's requests from Ms Claire Ultee, Senior Triage and Workflow Coordinator, Elective Services Centre. Ms Ultee reported:

On review of the clinical information on file, the client most recently had surgery on the 03/09/2020 and had an SRNA to consider the client's needs. The SRNA report dated 07/09/2020 identified a need for a recliner chair and a rental mobility scooter. The client has been supplied with both a recliner chair and mobility scooter. In the context of the claim, it appears reasonable that a mobility scooter is provided in the short term however a permanent need has not been established at present.

Requests have been received for a number of other items. In regard to the high cost items (ride on lawn mower, can-am Spyder motorbike, 2020 Volkswagen van) the client's long-term function and needs have not yet been established as it appears that the client is still recovering from recent surgery. Once the client has recovered and once appropriate engaged in rehabilitation, if there are ongoing injury related needs, these can be considered and assessed as appropriate.

[27] On 8 October 2020, the Corporation declined to provide/purchase various items requested by Mr Wheeler. In relation to the issues raised at this appeal, the Corporation stated:

On review of the clinical information on file, you most recently had surgery on 03/09/2020 and had a Social Rehab Needs Assessment (SRNA) completed to consider your injury related needs. The SRNA report dated 07/09/2020

identified a need for a recliner chair and a rental mobility scooter, ACC has supplied you with both a recliner chair and a rental mobility scooter.

In the context of the claim, it appears reasonable that a mobility scooter is provided in the short term however a permanent need has not been established at present, therefore we are unable to fund purchase of the requested Heartway Aviator S8X – Shop Floor Model Mobility Scooter requested and we are only able to hire the mobility scooter from our Contracted Equipment Company – Accessable. ...

Regarding the Can-am Spyder motorbike and 2020 Volkswagen Van, ACC provides assistance with transport to treatment and/or rehabilitation under Ancillary Regulations based on your injury related needs. ACC has provided you with taxis and effective from 07/10/2020 has agreed to the rental of a hand-controlled vehicle so that you can attend all treatment and rehabilitation appointments and be able to access your wider community.

As you are still receiving treatment post-surgery, any long- term effects of your injury are unable to be established at this time. Once you have recovered from the surgery and all appropriate treatment and rehabilitation has been completed, if it is identified that you are continuing to experience functional difficulties, appropriate assessments can be completed at that time

[28] On 8 October 2020, Mr Wheeler sought a review of his request. He advised that he thought that the scooter provided was too small for him and was underpowered/unable to travel up hills. He requested the Corporation to consider renting or purchasing a Heartway Vita X Model, for which he obtained a purchase quote.

[29] The Corporation arranged hire of a Pathrider 140XL Mobility Scooter, with a maximum weight of 180 kilogrammes. On 23 October 2020, the Corporation reiterated that it was not able to purchase a mobility scooter for Mr Wheeler because he did not have an assessed long-term injury-related need.

[30] On 5 February 2021, review proceedings were held. On 2 March 2021, the Reviewer dismissed the review. In relation to the mobility scooter, the Reviewer noted that Mr Wheeler's needs were assessed by a qualified assessor, and that the Corporation had met its obligations by providing a mobility scooter of an appropriate size. In relation to the motorcycle, the Reviewer found that Mr Wheeler's request did not meet the social rehabilitation of transport for independence criteria, as he had not been assessed as needing the motorcycle; it was not required as a direct consequence of his injury; it was not of the type ordinarily provided by the Corporation; it was not clear how a motorcycle would achieve a particular

rehabilitation outcome; and his transport needs had been met by the provision of a van.

[31] On 25 March 2021, a Notice of Appeal was lodged.

[32] On 6 July 2021, Mr Wheeler was seen by Dr David Prestage, Occupational Physician, for an Initial Medical Assessment and an opinion as to Mr Wheeler's ability to undertake the work types identified in an Occupational Assessment. Dr Prestage noted that the presentation of Mr Wheeler's injuries was complex, and it was unclear what the state of his injury was. Dr Prestage recommended an up-to-date CT scan and possibly an MRI scan, bariatric surgery, a psychiatric assessment, and consideration of a pain management assessment and programme if no orthopaedic intervention was required.

[33] On 21 September 2021, the Corporation offered to arrange a fresh Transport for Independence Assessment for Mr Wheeler. This new assessment would consider all of his needs for transport for independence assistance, including consideration of his current and long-term injury-related needs, together with the suitability of the assistance that the Corporation was currently providing. The Corporation advised that, once the new assessment was complete, the Corporation would issue a new transport for independence assessment, which would carry its own review and appeal rights.

[34] Mr Wheeler declined the Corporation's offer. He was not willing to participate in a Transport for Independence Assessment while his appeal was being processed, and instead confirmed that he wished to proceed to hearing.

[35] On 2 March 2022, Dr Prestage reported further on his assessment of Mr Wheeler:

Diagnosis(es):

- Undisplaced subchondral fracture within the right 2nd metatarsal extending from the junction between the proximal mid third to the metatarsal head

- Osteoarthrosis with minor flattening of the 2nd metatarsal head with associated subchondral cystic change without any evidence of articular surface collapse
- Shortening osteotomy of the right 2nd metatarsal on 14 May 2020
- Depression and anxiety

Barriers to rehabilitation:

Mr Wheeler has done very well since the previous Initial Medical Assessment in July 2021. Bariatric surgery has been a success and his foot has settled down as was hoped.

While Mr Wheeler has some mild pain in relation to the 2nd metatarsophalangeal joint, this is not significant. It will likely prevent him from being on his feet all day but otherwise he is fit for most forms of employment that allow him to be off his feet from time to time.

Mr Wheeler has a history of depression but is aware of his symptoms and is able to seek help when necessary.

There are no psychological barriers to rehabilitation.

After the Initial Medical Assessment last year, CT and MRI scans proved satisfactory and there is no significant concern about the state of the injury. The osteoarthrosis of the affected metatarsophalangeal joint may progress with time but in my opinion, this is likely to be a significant issue for a long time and it may never be a significant issue at all.

Mr Wheeler is working on setting up his own business and this is appropriate. From his description of his plans, it will be well within his capabilities.

Recommendations for management and rehabilitation:

I discussed the following recommendations with Mr Wheeler:

- Attend the psychologist as planned next week.
- Continue with his plans for self-employed.
- If he enters employment that requires safety footwear, referral to a podiatrist would be appropriate.

Relevant law

[36] Section 67 of the Accident Compensation Act 2001 (“the Act”) provides:

A claimant who has suffered a personal injury is entitled to 1 or more entitlements if he or she –

- (a) has cover for the personal injury; and

- (b) is eligible under this Act for the entitlement or entitlements in respect of the personal injury.

[37] Section 79 of the Act states that the purpose of social rehabilitation is “to assist in restoring a claimant's independence to the maximum extent practicable”. Section 6 of the Act states that “practicable”, in relation to rehabilitation, means practicable after considering and balancing: the nature and consequences of the injury; the achievement of rehabilitation outcomes; costs; cost effectiveness; the availability of other forms of rehabilitation; and other relevant factors.

[38] Section 81(1)(h) provides that transport for independence is a “key aspect of social rehabilitation”. Section 81(3) states that the Corporation’s liability to provide a “key aspect” of social rehabilitation to claimant arises if the conditions in subsection (4) are met, but not earlier than a date determined in accordance with section 83.

[39] Section 81(4) provides:

The conditions are—

- (a) a claimant is assessed or reassessed under section 84 as needing the key aspect; and
- (b) the provision of the key aspect is in accordance with the Corporation's assessment of it under whichever of clauses 13 to 22 of Schedule 1 are relevant; and
- (c) the Corporation considers that the key aspect—
 - (i) is required as a direct consequence of the personal injury for which the claimant has cover; and
 - (ii) is for the purpose set out in section 79; and
 - (iii) is necessary and appropriate, and of the quality required, for that purpose; and
 - (iv) is of a type normally provided by a rehabilitation provider; and
- (d) the provision of the key aspect has been agreed in the claimant's individual rehabilitation plan, if a plan has been agreed.

[40] Section 84 provides:

- (1) An assessment under this section assesses a claimant’s need for social rehabilitation and identifies the specific social rehabilitation that the claimant needs.

- (2) The Corporation may—
 - (a) do assessments and reassessments, itself, by using appropriately qualified assessors employed by the Corporation; or
 - (b) appoint and pay as many appropriately qualified assessors as it considers necessary to do assessments and reassessments; or
 - (c) both.
- (3) A claimant's need for social rehabilitation—
 - (a) may be reassessed from time to time; and
 - (b) must be reassessed if the Corporation considers that the claimant's condition or circumstances have changed.
- (4) The matters to be taken into account in an assessment or reassessment include—
 - (a) the level of independence a claimant had before suffering the personal injury:
 - (b) the level of independence a claimant has after suffering the personal injury:
 - (c) the limitations suffered by a claimant as a result of the personal injury:
 - (d) the kinds of social rehabilitation that are appropriate for a claimant to minimise those limitations:
 - (e) the rehabilitation outcome that would be achieved by providing particular social rehabilitation:
 - (f) the alternatives and options available for providing particular social rehabilitation so as to achieve the relevant rehabilitation outcome in the most cost effective way:
 - (g) any social rehabilitation (not provided as vocational rehabilitation) that may reasonably be provided to enable a claimant who is entitled to vocational rehabilitation to participate in employment:
 - (h) the geographical location in which a claimant lives:
 - (i) in the case of a reassessment,—
 - (i) whether any item that the Corporation provided for the purposes of social rehabilitation is in such a condition as to need replacing:
 - (ii) changes in the claimant's condition or circumstances since the last assessment was undertaken.

[41] Clause 12 of Schedule 1 of the Act provides:

Transport for independence-

- (a) means assistance with the cost of, for example,-
 - (i) escorted travel by vehicle:
 - (ii) modifying a vehicle:

- (iii) purchasing a vehicle:
- (iv) travelling by public transport:
- (v) travelling by taxi...

[42] Clause 22 of Schedule 1 of the Act sets out the rights and responsibilities of the Corporation in determining whether to purchase or contribute to the purchase of a car or transport. Clause 22(1) of Schedule 1 states:

The Corporation is not required to purchase, or contribute to the purchase of, a motor vehicle if the claimant, or a person proposing to transport the claimant,—

- (a) owns or part owns or has the use of a vehicle that may be modified in order to assist in restoring the claimant's independence; or
- (b) disposed of a vehicle, after the claimant's personal injury, that may have been able to be modified in order to assist in restoring the claimant's independence.

[43] In *Kacem v Bashir*,¹ Tipping J stated in the Supreme Court:

[32] ... a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

[44] In *SB*,² Judge Henare stated:

[20] The Corporation's decision to provide transport for independence is a key aspect of social rehabilitation. This decision involves the Corporation exercising its discretion. The case law is well established, with reference to the decision of the Supreme Court in *K v B* [2010] NZSC 112 that the exercise of the discretion can only be challenged where the Corporation has made an error of law, has failed to take into account some relevant matter, has taken into account an irrelevant matter or the decision is plainly wrong.

[45] In *R*,³ Judge Powell stated:

[29]... Providing independence to the maximum extent practicable means that ensuring that the appellant had access to a suitable vehicle to undertake this travel. Trying to provide for some sort of unquantified independence beyond the point identified by a duly qualified assessor pursuant to s 84 of the Act, not only goes beyond the needs identified by Ms Bellett and Ms Steptoe but raises the issue that the provision of non essential additional safety features, such as

¹ *Kacem v Bashir* [2010] NZSC 112; [2011] 2 NZLR 1.

² *SB v Accident Compensation Corporation* [2015] NZACC 297. See also *O'Mara v Accident Compensation Corporation* [2013] NZACC 1, at [40].

³ *R v Accident Compensation Corporation* [2015] NZACC 247.

those included with the Ford Kuga, may provide a false sense of security to the possible detriment of the appellant and indeed other road users.

Discussion

[46] The issue in this case is whether the Corporation's decision dated 8 October 2020, declining to purchase a mobility scooter and provide a tricycle, was correct. Mr Wheeler may be eligible for entitlements in respect of a personal injury for which he has cover.⁴ Included in entitlements is transport for independence, which is a key aspect of social rehabilitation.⁵ To be eligible for this entitlement, the Corporation must ensure that Mr Wheeler is assessed as needing the transport for independence.⁶ Further, the Corporation must consider that the transport for independence is: required as a direct consequence of the personal injury for which Mr Wheeler has cover; for the purpose of assisting in restoring Mr Wheeler's independence to the maximum extent practicable; necessary and appropriate, and of the quality required, for that purpose; and of a type normally provided by a rehabilitation provider.⁷ The Corporation's decision on whether to grant transport for independence is a discretionary one, and so the criteria for a successful appeal are stricter than in the case of a general appeal.⁸

[47] Mr Wheeler submits as follows:

- (a) the Corporation's actions caused him to suffer financial hardship, which required him to sell assets including the family home, work vehicle and a motorcycle;
- (b) he owns two American Staffordshire Terriers that require almost daily exercise;
- (c) the rental mobility scooters provided by the Corporation are not fit for purpose and do not properly meet his needs: (1) the first scooter provided by the Corporation was too small and he had to wait one month after notifying the Corporation of its deficiencies, before it provided a

⁴ Section 67(b) of the Act.

⁵ Section 81(1)(h).

⁶ Section 81(4)(a).

⁷ Section 81(4)(c).

⁸ See *Kacem v Bashir*, n1, at [32].

different model; and (2) the second scooter provided by the Corporation is also defective and the seat has broken and is unsafe;

- (d) motorcycles have been a key part of his life and central to relief from his depression and catching up with his friends; he has not been able to engage in these activities after his injury;
- (e) he had to sell his KTM motorcycle for \$37,000.00 post-injury as he could no longer use it; the Can-Am Spyder Tricycle is as close as possible to a motorbike that he could ride and would assist him in getting back a degree of pre-injury normality;
- (f) the assistance provided by the Corporation has not meet his needs, and the purchase of a mobility scooter and a Can-Am Spyder meet the legislative requirements for providing social rehabilitation to him; and
- (g) the rental van provided by the Corporation is to assist him with walking his dogs and transporting the rental mobility scooter, and does not help him with his social rehabilitation needs.

[48] This Court acknowledges Mr Wheeler's submissions and his own view of his needs. However, the Court notes the following considerations.

[49] First, in relation to the mobility scooter, the Corporation ensured that Mr Wheeler's need for the scooter was properly assessed, and the Corporation acted in accordance with the assessment advice provided and statutory requirements. Four days after Mr Wheeler's surgery, a Social Rehabilitation Needs Assessment was conducted by Ms Martin, Occupational Therapist, and she recommended that the Corporation consider the provision of a rental mobility scooter. Ms Martin later clarified that she suggested the rental scooter as she knew that Mr Wheeler would not need a permanent scooter and clarified with him that the expectation was that he would be walking again. The Corporation duly arranged for the hire of a mobility scooter, and later a replacement scooter for hire.

[50] Second, in relation to the motorcycle, the Corporation also ensured that Mr Wheeler's need for the motorcycle was properly assessed, and the Corporation

acted in accordance with the assessment advice provided and statutory requirements. Just over a month after Mr Wheeler's surgery, Ms Ultee, Senior Triage and Workflow Coordinator, Elective Services Centre, reported that Mr Wheeler's long-term function and needs had not yet been established, as it appeared that he was still recovering from recent surgery. Ms Ultee advised that, once Mr Wheeler had recovered and engaged in rehabilitation, if there were ongoing injury-related needs, these could be considered and assessed as appropriate. The Corporation duly arranged for the rental of a hand-controlled vehicle so that Mr Wheeler could attend all treatment and rehabilitation appointments and be able to access his wider community.

[51] Third, the Corporation, five weeks after Mr Wheeler's surgery, while declining to purchase a mobility scooter or provide the motorcycle requested, assured Mr Wheeler that, once he had recovered from his surgery and all appropriate treatment and rehabilitation had been completed, if it was identified that he was continuing to experience functional difficulties, appropriate assessments could then be completed.

[52] Fourth, Mr Wheeler has not produced any assessment report which has supported his requests to purchase a mobility scooter and be provided with a motorcycle, up to the time of the Corporation's decision to decline his requests.

Conclusion

[53] In light of the above considerations, the Court finds that Mr Wheeler has not established that the Corporation's discretionary decision dated 8 October 2020, to decline, at that stage, to purchase a mobility scooter and provide the motorcycle requested by Mr Wheeler, was plainly wrong.

[54] The decision of the Reviewer dated 5 February 2021 is therefore upheld. This appeal is dismissed. I make no order as to costs.

[55] This Court acknowledges the pain, discomfort, frustration and disappointments that Mr Wheeler has endured as a result of his injury. The Court notes the Corporation's offer to arrange a fresh Transport for Independence Assessment for

Mr Wheeler. This new assessment would consider all of his needs for transport for independence assistance, including consideration of his current and long-term injury-related needs, together with the suitability of the assistance that the Corporation was currently providing. The Court encourages Mr Wheeler to participate in such an assessment.

A handwritten signature in dark ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller
District Court Judge

Solicitors: Ford Sumner for the Respondent.