IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 152 ACR 62/22

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

Hearing: 8 August 2022
Held by telephone link

Appearances: J Howard for the Appellant
P McBride for the respondent

Judgment: 18 August 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for entitlements – ss 69(1) and 72(1), contracting out – s 299, Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 21 March 2022. The Reviewer declined jurisdiction in relation to two review applications lodged by Ms Howard.

Background

[2] Ms Howard was born in December 1947. At the time of her claim for cover, she was employed by New Zealand Post Ltd (NZ Post). NZ Post was an accredited employer under the Accident Compensation Act 2001 (the Act), and its work-

accident claims were managed by Care Advantage. Care Advantage managed Ms Howard's cover and entitlements until the cover was assigned to the Corporation.

[3] In 2006, Ms Howard suffered a spinal injury, and this was aggravated by a further injury in 2007. She suffered pain and functional limitations, was unable to work, and received cover for the injuries.

[4] On 21 May 2010, an individual rehabilitation plan (IRP) was prepared for Ms Howard, and this was signed and agreed by her on 27 May 2010.

[5] In the ensuing months, Care Advantage looked for medical advice concerning a path to Ms Howard's social or vocational rehabilitation. Her case manager considered that the next appropriate step was an assessment by an occupational medicine specialist. Mrs Howard was referred to Dr Courtney Kenny for an assessment. At the appointment Mr Howard, Ms Howard's husband, raised questions about Dr Kenny's scope of practice and suitability to conduct the assessment. Because of the objections, Dr Kenny agreed not to conduct the assessment.

[6] On 11 November 2010, Care Advantage sent a letter to Ms Howard, noting what had transpired in relation to Dr Kenny, and advised:

> This appointment was made in accordance with Section 72 - Responsibilities of claimant who receives entitlement (d) undergo assessment by a registered health professional specified by the Corporation, at the Corporation's expense. The reason for this assessment with an Occupational Physician has been provided to you on a number of occasions, in writing.
>
> You were provided on several occasions with information on the consequences of not attending and completing this assessment. I therefore regret to advise that we decline to provide entitlements, effective from Friday 26th November 2010.
>
> This decision is made in accordance with Section 117 Corporation may suspend, cancel or decline entitlements.
>
> If you are not happy with this decision, in the first instance you should contact your Care Manager to discuss the decision further. You should also ensure that any new information that the Care Manager may not have had at the time of making the decision is disclosed for consideration.

> In addition, you are able to contact the Disputes Manager at New Zealand Post Ltd, Andrew Inder, (04) 496 4442 (internal extension 44442), for an internal review of this decision.
>
> If any issues remain unresolved you may apply for a formal review. An official review application form must be completed and lodged with Care Advantage within three months of the date you receive this decision. Please refer to the attached Resolving Issues Fact Sheet, which explains the process of reviewing decisions.

[7] Ms Howard unsuccessfully applied for review of this decision, and then appealed to the District Court. In a judgment dated 29 June 2012, Judge Ongley dismissed the appeal on the basis that the Corporation's decision to suspend entitlements was correct. The Court found that it was reasonable for the Corporation to require Ms Howard to attend for assessment by an occupational physician, and that she unreasonably refused to engage in the assessment.[1] Ms Howard then appealed Judge Ongley's decision to the High Court, the Court of Appeal and the Supreme Court, without success.[2]

[8] On 30 July 2021, Ms Howard and the Corporation entered into a settlement agreement, in terms of which an *ex gratia* payment of $19,200 was made to Ms Howard. In clause 9 of the agreement, the parties acknowledged that they had had the opportunity to take legal advice as to the meaning and effect of the agreement prior to signing it.

[9] Under clause 1 of the settlement agreement, Ms Howard acknowledged and agreed that she had no outstanding ACC entitlement down to the date of the settlement. Under clause 4, Ms Howard agreed that she would not personally or by any agent representative or by proxy initiate or be involved in any further action, claim, application, proceeding or complaint in relation to any ACC entitlements, or any issues in any way relating to ACC cover, existing down to the date of the settlement. Clause 6 of the agreement stated, in relation to the *ex gratia* payment:

> Subject only to law, payment of the sum will be a full and final settlement of the claim, issue or complaint whatsoever that Maree Howard might have or have had against ACC or its representatives or appointees in respect of any

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1 *Howard v Accident Compensation Corporation* [2012] NZACC 218, at [41].

2 *Howard v Accident Compensation Corporation* [2013] NZHC 188; [2013] NZHC 1004; [2013] NZCA 617; and [2014] NZSC 31.

> entitlement or claim management issues in respect of any event or issue down to the date of the settlement and whether known, or not known to the parties.

[10] At the time of the agreement, the Corporation had paid $10,000 of the *ex gratia* payment, and agreed to pay the balance of $9,200 by 27 August 2021 (which payment was made).

[11] On 1 September 2021, Mr Howard, for Ms Howard, asked the Corporation to consider making payments for the period between 11 November 2010 and 9 April 2012.

[12] On 14 September 2021, the Corporation responded to Mr Howard's email, noting:

> We have mutually agreed on the full and final settlement of all issues Maree has had with ACC. We have been reasonable in paying her full entitlement for the full period of suspension. ACC will therefore not [be] progressing this and we see matters as fully concluded between Maree and ACC.

[13] In reply, Ms Howard clarified that the claim was for weekly compensation entitlement for the period between 26 November 2010 and 9 April 2012 and asked the Corporation to "issue an ACC written decision".

[14] On 21 September 2021, the Corporation replied to Mr and Ms Howard:

> ACC's position is that the weekly compensation you have requested has already been the subject of previous review and court decisions. This weekly compensation is also subject to the full and final settlement agreement which you signed on 30th July 2021.
>
> Therefore ACC will not be issuing any further decision, or engaging in any further correspondence in regard to this matter.
>
> ACC has worked in good faith with you through the settlement process, and is of the view that the matter is closed off by that process.

[15] In October 2021, Ms Howard applied for review of the IRP of 27 May 2010, alleging her rehabilitation needs as of 2010 had not been implemented. Ms Howard also contended it was unfair for the Corporation not to have made weekly compensation entitlements and that no notice of review rights had been given.

[16] Also, in October 2021, Ms Howard sought review of the Corporation's response of 14 September 2021 as being a reviewable decision. Ms Howard sought payment for the full period of suspension and contended that the sum paid as an *ex gratia* settlement was amenable to review.

[17] On 25 February 2022, review proceedings were held. On 21 March 2022, the Reviewer dismissed the review, concluding that he did not have jurisdiction because there was not a reviewable decision and surrounding circumstances were fatal to Ms Howard's claims.

[18] On 6 April 2022, a Notice of Appeal was lodged.

[19] On 8 August 2022, a hearing was conducted, with Mr Howard representing Ms Howard and Mr McBride representing the Corporation. The hearing was originally envisaged to be conducted by audio-visual link with Judge Spiller and Mr McBride, and with Mr Howard connected by telephone. Ms Howard also attended but was not required to speak as she was represented by Mr Howard. However, in view of the inability of Mr Howard to hear Judge Spiller and Mr McBride adequately, the hearing was reconvened as a telephone link, and Mr Howard expressed satisfaction with the ability to hear what was said at the hearing. Mr Howard then presented his submissions, Mr McBride presented the Corporation's submissions, and Mr Howard exercised the right of reply to Mr McBride. Mr Howard did not express any reservation about not being able to hear and reply to Mr McBride's submissions. However, subsequent to the hearing, Mr Howard advised the Ministry that it had been hard to hear Mr McBride with his voice fading out and so hard to respond to him. Judge Spiller did not have any such issues with Mr McBride's presentation.

[20] This Court is satisfied that Mr Howard, as Ms Howard's representative, had fair and full opportunity of presenting submissions on behalf of Ms Howard, and that he exercised this opportunity, both in writing before the hearing and orally at the hearing.

Relevant law

[21] Section 69(1) of the Act provides:

> The entitlements provided under this Act are—
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> (a) rehabilitation, comprising treatment, social rehabilitation, and vocational rehabilitation:
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> (b) first week compensation:
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> (c) weekly compensation: ...

[22] Section 72(1) of the Act provides:

> A claimant who receives any entitlement must, when reasonably required to do so by the Corporation,—
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> …:
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> (c) authorise the Corporation to obtain medical and other records that are or may be relevant to the claim:
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> (d) undergo assessment by a registered health professional specified by the Corporation, at the Corporation's expense:
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> (e) undergo assessment, at the Corporation's expense: …

[23] Section 299 of the Act provides that:

> **No contracting out of this Act**
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> This Act has effect despite any provision to the contrary in any contract or agreement.

[24] In *Griffin*,[3] Judge Beattie stated, with reference to the "no contracting out" provision in the Accident Rehabilitation and Compensation Insurance Act 1992:

> [15] I find that as a matter of law it was not open to the respondent to have the appellant agree to ceasing his entitlements, as the Act makes no provision for any such agreement or that any such agreement can have the force of law.

[25] In *Stockan*,[4] Judge Ongley stated:

> [20] … The test is whether this Court has any power to make any declaration or grant any relief that could follow from the arguing of the appeal. The answer is that it does not. There is no live issue …

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3 *Griffin v Accident Compensation Corporation* [2006] NZACC 51.

4 *Stockan v Accident Compensation Corporation* [2006] NZACC 233.

[26] In *Howard*,[5] Judge Powell stated:

> [9] It is clear Mrs Howard's review application was fundamentally misconceived. Pursuant to s 117(3) of the Act the Corporation is not required to "provide any entitlement" where entitlements are suspended. With Mrs Howard's entitlements suspended the Corporation was not therefore required to process any claims Mrs Howard has or make any entitlements, including those at issue in the present appeal.

[27] In *Howard*,[6] Courtney J stated:

> [21] … In submissions, Mr Howard emphasised the need to determine each proceeding on its own merits. This does not, however, include allowing the same argument that has already been decided between the same parties to be raised again in other proceedings. That would be contrary to the principle of issue estoppel or res judicata. As the Court said in *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group*,[7] the general principle is "that a party and its privies should not be twice vexed in the same matter".
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> …
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> [23] No matter how Mr Howard frames his arguments, the underlying complaint in this case and in all of the other proceedings involving Mrs Howard's claim is that the ACC should not have suspended her entitlements. Rightly or wrongly, that issue has now been determined. Mr Howard does not seem to grasp that finality in litigation relates to the substantive complaint. Once a substantive issue has been raised and determined in litigation between the parties it cannot be raised again. Advancing it in the guise of some other form of proceeding or framed as another kind of complaint cannot disguise its true nature.

Discussion

Effect of settlement agreement of 30 July 2021

[28] This Court acknowledges that the settlement agreement was an attempt made in good faith by the Corporation to bring to an end the lengthy disputes that had ensued after the Corporation suspended Ms Howard's entitlements in November 2010. The Court also finds that Ms Howard, having affirmed that she had had the opportunity to take legal advice about the agreement, must reasonably have known that she had agreed, on receipt of the *ex gratia* payment of $19,200, to refrain from

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5 *Howard v Accident Compensation Corporation* [2017] NZHC 76. See also *Howard v Accident Compensation Corporation* [2020] NZHC 174, at [51]-[52].

6 *Howard v Accident Compensation Corporation* [2018] NZHC 3342 (declining Mr Howard's special leave to appeal on behalf of Ms Howard).

7 *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group* [2014] NZCA 536 at [18] citing, inter alia, *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) at 31 per Lord Bingham and at 60 per Lord Millett. See also *Bhanabhai v Commissioner of Inland Revenue* [2007] 2 NZLR 478 (CA) at [59]-[61].

making any further claims in relation to any ACC entitlements existing through to the date of the settlement. The Court notes with concern that nevertheless, within a very short period after receipt of the payment in full, Mr Howard claimed weekly compensation on Ms Howard's behalf for a period between 2010-2012.

[29] However, this Court notes that section 6 of the settlement agreement, which provided that payment of the sum agreed would be a full and final settlement of any claim that Ms Howard might have had against the Corporation, was subject to law. The Court observes that the law applicable to the agreement includes section 299 of the Act, which provides that the Act has effect despite any provision to the contrary in any contract or agreement. This Court finds that the plain meaning of section 299 dictates that the terms of the settlement agreement cannot prevail over the rights and remedies contained in the Act, including the right to claim entitlements such as weekly compensation in relation to a covered injury.[8] The Court is therefore obliged to set the settlement agreement to one side for the purpose of deciding the present appeal.

Jurisdiction re: Ms Howard's application for review of the IRP of 27 May 2010

[30] Mr Howard, for Ms Howard, submits that the issues relating to the IRP are not the same issues that had been previously finally and conclusively judicially determined. Mr Howard claims that the assessment in the agreed IRP for physiotherapy treatment has never been implemented pursuant to Clause 8(3) of Schedule 1 of the Act (which requires that, when an IRP is agreed or finalised, the Corporation must implement the plan). Mr Howard asserts that Ms Howard was not told about review rights or given notice of decisions in time to make a review application pursuant to sections 63 and 64(4) of the Act.

[31] However, this Court finds that the question of the implementation of Ms Howard's IRP is moot, in light of the Corporation's decision to suspend her entitlements in November 2010. As noted above, section 69(1) of the Act lists rehabilitation as one of the entitlements provided by the Act. With Mrs Howard's entitlements suspended, the Corporation was not therefore required to implement

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8 See n 3 *Griffin*, at [15].

Ms Howard's IRP or other entitlements.[9] The Corporation's decision to suspend entitlements was confirmed as correct by this Court, and appeals against the Court's decision were unsuccessful.[10] This Court, in the present appeal, has no power to make any declaration or grant any relief in relation to the alleged non-implementation of the IRP.[11] The Court thus finds that it has no jurisdiction to entertain Ms Howard's application for review of the IRP of May 2010.

[32] For completeness, this Court further notes that

(1) Ms Howard did not, until the present proceedings, lodge a review relating to her IRP, and so this review is significantly out of time; and

(2) at least by November 2010, Ms Howard was fully informed of the nature and process of review (see paragraph [6] above).

Jurisdiction re: Ms Howard's application for review of the Corporation's email of 14 September 2021

[33] Mr Howard submits that the Corporation's email of 14 September 2021 constitutes a new decision declining Ms Howard's claim for weekly compensation, and so gives rise to review and appeal rights which she has exercised.

[34] However, this Court notes the following considerations:

(a) the Corporation's email was responded to by Ms Howard who asked that the Corporation "issue an ACC written decision", thus indicating that Ms Howard herself did not see the earlier email from the Corporation as constituting a decision. Further, Ms Howard clarified that her claim was for weekly compensation entitlement for the period between 26 November 2010 and 9 April 2012.

(b) Ms Howard's follow-up email was then answered by the Corporation, confirming that it would not be issuing any further decision. The

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9 *Howard v Accident Compensation Corporation* [2017] NZHC 76, at [9], and *Howard v Accident Compensation Corporation* [2020] NZHC 174, at [51]-[52].

10 *Howard v Accident Compensation Corporation* [2012] NZACC 218; [2013] NZHC 188; [2013] NZHC 1004; [2013) NZCA 617; and [2014) NZSC 31.

11 See n 4 *Stockan*, at [20].

> Corporation's reply also pointed to what was the true decision relating to Ms Howard's claim, namely, the decision of 11 November 2010, suspending Ms Howard's entitlements. As the Corporation indicated, its position (as reflected in the 2010 decision) was that the weekly compensation that Ms Howard requested had already been the subject of previous review and court decisions.

[35] This Court finds, in light of the above considerations, that Mr and Ms Howard's emails amounted to a renewed claim for weekly compensation and thus an attempt to relitigate the claim which she unsuccessfully pursued against the 2010 decision, which this Court found was correct, all subsequent appeals on this matter also failing. The hearing of this matter would thus be contrary to the principle of issue estoppel or *res judicata*.[12]

[36] This Court therefore finds that the Corporation's email of 14 September 2021 does not constitute a reviewable and appealable decision, and so this Court does not have jurisdiction to decide on this application for review.

Conclusion

[37] Overall, this Court finds that it does not have jurisdiction to hear Ms Howard's review applications of the IRP of 27 May 2010 and the Corporation's email of 14 September 2021. To paraphrase the words of Justice Clifford, the underlying basis of the present appeals, as of others involving Ms Howard, is that the Corporation should not have suspended her entitlements. As Justice Clifford noted, that issue has now been determined finally and adversely to her and cannot be raised again and advancing it in the guise of some other form of proceeding or claim cannot disguise its true nature.[13]

[38] The decision of the Reviewer dated 21 March 2022 is therefore upheld. This appeal is dismissed.

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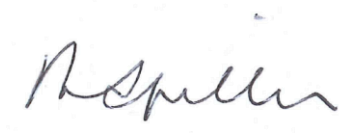
12 *Howard v Accident Compensation Corporation* [2018] NZHC 3342, at [21].
13 See n 12 above *Howard*, at [23].

[39] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors for the Respondent: McBride Davenport James