

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 188 ACR 219/21

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

Hearing: 30 August 2022
Heard at: Wellington/Te Whanganui-a-Tara

Appearances: Mr B Hinchcliff for the appellant (via AVL)
Mr I Hunt for the respondent (via AVL)

Judgment: 28 September 2022

**RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Proof of incapacity – s 102 Accident Compensation Act 2001]**

[1] This appeal concerns a decision of the respondent dated 12 March 2021 in which it declined a request for back dated weekly compensation for a period between 1989 and 1997.

Background

[2] The appellant was struck by a car while crossing the road on 20 December 1988. He suffered a right tibial avulsion fracture.

[3] The first medical certificate noted:

Spine requiring internal fixation.

[4] The appellant received weekly compensation from 27 December 1988 to 19 March 1989.

[5] On 20 March 1989, the appellant returned to work and weekly compensation ceased.

[6] In its decision of 12 March 2021, following the appellant's application for his historical weekly compensation, ACC said:

ACC has carefully assessed all the information available and finds that we're unable to accept your request because you are not entitled to weekly compensation for this period.

For the periods requested, there has not been incapacity demonstrated due to the covered injuries, with the exception of a period after the removal of metal ware surgery. There is evidence of incapacity for three and half months post this incapacity, a period for which you were paid weekly compensation and then made a full return to work. There is no further evidence establishing a clear picture or strong and supporting evidence of a continuing incapacity over the periods requested.

Appellant's submissions

[7] Mr Hinchcliff refers to the initial accident on 20 December 1988, when the appellant was struck by a car. He acknowledges that the appellant received weekly compensation from 27 December 1988 to 19 March 1989.

[8] On 20 March 1989, the appellant returned to work and weekly compensation payment stopped.

[9] On 26 April 1989, the appellant had a motorcycle accident for which he received cover for a right knee sprain injury. Mr Hinchcliff notes that the appellant was in receipt of an unemployment benefit from around June 1989 and that a sickness benefit started on 31 July 1989.

[10] Mr Hinchcliff referred to a medical certificate of 13 March 1989, noting the appellant was fit for selected or alternative work from 20 March 1989.

[11] An ACC memorandum dated 21 March 1989 stated:

Peter started work 20-3-89.

[12] The next report that Mr Hinchcliff refers to is a request for approval of private hospital treatment dated 1 October 1991, directed to ACC by orthopaedic surgeon, Mr McCowan. The proposed treatment includes arthroscopy of the right knee and removal of screw from right knee. Mr McCowan gave the reason for surgery:

To expedite treatment of this man who is not working because of his knee pain.

[13] An ACC memorandum dated 24 October 1991 notes:

Peter returned to work on 20 March 1989 with NE Construction and Engineering and left two months after this. He then went on the unemployment benefit since June 89. Had tried odd seasonal work i.e. apple picking.

He is currently on the sickness benefit (started about three weeks ago) due to his knee.

[14] The memo goes on to say that he left his employment on his own choice without consulting a GP. It also notes:

Has been living down in the South Island for the past two year. Came up to Auckland three months ago.

[15] Mr Hinchcliff refers to a report dated 17 July 1992, addressed to ACC, from Dr Jenkin, GP. In the report Dr Jenkin said:

Peter came in today to have his sickness benefit extended. ...I'm not sure why Peter has not been on a C15 compensation since his accident rather than a dole – then sickness benefit. His answer is that he did not know any different.

[16] Mr Hinchcliff refers to a medical report from Mr Hooker, orthopaedic surgeon dated 4 June 1993, where amongst other things, Mr Hooker said:

I am doubtful that in the future Mr Logan in spite of any further treatment to his right knee will return to unrestricted heavy manual work or vigorous

physical activities. His work capacity and his way of life I believe would have to be considered to have been significantly affected by his injuries.

[17] On 5 August 1994, Mr Smith, review officer gave a decision concerning the award of \$3,000 under s 79 of the Act in respect of injuries, particularly to his right leg suffered in the accident. Mr Smith said:

...It seems to me strange that the Corporation's rehabilitation services do not (according to the applicant) appear to have had much contact with him. He also tells me that his earnings related compensation was cut off, leaving him on a sickness benefit of \$150 per week.

As far as the s 79 award is concerned, it seems to be established that the current level of \$3,000 does not properly represent the impact of the injury upon his life style and it is therefore to be increased to a total of \$6,000, and an additional \$3,000.

[18] In a letter dated 12 December 1994, Dr Jenkin asked ACC why the appellant was not in receipt of weekly compensation.

[19] On 8 March 1995, the appellant's case manager wrote to Dr Jenkin stating:

Peter was in receipt of weekly compensation from 27 December 1988 and he was paid up to 19 March 1989. He returned to work at North Eastern Construction and Engineering Company Limited on 20 March 1989, hence his payments stopping.

No further application for weekly compensation or further medical certificate was received to advise that he was unfit for work or claiming for loss of income.

[20] In a memo dated 29 March 1995, ACC's case manager noted:

Peter was an apprentice boiler maker at the time of accident. He worked for North Eastern Construction and Engineering Company since January 1986 to date of accident. He was declared FFSW and returned to pre-accident employment on 20 March 1999.

Peter advises that he left after two months as he was unable to do the heavy work required of him i.e. carrying pipes and climbing on and off boats, carrying heavy loads, repetitive work etc.

He said he left of his own accord (without consulting his general practitioner) and a medical report 17 July 1992 indicates he was asked to leave by his employers.

From here he went on the unemployment benefit in June 1989 and then went down to the South Island for two years. He tried seasonal work and remembers seeking medical treatment once.

He returned to Auckland and went on to the sickness benefit in October 1991 because of his knee. He has been on the sickness benefit since.

He would like to claim back dated weekly compensation and I have given him an application form. He will get the appropriate medical certificates from NZ income support service and arrange a further appointment with me.

[21] Mr Hinchcliff refers to a further medical certificate dated 8 September 1995 which includes the following:

Peter returned to work 20/3/89 – found he couldn't cope because of pain and disfunction – has not work since.

[22] The doctor noted that the appellant was unfit for work for four weeks. There is also a handwritten note from income and support, date stamped 28 September 1995, confirming that the appellant has been on a sickness benefit continuously since 31 July 1989.

[23] On 26 February 1996, NZ income support service provided a breakdown of the amount the appellant received from the sickness benefit for the period from 31 July 1989 to 26 February 1996.

[24] That is the last document that Mr Hinchcliff refers to from the period in question and there are no other contemporary documents from that period amongst the bundle of documents before the Court.

[25] Mr Hinchcliff refers to the report of ACC medical advisor Dr Jones dated 29 November 2019 where she says:

Application was made in 1995 for back dated weekly compensation (at the multiple requests of his GP) but it is unclear whether this issue was ever resolved. The client's notes suggest that he is now a builder but it is unclear when his further incapacity began as he has been certified off work from 8/07/2019 when he underwent a total knee replacement through the public hospital system and appears to have reengaged with ACC.

[26] Mr Hinchcliff acknowledges that the reviewer's decision was that there was not enough evidence to establish the incapacity for the period from 1989 to 1997.

[27] Mr Hinchcliff nevertheless submits that there is evidence to find incapacity for the various periods that the appellant could not work from 1989 to 1997.

Respondent's submissions

[28] Mr Hunt acknowledges that the appellant had a number of periods of incapacity and, from what we know, the appellant was a boiler maker up to the time of his first accident. Mr Hunt notes that there was no medical opinion of incapacity between 1989 and 1997 other than for specific periods.

[29] Mr Hunt referred to the decision of Judge MacLean in *Knight*,¹ where Judge MacLean considered a number of decisions of the Court, and said:

A common theme coming through all the decisions I have referred to is that the Court should approach retrospective certification, as to continuous incapacity with caution, and there needs to be a clear picture established of continuing incapacity. The case of *Jamieson* is of the assistance because it, as here, involve the concept of “reigniting of entitlements”.

[30] Mr Hunt submits therefore that the onus is on the appellant to establish a retrospective incapacity and that without contemporary medical certificates this is very difficult.

[31] Mr Hunt also referred to *Tonner*,² where Justice Muir confirmed:

...the authorities have consistently identified that the onus is on such claimants to establish a clear picture of incapacity over the relevant period and that, in such context, retrospective medical certificates will be treated with caution.

[32] Furthermore, Mr Hunt says this is not a case where there is an opinion from a medical person saying that there was incapacity at the relevant time and that is an important omission.

[33] Mr Hunt submits the papers that are available show the appellant worked intermittently over the time in question and that prima facie therefore the evidence is that he was not incapacitated.

[34] Mr Hunt submits that the appellant in this case is not discharged the onus that is on him to establish incapacity for the times in question.

¹ *Knight v Accident Compensation Corporation* [2016] NZACC 174 at [73].

² *Tonner v Accident Compensation Corporation* [2019] NZHC 1400 at [43].

Decision

[35] This is an appeal against the decision of the respondent of 12 March 2021 which declined a request for back dated weekly compensation between 1989 and 1997.

[36] The decision said:

For the periods requested, there has not been incapacity demonstrated due to the covered injuries, with the exception of a period after the removal of metal ware surgery. There is evidence of incapacity for three and half months post this incapacity, a period for which you were paid weekly compensation and then made a full return to work. There is no further evidence establishing a clear picture, or strong and supporting evidence of a continuing incapacity of the periods requested.

[37] What is clear from the documents is that following the appellant's unfortunate accident on 20 December 1998 when he was hit by a car whilst crossing the road, there was appropriate engagement with ACC and the appellant accessed earnings related compensation is the result of his incapacity. At the time the appellant was an apprentice boiler maker.

[38] Medical certificates on the file show that he was assessed as unfit for work for six weeks from the date of accident, for a further four weeks from 16 January 1989 and for a further four weeks from 13 February 1989.

[39] A medical certificate dated 13 March 1989 certified the appellant fit for selected or alternative work from 20 March 1989.

[40] The next medical record dated 1 October 1991, from orthopaedic surgeon Mr McCowan, indicates that the appellant was not working because of his knee pain.

[41] Given the earlier certificates in which he was judged unfit for work, it is reasonable to infer that the appellant had acquired some knowledge of how unfitness for work was dealt with within the ACC system.

[42] An ACC memo dated 24 October 1991 notes that the appellant "advises he left work due to his knee problem – swelling and twisting knee".

[43] The same memorandum notes the appellant went on the unemployment benefit from June 1989 and had tried seasonal work – apple picking.

[44] The same memorandum notes that the appellant had left his engineering job “on his own choice without consulting the GP”. It also noted that he had been living down the South Island for the past two years.

[45] In evidence before the reviewer, the appellant acknowledged that on 26 April 1989, he “came off a farm bike on a farm”.

[46] That accident is not recorded in the schedule of the appellant’s injuries with ACC.

[47] The appellant said that he stopped working then:

because I was having difficulties with my knee prior to the motorbike accident and after that it was even twice as worse.

[48] The appellant went on to acknowledge that he went back to work for a while after the April 1989 accident for a couple of months “but I was taking time off all the time”. After that the appellant said he was on the unemployment benefit and the sickness benefit.

[49] The appellant said that otherwise until 1997, he worked “very occasionally”. He says that he had another operation in 1996 which he described as a partial knee replacement.

[50] A letter from Income Support Service, dated 26 February 1996, provided ACC with gross and net rates of benefit received by the appellant from 31 July 1989 to 26 February 1996.

[51] The inference to be taken is that such information was of potential assistance to ACC. Should retrospective weekly compensation be granted, the quantum of such needs to be assessed, taking into account the benefits the appellant received from Income Support Services.

[52] From the documents that have survived, I conclude that the appellant had a basic understanding of the need for incapacity to be certified so that earnings related compensation could be paid. Likewise, I find that there is nothing on the file to suggest that ACC, in any way, was putting obstacles in the way of the appellant obtaining entitlements that were due to him on account of his injuries.

[53] In his submissions, Mr Hunt has referred to a number of cases that deal with back dated weekly compensation and the principles were summed up in *Tonner*:³

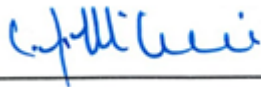
...the authorities have consistently identified that the onus is on such claimants to establish a clear picture of incapacity over the relevant period and that, in such context, retrospective medical certificates will be treated with caution.

[54] In this case, the appellant faces the additional hurdle of there being very little in the way of retrospective medical information and no medical certificates as such.

[55] On the evidence before me therefore, I must find that the appellant has failed to discharge the onus that is on him to prove incapacity for all or any of the periods during which he was not employed between 1989 and 1997.

[56] Accordingly, I must dismiss this appeal.

[57] There is to issue as to costs.



Judge C J McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch
ACC and Employment Law, Ellerslie, Auckland

³ See *Tonner* n2 above at [45].