

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 195 ACR 251/21

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

Hearing: 28 September 2022

Held at: Auckland/Tāmaki Makaurau

Appearances: B Hinchcliff for the Appellant
 F Becroft for the Respondent

Judgment: 6 October 2022

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for weekly compensation - ss 103, 104, 105,
Accident Compensation Act 2001 (the Act)]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 28 October 2021. The Reviewer dismissed an application for review of the Corporation’s decision dated 21 January 2021 confirming that section 105 of the Act was the correct provision to use in assessing Mr Lisale’s eligibility for weekly compensation, and that the Corporation’s decision of 1 October 2020, to cease Mr Lisale’s weekly compensation, was correct.

Background

[2] Mr Lisale was born in 1995. He worked in scaffolding. His last day of work with his employer was 29 August 2017, with the official date of termination being 30 August 2017. He was paid 5.59 days of holiday pay, as well as an additional payment, in lieu of notice.

[3] On 17 September 2017, Mr Lisale suffered a number of fracture injuries in a motor vehicle accident. He was immediately hospitalised following the accident and was unable to work because of the various injuries. He made an ACC claim, number ending 383 (the 2017 injury claim), and received cover for his injuries.

[4] On 18 September 2017, Mr Lisale underwent surgery for right tibia and fibula fractures and right lower leg compartment syndrome.

[5] Mr Lisale applied to the Corporation for weekly compensation. The Corporation subsequently determined that the earner status extension criteria (under Clause 43 of Schedule 1 to the Act) were satisfied, and therefore assessed Mr Lisale's compensation entitlement. Weekly compensation payments commenced on 24 September 2017 at the rate of \$694.66 per week.

[6] On 10 October 2017, an initial client contact script transcript recorded that Mr Lisale was still taking a lot of pain medication and was receiving assistance from his parents with his care.

[7] From December 2017, the Corporation approved rehabilitation, including support in the home and physiotherapy. A back-to-work plan was also drafted, with monitoring and a pool and gym programme.

[8] On 9 February 2018, an x-ray showed failure of metalware on the right distal femur. On 21 February 2018, further surgery was undertaken by Mr John Mills. Mr Lisale continued to be certified unfit.

[9] On 21 June 2018, an Initial Occupational Assessment (IOA) was undertaken by Ms Karen Mannall, to identify work types that were vocationally suitable for

Mr Lisale and any vocational rehabilitation that could be provided. A number of job options, for which he had the existing skills, were identified.

[10] In late 2018, a further back-to-work programme commenced. Around this time, Mr Lisale missed some physiotherapy appointments. On 12 and 20 December 2018, the Corporation warned that there was a risk that his weekly compensation payments could be suspended if he continued to miss appointments. On 27 December 2018, entitlements were suspended because of his failure to comply. The decision letter advised that weekly compensation entitlements would restart only when he attended the next available physiotherapy appointment.

[11] On 14 January 2019, Mr Lisale recommenced a six-week gym programme and weekly compensation was resumed. However, Mr Lisale continued to miss appointments. On 14 March 2019, he was advised that, if contact was not made with the Corporation within seven days, weekly compensation might stop again.

[12] On 18 March 2019, the Corporation wrote to Mr Lisale advising:

We have been reviewing your ongoing eligibility for weekly compensation.

We just wanted to let you know we have a current medical certificate telling us that you are unable to return to work but understand that you have in fact returned to work, therefore, we have stopped paying you weekly compensation from 25/2/2019.

What you need to do:

If you are unable to keep working due to your injury, we may be able to start your weekly compensation again. All you need to do is send us a current ACC18 medical certificate stating your inability to work. We will need to consider whether your injury is stopping you from performing the work you could do before you were injured. This might mean we need to ask for more medical information.

This decision to stop your weekly compensation will not [a]ffect your eligibility for treatment or other entitlements. However, it may affect your vocational rehabilitation you are receiving

[13] On 23 July 2019, Mr Lisale suffered a further injury at work, and made an ACC claim, number ending 418 (the 2019 injury claim). The Corporation granted cover for a sprain or partial tear of the right knee and lateral collateral ligament.

From 30 July 2019, he was paid weekly compensation, at the rate of \$273.59 per week.

[14] On 25 July 2019, a late review application was filed by Mr Hinchcliff, against the Corporation's 18 March 2019 decision. On 1 August 2019, Simon Bates, the Corporation's Technical Advisor, noted that no medical certificate had been provided beyond 23 February 2019; and that the Corporation needed to determine Mr Lisale's incapacity under section 105(2) of the Act, for any period after that date. Mr Bates suggested that, if the answer to incapacity was unclear, the Corporation could arrange occupational and section 105 assessments.

[15] On 5 August 2019, a medical certificate was provided certifying Mr Lisale as having been unfit from 24 February 2019 to May 2019. A further certificate continued the period of incapacity to August 2019, and a third certificate confirmed incapacity to November 2019. Further clinical notes were subsequently obtained.

[16] On 24 September 2019, Dr Peter Thakurdas, the Corporation's Medical Advisor, reviewed the file. He thought that the notes provided suggested a possible injury-related incapacity from July 2019 onwards, noting that, in July 2019, Mr Lisale had suffered a new injury. Dr Thakurdas further noted that, alternatively, the July incident was an aggravation of the 2017 injury. He suggested obtaining further orthopaedic notes.

[17] On 4 October 2019, Dr Chris Walls, Occupational Medicine Physician, reported. He detailed the 2017 accident and noted that, on 23 July 2019, Mr Lisale slipped at work twisting his right knee. At that stage, Mr Lisale was reporting pain around the femur fracture site. Dr Walls diagnosed a compound fracture of the right femur with a complicated recovery following the July fall "which may have damaged the femur". He thought that there might be pseudoarthrosis and noted that more complex imaging was appropriate.

[18] On 8 November 2019, Dr Walls provided advice to the Corporation in regard to Mr Lisale's work capacity. Dr Walls thought that, from February 2019 until July 2019, Mr Lisale would not have been able to engage in work to which he was suited

because of his education, experience or training for 30 hours or more a week. Dr Walls, however, noted that the roles of Forklift Driver, Delivery Driver Van/Car, Postal Sorting Officer and Service Station Attendant were potentially sustainable roles for Mr Lisale.

[19] On 19 November 2019, review proceedings were held. On 6 December 2019, the Reviewer quashed the Corporation's decision and substituted it with her own decision. The Reviewer found that Mr Lisale was still incapacitated as at 25 February 2019 in relation to the 2017 accident, and that weekly compensation was to be reinstated from the date it had been suspended.

[20] On 11 December 2019, Mr Simon Bates, Technical Specialist, noted that, following the Reviewer's decision, weekly compensation was to be paid on the 2017 injury claim, and that the much-reduced weekly compensation paid on the 2019 injury claim would need to be raised as an overpayment which would be offset by arrears payable on the 2017 injury claim.

[21] On 18 December 2019, a further IOA was undertaken by Karen Mannall. She noted that Mr Lisale reported a particular interest in the role of metal fabricator, and she identified certain other work types for which he was vocationally ready.

[22] In January 2020, Dr Simon Mayhew, Sports Physician, undertook a section 105 assessment of Mr Lisale. Dr Mayhew confirmed that Mr Lisale was not fit for any work duties involving walking or standing for more than 30 minutes at a time. Dr Mayhew identified a number of jobs which he thought Mr Lisale could undertake, including Forklift Driver, Delivery Driver, and Alarm Security or Surveillance Monitor. Dr Mayhew confirmed that his comments applied from February 2019 through to the current day.

[23] On 3 February 2020 a further review application was filed, alleging that the Corporation had unreasonably delayed reinstating weekly compensation. Mr Hinchcliff, for Mr Lisale, asked that the Corporation backdate and modify the weekly compensation payments from 25 February 2019, with fees, interest and costs.

[24] On 7 February 2020, the Corporation made an additional payment of \$20,071.86 for backdated weekly compensation, with interest, for the period from 24 February 2019 to 5 February 2020. This amount was paid in respect of the 2017 injury claim.

[25] On 21 February 2020, another warning was sent to Mr Lisale as he had not attended scheduled rehabilitation appointments.

[26] On 6 March 2020, the Corporation advised Mr Lisale that his weekly compensation had been suspended due to non-compliance, and that he needed to get in touch with the physiotherapist to arrange a new appointment.

[27] Mr Lisale applied for a review of that decision. Subsequently, he reinitiated contact with his provider and weekly compensation resumed.

[28] Thereafter, Mr Lisale was provided assistance with a number of vocational modules. Initially, there was some focus on getting Mr Lisale his forklift driving endorsements, but this process was delayed because he did not have his full licence. It was suggested that this would not limit his ability to work as a Forklift Driver, provided the role did not require operating a forklift on the road or in a public space.

[29] On 21 August 2020, Mr Lisale's file was examined by Mr Bates, Technical Specialist. He was of the view that Mr Lisale was no longer incapacitated under section 105, based on Dr Mayhew's earlier advice that Mr Lisale was fit for work in three suitable job options. The Corporation decided to arrange a further independent medical review in regard to Mr Lisale's capacity.

[30] On 18 September 2020, Dr Mayhew reported again, confirming Mr Lisale's capacity to work in the roles of Forklift Driver, Delivery Driver, Storeperson, and Alarm Security or Surveillance Monitor. The file was then reviewed again by Mr Bates who confirmed that Mr Lisale was no longer incapacitated.

[31] On 1 October 2020, the Corporation issued a decision suspending Mr Lisale's entitlement to weekly compensation on the basis that he was no longer incapacitated.

[32] Mr Lisale applied for a review of that decision.

[33] On 3 December 2020, following a conciliation meeting, the Corporation agreed to obtain further technical advice on whether Mr Lisale's entitlement to weekly compensation should be tested under section 103 of the Act, and then to issue a new decision with review rights.

[34] On 21 January 2021, the Corporation issued its decision confirming its 1 October 2020 decision to cease entitlement to weekly compensation based on the application of section 105 of the Act. A further review application was then filed against that decision.

[35] On 7 October 2021, review proceedings were held. On 28 October 2021, the Reviewer dismissed the review, on the basis that she was satisfied that the Corporation was correct to assess Mr Lisale's eligibility for weekly compensation under section 105(2) rather than section 103(2) of the Act, and to confirm that his weekly compensation had ceased.

Relevant law

[36] Section 103 of the Act provides:

Corporation to determine incapacity of claimant who, at time of personal injury, was earner, on unpaid parental leave, or recuperating organ donor

- (1) The Corporation must determine under this section the incapacity of—
 - (a) a claimant who was an earner at the time he or she suffered the personal injury:
 - (b) a claimant who was on unpaid parental leave at the time he or she suffered the personal injury:
 - (c) a claimant who was within a payment period under the Compensation for Live Organ Donors Act 2016 at the time he or she suffered the personal injury.
- (2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

[37] Section 105 of the Act provides:

Corporation to determine incapacity of certain claimants who, at time of incapacity, had ceased to be in employment, were potential earners, or had purchased weekly compensation under section 223

- (1) The Corporation must determine under this section the incapacity of a claimant who—
 - (a) is deemed under clause 43 of Schedule 1 to continue to be an employee, a self-employed person, or a shareholder-employee, as the case may be; or
 - (b) is a potential earner; or
 - (c) has purchased the right to receive weekly compensation under section 223.
- (2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in work for which he or she is suited by reason of experience, education, or training, or any combination of those things.

[38] Section 104 of the Act provides:

Effect of determination under section 103 on entitlement to weekly compensation

If the Corporation determines under section 103(2) that the claimant is not incapacitated for employment—

- (a) a claimant who is receiving weekly compensation for loss of earnings from employment—
 - (i) loses that entitlement immediately; and
 - (ii) cannot be subject to a determination under section 107 in respect of that incapacity.

[39] Clause 42 of the First Schedule of the Act provides:

Weekly earnings of earners in full-time employment: increase in certain circumstances

- (1) This clause applies to a claimant who—
 - (a) was, immediately before his or her incapacity commenced,—
 - (i) in the category of earners liable to pay the minimum levy set in regulations made for the purposes of section 168B; or
 - (ii) an earner in full-time employment; and
 - (b) had weekly earnings calculated under clause 41 or, if that clause does not apply, under any of clauses 34, 36, 38, or 39 of less than

the minimum weekly earnings as determined under subclause (3);
and

- (c) is incapacitated for more than 5 weeks after the incapacity first commenced.
- (2) For the purpose of calculating weekly compensation for loss of earnings payable to the claimant for any period after the 5-week period, the claimant is deemed to have had, immediately before his or her incapacity commenced, the minimum weekly earnings as determined under subclause (3).

Discussion

[40] The issue in this case is a decision of the Corporation dated 21 January 2021, confirming its 1 October 2020 decision to cease entitlement to weekly compensation based on the application of s 105 of the Act.

[41] Section 103(1)(a) of the Act provides for the Corporation to determine the incapacity of a claimant who was an earner at the time he or she suffered the personal injury. Here, the question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury (s 103(2)). By contrast, s 105(1)(a) of the Act provides for the Corporation to determine the incapacity of a claimant who, at time of incapacity, had ceased to be in employment, but was deemed under clause 43 of Schedule 1 to continue to be an employee. Here the question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in work for which he or she is suited by reason of experience, education, or training, or any combination of those things (s 105(2)). Section 104(a)(i) of the Act provides that, if the Corporation determines a claimant is not incapacitated for employment, a claimant who is receiving weekly compensation for loss of earnings from employment loses that entitlement immediately.

[42] In September 2017, Mr Lisale suffered several fracture injuries in a motor vehicle accident and was granted weekly compensation under s 105(1)(a) of the Act. In February 2019, Mr Lisale returned to work and, in March 2019, the Corporation advised that his weekly compensation ceased from February 2019. In July 2019, he suffered a sprain/partial tear injury at work, for which he received cover and weekly

compensation, albeit at a substantially lower level than before. Also, in July 2019, Mr Lisale applied to review the Corporation's March 2019 decision. In December 2019, a Reviewer quashed the Corporation's decision and substituted her own decision. The Reviewer found that Mr Lisale was "still incapacitated as at 25 February 2019" and directed that weekly compensation was to be reinstated from the date it was suspended. The Corporation then debited the weekly compensation paid for the July 2019 injury from that due under the 2017 injury, and Mr Lisale was paid at the higher level of weekly compensation for the 2017 injury. Mr Lisale subsequently underwent assessment as to his fitness for employment in terms of s 105 (2) of the Act, and, on 1 October 2020, the Corporation issued a decision suspending Mr Lisale's entitlement to weekly compensation on the basis that he was no longer incapacitated. On 21 January 2021, the Corporation issued its decision confirming its 1 October 2020 decision.

[43] Mr Hinchcliff, for Mr Lisale, submits Mr Lisale's weekly compensation is payable under section 103 of the Act because he was an earner at the date of his injury (in 2019). He submits that although the Corporation was paying weekly compensation on a 2017 claim, the 2019 claim is in fact the claim under which Mr Lisale is eligible. The Corporation thus wrongly assessed Mr Lisale's continuing entitlement to weekly compensation under s 105(2).

[44] This Court acknowledges the above submissions. However, this Court finds that the weekly compensation entitlement that Mr Lisale has received flowed from the 2017 accident. It was this entitlement that was later suspended, reinstated, assessed and again suspended. This Court points to the following evidence:

- (a) The Reviewer's decision of December 2019 reinstated Mr Lisale's weekly compensation arising from his 2017 injury. The Reviewer found that Mr Lisale was "still incapacitated as at 25 February 2019", that is, before he sustained his July 2019 injury.
- (b) The Reviewer's decision of December 2019 reinstated Mr Lisale's weekly compensation arising from his 2017 injury from the date it was

suspended (25 February 2019), and no concluding date for the weekly compensation payment was specified.

- (c) In that there is no provision for a claimant to receive more than one weekly entitlement, the Corporation correctly debited the lower, short-term weekly compensation received in respect of the July 2019 injury from the substantially higher, ongoing weekly compensation flowing from the 2017 injury. Payments (including backdated money) received thereafter by Mr Lisale were made with reference to the 2017 injury claim.

[45] Because the weekly compensation entitlement that Mr Lisale has received flowed from the 2017 accident, the Corporation correctly conducted its assessment of his continuing entitlement to weekly compensation under s 105(2). This assessment was directed towards whether he was unable, because of his personal injury, to engage in work for which he was suited by reason of experience, education, or training, or any combination thereof. The assessment was conducted in accordance with the requirements of the Act, by way of an occupational and a medical assessment. Dr Simon Mayhew, Sports Physician, identified certain jobs which he thought Mr Lisale could undertake. Mr Lisale was then provided assistance with a number of vocational modules. Based on Dr Mayhew's advice, Mr Bates, the Corporation's Technical Specialist, advised that Mr Lisale was no longer incapacitated under s 105. This Court has no countervailing occupational and medical evidence.

Conclusion

[46] In light of the above considerations, the Court finds that the decision of the Corporation dated 21 January 2021, confirming its 1 October 2020 decision to cease entitlement to weekly compensation based on the application of s 105 of the Act, is correct. The decision of the Reviewer dated 28 October 2021 is therefore upheld. This appeal is dismissed.

[47] I make no order as to costs.

A handwritten signature in black ink, appearing to read "P R Spiller". The signature is written in a cursive style with a large initial "P".

P R Spiller
District Court Judge

Solicitors for the Respondent: MedicoLaw.