

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 196 ACR 77/22

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	SARAH CURGENVEN 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
**[Calculation of earnings for weekly compensation – section 9 and Schedule 1,
Accident Compensation Act 2001]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 3 May 2022. The Reviewer dismissed an application for review of the Corporation’s decision dated 19 November 2021 concerning Ms Curgenven’s claim for backdated weekly compensation and interest.

Background

[2] Ms Curgenven was born in September 1973.

[3] On 6 July 1994, Ms Curgenven suffered a number of injuries in a motor vehicle accident, including fractures to both ankles. She was granted cover for these injuries. She underwent a number of surgeries following the accident, and in the following years. However, she continued to have stability issues with her ankles.

[4] Weekly compensation was sought. The Corporation based her compensation on an Earnings Certificate dated 15 July 1994 associated with Ms Curgenven's work for a café called "A Taste of Kapiti", owned by her father. Ms Curgenven had been working 25 hours per week in this job.

[5] Between 1994 and 10 January 1996, weekly compensation was paid. It then ceased, as Ms Curgenven returned to study and later undertook further work.

[6] On 29 May 2009, the Corporation issued a decision declining an application for backdated weekly compensation (to 1996), on the basis that there was no clinical evidence that Ms Curgenven had been incapacitated since 10 January 1996.

[7] On 27 May 2009, Ms Curgenven applied for a review of the Corporation's decision and, in the review application, wrote:

I may have received some weekly compensation in 1994 to 1996 but this was at the student allowance rate and did not include my income from working at the cafe and should be adjusted to fix this.

My weekly compensation was stopped in January 1996 when I returned to study as I was told by my case manager at the time ACC would help and assist me the costs involved in my training. This did not happen.

The course I started studying I could not complete as the pain I was in was unbearable and my doctor told me stop before I did any further damage to my ankles. This has become the pattern of my life since. I always dreamed of doing hotel management and owning my own hotel since I was a kid and this was what I went to study only to find that within a matter of weeks my dream was shattered when I had to withdraw from the course as the pain I was in was unbearable. I was told by my doctor to stop immediately. As a requirement of the course I had to have a job working in the hospitality industry and I had a position as a Kitchenhand which was one day a week. I was on my feet for the entire 4 hours I worked and as enjoyable as it was (and getting some income and having a job) I then spent the next 3 days recovering from it and getting pain levels back to some sort of normal. I had to give this job up as it wasn't worth the pain I was in.

I have since only had one paid position as a Teacher Aid for 6 hours a week. Again the pain was too much and the recovery from it not worth it.

I have had 16 operations (the first 9 were during the initial 8 weeks in hospital). On my ankle in 15 years and the length of recovery from these is up to a year which makes my life very difficult.

[8] On 11 December 2009, the Corporation's decision was quashed at review. The Reviewer determined that Ms Curgenvén was entitled to backdated weekly compensation from 10 January 1996. Weekly compensation was reinstated and back paid.

[9] On 18 December 2009, Ms Curgenvén sent an email to the Corporation claiming that she had earned \$268 from the café, A Taste of Kapiti, and \$162 from Gosling Gear, a shop where she worked, for a total of \$430 per week gross. She said that she had filed no tax returns from the shop as there was no profit and at the time the records were included in her father's tax returns.

[10] On 23 April 2010, Ms Curgenvén wrote to the Corporation enclosing a letter from Mr A N Boyce, Accountant, dated 26 July 1994, which provided details in relation to Ms Curgenvén's pre-injury earner status. The letter stated:

When Sarah started on 16 May 1994 at A Taste of Kapiti she also started getting paid for her work at Gosling Gear. Sarah was paid \$430.00 gross per week. This was earned by working 25 hours per week at A Taste of Kapiti and 17 hours per week at Gosling Gear. A total of 42 hours a week. Up until this time the Gosling Gear business had not been providing her an income. Her income in the previous 12 months had been received only in the form of a standard student allowance as she studied NCB at Polytech.

Although Sarah is stated as being the owner of Gosling Gear the business' accounts were run through my client's accounts as she was only 17 years old when she started the business and at the time was not eligible for any business banking assistance. As the Gosling Gear business was being run through my client's business accounts that would mean she is an employee of the business, which should be reflected in the amount that you and ACC will be compensating her with.

[11] Ms Curgenvén asked that her weekly compensation be recalculated.

[12] On 31 May 2010, Ms McKay, Case Administrator for the Corporation, confirmed the Corporation's earlier weekly compensation decision. Ms McKay noted the absence of returns filed with the Inland Revenue Department, and that there was no validation of the business for which she claimed to work or any associated earnings. Ms Curgenvén applied for a review of this decision.

[13] On 20 August 2010, the Reviewer declined jurisdiction on the basis that the 31 May 2010 letter was not a decision under the Act. The Reviewer made the following remarks about the accountant letter:

For the sake of completeness, the accountant's letter of 1994 that Mrs Jones (nee Curgenvén) was paid \$430 per week cannot be verified. Mrs Jones' evidence was that she was paid cash into her bank account as an employee. She didn't know whether she did a tax return.

Mrs Jones stated that IRD told her no records are held later than 7 years. Ms Richards stated IRD told her records are kept back to at least 1991.

... I record that if there is no taxable earnings there is no entitlement to weekly compensation

[14] On 6 November 2010, Ms Curgenvén provided further information, including advice from the IRD as to her income in 1994-1995, and asked the Corporation to recalculate her weekly compensation again. The Corporation declined to revisit the matter.

[15] On 22 November 2010, an Initial Medical Assessment from Dr Waite noted that Ms Curgenvén's left ankle continued to be a problem, and that by that stage she had undergone 16 operations. Ms Curgenvén evidently had not returned to any full-time work since 2004. The report also noted that Ms Curgenvén now had three children aged 9, 4 and 3. Ms Curgenvén admitted that her main pre-occupation was caring with her children. Dr Waite considered that, in the right environment, Ms Curgenvén would be able to work, but he acknowledged the difficulties that Ms Curgenvén had with prolonged standing or walking.

[16] Ms Curgenvén continued to receive weekly compensation and rehabilitation support in the years that followed. On 15 May 2011, she dislocated her right knee and fractured her right ankle during return-to-work rehabilitation.

[17] In 2012, Ms Curgenvén underwent the vocational independence process. On 24 October 2012, the Corporation advised that she had been found vocationally independent in a number of job options and that her weekly compensation would cease effective of 24 January 2013. At the time Ms Curgenvén did not challenge that decision.

[18] In 2018, Mr Hinchcliff began acting for Ms Curgenvén. On 15 October 2018, he filed a late review application against the Corporation's letter of 31 May 2010. Mr Hinchcliff also applied for a review of the Corporation's 24 October 2012 vocational independence decision.

[19] On 30 October 2018, the late review application against the 24 October 2012 decision was declined by the Corporation. Ms Curgenvén then applied for a review of the decision declining to accept the review application.

[20] Ms Curgenvén subsequently withdrew the review application against the 31 May 2010 decision. On 24 December 2018, the Reviewer dismissed the review in relation to the Corporation's decision to decline the late review application against the vocational independence decision.

[21] On 13 April 2019, Dr A Matthews, GP, certified Ms Curgenvén unfit for work until 11 July 2019 because of "extensive left foot injury".

[22] On 16 April 2019, the Corporation wrote to Ms Curgenvén advising that it had approved weekly compensation with effect from 11 April 2019. Weekly compensation payments would continue until Ms Curgenvén recovered from surgery and was able to work 30 hours a week (that is, when she was vocationally independent).

[23] Ms Curgenvén contacted the Corporation and said that she wanted to receive a WINZ benefit instead of weekly compensation. On 20 May 2019 the Corporation wrote to Ms Curgenvén advising that it had stopped paying weekly compensation in light of her preference.

[24] On 21 May 2019, a review application was filed against the Corporation's 16 April 2019 decision, with the intent to challenge the quantum of weekly compensation paid on the claim.

[25] On 24 May 2019, the Corporation revoked its 20 May 2019 decision suspending weekly compensation, and reinstated weekly compensation payments.

[26] The issue of quantum was referred to the Corporation's Weekly Compensation Panel (the Panel) for a review of Ms Curgenvén's weekly compensation calculation.

[27] On 25 September 2019, guidance from the Panel was provided by Mr Phillip Clayton, Technical Specialist. He advised:

This raises the question whether or not Ms Curgenvén was in receipt of earnings and whether an entitlement to weekly compensation exists? If it is accepted that weekly compensation was correctly paid, is there sufficient information to include the hours worked in the employment for Gosling Gear for the purposes of determining whether the combined employment was full-time, despite there being no evidence of earnings from this employment?

These 2 questions were considered by the Weekly Compensation Panel on 25 September 2019. The Panel agreed that, although the income from the employment with A Taste of Kapiti cafe had never been subject to PAYE deductions, the contemporaneous records, coupled with the client's age at the time of the injury, make it difficult to establish the client was complicit in the failure to declare the Income to Inland Revenue. As a result the Panel considered that the client was eligible to weekly compensation.

The Panel also considered that it was appropriate to include the hours worked in the second employment, with Gosling Gear, for the purposes of establishing an entitlement to the minimum full-time earner rate. Although the income derived from this employment also appears not to have been declared to Inland Revenue, the determination of full-time requires the person to have been engaged in employment for 30 hours or more per week; it does not require the person to be in receipt of earnings from that employment. Rather employment is defined more generally as work performed for the purposes of pecuniary gain or profit. Accordingly Ms Curgenvén would be entitled to an increase to the minimum earner rate in accordance with s. 43 of the ARCI [Accident Rehabilitation and Compensation Insurance] Act 1992, as the combined hours from the 2 employments exceeded 30 hours, and this should be backdated for the entitlement periods beyond 5 weeks after the incapacity first commenced. Further the Panel considered that there was no evidence to support a discontinuation, under s. 43(3), to this increase.

Ms Curgenvén will be entitled to interest on this arrears payment. The Panel agreed that for the purposes of the all information date it would be appropriate to accept 26 July 1994, being the date of the letter from the accountant. We do not have evidence that this letter was received however it is addressed to the ACC Case Manager and it would not be appropriate to rely on the absence of evidence of receipt as the basis for a later all information date.

[28] On 1 October 2019, the Corporation issued a notice advising that it owed an additional amount of weekly compensation for the period from 10 August 1994 to 25 September 2019. That additional amount arose from Ms Curgenvén's weekly compensation being uplifted to the minimum required. On 7 October 2019, Ms Curgenvén applied for a review of that decision.

[29] On 22 November 2019, the Corporation issued a further decision in regard to interest on the backdated weekly compensation payment for the period 26 July 1994 to 9 October 2019. On 21 January 2020, Ms Curgenven applied for a review of the Corporation's 22 November 2019 decision.

[30] On 13 May 2020, there was a case conference for the various matters, which recorded:

A hearing was set to take place at 1.00 pm on Wednesday, 13 May 2020. The day before, Mr Scott emailed Dr Hinchcliff confirming that Ms Curgenven was indeed entitled to be uplifted to the minimum rate however there had been a clerical error in the figures used in calculating her entitlement and Ms Curgenven was not paid the correct amount. He outlined what the correct calculation ought to have been and advised that this would affect ACC's calculation of Ms Curgenven's entitlement to interest also.

Mr Paul asked Dr Hinchcliff how he wished to proceed in light of that new information. Dr Hinchcliff advised that the hearing should proceed as he still had queries about ACC's calculations.

The parties agreed that in lieu of a hearing, they would hold a case conference in an effort to iron out what issues needed clarifying.

Dr Hinchcliff advised that based on the information ACC had provided to date, it was unclear to him on what basis ACC had calculated Ms Curgenven's entitlement. He understood that under 1992 Act the minimum entitlement was around \$140.00 per week, yet judging by the sum ACC paid to Ms Curgenven, she had been paid less than \$100.00 per week. Mr Paul advised that the calculation was based on the memorandum of Phillip Clayton from September 2019 and screenshots Mr Paul had been sent the day before. Even so, Dr Hinchcliff advised that he could not tell how ACC had broken down its calculation. He said in his experience, ACC had provided a weekly breakdown of the client's entitlement to weekly compensation which made it easy to see the basis of its calculations.

There was also a period between 23 January 2013 and 11 April 2019 where Ms Curgenven was not in receipt of weekly compensation. Dr Hinchcliff noted that Ms Curgenven underwent surgery, which was funded by ACC during that period so he could not understand why Ms Curgenven's entitlement to weekly compensation was not reinstated earlier.

Mr Paul advised that these matters he would need to investigate further and raise with the weekly compensation team. He asked Dr Hinchcliff to outline in a detailed memorandum exactly what he wanted ACC to look into and provide. Dr Hinchcliff confirmed that he would.

[31] On 20 May 2020, the Corporation issued a further decision in relation to interest on backdated weekly compensation. On 15 June 2020, Ms Curgenven applied for a review of that decision.

[32] The matter was referred to the Panel again to consider the issue of whether Ms Curgenvén was entitled to further weekly compensation for her work for Gosling Gear.

[33] On 3 March 2021, Mr Scott Paul, Review Specialist, noted that the Panel advised that it could not accept the accountant's letter as evidence of earnings from Gosling Gear in the absence of any declared income. The view of the Panel was that, for the Corporation to undertake a reassessment of the weekly earnings, it would be necessary for Ms Curgenvén to lodge her pre- and post-incapacity income from the employment with Gosling Gear as earnings with Inland Revenue. The Panel also remained unclear whether Ms Curgenvén's work for Gosling Gear was as an employee (as the accountant suggested) or as a self-employed person (Ms Curgenvén apparently owned the business).

[34] On 20 April 2021, the Reviewer quashed the Corporation's decisions of 1 October 2019 (on backdated weekly compensation), 22 November 2019 and 20 May 2020 (as to interest on backdated weekly compensation). The Reviewer was concerned that there was not enough information to support the calculations that the Corporation had made. He made the following directions:

ACC will reinvestigate Ms Curgenvén's entitlement to backdated weekly compensation and interest.

ACC will put its reasoning in writing to Ms Curgenvén.

As part of the reinvestigation ACC will obtain an external peer review from an independent chartered accountant.

Once ACC has obtained the chartered accountant's report it must issue a new decision in relation to both issues within 14 days.

[35] On 6 July 2021, Ms Erica Roets, Technical Accounting Specialist, completed a full audit of Ms Curgenvén's weekly compensation entitlement and interest payment from 10 August 1994. This audit showed two errors in the calculation of the interest payments and resulted in a recalculation with the correct interest due being \$42,669.37. Ms Roets noted in her background information that there were no PAYE earnings filed with Inland Revenue for self-employed earnings or other employee earnings relating to her work.

[36] On 4 August 2021, Ms Roets reported further that a full audit had revealed no errors in the calculation of weekly compensation for the period 10 August 1994 to 25 September 2019.

[37] Chartered accounting firm KPMG conducted an external peer review of the Corporation's findings. On 8 November 2021, KPMG reported that the backdated long-term weekly compensation payment made to Ms Curgenven was \$163,706.55, whereas the correct payment should have been \$163,692.07. KPMG further reported that the Corporation's recalculation of interest was marginally incorrect, but otherwise the logic of its recalculation was correct.

[38] On 19 November 2021, the Corporation issued a new decision in line with KPMG's figures, advising:

Following the directions of the Reviewer on 20 April 2021, an ACC technical accountant specialist undertook a reassessment of backdated weekly compensation and interest.

The technical accounting memorandum was peer reviewed by KPMG, who provided its report on 8 November 2021.

ACC now issues a new decision about backdated weekly compensation and interest. In accordance with KPMG's recommendation, ACC has determined that Ms Curgenven is entitled to:

- Nil additional entitlement in respect of backdated weekly compensation.
- \$42,882.83 in respect of interest.

[39] On 25 November 2021, Ms Curgenven applied for a review of that decision.

[40] In December 2021, the Corporation paid Ms Curgenven the interest owed, as calculated above.

[41] On 14 April 2022, review proceedings were held. At the hearing, Ms Curgenven argued that:

- The Corporation had omitted the first four weeks of weekly compensation from its calculations.
- Ms Curgenven's vocational independence deterioration date was earlier than what the Corporation said it was.

- The Corporation should accept the 1994 accountant letter as the basis for earnings.

[42] On 3 May 2022, the Reviewer dismissed the review. The Reviewer found that it was not appropriate to determine the issue of vocational independence in the context of a challenge to the 19 November 2021 decision. The Reviewer also agreed with the Corporation that it would be impossible to calculate any weekly compensation associated with Ms Curgenvén's work for Gosling Gear without earnings first being considered by Inland Revenue. This was because Schedule 1 prescribes how weekly compensation is to be calculated and there was not enough information available to apply that Schedule properly.

[43] On 4 May 2022, Ms Curgenvén completed a Notice of Appeal.

[44] On 1 September 2022, Mr Edward Cook, ACC Recovery Coordinator, wrote to Mr Hinchcliff proposing to make a decision based on its vocational independence deterioration and surgery policy which allowed the Corporation to make a decision regarding the matter of Ms Curgenvén's deterioration. Mr Cook noted that, if Mr Hinchcliff was intending to challenge the proposed decision, the Corporation would prefer to work with Mr Hinchcliff to resolve the matter before issuing a decision.

Relevant law

[45] Section 100(1)(a) of the Act requires the Corporation to pay weekly compensation to a claimant who has been incapacitated from their pre-injury employment due to a covered injury and was an earner at the date of injury and incapacity.

[46] The provisions for calculating the weekly compensation are found in Part 2 of Schedule 1 to the 2001 Act. Under clause 42 of Schedule 1, a claimant is entitled to have his or her calculation of weekly compensation uplifted to the minimum if the claimant: was a full-time employee (working an average of at least 30 hours per week) before their injury; had earnings below the minimum earnings prescribed in

clause 42(3); and is incapacitated for more than five weeks after the incapacity commenced.

[47] Section 114 of the Act states that the Corporation is liable to pay interest on late payments of weekly compensation if the payment has not been made within one month after the Corporation has received all information necessary to calculate and make the payment. There have been a variety of different legislatively prescribed interest rates at different stages.

[48] Section 9(1) of the Act provides:

Earnings as an employee, in relation to any person and any tax year, means all PAYE income payments of the person for the tax year.

[49] Section 14 of the Act provides:

- (1) Earnings as a self-employed person, in relation to any person and any tax year,—
 - (a) means A minus B, A being the amount described in subsection (2) and B being the amount described in subsection (3); and
 - (b) does not include any earnings as an employee or earnings as a shareholder-employee.
- (2) A is the amount of income (if any)—
 - (a) that the person derives in the tax year for the purposes of the Income Tax Act 2007; and
 - (b) that is dependent on the person's personal exertions.
- (3) B is all amounts that the person is allowed as deductions for the purposes of the Income Tax Act 2007 because of the person deriving the income described in subsection (2)

[50] Clause 31 of Schedule 1 of the Act provides:

If the Corporation is determining earnings under this Part in relation to a self-employed person or a shareholder-employee, it must take an income tax return into account, if—

- (a) the claimant has given the return to the Commissioner; and
- (b) the Corporation considers that the return, and any related accounts, have not been unreasonably influenced by—
 - (i) the fact of the claimant's incapacity; or
 - (ii) the effects or likely effects of the incapacity on the claimant's income or business activities.

[51] Clause 37 of Schedule 1 of the Act provides:

Weekly earnings if earner had earnings as self-employed person immediately before incapacity commenced: application of clause 38

- (1) Clause 38 applies to a claimant who had earnings as a self-employed person immediately before his or her incapacity commenced.
- (2) The weekly earnings of such a claimant are as calculated under clause 38.
- (3) For the purposes of clause 38, if the claimant's income tax return for the relevant year is not available, the income tax return for the next previous year must be used for the calculation of weekly earnings until the earlier of the following events:
 - (a) the first-mentioned income tax return is available; or
 - (b) 3 months have passed after the incapacity commenced.

[52] In *Kahn*,¹ Judge Beattie stated:

[88] Quite frankly, if people operate business activities on a cash basis and on non-complying tax and GST basis and without basic business records or structure, they cannot complain if they are unable to prove that they had work status in a particular time.

Discussion

[53] The issue in this case is whether the Corporation should have accepted a letter from Ms Curgenvén's accountant (see above paragraph [10]), in support of her own evidence, as the basis for her weekly compensation calculation.

[54] A further issue which was initially raised on appeal was whether Ms Curgenvén is entitled to a further payment of backdated weekly compensation arising from a claimed earlier deterioration in her vocational independence. However, at the hearing, Mr Hinchcliff withdrew this ground of appeal in light of the Corporation's letter of 1 September 2022, proposing to make a decision regarding the matter of Ms Curgenvén's deterioration. This decision would attract its own review and appeal rights.

¹ *Khan v Accident Compensation Corporation* [2005] NZACC 231, followed in *Adolph v Accident Compensation Corporation* [2022] NZACC 147, at [68].

Basis of weekly compensation calculation

[55] Mr Hinchcliff, for Ms Curgenvén, submits the Corporation was wrong to calculate Ms Curgenvén's weekly compensation based on the minimum under clause 42 of Schedule 1 of the Act. He submits Corporation should have based her weekly compensation on the earnings reported by her and her accountant from both the Taste of Kapiti café job and from her work as an employee at Gosling Gear. He notes Ms Curgenvén gave evidence that cash was paid into her bank account as an employee and that she did not know whether she did a tax return. Mr Hinchcliff submits the accountant's letter dated 26 July 1994 advised that, as Ms Curgenvén's income was being channelled through her father's business, she was effectively an employee of her father, and the accountant had assessed Ms Curgenvén earned \$430 gross per week from both jobs.

[56] This Court notes the evidence of Ms Curgenvén and her accountant. However, the Court also notes the following considerations.

[57] First, governing legislation places primary importance, in calculating earnings, on tax returns and other tax documents lodged with the Inland Revenue Department. This importance is reflected in sections 9 and 14, and clauses 31 and 37 of the First Schedule, of the current Act. This importance was also reflected in the preceding Accident Rehabilitation and Compensation Insurance (Earnings Definitions) Regulations 1992, clauses 2-6.

[58] Second, any income derived from Ms Curgenvén's employment with Gosling Gear was not declared to Inland Revenue. This fact is noted by the Corporation's advisers Ms McKay (Case Administrator), Mr Clayton (Technical Specialist), Ms Roets (Technical Accounting Specialist), and Mr Paul (Review Specialist, for the Weekly Compensation Panel).

[59] Third, Ms Curgenvén acknowledged that she filed no tax returns from the Gosling Gear shop as there was no profit and the records were included in her father's tax returns at the time.

[60] Fourth, there is no other evidence (such as bank statements, earnings records or employment contracts) to support the claims made by Ms Curgenven and her accountant, that she earned money from work with Gosling Gear. As noted by Ms McKay (Case Administrator), there was no validation of this business or any associated earnings.

[61] Fifth, there is a lack of clarity as to whether Ms Curgenven's position in relation to Gosling Gear was that of an employee or as a self-employed person. The Corporation's Weekly Compensation Panel noted that, while the accountant suggested that Ms Curgenven was as an employee, he also noted that she was the owner of the business.

[62] In light of the above facts, this Court finds that the Corporation reasonably advised Ms Curgenven that it would not rely upon her or her accountant as to earnings from Gosling Gear. Instead, the Corporation reasonably advised that, for it to undertake a reassessment of her weekly earnings, it would be necessary for Ms Curgenven to verify her pre- and post-incapacity income, as earnings from the employment with Gosling Gear, with the Inland Revenue Department.

Conclusion

[63] In light of the above considerations, the Court finds the Corporation correctly calculated Ms Curgenven's weekly compensation calculation based on the information at hand. The decision of the Reviewer dated 3 May 2022 is therefore upheld. This appeal is dismissed.

[64] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors for the Respondent: MedicoLaw.