IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 217 ACR 84/21

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

Hearing: 17 November 2022
Held at: Hamilton/Kirikirioa

Appearances: P Schmidt for the Appellant
L Hawes-Gandar and F Becroft for the respondent

Judgment: 25 November 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Weekly compensation - cl 36, Schedule 1,
Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 10 March 2021. The Reviewer dismissed an application for review of two decisions of the Corporation:

(a) The decision dated 3 September 2019, calculating Mr Daly's weekly compensation at $549.46; and

(b) The decision dated 9 September 2019, determining that Mr Daly was not entitled to interest on a backdated payment of weekly compensation.

Background

[2] Mr Daly was born in 1958. In 1974, he began working for PCCS Limited at a freezing works' plant. He was also self-employed as a farmer.

[3] On 6 December 2005, Mr Daly was poisoned by glutaraldehyde as a result of being sprayed with stock wash. Soon after being poisoned, he developed a sensitivity to glutaraldehyde and related chemicals, and his employment at the freezing works ended. On 14 December 2005, Mr Daly was granted cover for his work-related injury.

[4] On 18 September 2006, the Corporation asked Mr Daly for information required to complete its calculations of his weekly compensation. On 20 September 2006, Mr Daly advised:

> My incapacity started on 6.12.2005, and I was working both at PCCS and was self-employed.

[5] On 29 November 2006, PCCS determined that Mr Daly's long-term weekly compensation rate was $549.46 per week. This amount was 80% of Mr Daly's average weekly earnings as an employee of PCCS over the 52 weeks immediately prior to his incapacity (80% of $35,714.63 ÷ 52 weeks).

[6] On 17 September 2007, PCCS suspended Mr Daly's entitlements. This decision followed a review of Mr Daly's condition filed by Dr M Beasley, Medical Toxicologist, which suggested that Mr Daly's ongoing symptoms were not caused by his chemical exposure.

[7] On 5 May 2017, the Corporation's suspension decision was quashed by the District Court, on the basis that the Corporation did not have a sufficient basis to suspend Mr Daly's entitlements.[1] Mr Daly thus became entitled to backdated weekly compensation.

[8] On 7 December 2017, the Corporation (now managing Mr Daly's claim) issued a decision reinstating Mr Daly's weekly compensation and advising that his

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1 *Daly v Accident Compensation Corporation* [2017] NZACC 54.

backdated weekly compensation was $348,796.39. This calculation was done using the same long-term rate earlier used by PCCS. Mr Schmidt, Mr Daly's lawyer, applied for a review of the Corporation's decision.

[9] On 2 March 2018, the Corporation advised that Mr Daly was entitled to interest of $94,170.42 from 4 October 2007 (when his weekly compensation stopped).

[10] On 27 March 2018, Mr Schmidt wrote to the Corporation advising that he had checked the calculation of weekly compensation and thought that "the base calculation" was correct, but that the value of certain allowances that Mr Daly had received should have been added to his pre-incapacity earnings. On 23 May 2018, the Corporation considered this request, but determined that the allowances were not of a type that could be included in earnings.

[11] On 2 July 2018, Mr Schmidt wrote to the Corporation again, this time advising that Mr Daly had worked on his own farm in a self-employed capacity "in between" the freezing work seasons. On this basis, Mr Schmidt suggested that the base rate used by the Corporation was in fact wrong, as the period during which Mr Daly had been self-employed should have been disregarded under clause 36 of the First Schedule of the Act.

[12] On 3 July 2018, review proceedings were held. The Corporation's representative accepted that Mr Daly's self-employment may have been overlooked. The Reviewer quashed the Corporation's decision of 7 December 2017. The Reviewer directed Mr Daly to provide a statement providing details of the periods in which he had been self-employed, and that the Corporation then issue a fresh decision.

[13] On 8 August 2018, Mr Schmidt again wrote to the Corporation advising that, due to the seasonal nature of the work at the freezing works, Mr Daly had had around three months of self-employment "between seasons". Mr Schmidt provided a tax return confirming Mr Daly's self-employment, which showed that he had made a loss in the relevant 2005 tax year and previous years. In these circumstances,

Mr Schmidt submitted that clause 36(3) of the Act applied, being the provision for excluding a period from the assessment.

[14] On 10 August 2018, Mr Daly's claim was reviewed by Mr Nick Lamb, the Corporation's Technical Advisor. Mr Lamb agreed with Mr Schmidt's observations, and advised that he agreed that the divisor should be reduced from 52 to 43 weeks for the purposes of calculating Mr Daly's employment.

[15] On 16 August 2018, the Corporation issued a decision increasing Mr Daly's entitlement to weekly compensation to $646.46 per week, payable from 17 January 2006. This was 80% of Mr Daly's average weekly earnings as an employee of PCCS over the 52 weeks prior to his incapacity, excluding the nine weeks during which he had not been working for PCCS (80% of $35,714.63 ÷ 43 weeks). An arrears payment of $78,189.12 was made to Mr Daly for the period 4 October 2007 to 9 August 2017.

[16] On 23 August 2018, Mr Schmidt, for Mr Daly, requested interest on backdated weekly compensation for the period 4 October 2007 to 9 August 2017.

[17] On 24 August 2018, the Corporation issued a decision advising of a further payment of backdated weekly compensation to Mr Daly of $51,440.21. The Corporation determined that interest was not payable on this amount. Mr Daly applied for a review of this decision.

[18] The matter was referred to the Corporation's weekly compensation panel to consider whether the decision declining interest should be re-visited. The panel reviewed the information on file from the PCCS, to determine whether there had been sufficient information available to determine details of Mr Daly's self-employment before Mr Schmidt had written to the Corporation.

[19] On 26 October 2018, Mr Martin Shelton, Technical Policy Advisor, reported that it was evident that previous periods of Mr Daly's self-employment before his incapacity had not been accounted for, and that, in principle, interest would be due because of the Corporation's oversight. On this basis, the panel suggested that the

calculation of weekly compensation needed to be checked, but, unless there was something to show that the identified information was clearly wrong, the calculation of weekly compensation should be amended.

[20] In April 2019, Mr Daly provided a statement of evidence for the coming review hearing about how his employment and self-employment operated prior to incapacity. He estimated that, during the Freezing Works' season, he worked around nine hours a week on his farm, whereas, during the off-season, he worked around 30 hours a week on the farm.

[21] On 15 July 2019, the Reviewer, by consent, quashed the Corporation's decision of 24 August 2018 regarding interest, and directed the Corporation to calculate interest on the basis of the backdated weekly compensation decision issued on 16 August 2018.

[22] On 8 August 2019, the Corporation's weekly compensation panel recommended changing the divisor back from 43 to 52 weeks, because it considered that the evidence supported that Mr Daly was self-employed and an employee at the date of the accident.

[23] On 3 September 2019, the Corporation issued a decision re-assessing Mr Daly's long-term weekly compensation rate at the original level of $549.46 per week, using the divisor of 52 weeks. This meant that the Corporation had overpaid Mr Daly by $58,119.52. However, the Corporation elected not to recover this, as Mr Daly had received the amount in good faith.

[24] On 9 September 2019, the Corporation issued a decision declining interest on the backdated weekly compensation payment for the period 4 October 2017 to 9 August 2017. The Corporation considered that it had incorrectly recalculated Mr Daly's entitlement to weekly compensation in its decision of 16 August 2018. Mr Daly applied for a review of both this decision and the decision of 3 September 2019.

[25] On 10 March 2021, review proceedings were held in respect of the Corporation's decisions of 3 September 2019 and 9 September 2019. On 7 April 2021, the Reviewer dismissed the review on the basis that the Corporation correctly calculated Mr Daly's weekly compensation, and he was not entitled to interest on the backdated weekly compensation payment.

[26] On 12 April 2021, a Notice of Appeal was lodged against the Reviewer's decision.

[27] On 16 August 2022, Mr Daly provided a further brief of evidence which confirmed many of the details of his earlier brief of evidence. He added:

> I interpret work for pecuniary gain as meaning farm work designed to make a profit. That requires you being able to put a farm plan into effect, such as raising stock or carrying out a milking operation. That kind of farm work, which is where your profit come from, is not possible during the freezing works season. Even with the help from my wife, season and contractors, the commercial farming operation was effectively put on hold until the season came to an end because I did not have a free day, let alone several days, to finish a job.

Relevant law

[28] Section 6 of the 2001 Act defines employment as "work engaged in or carried out for the purposes of pecuniary gain or profit", and a "self-employed person" as "a natural person who has earnings as a self-employed person". Section 14 defines "earnings as a self-employed person" as the amount of income a person derives in the tax year for the purposes of the Income Tax Act 2007, minus all amounts the person is allowed as deductions.

[29] Weekly compensation is assessed in accordance with the provisions of Part 2 of Schedule 1 of the 2001 Act. There are different calculations depending on the claimant's employment status immediately prior to the commencement of their incapacity:

(a) Clauses 33 and 34 apply to claimants who were employees in permanent employment.

(b) Clauses 35 and 36 apply to claimants who were employees not in permanent employment.

(c) Clauses 37 and 38 apply to claimants who were self- employed; and

(d) Clause 41 applies in relation to claimants who have had more than one type of employment, and allows for earnings from the different employment situations to be aggregated.

[30] Clause 36 of the Act provides:

> **36 Weekly earnings if earner had earnings as employee not in permanent employment immediately before incapacity commenced: calculations …**
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> (2) This subclause applies to any weekly period of incapacity after the 4 weeks described in subclause (1). The claimant's weekly earnings for any such weekly period are calculated using the following formula:
>
> a ÷ b where—
>
> a is the claimant's earnings as an employee (from all employment that was not permanent employment) in the 52 weeks immediately before his or her incapacity commenced
>
> b is 52 or such smaller number, if adjustments are required under subclause (4).
>
> (3) For the purposes of this clause the following must be disregarded in calculating weekly earnings:
>
> (a) any period during which the claimant was entitled to weekly compensation:
>
> (b) any continuous period of unpaid sick leave, during a period of employment, of more than 1 week:
>
> (c) any period during which—
>
> (i) the claimant did not receive earnings as an employee; and
> (ii) the claimant did receive earnings as a self-employed person or as a shareholder-employee; and
> (iii) those earnings ceased before the commencement of the claimant's incapacity:
>
> (d) any earnings in respect of any period under paragraph (a), (b), or (c).
>
> (4) In item b of the formula set out in subclause (2), the expression 52 is adjusted by deducting from it any number of weekly periods that subclause (3)(a), (b), or (c) applies to.
>
> (5) For the purposes of subclause (3)(c), the Corporation may determine the number of weeks that fairly and reasonably represent the period during which the claimant received earnings as a self-employed person or as a shareholder-employee.

[31] Clause 41 of the First Schedule of the Act provides that claimants who have earnings as an employee at the time their incapacity commences may include these earnings in the assessment of their weekly compensation.

[32] In *Te Amo*,[2] Judge Beattie stated:

> [21] The purpose of the Act of the distinction to be drawn between employees in permanent employment and employees not in permanent employment for the purposes of calculating weekly compensation, is to give the employee who is considered to be a permanent employee the proper recognition of his pre-accident earnings for the period that he has been so permanently employed, particularly if his permanent employment is only of recent time.
>
> [22] The purpose of weekly compensation is to compensate an injured employee during the period he is unable to earn by reason of incapacity. It is intended to compensate him for lost earnings. For this reason the Legislature has seen fit to give the benefit to a permanent employee who it can safely be said would in the future have continued to earn his income from that employment had he not been injured, and that it is right and proper that he be compensated in line with the income from that employment that he has lost because of his injury.
>
> [23] Contrasted with that is the calculation to be made for a non-permanent employee who is a person who may be a casual employee or a person who is there on a short-term contract. In the case of that person a crystal ball would be much cloudier and it could not be confidently predicted that that person would in the future continue to earn the type of income that he was receiving at the date of injury, particularly for the next 12 months. So the Act then takes an historical look at the person's track record of employment for the preceding 52 weeks and says that he/she is entitled to receive weekly compensation calculated by dividing the income that that person had received over the last 52 weeks, whether in fact they had worked for all of those 52 weeks. The divisor must in every case be 52 rather than just the number of weeks worked. Thus the future is intended to reflect the past.

[33] In *White*,[3] Justice Mackenzie stated:

> [17] Counsel for the appellant submits that the maximum period which could fairly and reasonably be taken to represent the period during which the respondent received earnings as a self employed person is each of the 10 weeks in which one hour of tutoring duties was undertaken. I do not consider that that is necessarily so. The discretion is to determine "the number of weeks that fairly and reasonably represent the period during which the claimant received earnings as a self employed person". I consider that that is capable, as a matter of law, of including the whole of the period from the date on which the respondent was first engaged as a peer tutor until the date on which she ceased to act as a peer tutor. The wording of the clause does not require that the claimant be continuously employed during the relevant period. The time of first

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2 *Te Amo v Accident Compensation Corporation* [2002] NZACC 206.

3 *Accident Compensation Corporation v White* [2005] NZAR 110.

> engagement and the time when that engagement ceased form the outer boundaries of the period during which the respondent received earnings as a self employed person. The determination of the number of weeks that fairly and reasonably represent the period of self employment, within those outer boundaries, is a matter for the discretion of the appellant, in the first instance, and for the Judge on appeal. I consider that to go beyond those outer limits, and to include a period when the respondent was on holiday or seeking employment, goes beyond the scope of the discretion available, and does constitute an error of law.

[34] Section 65 of the Act provides:

> (1) If the Corporation considers it made a decision in error, it may revise the decision at any time, whatever the reason for the error.
>
> (2) The Corporation may revise a decision deemed by section 58 to have been made in respect of any claim for cover, but may not recover from the claimant any payments made by it, in respect of the claim, before the date of the revision unless the claimant has made statements or provided information to the Corporation that are, in the opinion of the Corporation, intentionally misleading.
>
> (3) A revision may—
>
> (a) amend the original decision; or
>
> (b) revoke the original decision and substitute a new decision.

[35] In *Bartels*,[4] Gendall and Ronald Young JJ stated, in relation to the Injury Prevention, Rehabilitation, and Compensation Act 2001, section 390 (equivalent to section 65(1) above):

> [28] … the process under s 390 requires the Corporation to examine the earlier decision. It is after all, in the words of s 390, for the Corporation to establish "that the decision was made in error". We are satisfied, however, that it is entitled to do so using material not available to it at the time of the original decision but which has become available since. We stress, however, that material must clearly establish that the original decision was made "in error" before it can invoke s 390. …
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> …
>
> [31] ... We are satisfied that all Parliament meant was that the Corporation can today, with the factual and other material it now has, look back at the decision previously made and decide if it was "made in error". A simple example will illustrate the position. A claim is made for a broken arm. An x-ray is inspected which confirms the break and thus cover accepted. Later it is discovered that either the x-ray has been misread or someone else's x-ray has been read and that the x-ray of the claimant reveals no break. This is "new evidence" and would be highly relevant to a decision under s 390 to revoke the original decision as made "in error".

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4 *Accident Compensation Corporation v Bartels* [2006] NZAR 680.

…

> [33] Finally, we agree with the Corporation's submissions … that where decisions previously made are clearly made in error that those decisions should not be left to advantage or disadvantage either claimants or the Corporation. This is a publicly funded insurance scheme for those who suffer personal injury by accident. Those who suffer personal injury by accident should have cover under the Act and those who do not should not get cover when none is due…
>
> [34] We wish to stress, however, that the pivotal issue in many cases under s 390 will be whether an "error" has been established. As we will illustrate when we consider the facts of this particular case, a decision will not be made in error if there are credible differences of opinion between experts. "Error" requires the identification of factual material significant to the original decision which has now been exposed to be clearly wrong. It will not be sufficient to establish error for others to have a different opinion unless the new opinions are based on fresh or new evidence which was not in the possession of the original decision-makers and which undermines their decision to a degree from which one can conclude, with that information, that their decision was clearly wrong.

[36] The Court has, on several occasions, accepted that the Corporation was entitled to revisit and revoke an earlier decision that it had made.[5]

[37] In *Atapattu-Weerasinghe*,[6] Williams J held:

> [22] … it seems clear that s 65(1) and (2) cover two different situations. The first, where a decision has been made and is now felt to be erroneous; the second, where no decision has been made, cover is deemed to be granted, and the Corporation wishes to revisit that. *Bartels* does not speak to the second situation.
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> [23] … The reverse onus, as provided for in *Bartels*, only makes sense because an actual error has been identified by the Corporation in the earlier decision. It seems entirely fair that, in that situation, the Corporation should be required to justify the change. But in the absence of such error, reversal of the onus makes no particular sense. …

Discussion

Calculation of Mr Daly's weekly compensation at $549.46

[38] The issues in this case are based on the assessment of Mr Daly's pre-incapacity earnings under clause 36 of Schedule 1 of the Act, to determine his weekly compensation. This clause applies to claimants who were employees in non-

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5 *Stowers v Accident Compensation Corporation* DC Christchurch 167/2009, 5 October 2009; *Paku v Accident Compensation Corporation* [2017] NZACC 143; *Crosswell v Accident Compensation Corporation* [2019] NZACC 37; *Garing v Accident Compensation Corporation* [2019] NZACC 63; and *Herbst v Accident Compensation Corporation* [2020] NZACC 109.

6 *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142, followed in *Singh v Accident Compensation Corporation* [2019] NZACC 102, at [112].

permanent employment immediately prior to their incapacity. The clause provides that such claimants' long-term weekly compensation is based on their average earnings as employees over the year prior to their incapacity, with provision to exclude periods of that year in various circumstances. The issues in this appeal are:

(1) whether the Corporation's ultimate weekly compensation decision (of 3 September 2019) is correct, or whether a nine-week period should be excluded under clause 36; and

(2) whether there was a sufficient basis for the Corporation to amend its earlier decision (of 16 August 2018) which increased Mr Daly's weekly compensation.

Exclusion of the nine-week period?

[39] Mr Daly's assessment falls under clause 36 because he was an employee not in permanent employment immediately prior to the commencement of his incapacity. In principle, Mr Daly's weekly compensation is calculated by dividing by 52, the income that he had received over the last 52 weeks (clause 36(2)). However, the calculation of weekly earnings must disregard any period during which:

(1) Mr Daly did not receive earnings as an employee;

(2) he received earnings as a self-employed person or as a shareholder-employee; and

(3) those earnings ceased before the commencement of his incapacity (clause 36(3)(c)).

It is accepted by both parties that Mr Daly satisfied the first requirement in that he did not receive earnings as an employee in his "off season" period.

[40] Mr Schmidt, for Mr Daly, submits as follows.

- Mr Daly satisfied the second requirement of clause 36(3)(c) because he was engaged in economic activity generating wealth.

- He also satisfied the third requirement, which should be generously interpreted in light of meaningful self-employed activity.

[41] Mr Daly submits that the Corporation's ultimate weekly compensation decision is incorrect because a period of nine weeks, when he claims that he was receiving self-employed earnings, should have been excluded from the assessment.

[42] This Court acknowledges the above submissions. However, the Court draws attention to the plain meaning of clause 36(3)(c), which requires all three criteria to be met before a period can be disregarded in calculating weekly earnings. In light of this plain meaning, the Court finds:

(a) The second requirement was not met. As noted above in paragraph [13], tax returns confirming Mr Daly's self-employment showed that he made a loss in the relevant 2005 tax year (and in previous years). The Court does not accept the interpretation of this requirement that it extends to engagement in economic activity generating wealth, regardless of actual earnings. Mr Daly therefore did not meet the second requirement of receiving earnings as a self-employed person.

(b) If the Court is wrong in its finding in relation to the interpretation of earnings, then Mr Daly's self-employment did not meet the third requirement. As noted above in paragraph [4], Mr Daly acknowledged that his self-employment on the farm did not cease before the commencement of his incapacity. The effect of this is that any earnings he received from his self-employment did not cease before the commencement of his incapacity, as required by the third criterion.

Sufficient basis to amend the earlier decision?

[43] Section 65(1) of the Act provides that, if the Corporation considers it made a decision in error, it may revise the decision at any time, whatever the reason for the error. The High Court has established that the Corporation can, with the factual and other material it subsequently has, look back at a decision previously made and decide if it was made in error. The High Court stressed that, where decisions

previously made are clearly made in error, those decisions should not be left to advantage or disadvantage either claimants or the Corporation.[7]

[44] Mr Schmidt for Mr Daly submits there was insufficient basis for the Corporation to amend the earlier decision increasing weekly compensation (by excluding a period of nine weeks). He submits Corporation changed its mind rather than made an error in its prior decision. There was no genuinely new evidence around Mr Daly's farm work, rather, the Corporation took a different view of this work after pressure from the accredited employer.

[45] This Court acknowledges the above submissions. However, the Court notes that the Corporation's previous decision, to disregard a period of nine weeks in the calculation of Mr Daly's weekly compensation, must have proceeded on the basis that he met the criteria for his period of self-employment to be disregarded in the calculation of weekly compensation. As noted above, this decision was clearly made in error, in light of the facts of Mr Daly's self-employment. It was only when Mr Daly's claim file was subsequently reviewed by the Corporation's weekly compensation panel that it was identified that Mr Daly's self-employment did not meet the criteria for the nine-week period to be disregarded. This Court finds that this situation is clearly one within the ambit of section 65(1) of the Act, thus allowing the Corporation to consider that it made its previous decision in error and so to revise its decision.

Determination of non-entitlement to interest on weekly compensation

[46] The issue here is whether the Corporation correctly declined a request from Mr Daly for interest on a payment of backdated weekly compensation which the Corporation had made as a result of the decision increasing his weekly compensation. The parties agree that the correctness of the interest decision turns on the correctness of the weekly compensation decision. In that the Court has found that the Corporation's earlier decision increasing Mr Daly's weekly compensation was made in error, the Corporation correctly declined the request from Mr Daly for interest on the payment of backdated weekly compensation.

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7 *Bartels*, above note 4, at [31] and [34].

Conclusion

[47] In light of the above considerations, the Court finds that:

(a) the Corporation's decision dated 3 September 2019, calculating Mr Daly's weekly compensation at $549.46, was correct; and

(b) the Corporation's decision dated 9 September 2019, determining that Mr Daly was not entitled to interest on a backdated payment of weekly compensation, was correct.

[48] The decision of the Reviewer dated 10 March 2021 is therefore upheld. This appeal is dismissed.

[49] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors for the Respondent: Medico Law.