

Background

[3] Mr Lisale 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.

[4] On 17 September 2017, Mr Lisale suffered fracture injuries in a motor vehicle accident. He was immediately hospitalised following the accident and was unable to work because of the various injuries for which he received cover. The next day, 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 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 Mr Lisale was still taking a lot of pain medication and was receiving assistance from his parents with his care. Subsequently, the Corporation approved a rehabilitation programme.

[7] On 9 February 2018, an x-ray showed failure of metalware on the right distal femur leading to further surgery.

[8] On 21 June 2018, an Initial Occupational Assessment (IOA) was undertaken and the job options, for which Mr Lisale had the existing skills, were identified.

[9] 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.

[10] 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.

[11] 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

[12] On 23 July 2019, Mr Lisale suffered a further injury at work, and made a 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.

[13] 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 no medical certificate had been provided beyond 23 February 2019; and the Corporation needed to determine 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 section 105 assessments.

[14] 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.

[15] On 24 September 2019, Dr Thakurdas, the Corporation's Medical Advisor, reviewed the file, noting 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.

[16] On 4 October 2019, Dr 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 there might be pseudoarthrosis and noted that more complex imaging was appropriate.

[17] On 8 November 2019, Dr Walls provided advice to the Corporation in regard to work capacity, 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. He noted the work types of Forklift Driver, Delivery Driver Van/Car, Postal Sorting Officer and Service Station Attendant were potentially sustainable roles.

[18] 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 that Mr Lisale was still incapacitated as at 25 February 2019 in relation to the 2017 accident, and directed reinstatement of weekly compensation from the date of suspension.

[19] On 11 December 2019, Mr 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 offset by arrears payable on the 2017 injury claim.

[20] On 18 December 2019, a further IOA was undertaken noting 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.

[21] In January 2020, Dr Mayhew, Sports Physician, undertook a section 105 assessment and 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 jobs which he thought Mr Lisale could undertake, including Forklift Driver, Delivery Driver, and Alarm Security or Surveillance Monitor. Dr Mayhew confirmed that his opinion applied from February 2019 through to the current day.

[22] On 3 February 2020 a further review application was filed, alleging 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.

[23] 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.

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

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

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

[27] 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 place.

[28] On 21 August 2020, Mr Lisale's file was reviewed with Mr Bates, Technical Specialist noting Mr Lisale was no longer incapacitated under section 105, based on Dr Mayhew's earlier advice that he was fit for work in three suitable job options. The Corporation then arranged a further independent medical review in regard to capacity.

[29] 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.

[30] 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.

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

[32] 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.

[33] On 21 January 2021, the Corporation issued its decision confirming the 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.

[34] On 28 October 2021, the Reviewer dismissed the review, on the basis that she was satisfied 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.

Judge Spiller's decision

[35] Judge Spiller identified the relevant legal tests and evidence. Specifically, at paragraph [42], his decision addressed when Mr Lisale was receiving entitlements, on what claim, the review decision, the effect of the review decision that entitlements were transferred back to the covered injuries under the 2017 claim. His Honour determined that weekly compensation entitlements flowed from the covered 2017 accident and that entitlement was suspended, reinstated, assessed and again suspended leading to review and this appeal.

[36] At paragraph [44], His Honour pointed to the following evidence to support his factual findings:

- (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 on 25 February 2019 and no concluding date for weekly compensation 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 following from the 2017 injury. Payments, including backdated payments received thereafter by Mr Lisale were made with reference to the 2017 injury claim.

[37] His Honour went on to determine that because weekly compensation flowed from the covered 2017 accident, the Corporation correctly conducted its assessment

of incapacity under s 105(2) of the Act. His Honour noted the evidence provided by Dr Mayhew supported the conclusion that Mr Lisale was no longer incapacitated. His Honour also noted there was no countervailing evidence.

Relevant Law

[38] Section 162(1) of the Act provides:

A party to an appeal who is dissatisfied with the decision of the District Court as being wrong in law may, with the leave of the District Court, appeal to the High Court.

[39] The legal principles governing an application for leave to appeal are:

- The issue must arise squarely from the decision challenged: *Jackson v ACC*;² *Kenyon v ACC*.³
- The point of law must be “capable of bona fide and serious argument”: *Impact Manufacturing*.⁴
- Care must be taken to avoid allowing issues of facts to be dressed up as questions of law: *Northland Co-Operative Dairy Co Limited v Rapana*.⁵
- Where an appeal is limited to questions of law, and mixed question of law and fact is a matter of law: *CIR v Walker*.⁶
- A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision: *Edwards v Bairstow*.⁷

² *Jackson v Accident Compensation Corporation*, unreported, HC Auckland, Priestley J, 14 February 2002 AP 404-96-01.

³ *Kenyon v Accident Compensation Corporation* [2002] NZAR 385

⁴ *Impact Manufacturing*, unreported, Doogue J, HC Wellington AP266/00, 6 July 2001.

⁵ *Northland Co-Operative Dairy Co Limited v Rapana* [1999] ERNZ 361, 363 (CA).

⁶ *CIR v Walker* [1963] NZLR 339, 353 – 354 (CA).

⁷ *Edwards v Bairstow* [1995] 3 All ER 48, 57.

- It is a question of law whether or not a statutory provision has been properly construed or interpreted and applied to the facts: *CIR v Walker*.⁸
- Even if the qualifying criteria are established there remains an extensive discretion in the grant or refusal of leave to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law: *Jackson and Kenyon*.⁹

Grounds of appeal

[40] Mr Hinchcliff submitted the main issue in the appeal was whether Mr Lisale's weekly compensation should have been paid under the 2017 claim or the 2019 claim.

[41] In Mr Hinchcliff's submission, His Honour relied on the fact the Corporation paid backdated weekly compensation under the 2017 injury and continued to pay weekly compensation under that claim and ignored Mr Lisale's incapacity under the 2019 claim.

[42] Mr Hinchcliff also raised other questions of law:

- (i) Can a person return to full-time work and then suffer a new injury and still be declared incapacitated due to an early injury that occurred before the return to work and was a different injury?
- (ii) Can ACC transfer entitlements to a different claim without the claimant's knowledge or without making a formal decision on the transfer?
- (iii) If a new injury causes a new period of incapacity, under what circumstances can ACC transfer the entitlements back to an earlier claim?

⁸ Supra.
⁹ Supra.

Analysis

[43] The case for Mr Lisale is that he sustained a new injury in July 2019 when he was working, and it was the effects of this injury that caused his incapacity and the requirement for weekly compensation. In consequence, a s103 assessment should have been undertaken. Mr Hinchcliff submitted His Honour's judgment ignored this position. This Court finds His Honour was seized of the case put for Mr Lisale which he referred to at paragraph [43] of the judgment.

[44] Ms Becroft submitted following the 2019 review decision, the Corporation appropriately transferred entitlements back to the 2017 claim and continued to make weekly compensation payments on that claim. In Ms Becroft's submission, the decision letter at review and before His Honour was a decision made under the 2017 claim. Since Mr Lisale was not an earner at the date of the 2017 injury, clause 43 applied which meant entitlement to weekly compensation and incapacity was assessed under s105 rather than s103 of the Act.

[45] After stating the issue in the appeal, His Honour discussed the applicable tests regarding incapacity under ss 103, 104 and 105 together with clause 43 of Schedule 1 of the Act.

[46] His Honour then referred at length to the background history of the claims, the evidence of the covered injuries and weekly compensation payments under the 2017 and 2019 accidents. His Honour discussed the relevant finding of the Reviewer in the review decision of December 2019 that Mr Lisale was "still incapacitated as at 25 February 2019", that is before Mr Lisale sustained his injury in July 2019.

[47] Mr Hinchcliff submitted he could not find evidence of a Reviewer's direction to transfer entitlements to the 2017 claim. His Honour did refer to the Reviewer's decision in December 2019 that "weekly compensation was to be reinstated from the date it was suspended." His Honour concluded on the evidence he discussed that the entitlement to weekly compensation received by Mr Lisale, flowed from the 2017 covered accident.

[48] His Honour then determined the Corporation correctly conducted its assessment and suspension under s105 (2) of the Act. His Honour discussed the assessments, particularly that of Dr Mayhew concluding Mr Lisale was no longer incapacitated under s105. His Honour further noted there was no countervailing evidence.

[49] This Court accepts Ms Becroft's submission it could not have been plainer the weekly compensation which Mr Lisale was in receipt, was being paid on the 2017, rather than the 2019 claim. This Court observes Mr Hinchcliff acknowledged Mr Lisale was not an earner at the date of the 2017 accident and he also acknowledged that if the 2017 claim is the claim on which entitlements were paid then the correct test for incapacity was applied.

[50] An appeal cannot be regarded as being brought on a question of law where the fact-finding court has applied the law to the facts as found. In my opinion, no question of law arises.

[51] For the sake of completeness, I turn to consider other questions of law formulated by Mr Hinchcliff.

[52] The first question of law is:

Can a person return to work full-time and then suffer a new injury and still be declared incapacitated due to an earlier injury that occurred before the return to work and was a different injury?

[53] This question is fact dependent. His Honour referred at length to the December 2019 review decision. The Reviewer determined Mr Lisale continued to be incapacitated following his suspension of entitlements in February 2019 and remained incapacitated, on the 2017 claim, even though he was doing some work in the months that followed, leading up to the accident in 2019. The Reviewer confirmed that incapacity continued from the 2017 accident and as a consequence of that finding it was incumbent on the Corporation to pay weekly compensation on the 2017 claim from February 2019 onwards, without any end point.

[54] The question does not identify any error of law in the Court's judgment.

[55] The second question of law is:

Can ACC transfer entitlements to a different claim without the claimant's knowledge or without making a formal decision on the transfer?

[56] The purpose of a leave application is to identify an error of law in the District Court's judgment. This Court accepts Ms Becroft's submission that posing a general question does not constitute an error of law in the Court's approach.

[57] His Honour identified the Corporation did transfer entitlements from the 2019 claim to the 2017 claim following the review decision and that it was appropriate for it to do so. This is a factual finding, open to the Court.

[58] This question does not identify any error of law in the Court's judgment.

[59] The third question is:

If a new injury causes a new period of incapacity, under what circumstances can ACC transfer the entitlements back to an earlier claim.

[60] Again, this question is broad and not one specific to an identified error in His Honour's judgment. His Honour noted the Reviewer's decision of December 2019 to reinstate weekly compensation on the 2017 claim. His Honour observed that the Corporation cannot pay weekly compensation on two claims simultaneously which meant that Mr Lisale's earlier incapacity arising from the 2017 claim continued, uninterrupted, from February 2019 onwards, and he had the benefit of the higher rate of weekly compensation attaching to the 2017 claim.

[61] This question does not identify any question of law in the Court's judgment.

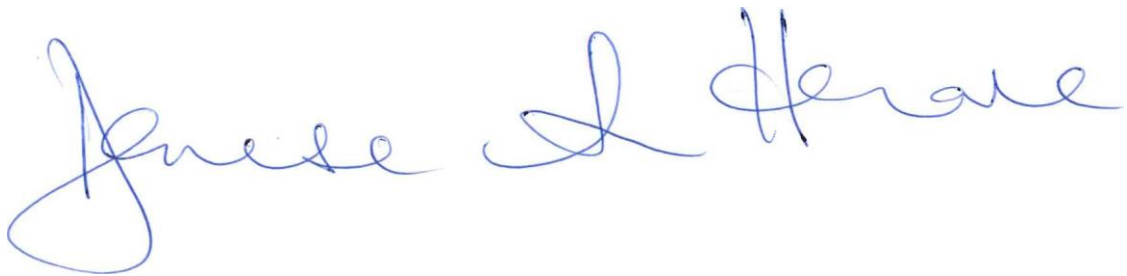
Conclusion

[62] No questions of law arise in this case.

[63] It is clear from the decision that the Court was conscious of and applied the correct legal tests, discussed, and analysed the relevant considerations and was entitled on the facts as found to determine the Corporation's decision 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, as upheld at review.

[64] Accordingly, the application for leave to appeal is dismissed.

[65] There is no issue as to costs.

A handwritten signature in blue ink, reading "Denese L Henare". The signature is written in a cursive style with a large initial 'D'.

Denese L Henare
District Court Judge

Solicitors: ACC and Employment Law, Auckland, for the Applicant
Medico Law Limited, Auckland, for the Respondent