IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 59 ACR 117/21

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

Hearing by AVL: 8 March 2022

Appearances: W Akel for the appellant
B Johns and T Morrison for the respondent

Judgment: 12 April 2022

RESERVED JUDGMENT OF JUDGE D L HENARE
[Costs on Appeal]

Introduction

[1] The substantive issues in the appeal were settled in advance of hearing on the basis the Corporation revoked the decline decision under appeal, and granted the appellant, Murray McPhail, cover for osteoarthritis of the left ankle and approved funding for the costs of surgery.

[2] The parties have been unable to agree costs which is the sole issue for the Court to determine.

[3] The Corporation has offered costs calculated in accordance with the District Court Rules 2014, on a category 2B basis of $5,252.50 on the basis:

[i] This is an appeal of average complexity not requiring counsel to have special skill and experience, and only requiring a normal amount of time.

[ii] Actual costs on appeal have not been advised nor invoices rendered.

[iii]There is no principled basis for uplift from scale 2B costs or indemnity costs.

[iv] Settlement prior to hearing should not entitle Mr McPhail to a greater award of costs than if the Corporation had defended its decision at hearing.

[4] Mr Akel submitted the Corporation failed to properly consider the treating surgeon's opinion that Mr McPhail suffered an accident that is, "a series of injuries to the ankle leading to osteoarthritis." As a result, the appellant was put through a prolonged process where settlement was achieved late in an appeal proceeding, rather than at an earlier stage.

[5] In these circumstances, Mr Akel submitted the Court should not slavishly apply scale costs and should exercise its discretion to order costs "in the vicinity of $10,000". The Court is invited to award a sum as a "global figure conscious of what the likely actual costs are" and "what category 3 costs would likely be".

Background

[6] A summary of the key facts is taken from the parties' submissions as follows:

(a) On 2 December 2008, Mr McPhail injured his left ankle when a pile of logs he was standing on rolled out from underneath him. Mr McPhail's GP submitted a claim for a left ankle haematoma and plantar fasciitis and the Corporation granted cover.

(b) In April 2009, Mr Farah, orthopaedic surgeon, reviewed an MRI of Mr McPhail's ankle and reported that it showed arthritic change.

(c) Three years later, on 8 May 2013, Mr Tomlinson, orthopaedic surgeon, reviewed Mr McPhail's ankle and diagnosed "osteoarthritis of his left ankle". During the consultation, Mr McPhail reported that, prior to the accident in 2008, he had also suffered an injury in the 1980s (twisted his ankle while running down the steps of a stadium).

(d) Between 2013 and 2020, Mr Tomlinson regularly reviewed Mr McPhail's ankle. On 13 July 2020, Mr Tomlinson submitted an Assessment Report

and Treatment Plan (ARTP) to the Corporation seeking funding for left ankle joint replacement surgery. In the ARTP, under the heading "Causal Medical Link between Proposed Treatment and Covered Injury", Mr Tomlinson stated "a series of injuries to the ankle leading to osteoarthritis". He diagnosed "post-traumatic osteoarthritis".

(e) The Corporation sought comment on Mr McPhail's claim from clinical advisor and orthopaedic surgeon, Mr Atkinson. In a report dated 21 September 2020, Mr Atkinson advised that it was "improbable" that the December 2008 accident had caused Mr McPhail's osteoarthritis. On 1 October 2020, the Corporation issued a decision declining funding for surgery to treat Mr McPhail's osteoarthritis.

(f) On 4 May 2021, the reviewer dismissed Mr McPhail's review and upheld the Corporation's decision. The reviewer concluded the weight of the evidence shows the osteoarthritis is not a personal injury caused by the 2008 accident.

(g) On 26 May 2021, Mr McPhail filed the present appeal, with submissions subsequently filed in September. On receipt of those submissions, the Corporation reassessed the merits of continuing to defend the appeal. On 20 October 2021, the Corporation issued a decision granting cover for osteoarthritis of the left ankle and approving funding for the cost of Mr McPhail's ankle replacement surgery.

The law relating to costs awards in Accident Compensation Appeals

[7] The Accident Compensation Act 2001 (the Act) does not make specific provision for a costs award in appeals to the District Court from review decisions.

[8] Section 150 of the Act provides that appeals to the District Court are dealt with in accordance with the District Court Rules 2014 (the Rules) as modified by the Act and any regulations made under it.

[9] Rule 14.1 of the Rules, sets out the general approach to costs:

> **14.1 Costs at discretion of court**
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> (1) All matters are at the discretion of the court if they relate to costs—
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> (a) of a proceeding; or
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> (b) incidental to a proceeding; or
>
> (c) of a step in a proceeding.
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> (2) Rules 14.2 to 14.10 are subject to subclause (1).
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> (3) The provisions of any Act override subclauses (1) and (2).

[10] The principles that apply in determining the appropriate level of costs are contained in Rule 14.2:

> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds;
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> (b) an award of costs should reflect the complexity and significance of the proceeding;
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> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application;
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> (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application;
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> (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs;
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> (f) an award of costs should not exceed the costs incurred by the party claiming costs; and
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> (g) so far as possible, the determination of costs should be predictable and expeditious.

[11] Rules 14.3 to 14.10 provide further guidance with Schedules 4 and 5 providing time allocations and daily recovery rates determining costs.

Case law

[12] Cost awards in Accident Compensation Appeals were discussed by Judge Powell in *Dickson-Johansen*[1]. His Honour noted costs in this jurisdiction had previously been determined in accordance with the principles set in *P.*[2] They were not determined on the basis of scale costs under the Rules.

[13] Judge Powell stated it was not appropriate for the Court to sanction the reimbursement of costs simply because they were rendered to a claimant. His Honour opined:[3]

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1 *Dickson-Johansen v Accident Compensation Corporation* [2018] NZACC 36.
2 *P v Accident Compensation Corporation* [2008] NZACC 152 at paras [15]-[21] and [39].
3 *Dickson-Johansen,* above n1 at [15].

> Having accepted this starting point it is obvious there are practical difficulties with this approach, not in the least because it presupposes that any costs rendered to a claimant are reasonable. It is clearly not appropriate for this Court to sanction the reimbursement of costs simply because they have been rendered to a claimant. In addition the Court is not only ill suited to determining what might be reasonable costs in a particular instance having regard to the economics of private legal practice, but any such attempt would impose a significant burden on judicial resources should every decision on costs require the careful consideration of this Court.

[14] Judge Powell noted that the solution to this difficulty in other jurisdictions (including the District Court's general civil jurisdiction) has been to award costs based on the scale costs in Schedules 4 and 5 of the Rules. In doing so, His Honour concluded there was no principled reason why the scale costs in the Rules should not be used to calculate costs in Accident Compensation Appeals:[4]

> Taking these different threads together I am satisfied that the approach in *P v Accident Compensation Corporation* requires some adjustment, particularly with regard to the "normal award" referred to by Judge Barber, noting for example that even in the present case the Corporation has offered $3500. In the circumstances and upon reflection I can see no reason why the scale set out in the Rules should not be used for the calculation of costs in accident compensation appeals. The Court will in fact continue to retain flexibility in appropriate cases, including where the costs sought are from advocates, nor will there be any reason to depart from the accepted principle that in general the Corporation will not be entitled to costs where a claimant is unsuccessful unless the Court specifically directs otherwise. On the other hand, not only is a broadly objective standard helpful to the Court, there can also be no reason why claimants in this jurisdiction should be required to recover less for costs incurred than is allowed for them in the general civil jurisdiction of the District Court, and having a more certain costs recovery framework for claimants may in tum make it easier for claimants to obtain legal representation on appeal.

[15] The Court noted that under the Rules, there was discretion under 14.1 in relation to costs of, or incidental to, any proceeding or a step in any proceeding.[5]

[16] Adopting the approach in *Dickson-Johansen,* this Court has regularly awarded scale costs to successful appellants in accordance with the District Court Rules, most recently in *Mackley*.[6]

[17] The High Court's decision in *Carey*[7] confirmed that an award of costs under the Rules could be made to a claimant represented by a non-lawyer in an Accident

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4 At [18].
5 At [11].
6 *Mackley v Accident Compensation Corporation* [2022] NZACC 14.

Compensation appeal. The Court set out the correct approach to the quantum of such costs, with the starting point as 50 per cent of category 1 scale. The decision is instructive, noting that subject to the "indemnity rule", an award of costs cannot exceed the amount actually charged to a claimant. The High Court set aside the District Court's award of category 2 band B costs and substituted 50 percent of category 1 on the following basis:

> [120] … This reflects [the representative] was of reasonable assistance to the Court in a straightforward appeal that was successful.

Submissions of the parties

[18] Mr Akel suggested the options for the Court to consider in the exercise of its discretion are indemnity costs, failing that increased costs, with an uplift from scale 2B costs.

[19] Mr Akel submitted the opinion of the treating surgeon on causation was ignored with the Corporation relying on the opinion of Mr Atkinson. In consequence, the Corporation was remiss and failed to consider s25(1)(a) of the Act.

[20] Mr Akel submitted Mr McPhail should not be substantially out of pocket for seeking the statutory entitlement which should not have been denied to him in the first place.

[21] Ms Johns submitted the case for the appellant proceeds on the wrong assumption that a finding in favour of the appellant is inevitable.

[22] In Ms Johns' submission, the Corporation investigated the claim having regard to the relevant provisions of the Act and it has acted fairly and reasonably, and then swiftly to settle the substantive appeal.

[23] Ms Johns submitted:

[i] Actual costs are unknown and there is no basis to depart from scale costs.

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[7] *Accident Compensation Corporation v Carey* [2021] NZHC 748.

[ii] There is no basis for indemnity costs or increased costs with uplift from scale 2B costs.

Discussion

[24] The sole issue before the Court, is to determine the appropriate costs award following settlement of Mr McPhail's appeal. I accept Ms John's submission that it cannot be assumed that settlement of an appeal is akin to judgment for the appellant. Where an appeal has been settled prior to hearing, the principle is that an award should not exceed the normal award for costs for successful appellants following a full hearing, unless there is good cause.[8]

[25] Mr Akel submitted there is good cause for the Corporation to exercise discretion in this case and take a global view of costs. He submitted claimants seeking accident compensation should not be penalised by a formulaic costs' regime under the Rules.

[26] Mr Akel referred to the review by Miriam Dean QC[9] into the dispute resolution process under the Act, and her comments about the complexity of litigation in this jurisdiction. A review of Ms Dean's report shows the focus of her inquiry was whether review costs were fair and reasonable. She recommended that costs at review should be increased. She did not make recommendations on the direct issue of costs on appeal. Rather, her recommendations addressed wider considerations of participation and representation. In my view, Ms Dean's general comments cannot be extrapolated to specific comments in relation to this case.

[27] Ms Dean expressed her concern about District Court processes in this way:[10]

> A final word is needed on District Court processes. In especially complex appears by claimants suffering from a physical or mental injury, it is a hard ask for claimants to represent themselves because of the attendant risks of unfairness and injustice. It is just such claimants who are often at the mercy of unscrupulous advocates. The District Court raised with this review – and also in its submission on the discussion document about the future of accident

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8 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897.

9 Miriam Dean CNZM QC Independent Review of the Acclaim Otago (Inc), July 2015 Report into Accident Compensation Dispute Resolutions Process (May 2016).

10 At [5].

> compensation appeals – a power for judges to appoint counsel to represent claimants where appropriate. At present, the District court has the power to appoint an impartial adviser to the court (amicus curiae) but such appointments are primarily to assist the court, not a party. Māori Land Court judges have such a power.

[28] Ms Dean's report recommended:[11]

> - ACC consider:
>   - Increasing funding to existing free advocacy services
>   - Funding a free nationwide service modelling broadly on the Health and Disability Commission Advocacy Service
> - ACC more widely promotes organisations (existing and new) offering advocacy services on its website and in other guidance material.
> - **Relevant participants in the accident compensation area – whether Acclaim, the New Zealand Law Society, or others – explore initiatives to encourage more lawyers into this field of work.**
> - Consideration be given to the District Court's proposal that it have the power to appoint counsel to represent claimants in those exceptional cases where justice and efficiency require it.
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> (Emphasis added)

[29] I agree with Mr Akel that access to the law includes access to representation, and in this jurisdiction, lawyers experienced in accident compensation law.

[30] This point was recognised in *Dickson-Johansen* by Judge Powell when he identified the policy reasons why the application of the scale under the Rules was advantageous, appreciating the purpose provisions of the Act for a fair and sustainable scheme and providing access to health entitlements. His Honour appreciated also that it might be easier for claimants to obtain legal representation on appeal, if there was a more certain costs recovery framework.

[31] In my opinion, this Court's adoption of the scale costs in *Dickson-Johansen* under the Rules in Accident Compensation Appeals, represents both a principled approach and sensible shift from the previous costs' regime where fixed amounts for each appeal were applied irrespective of complexity. Judge Powell explained the context.[12]:

> ……The historic reluctance to rigidly apply the Rules must also be seen in a context where, in recognition of the nature of the jurisdiction, the Corporation does not generally seek nor is it generally awarded costs against unsuccessful claimants when it is successful in an appeal. As a result in most cases the Court

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11 At [20]

12 *Dickson-Johansen*, above n1 at [13].

> will indicate that there is no issue of costs arising if a claimant is unsuccessful or if the Corporation otherwise succeeds at appeal. There are exceptions to this, either signalled well in advance by the Corporation or where the Court indicates the Corporation has leave to apply for costs given the particular circumstances of an appeal. The recent practice of this Court has accordingly been to indicate in a judgment on an appeal whether costs are payable by either (or any) party, and if so, to give the parties a period to attempt to reach agreement on those costs, reserving leave for the parties to have costs determined if, as in the present appeal, no agreement is able to be reached.

[32] His Honour acknowledged the guiding principle in Rule 14.1 that costs are at the discretion of the Court and there is flexibility in relation to costs.

[33] I now turn to consider indemnity costs.

[34] At the outset, Mr Akel acknowledged indemnity costs are sought when no bill of costs has been provided. Indemnity is sought in the vicinity of $10,000. In my opinion, when discussing a principled basis to support indemnity costs, there needs to be some principled yard stick to measure these costs.

[35] Mr Akel submitted indemnity costs are payable because the Corporation has put the appellant to the cost of litigation when it should not have done so. In Mr Akel's submission, the Corporation ignored s 25(1) (a) of the Act that defines accident as "a specific event or a series of events" when it investigated the claim.

[36] Mr Akel urged the Court to consider the appellant's substantive submissions fully.

[37] Ms Johns cautioned the Court not to wade into the deep in evidence which has not been tested at a hearing. Mr Akel countered there is no danger here because the Corporation's own records are not challenged. He says the appellant relies on these documents.

[38] I turn to consider the documents made available to the Court.

[39] The starting point is the ARTP which is a request to the Corporation for funding for surgical treatment. Treatment is an entitlement. There can be no entitlement without a covered injury.[13]

[40] Mr Tomlinson diagnosed the condition needing surgery as post traumatic osteoarthritis. Mr Tomlinson opined that the causal medical link between the proposed surgical treatment and the covered injury is "*a series of injuries to the ankle leading to osteoarthritis*". A series of injuries leading to osteoarthritis is not explained. Post traumatic osteoarthritis is not a covered injury. No covered injury is recorded.

[41] The series of events under s 25 (1)(a) of the Act is a definition of accident. The provisions relating to accident and personal injury under s26 are quite separate. Section 25(3) states the fact that a person has suffered a personal injury is not of itself to be construed that it was caused by an accident.

[42] Eligibility for an entitlement is in respect of a personal injury pursuant to s 67 of the Act. There is no entitlement for an uncovered injury. Under Schedule 1 of the Act, the liability for funding of treatment is for a personal injury for which a claimant has cover.

[43] Ms Johns submitted the only way for the osteoarthritis to be covered is that it met the criteria consequential on another covered injury under s 20(2).

[44] The Corporation investigated the two accidents mentioned in the ARTP to ascertain a relevant covered injury.

[45] The first accident recorded by Mr Tomlinson related to an accident in or around 1980 when Mr McPhail injured his ankle in a stadium. The Corporation investigated whether there was a covered injury caused by this accident. Ms Johns submitted there was no claim lodged, no medical evidence available and therefore, no covered injury arising from the stadium accident.

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13 *Medwed v Accident Compensation Corporation* [2009] NZACC 87.

[46] The focus then turned to the covered injury arising from the second accident in 2008, that is, haematoma with intact skin and plantar fasciitis-left ankle. Mr Atkinson opined that it was improbable the 2008 accident caused post traumatic osteoarthritis on the imaging he viewed, together with a report from Mr Farah. Neither the imaging nor the report from Mr Farah are before me. They do not need to be since I have no jurisdiction to determine causation. Rather, my approach is to consider the process and provisions to which the ARTP gave rise.

[47] The available documents show the process of investigation included the Corporation also referring the imaging of a covered left ankle sprain arising from a rolled left ankle accident in 2012, together with the imaging relating to the covered injury from the 2008 accident. The Corporation obtained reports from Mr Atkinson and Mr Farah.

[48] Mr Akel submitted Mr Tomlinson is an eminent orthopaedic surgeon and the treating surgeon here and his opinion should have been relied on by the Corporation. It is the case, there is no presumption that evidence of a treating specialist is to be preferred.[14]

[49] The Corporation investigated the covered injuries for Mr McPhail's left ankle as it was required to do, in considering the request for funding for surgery under the ARTP.

[50] The substantive appeal did not go to hearing to enable a Court to make a finding on causation, and it did not end with a judgment. There is no proper basis for this Court to assess causation.

[51] I accept Ms Johns' submission that following the filing of substantive submissions for Mr McPhail in the appeal, the Corporation moved swiftly to settlement in a prudent and cost-effective way, weighing litigation risks.

[52] I can discern no basis that the Corporation put the appellant to the cost of unnecessary litigation.

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[14] *Lucas v Accident Compensation Corporation* [2015] NZACC 324.

[53] For all the reasons discussed, I find there is no basis for indemnity costs to be awarded here.

[54] I turn to consider Mr Akel's submission that the case is complex and warrants an uplift from scale 2B. In support of the submission for increased costs either under Rule 14.6 or by exercising discretion under Rule 14.1, Mr Akel submitted the Court could conclude the nature of the proceeding and the issues involved mean that scale 2B costs are not fair, and that an uplift of costs on a category 3 basis is fair.

[55] Ms Johns submitted the Corporation's offer of costs on a 2B basis is reasonable because this is a proceeding of average complexity; requiring counsel of skill and experience considered average (category 2); with a normal amount of time for each step considered reasonable (band B). She said the Corporation has taken a generous approach to the calculation of time, including preparation of the case on appeal, even though that step was not taken.

[56] Rating this case according to its complexity within categories 1 to 3, I conclude this is not an appeal of significant complexity. Of course, that does not prevent a party selecting as its counsel a lawyer of above average skill. But a party which chooses to have counsel of superior skill cannot expect the other party to pay for the additional costs which such higher skill quite reasonably commands.

[57] The issue in this case is whether the covered injuries in 2008 and 2012 and potentially an uncovered injury that occurred prior to 2008, caused post traumatic osteoarthritis. The issue is not complex. There are not multiple experts here giving different opinions. In my opinion, the nature of this case does not require an uplift to category 3.

[58] However, the Court takes into account that a comprehensive Notice of Appeal setting out the grounds of appeal was filed on 25 May 2021 and comprehensive submissions for Mr McPhail were filed on 24 September 2021.

[59] Clearly, there was a high degree of advocacy and effort to achieve a revised decision that issued a month after submissions for the appellant were filed in the

appeal. The Corporation not only granted cover for osteoarthritis of the left ankle but also granted entitlement to surgery funding. There is no doubt that considerable work was undertaken to achieve early settlement of the appeal. This has saved the Corporation from filing submissions in the appeal and, in turn, avoided recourse to judicial determination of the substantive issues.

[60] The Court is encouraged by Ms Johns' submission that the Corporation has adopted a generous approach to the offer on costs including allocating time for the step of preparation of the case on appeal. Although some of the time spent in preparation of the appeal would have duplicated time spent at review, a reconsideration of that material and any new evidence would have been necessary for the appeal. I consider this appeal involved above normal preparation time.

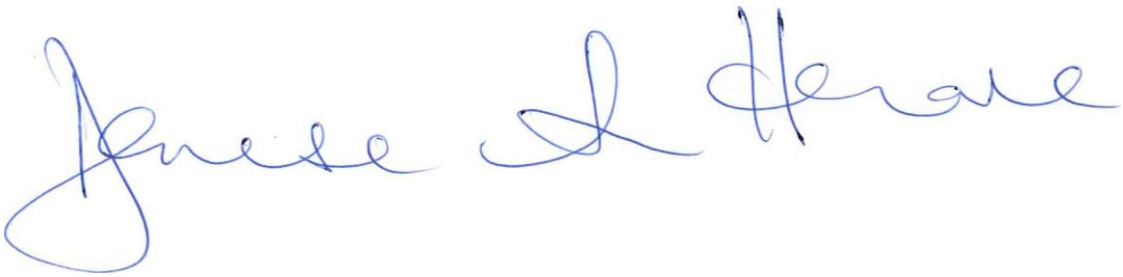
[61] In my view, the costs award in this case should recognise all these factors.

[62] Accordingly, I certify the following steps calculated on a 2B basis for the time allocations as detailed below:

Step	**Time allocation - band B**
Commencement of appeal (20)	0.5
Filing joint memo for ICMC (23)	0.25
Preparation of case on appeal (24)	1.5
Preparation of written submissions (24A)	1.5
Time (days)	**3.75**

[63] Applying the daily recovery rate of $1,910, this gives a total of $7,162.50, together with any reasonable disbursements.

[64] I also certify costs in this Court on the normal basis for a half day hearing.



Judge Denese Henare
District Court Judge

Solicitors: Grey Street Legal limited, Gisborne; William Akel, Barrister, Auckland for the appellant
Claro Law, Wellington for the respondent