IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 88 **ACR 198/21 and 217/21**

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

Hearing: 21 April 2022
Held at: Auckland/Tāmaki Makaurau

Appearances: The appellant was self-represented
F Becroft for the respondent

Judgment: 12 May 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Suspension of entitlement - s 117, Accident Compensation Act 2001]

Introduction

[1] The present matter comprises two appeals:

(a) Appeal ACR 198/21 against the decision of a Reviewer dated 3 August 2021. The Reviewer dismissed an application for review of the Corporation's decision dated 17 December 2020, suspending Mr Pol's weekly compensation because of non-compliance.

(b) Appeal 217/21 from the decision of a Reviewer dated 31 August 2021. The Reviewer dismissed an application for review of the Corporation's decision dated 22 March 2021, declining to provide Mr Pol further cover for an annular tear.

Background

[2] Mr Pol was born in 1965. He has worked in various fields.

[3] On 6 November 2015, Mr Pol suffered a fall from a ladder. On 9 November 2015, he was granted cover for a left wrist injury.

[4] On 11 November 2015, Mr Pol underwent surgery on his wrist and the Corporation provided him with various entitlements, including weekly compensation and hand therapy treatment, to help him return to work. On 12 September 2016, weekly compensation payments ceased, after Mr Pol was certified fit for return to normal work duties. Throughout this period, the Corporation was aware of only the left wrist injury, and the contemporaneous medical records do not mention any back injuries. However, Mr Pol subsequently advised that he hurt his back in the fall, and that this was overlooked initially due to the more pressing concerns with his wrist.

[5] On 28 May 2017, Mr Pol suffered a further accident when he was bending over to shear a sheep. He was granted cover for a lumbar sprain.

[6] On 13 July 2017, Mr Pol slipped on a deck and fell on his back. On 21 July 2017, cover was granted cover for contusions to his chest and back, and for a thoracic vertebrae fracture at the T10 level. From October 2017, he received weekly compensation and rehabilitation in respect of this injury.

[7] On 2 August 2017, Mr Pol visited his GP who lodged a claim for a lumbar sprain and left sided sciatica, said to have been caused by the accident on 28 May 2017. Mr Pol advised that he had not been working since mid-June and his GP certified him as having been unfit since that time. On 8 August 2017, the Corporation granted cover and began to pay weekly compensation, backdated to the date of first incapacity in June.

[8] In September 2017, Mr Pol underwent x-ray and MRI imaging of his spine, which showed a fracture of the T10 vertebrae in the thoracic spine, and an annular tear at L5/S1 in the lumbar spine.

[9] On 25 September 2017, Mr Pol was seen by Mr Grant Thompson, Musculoskeletal Physician. He suggested that Mr Pol was suffering from lumbosacral pain related to the disc pathologies in his lumbar spine, as well as some potential discogenic pain from his thoracic spine. Mr Thompson certified Mr Pol as unfit for work due to these issues.

[10] The Corporation obtained advice from Branch Medical Advisor, Dr Shanali Jayawardhana. On 18 October 2017, he noted that Mr Pol was recorded to have been suffering from low back pain since June 2017, but the identified pathology was unlikely to have been caused by the May 2015 accident, and the covered lumbar sprain (on the May 2017 claim) had likely resolved. However, he also noted that it was plausible that the fracture at T10 had been caused by the July 2017 accident.

[11] On 19 October 2017, based on Dr Jayawardhana's advice, the Corporation suspended entitlements under the May 2017 accident claim. On 20 October 2017, the Corporation added cover for a fracture of the T10 vertebrae in respect of the July 2017 accident. The Corporation transferred Mr Pol’s weekly compensation and rehabilitation programme from the May 2017 accident claim to the July 2017 accident claim.

[12] In early 2018, the Corporation arranged for Mr Pol to be assessed by Mr Bill Sanderson, Orthopaedic Surgeon, to help clarify the scope of injuries caused by the July 2017 accident, and the cause of his ongoing symptoms.

[13] On 14 February 2018, Mr Sanderson advised that Mr Pol was suffering from changes to the discs in his lumbar spine which pre-dated the July 2017 accident and had merely been exacerbated by it. Mr Sanderson advised that Mr Pol was expected to make a full recovery from these injuries and was nearing that point. However, Mr Sanderson suggested that Mr Pol’s pre-accident occupation as a stonemason was likely unsustainable due to the degenerative changes in his spine.

[14] In June 2018, the Corporation sent Mr Pol a draft Individual Rehabilitation Plan ("IRP"). After receiving no response, on 2 August 2018, the Corporation issued a decision deeming the IRP final. Mr Pol lodged a review in respect of this decision, and the parties then attended a conciliation meeting to try to resolve matters. At conciliation, it became apparent Mr Pol's key concerns were with the content of the report from Mr Sanderson. Mr Pol also wanted the Corporation to consider whether his lumbar back problems had been caused by the 2015 accident. An agreement was reached, whereby the review proceeding was adjourned and:

(a) Mr Pol provided details of his concerns with Mr Sanderson's report on 3 October 2018 and the Corporation sent the concerns to Mr Sanderson for comment, which he provided on the same date;

(b) On 2 October 2018, Mr Pol saw his GP, who lodged a claim for an L5/S1 annular tear as a result of the 2015 accident, which the Corporation investigated; and

(c) The Corporation prepared a new draft IRP which it sent to Mr Pol in November 2018.

[15] On 22 November 2018, the Corporation declined Mr Pol's claim for an L5/S1 annular tear as a result of the 2015 accident. Mr Pol lodged an application for review of this decision.

[16] Mr Pol did not respond to the new draft IRP. On 10 December 2018, the Corporation deemed the IRP final. Mr Pol did not agree to withdraw his review.

[17] On 25 February 2019, a review hearing took place. On 20 March 2019, the Review dismissed the review for lack of jurisdiction, as the IRP of 2 August 2018 had been replaced by the updated IRP of 10 December 2018. However, to assist the parties, the Reviewer made recommendations that had been agreed by the parties:

(a) The Corporation would consider appointing a new case manager;

(b) Mr Pol's statement of corrections and Mr Sanderson's response would be included with his original report, and the Corporation would provide Mr Pol with a list of documents to be provided to any assessors, going forward;

(c) Mr Pol would provide a statutory declaration of any factual matters he would like the Corporation to take into account, and the Corporation would provide this to any assessors or report writers; and

(d) Mr Pol would advise the Corporation in writing what he would like included in his IRP going forward.

[18] On 27 May 2019, a review hearing took place to consider the decision of the Corporation of 10 December 2018, deeming the IRP final. On 12 July 2019, the Reviewer issued a decision noting that Mr Pol largely agreed with the contents of the IRP but remained concerned about Mr Sanderson's report. The Reviewer noted that the existence of Mr Sanderson's report did not invalidate the IRP. However, the Reviewer noted that a new report from an Occupational Therapist, Joanna Kaipo, had been received following the draft IRP being issued, which recommended further strengthening and pain management rehabilitation. The Reviewer therefore quashed the IRP, and directed the Corporation to prepare a new IRP, incorporating the recommendation from Ms Kaipo.

[19] On 22 July 2019, a review hearing was convened to consider the Corporation's decision declining Mr Pol's "adamant" claim for an L5/S1 annular tear as a result of the 2015 accident. On 11 September 2019, the Reviewer quashed the Corporation's decision and granted Mr Pol cover for an L5/S1 annular tear. The Reviewer noted:

> The existence of the L5/S1 annular tear is clear from the MRI scan. It was obviously caused by something. Mr Pol says it was the accident on 6 November 2015. There is a temporal link between that accident and the onset of symptoms and back pain.

[20] On 21 August 2019, the Corporation sent Mr Pol a letter advising that he was required to attend an appointment with pain specialist, Dr Giresh Kanji, on 16 September 2019. The letter advised that it was important that Mr Pol attend the

appointment and that his weekly compensation could be suspended if he failed to do so.

[21] On 10 September 2019, Mr Pol advised that he was unable to attend as he had something else scheduled for the same day. The Corporation responded the next day advising that Mr Pol's late notice of another appointment on the same day was not considered a reasonable explanation, and that he risked having his weekly compensation suspended if he failed to attend. Mr Pol did not attend the appointment, and the Corporation issued a decision suspending his weekly compensation on the basis of noncompliance. Mr Pol applied for a review of the Corporation's non-compliance decision.

[22] On 17 September 2019, the Corporation confirmed that it had approved cover for annular tear of the lumbar disc (in terms of the Reviewer's decision of 11 September 2019).

[23] On 12 November 2019, the Corporation issued a decision declining to fund Seita Shiatsu Therapy. The decision explained that the Corporation could only fund treatment provided by registered health professionals, but that it might be able to offer other assistance instead.

[24] The review of the Corporation's non-compliance decision was heard on 20 February 2020. At the hearing Mr Pol disclosed, for the first time, that he did not attend the appointment with Dr Kanji because he had left New Zealand on the same day, and he had booked his flights before he had known about the appointment. In a review decision dated 17 March 2020, the Reviewer found that the requirement for Mr Pol to attend the appointment with Dr Kanji was reasonable, noting that it was Mr Pol's GP who had made the referral to Dr Kanji. However, the Reviewer found that, while Mr Pol could have been more forthcoming about his reasons for not being able to attend, those reasons were not unreasonable. The Reviewer therefore quashed the Corporation's noncompliance decision and directed it to reinstate and backdate his weekly compensation.

[25] In the same decision, the Reviewer also dealt with a further IRP which had been finalised in a decision dated 13 June 2019, prior to another Reviewer issuing her review decision on the second IRP. The Corporation accepted that the 13 June 2019 IRP had been superseded by the other Reviewer's directions. Therefore, this IRP was quashed by consent, and the Corporation was directed to prepare a new IRP with input from Mr Pol.

[26] In May 2020, Mr Pol's then case manager asked his GP, Dr Andrew Miller, for recommendations on what treatment and rehabilitation Mr Pol required, noting that no treatment had been provided for some time and that Dr Kanji was no longer prepared to see Mr Pol.

[27] On 25 May 2020, Dr Miller explained that he was not clear on the details of Mr Pol's disputes with the Corporation and that Mr Pol had two back injuries, namely, the T10 fracture of 2017 and an annular disc tear from 2015. However, Dr Miller stated that he was not sure what injuries were covered or what Mr Pol was entitled to. Dr Miller noted that he believed Mr Pol was: "unwilling to engage with ACC appointed providers but remained motivated to re-engage when he knows he has no further reason to question how his case is being processed".

[28] In reply, the case manager explained that there were no longer any active disputes, that the Corporation had provided cover for both back injures, and that Mr Pol was currently receiving weekly compensation. She also explained that Mr Pol was entitled to treatment and rehabilitation but was not currently receiving anything, and that the purpose of her contacting Dr Miller was to find out what was required.

[29] In response, Dr Miller suggested that it would be useful to have input from a psychologist to assist Mr Pol with resolving psychological barriers to starting rehabilitation. The case manager agreed and suggested that this input could be provided as part of a pain management program. She also explained that a new case manager would be appointed, due the relationship between her and Mr Pol having broken down.

[30] On 11 June 2020, Mr Pol's then advocate sent an email to the Corporation, attaching a letter from Mr Pol, dated 25 May 2020. The letter was addressed to the chief executive officer ("CEO") of the Corporation and listed various complaints about the management of his claim as well as a request for an "out of scope payment" to compensate Mr Pol for the suspension of his weekly compensation in September 2019, over and above the payment of backdated weekly compensation and interest which he had already received.

[31] On 29 June 2020, the Corporation responded to the request for money, explaining that no additional payment would be made. In addition, the Corporation treated the letter as a complaint under the Code of ACC Complainant's Rights.

[32] On 6 July 2020, the Corporation issued a decision finding no breach of the Code in relation to the suspension of Mr Pol's weekly compensation, but that there had been a breach in relation to a delay in implementing the review directions of the Reviewer, to prepare a new IRP. The decision letter included an apology for this breach, and noted that a new case manager had been appointed and that it was hoped that Mr Pol would work with the new manager in a positive way to prepare a new IRP.

[33] On 15 July 2020, the new case manager emailed Mr Pol, introducing herself and asking to meet with him to discuss his claim. Over the following days, the case manager responded to emails from Mr Pol and his advocate, in relation to concerns Mr Pol raised that his injuries were not properly recorded by the Corporation. The manager explained that the schedule of injuries, referred to by Mr Pol, showed a summary of his covered injuries based on a standardised format for describing injuries, and that additional details regarding his injuries were included in his file. The manager invited Mr Pol and his advocate to provide details of any injury details which were wrong.

[34] On 11 August 2020, the case manager had a conversation with Dr Miller, who recommended that Mr Pol participate in a multidisciplinary pain management programme, as he had previously agreed with the case manager. The case manager

advised Mr Pol of this on the same day and provided him with some different options for attending such a programme.

[35] On 20 August 2020, Dr Miller advised that Mr Pol continued to have concerns about his file being factually incorrect, and that he was not happy about the suggestion that he participate in a pain management programme while he still had unresolved issues with the Corporation. Dr Miller noted that he did not know what these unresolved issues were, and suggested that the Corporation might engage in a mediation to try to reach resolution with Mr Pol.

[36] Over the following days, Mr Pol repeated various concerns, including assertions that his recorded injuries were incorrectly recorded and that the report from Mr Sanderson should be removed from his file. On 18 August 2020, Mr Pol complained that the Corporation had not produced a new IRP as directed by the Reviewer his review decision in March 2020. He indicated that he wished to be referred to a spinal specialist, Mr John Ferguson (an Orthopaedic Surgeon). On 25 August 2020, Mr Pol's GP, Dr Miller, confirmed that he would be referring Mr Pol to a spinal specialist, and, on 26 August 2020, Dr Miller confirmed that Mr Pol wanted to see Mr Ferguson.

[37] The case manager agreed to this proposal and arranged with Dr Miller that he would make the referral to Mr Ferguson directly. She advised Mr Pol of this on 26 August 2020 and asked for feedback on this referral being included as the only intervention in a new IRP, with the IRP to be reviewed once Mr Pol had seen Mr Ferguson.

[38] Mr Pol then queried who would provide the relevant medical information for the referral to Mr Ferguson, and the case manager explained that Dr Miller would be making the referral directly. The manager again asked Mr Pol for his views on her suggestion for a new IRP.

[39] On 27 August 2020, the Corporation received a letter from Mr Pol, dated 20 August 2020, again addressed to the former CEO of the Corporation. In this letter Mr Pol expressed dissatisfaction with the response to his previous letter of June 2019

and asked for reconsideration of his request for a further payment. Mr Pol asserted that he had suffered losses of $6,308.49 because of the suspension decision.

[40] On 2 September 2020, Mr Pol responded to the case manager's email regarding his IRP, stating that "the matter is sent to [the former CEO], and I am waiting his response".

[41] On 22 September 2020, the case manager wrote to Mr Pol enquiring if he had an appointment to see Mr Ferguson. Mr Pol responded the next day repeating his previous message that he was waiting on his response from the former CEO.

[42] The case manager then checked with Mr Ferguson's office whether an appointment had been made. She was advised that Mr Pol had been contacted to make an appointment but that he had declined to do so, saying that he was waiting on a response from "ACC CEO, Mr Pickering".

[43] On 15 October 2020, the case manager wrote to Mr Pol explaining that the appointment with Mr Ferguson was required to see what further rehabilitation and treatment he needed. She asked Mr Pol to explain why he had felt unable to make an appointment with Mr Ferguson and whether there was anything she could do to assist with this.

[44] Mr Pol replied on 19 October 2020, again simply stating that he was awaiting a response from the former CEO.

[45] On 23 October 2020, the case manager advised Mr Pol that she had followed up internally regarding a response to his letter to the CEO. However, she again explained that the appointment with Mr Ferguson was required to progress his rehabilitation and therefore should not be delayed. The manager noted that it was unclear why Mr Pol felt unable to see Mr Ferguson and offered mediation as a way forward.

[46] On 27 October 2020, Ryan Murray, Resolution Specialist, responded to Mr Pol's August complaint and request for payment, explaining that he was

responding on behalf of the CEO, and that the request for an additional payment would be addressed by a local branch of the Corporation. Over the following days, Mr Murray responded to questions from Mr Pol, explaining that the CEO would not be responding to him personally, that Mr Pol's concerns regarding management of his claims had already been addressed in the code complaint decision of 6 July 2020, and that the request for payment would be addressed by the branch.

[47] On 2 November 2020, the case manager wrote to Mr Pol, confirming that the branch was looking at Mr Pol's further request for an additional payment. To enable the branch to consider the request, the manager asked Mr Pol for further details about the basis for his request and how he had calculated his alleged loss of $6,308.49.

[48] Mr Pol responded by saying that he was waiting on a response from Mr Murray. Ms Simpson clarified that Mr Murray was no longer dealing with the matter and would not be replying further. She repeated her request for further information for the branch to consider the request in emails on 3, 4 and 6 November 2020. The information was not provided.

[49] On 12 November 2020, Mr Pol sent a further letter addressed to the former CEO (Mr Pickering), referring to the two previous letters and the responses received so far, and questioning whether Mr Pickering thought these were adequate and how he thought Mr Pol could move forward.

[50] On 25 November 2020, Mr Murray sent a response, noting that it appeared that Mr Pol had been dissatisfied with the responses to his previous letters, but explaining that the Corporation's position remained the same.

[51] On 25 November 2020, the case manager sent Mr Pol a letter, again explaining why the Corporation required him to attend an assessment with Mr Ferguson. The manager advised that an appointment had been scheduled for 29 January 2021, and that Mr Pol was required to confirm agreement to attend this appointment, by 3 December 2020. The letter warned Mr Pol that his weekly compensation would be

stopped if he did not agree to attend or provide a reasonable explanation as to why he did not agree. The case manager again offered the option of mediation/conciliation.

[52] Between 26 November and 1 December 2020, the case manager engaged in email correspondence with Mr Pol's advocate, who advised that Mr Pol remained concerned that his injuries were incorrectly recorded, and that he wanted to know what documents the Corporation had provided to Mr Ferguson. The case manager again explained that Dr Miller would make the referral to Mr Ferguson directly, and requested specific details of any information which Mr Pol believed incorrect.

[53] In an email dated 26 November 2020, Mr Pol's advocate noted that she had advised Mr Pol to attend the assessment with Mr Ferguson and not to "continue down this path".

[54] On 30 November 2020, Mr Pol responded to the 26 November 2020 warning letter. He said that he was awaiting a response from Mr Pickering personally and believed that he was not being unreasonable in doing so.

[55] On 30 November 2020, Mr Ferguson's office notified the Corporation and Mr Pol that his appointment with Mr Ferguson needed to be rescheduled to 24 February 2021. Mr Pol responded the same day, indicating that he was still awaiting a response from Mr Pickering.

[56] Over the next few days, the case manager emailed Mr Pol several times, noting that Mr Ferguson's office had changed the date of the appointment and asking if this changed Mr Pol's response in anyway. On the morning of 8 December 2020, the manager emailed Mr Pol, requesting that he respond to her previous queries, by 3.00 pm that day, noting that she would otherwise have to presume that he was still refusing to agree to attend an appointment with Mr Ferguson.

[57] On 9 December 2020, Mr Pol responded, stating that he was still awaiting a response from Mr Pickering. Mr Pol queried various matters, including why the Corporation was threatening suspension if the appointment with Mr Ferguson was "not an ACC assessment", why the Corporation had not, in his view, followed

medical advice on his file, and when he would receive a response to his letter to Mr Pickering.

[58] On 9 and 10 December 2020, the case manager responded once again, explaining why the Corporation required Mr Pol to see Mr Ferguson, reminding him that his weekly compensation might be stopped if he did not agree to attend the assessment, or provide a reasonable reason for not doing so, and explaining that the Corporation did not accept that the reasons he had provided to date were reasonable. The case manager also extended the deadline for Mr Pol to confirm his acceptance to 14 December 2020.

[59] On 17 December 2020, the Corporation issued a decision suspending Mr Pol's weekly compensation from 5 January 2020, until Mr Pol agreed to attend and fully participate in an appointment with Mr Ferguson. The decision letter noted that payments would only be backdated in exceptional circumstances. Mr Pol lodged an application for a review of the Corporation's decision.

[60] On 4 February 2021, a request was made on behalf of Mr Pol for a diagnosis of an annular tear of lumbar disc L5/S1 to be added in respect of the 28 May 2017 accident.

[61] On 22 March 2021, the Corporation issued a decision declining cover for the diagnosis of an annular tear of the lumbar disc in respect of the accident on 28 May 2017. The Corporation's letter explained that Mr Pol already had cover for the annular tear in respect of the November 2015 accident and the evidence did not support a causal link to the May 2015 accident. Mr Pol lodged an application to review this decision.

[62] On 7 July 2021, a review hearing took place to consider the Corporation's decision of 17 December 2020, suspending Mr Pol's weekly compensation. On 3 August 2021, the Reviewer dismissed the review on the basis that Mr Pol's failure to agree to attend a medical assessment was unreasonable and that the Corporation was entitled to decline to provide weekly compensation. On 27 August 2021, a

Notice of Appeal (ACR 198/21) was lodged against the Reviewer's decision of 3 August 2021.

[63] On 18 August 2021, a review hearing was held to consider the Corporation's decision of 22 March 2021, declining cover for the diagnosis of an annular tear of the lumbar disc in respect of the accident on 28 May 2017. On 31 August 2021, the Reviewer dismissed the review on the basis that the medical evidence did not show that the 2017 accident was the cause of the L5/S1 annular tear, and, instead, pointed towards the 6 November 2015 as having caused the tear. The Reviewer also referred to the decision of the Reviewer of 11 September 2019, which had not been appealed. On 23 September 2021, a Notice of Appeal (ACR 217/21) was lodged against the Reviewer's decision of 31 August 2021.

Appeal 198/21

Relevant law

[64] Section 72(1) of the Accident Compensation Act 2001 (the Act) provides:

> (1) A claimant who receives any entitlement must, when reasonably required to do so by the Corporation,
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> …
>
> (d) undergo assessment by a registered health professional specified by the Corporation, at the Corporation's expense:
>
> (e) undergo assessment, at the Corporation's expense:
>
> (f) co-operate with the Corporation in the development and implementation of an individual rehabilitation plan:
>
> (g) undergo assessment of present and likely capabilities for the purposes of rehabilitation, at the Corporation's expense:
>
> (h) participate in rehabilitation.

[65] Section 117 of the Act provides:

> The Corporation may suspend or cancel an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.
>
> …

> (3) The Corporation may decline to provide any entitlement for as long as the claimant unreasonably refuses or unreasonably fails to—
>
> (a) comply with any requirement of this Act relating to the claimant's claim; or
>
> (b) undergo medical or surgical treatment for his or her personal injury, being treatment that the claimant is entitled to receive; or
>
> (c) agree to, or comply with, an individual rehabilitation plan.

[66] In *Peck*, the majority of the Court of Appeal found that the Corporation had the discretionary power to decline Ms Peck's entitlements permanently for the period of her unreasonable refusal to submit to a medical examination.[1] Justice McGrath stated:[2]

> The purpose of s 116(3) in this context is to provide a mechanism that the Corporation can use in appropriate cases to ensure compliance by persons who have entitlements with their duties to keep the Corporation informed about their condition when required. This enables the Corporation to maintain the integrity of the statutory scheme by ensuring only those eligible receive benefits under it. The terms of s 116 reflect the legislature's perception of the scope of powers needed by the statutory body with principal responsibility for the administration of the Act.
>
> Thus the power to decline to provide an entitlement, which is conditional on a person entitled acting unreasonably in the manner outlined in s 116(3), is an enforcement power given in the public interest. It is available where there has been a breach of duty. It is not given for punitive purposes but in order to ensure that the duties of persons entitled are observed, so that the scheme operates effectively.
>
> The effective management of the scheme would be frustrated if the Corporation were not empowered to refuse to pay entitlements permanently during a period of default. That could create the anomalies pointed to by Mr Barnett, where persons prolonged their entitlements by refusing to comply with requirements for periods of time. That result would in our view be inconsistent with the purpose of the legislation.

[67] In *Thirring*, Judge Barber observed:[3]

> The law is clear that where a claimant unreasonably fails to comply with a requirement prescribed by the Act, ACC is entitled to suspend any entitlements available to the claimant. This approach is consistent with the philosophy of the Act which couples rights of a claimant with responsibilities to engage with ACC, and ensure the effective running of the scheme.

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1 *Accident Compensation Corporation v Peck* (2005) 7 NZELC 97,712 (CA).
2 At [32] – [34].
3 *Thirring v Accident Compensation Corporation* [2012] NZACC 23 at [47].

[68] The onus is on the Corporation, where it makes a decision under section 117(3), to show that the claimant's failure or refusal was unreasonable, the test being an objective one.[4] In *O'Malley-Scott*, Judge Barber observed:[5]

> There is no dispute that the reasonableness of the respondent's decision to decline entitlements is to be judged at the date of that decision, namely, 8 August 2008. What may have happened since then should not impact upon the correctness of Work Aon's decision. Accordingly, the relevant communications between the parties are those between 9 July and 8 August 2008, rather than subsequently.

[69] In *Woolley*, Judge Beattie stated:[6]

> From a purely legal perspective, I find that a decision made pursuant to section 117(3) is not a decision which is required to be made only after an explanation of the failure to attend has been sought, where the evidence is clear that the appellant was aware of his obligations and of the consequences of failure to comply, and where the statutory provision itself does not require reasonable written notice of the proposed cessation.

Discussion

[70] The issue for determination in this appeal is whether it was unreasonable for Mr Pol to refuse to attend a medical assessment. The Act requires that Mr Pol, as the recipient of an entitlement, when reasonably required to do so by the Corporation, must undergo assessment by a registered health professional specified by the Corporation, at the Corporation's expense.[7] If Mr Pol unreasonably refuses or unreasonably fails to comply with any requirement of the Act relating to his claim, the Corporation may decline to provide any entitlement for as long as he refuses or fails to do so.[8] The Corporation's powers are seen to be consistent with the philosophy of the Act, which couples the rights of a claimant with the responsibilities to engage with the Corporation, and so ensures the effective running of the accident compensation scheme.[9]

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4 *Sad v Accident Rehabilitation and Compensation Insurance Corporation* DC Wanganui Decision 222/97, 10 November 1997.
5 *O'Malley-Scott v Accident Compensation Corporation* DC Wellington Decision 135/2009, 5 August 2009 at [27].
6 *Woolly v Accident Compensation Corporation* [2012] NZACC 146 at [30].
7 Section 72(1)(d) of the Act.
8 Section 117(3)(b).
9 See *Thirring*, note 2 above; and *Peck*, note 1 above.

[71] Mr Pol's position is that he has raised a number of concerns regarding the Corporation's management of his claims and he has not been satisfied by the Corporation's responses to date. Mr Pol alleges that the Corporation has threatened and bullied him throughout its management of his claims. Therefore, he says, it was not unreasonable for him to refuse to attend the medical assessment with Mr Ferguson until he received a satisfactory reply from the CEO to his complaints.

[72] This Court acknowledges Mr Pol's submissions and the range of concerns that he has raised about the Corporation's interaction with him. Mr Pol has had extensive correspondence and interaction with the Corporation over more than six years, and it is unfortunate that he has reached an impasse with the Corporation. However, this Court is not in a position to address the variety of concerns that Mr Pol has raised and must focus on the issues directly relevant to this appeal. The Court notes the following considerations.

[73] First, the Court finds that the Corporation reasonably required Mr Pol, as the recipient of weekly compensation, to undergo assessment by Mr Ferguson, a registered Orthopaedic Surgeon. The Court notes that Mr Pol complained that the Corporation had not produced a new Individual Rehabilitation Plan and indicated that he wished to be referred Mr Ferguson. Mr Pol's GP, Dr Miller, confirmed that he would be referring Mr Pol to a spinal specialist, and that Mr Pol wanted to see Mr Ferguson. The Court finds that an assessment by Mr Ferguson was a reasonable step in the development of Mr Pol's rehabilitation plan.

[74] Second, the Court finds that Mr Pol unreasonably refused or failed to comply with the requirement that he undergo a medical assessment. The Court notes the repeated, unsuccessful attempts by the Corporation, between 26 August 2020 and 10 December 2020, to address Mr Pol's concerns and to get him to see Mr Ferguson. The Court finds that Mr Pol's insistence on needing a response from the Corporation's Chief Executive Officer had no objective bearing on Mr Pol's obligation to participate in his rehabilitation through an assessment by a medical professional. Any ongoing concerns that Mr Pol has regarding the Corporation's management of his claims, relevant to his health and rehabilitation, could be raised with Mr Ferguson or other medical specialists.

[75] Third, the Court finds, in light of Mr Pol's unreasonable refusal or failure to comply with the Corporation's reasonable requirement that he undergo assessment by Mr Ferguson, that the Corporation was entitled to suspend Mr Pol's weekly compensation. The Court notes that, prior to the decision to suspend the weekly compensation, the Corporation repeatedly warned Mr Pol that his weekly compensation might be stopped if he did not agree to attend the assessment.

Appeal 217/21

Relevant law

[76] Section 6(1) of the Act provides:

> decision or Corporation's decision includes all or any of the following decisions by the Corporation:
>
> (a) a decision whether or not a claimant has cover:
>
> (b) a decision about the classification of the personal injury a claimant has suffered (for example, a work-related personal injury or a motor vehicle injury):
>
> (c) a decision whether or not the Corporation will provide any entitlements to a claimant:
>
> (d) a decision about which entitlements the Corporation will provide to a claimant:
>
> (e) a decision about the level of any entitlements to be provided:
>
> (f) a decision relating to the levy payable by a particular levy payer:
>
> (g) a decision made under the Code about a claimant's complaint

[77] Section 134(1) provides:

> Who may apply for review
>
> (1) A claimant may apply to the Corporation for a review of—
>
> (a) any of its decisions on the claim:
>
> (b) any delay in processing the claim for entitlement that the claimant believes is an unreasonable delay:
>
> (c) any of its decisions under the Code on a complaint by the claimant.

[78] In *Van Essen*,[10] Barber DCJ stated:

> [23] It is settled law, in accordance with the decisions such as that of *Weir* that administrative decisions issued, and requests made, do not amount to decisions within the meaning of s.6 of the IPRC Act.

Discussion

[79] The issue for determination in this appeal is whether the Corporation's decision declining cover for a lumbar disc annular tear in respect of the May 2017 accident was correct. The Act provides that a claimant may apply for review of a Corporation's decision, unreasonable delay in processing a claim for entitlement, and decision on a complaint.[11] The Act defines decision to include a decision about cover, classification of a personal injury, entitlements, levy payable, or a complaint.[12] Administrative decisions issued, and requests made, do not amount to decisions within the meaning of the Act.[13]

[80] Mr Pol's agrees that the lumbar disk annular tear was caused by the November 2015 accident. However, he believes that the subsequent May 2017 accident aggravated the injury, and that this accident should therefore be linked/added to his record alongside the November 2015 accident. The Court acknowledges Mr Pol's submissions but notes the following considerations.

[81] First, on 17 September 2019, the Corporation confirmed that it had approved Mr Pol's cover for annular tear of the lumbar disc (in terms of the Reviewer's decision of 11 September 2019). Mr Pol's concern does not appear to relate to the nature of, or the entitlements flowing from, the cover granted to him in November 2015. His concern is that the Corporation's schedule of injuries needs to have the lumbar disk annular tear linked to the injury on 28 May 2017 accident. His concern therefore appears to be of an administrative nature, which is not a matter that can legitimately be taken on review and appeal.

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10 *Van Essen v Accident Compensation Corporation* [2008] NZACC 83.
11 Section 134(1) of the Act,
12 Section 6(1).
13 See *Van Essen*, note 10 above.

[82] Second, Mr Pol has not produced medical evidence to show that the lumbar disk annular tear was caused, not only by the 2015 accident, but also by the 2017 accident. The Court notes that, at the review hearing held in July 2019, two years after the 2017 accident, Mr Pol was insistent that his L5/S1 annular tear was caused by the accident on 6 November 2015. His only reference to the 2017 accident was that this had aggravated the injury. The Reviewer granted Mr Pol cover for his lumbar disk annular tear on the basis that this was caused by the 2015 accident, without reference to the 2017 accident. No appeal was lodged against this decision by Mr Pol.

Conclusion

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

(a) Appeal ACR 198/21 against the decision of a Reviewer dated 3 August 2021 is dismissed. The Court finds that the Reviewer correctly dismissed an application for review of the Corporation's decision suspending Mr Pol's weekly compensation for reason of non-compliance.

(b) Appeal 217/21 against the decision of a Reviewer dated 31 August 2021 is dismissed. The Court finds that the Reviewer correctly dismissed an application for review of the Corporation's decision declining to provide Mr Pol cover for an annular tear from the 2017 accident.

[84] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors: Medico Law Ltd for the respondent.