ACCIDENT COMPENSATION APPEAL AUTHORITY **[2015] NZACA 11**
NEW ZEALAND

ACA 12/2013

Kenneth Leslie Reid
Appellant

Accident Compensation Corporation
Respondent

Before:	D J Plunkett
Counsel for the Appellant:	R Ward
Counsel for the Respondent:	P McBride
Date of Hearing	18 August 2015
Date of Decision:	9 September 2015

DECISION

INTRODUCTION

[1] This is an appeal by Kenneth Leslie Reid against the decision of a review officer of 27 May 2013.

[2] Mr Reid suffered serious injuries in a building accident in 1982. It is covered by the accident compensation scheme and the respondent Corporation has provided compensation and other benefits since then. Following discharge from a prolonged period in hospital and a rehabilitation centre, Mr Reid received considerable unpaid assistance initially from his then partner and subsequently from his now elderly mother for household tasks and limited personal care (the latter known under the scheme as attendant care). After his partner left him, he had to move in with his parents as he could not completely look after himself.

[3] A late claim for retrospective attendant care was made but was declined by the Corporation on the basis that Mr Reid's needs did not meet the high threshold set for entitlement to such care. His application for review of the Corporation's

decision was declined by a reviewer. That was on jurisdictional grounds, as Mr Reid had been late seeking review.

[4] In deciding whether the review application should have been accepted, the essential issue for me is whether, despite its lateness, the claim for attendant care should succeed on its merits. I must assess whether the type of care Mr Reid required during the relevant period (up to 30 June 1992) is regarded as attendant care and whether the level of such care meets the high threshold set by the statute.

BACKGROUND

[5] On 23 January 1982, at the age of 34, Mr Reid was seriously injured in a building accident. He was supervising the demolition of a building, which collapsed onto him causing severe lower limb and internal injuries. He lost his right leg and suffered other crush injuries which have since left him with pain, infections, fatigue, difficulty controlling urine and bowel motions, and difficulty with mobility.

[6] It was not until October 1983 that he was discharged from a rehabilitation centre following prolonged hospitalisation. He returned home to his then partner and their young child, but required assistance from her for household tasks such as cooking and for some personal tasks such as bathing. His difficulty controlling his bowel motions meant that there were ‘accidents’, which required the cleaning of soiled clothing and bed sheets. He was unable to do this himself.

[7] As Mr Reid’s partner could not cope with the changes in him and their altered circumstances, she left him in 1984 or 1985. He was unable to look after himself on his own, so he moved in with his parents, who in turn moved from Wellington to a small town and he with them. Mr Reid’s mother then looked after him. Apart from attending to all the usual household tasks, such as laundry and household cleaning, his mother did the cooking and provided some assistance with personal care. In 1988, he tried flatting on his own, but could not cope on his own.

[8] The Corporation accepted coverage under the accident compensation scheme. Over the years, it has paid for his medical expenses, rehabilitation aids, housing modifications, lump sums and earnings related compensation as largely he has not been able to work since the accident.

[9] An internal memorandum of the Corporation (22 November 1983) recorded that Mr Reid was paid a lump sum of $5,250, being 75% of the then maximum lump sum payment of $7,000. There was at that time a statutory discretion to pay an additional sum up to a maximum of $17,000, which was exercised in his favour, so the maximum amount was paid to Mr Reid on 1 December 1983. This had followed a request from a rehabilitation officer (26 October 1983) and then an internal assessment (11 November). The assessment recorded Mr Reid's concerns about the future, a specific incapacity, his severely altered lifestyle, moderate to severe pain, total loss of one leg, destroyed social life, inability to return to his old job and inability to work. It noted that he was able to get around on crutches.

[10] The Corporation's documentation shows that it did not believe that Mr Reid was capable of even part-time employment, so it did not fund any vocational rehabilitation. While he did return to work at his previous employer supervising demolitions, there was little work for him to do. Essentially, he has not worked or at most has undertaken little paid work since the accident.

Evidence of Mr Reid

[11] Mr Reid's brief of evidence sets out some history of his various claims and what he regards as the unsatisfactory attitude of the Corporation.

[12] In his evidence to the Authority, Mr Reid explained the assistance he has needed since October 1983 and which has been provided by his mother. Some nights, but not all, he suffered incontinence. His mother would clean the bed linen. He cannot hang out washing or bring it in. His mother used to make his meals for him, but he can now do this for her in view of her age (the kitchen is now modified for his use). He washes himself largely by hand, with some assistance from his mother for washing and drying his lower leg which suffers infections. She is also responsible for setting up the shower beforehand and cleaning it afterwards.

[13] While Mr Reid could not do any housework, he was able to organise, clean and repair things salvaged from demolished buildings. He described this to me as his recreation.

[14] Mr Reid told me that even more important than the help he needed was the equipment required to help himself. This was not forthcoming from the Corporation in the early days. For example, he now has a modified kitchen and

bathroom, so is more independent. Initially, he was only given crutches, but now has a motorised wheelchair and mobility scooter.

[15] As for public transport, Mr Reid found it impossible to use a bus. He said it was generally hard to get around. Parking his car in Wellington was a problem, as he would need to park a long way from where he wanted to go.

[16] Mr Reid explained that he stresses his body transferring on/off the toilet, into/out of bed or into/out of a vehicle. This had led to continuous infections on his buttocks and his lower leg.

Medical reports

[17] The most comprehensive medical report is from Dr Haywood, a medical occupational specialist (dated 13 July 2001). It comprises 36 pages and is detailed. Dr Haywood regarded Mr Reid's injuries as serious. He assessed him as having "a 69% whole person impairment".

[18] Dr Haywood concluded that Mr Reid did not require 24-hour supervision, as there were periods of time when he could be left on his own. Indeed, as the doctor noted, Mr Reid was able to drive his own vehicle, visit friends and even stay with relatives. I appreciate that Dr Haywood's report expresses conclusions regarding Mr Reid many years after the period relevant to my jurisdiction (up to 30 June 1992), but it records the history of Mr Reid's dependence/independence since before his discharge from the rehabilitation centre.

[19] It was noted by Dr Haywood that (at May 1983) Mr Reid was independently mobile in a wheelchair or on crutches, could manoeuvre around his home on crutches and into/out of a wheelchair, could independently manage a urine bottle and colostomy bag, and dress independently. By October 1983, he was able to drive an automatic vehicle. In 1988, he tried flatting on his own, but had extreme difficulty with showering, laundry, making beds and preparing meals, so he moved into a motel with disability facilities as a trial. These activities caused pain in his left ankle and an inability to stand, so he shifted to his parents' home. In about 1998, he obtained a mobility scooter.

[20] According to Dr Haywood, Mr Reid (at July 2001) was reliant on assistance for a considerable portion of the day for simple tasks such as meal preparation, cleaning, laundry and even some personal care. He would not be able to stay on his own for 24 hours without significant home help and some supervision, particularly in regards to meals and showering. He was independent with

showering, but his mother had to dry his left foot and cleaned the shower. Mr Reid was independent in oral hygiene, dressing, skin care, eating and bowel and bladder elimination. He could independently transfer from his wheelchair to the bed, to crutches and onto the toilet. He could look after his own medication, maintain his own equipment, communicate and plan independently. Mr Reid had some difficulty with the laundry of his underwear because of intermittent incontinence. He would soak or scrub them, rather than ask his mother to do it.

[21] Dr Haywood stated that the greater component of assistance needed was home help in order to perform the activities of daily living, particularly household cleaning, which he could not do. It was noted that Mr Reid maintained a determination to be as independent as possible (I note this is a consistent theme of much documentary evidence). The medical practitioner recommended that the Corporation be more forthcoming in assistance to a person who, in the doctor's opinion, had begrudged asking for it because of his belief in independence. Dr Haywood considered that Mr Reid should be provided with more home help and mobility aids, such as a motorised wheelchair.

[22] There is a medical report (12 April 2007) obtained by the Corporation from Dr Fulton, for the purpose of assessing an independence allowance and a further lump sum payment. Dr Fulton assessed Mr Reid as having a 77% whole person impairment.

Attendant care claim

[23] I am not aware of the complete history of the claim for attendant care, but it was first made before 2001. There appear to have been decisions by the Corporation and/or reviewers, prior to the decision of the Corporation on 18 January 2006, which is now contested by Mr Reid.

[24] A lengthy Corporation memorandum of 24 November 2005 sets out some history of the Corporation's assessments of attendant care and of his needs at that time.

[25] According to the memorandum, there was no need for attendant care prior to February 2003 (for reasons which are not set out). Mr Reid was assessed as needing 2 hours of attendant care weekly from February 2003, in addition to home help (combined 5.5 hours weekly) and 1 hour per fortnight for shopping. The distinction between attendant care and home help was not explained. Attendant

care was also described in the memorandum as “constant personal attention” (the statutory criteria) and “personal care”.

[26] The memorandum stated that assessments for attendant care in April 2003, April 2004 and May 2005 (for the period up to May 2007) showed that Mr Reid needed between 1.5 and 2.5 hours weekly. The tasks for which the officer accepted attendant care was needed were not identified. The officer concluded that Mr Reid had never needed attendant care since he was discharged from hospital in October 1983.

[27] According to the memorandum, Mr Reid was determined to be independent in all activities of daily living. In particular, he could independently:

(1) use crutches, a mobility scooter and a car;

(2) access and egress from his home;

(3) travel by train from Palmerston North to Wellington, without seeking attendant care, to visit his partner and child (while residing in the rehabilitation centre);

(4) get up off the floor if he fell;

(5) make himself a snack;

(6) do some work on construction sites (in 1997, he supervised the construction of a building);

(7) walk at least a mile, manage several flights of stairs and rough ground (October 1982);

(8) transfer in and out of a car; and

(9) manage his own personal care.

[28] A brief decision by the Corporation on 18 January 2006 concerning the claim for retrospective attendant care recorded that the claim for expenses and losses under section 80(2)(b) of the Accident Compensation Act 1982 (“the 1982 Act”) had not succeeded. This was because Mr Reid had provided no evidence of paying someone else for the care. Furthermore, he had no entitlement to compensation under section 80(3), since that was to pay for the care of those who

needed constant personal attention (168 hours per week of “direct hands on care”).

[29] Mr Reid sought review of the Corporation’s decision, but he did not do so until October 2012, more than six years after the expiry of the time limit. There was a hearing on 15 May 2013 and the reviewer issued a decision on 27 May 2013.

[30] The reviewer assessed the application for an extension of time to file the review, in accordance with the factors set out in *McDougall v Accident Compensation Commission* (1983) 4 NZAR 85 at 87, by looking at the length of the delay, the reasons for the delay, the strengths or merits of the underlying case and the prejudice to the Corporation. The reviewer declined to grant an extension, so dismissed the review application on the basis that he did not have jurisdiction.

[31] In terms of the merits of the underlying application for attendant care, the reviewer stated that Mr Reid had not established how the new information received from the Corporation (which had been the explanation for the delay) had altered the evidential picture. There was no overall assessment of the merits of the claim for attendant care by the reviewer.

[32] It is from the decision of the review of 27 May 2013 that Mr Reid appeals to the Authority.

CASE ON APPEAL

[33] The Authority received submissions from Mr Reid’s counsel (4 May 2015) and he made oral submissions at the hearing. A brief of evidence (3 August 2015) was filed by Mr Reid prior to the hearing and he gave oral evidence at the hearing. Mr Ward, on behalf of Mr Reid, also filed an additional Corporation document (the memorandum of 24 November 2005) at the hearing. Following the hearing, Mr Ward produced a DVD, photographs of the collapsed building, Corporation documentation concerning Mr Reid (including medical reports) and general Corporation documentation.

[34] I record that I watched the video, in which Mr Reid portrays the difficulties he has with mobility and daily living, such as transferring onto the mobility scooter, on/off the toilet, in/out of the shower, on/off a bed, in/out of a wheelchair and using a wash basin.

[35] On behalf of the Corporation, Mr McBride filed written submissions (25 May 2015) and made submissions at the hearing. A further memorandum, with additional documents, was filed on 19 August 2015.

[36] Two bound volumes of documentary evidence had been filed at various stages of the appeal, one each from the appellant and respondent.

THE LAW

[37] An appeal lies to the Authority against certain decisions of a review officer (section 107 of the 1982 Act). An appeal is by way of a rehearing (section 109(1)). The Authority can confirm, modify or reverse a decision, or refer the matter back to the Corporation (section 109(7) & (8)).

[38] Notwithstanding the repeal of the 1982 Act, the Authority continues to have jurisdiction over certain claims arising from personal injury by accident occurring on or before 30 June 1992 (section 391 of the 2001 Act). It is the 1982 Act that is applicable to Mr Reid's entitlement to attendant care in the period up to 30 June 1992. This is because the entitlement arises from October 1983, when Mr Reid left the rehabilitation centre. The 1982 Act had become effective by then.

[39] The relevant entitlement provision of the 1982 Act at issue here is section 80(3):

> **80 Compensation for pecuniary loss not related to earnings –**
>
> ...
>
> (3) Where a person suffers personal injury by accident in respect of which he has cover and the injury is of such a nature that he must have constant personal attention, the Corporation, having regard to any other compensation payable, may pay to that person, or if it thinks fit to the administrator of that person, such amounts as the Corporation from time to time thinks fit in respect of the necessary care of the person in any place of abode or institution.
>
> ...

[40] The higher courts have set out the principles to be applied in assessing whether an injured person "must" have "constant personal attention", allowing the Corporation to pay for the "necessary" care of that person.

[41] The High Court had this to say in *Accident Rehabilitation and Compensation Insurance Corporation v Campbell* [1996] NZAR 278 at 285-286:

> This case however, has to be resolved on the basis that up until April 1995, constant personal attention equated to 24-hour care and that the necessary care level would involve the continuous attendance of persons on the individual throughout. Clearly the level of attention required would vary. To some extent that is reflected in the level of hourly rate and variations within the rate where it is acknowledged that assiduous attention to the individual is not constantly required such as some cases (but only some) when he or she is asleep. The entitlement to vary the rates in accordance with that factor is undoubted in light of the clear statutory direction contained in the words "such amount as the Corporation from time to time thinks fit in respect of the necessary care". The ability of the Corporation to temper expensive full time caregiving and to apply a cushioning principle is contained in this aspect of the discretion. What is in issue here, however, is whether under the same discretion or otherwise in accordance with s 80(3), the Corporation can dictate a lesser number of hours than the full entitlement which the words 'constant personal attention' involve and the evidence requires. Necessary care could, we imagine, involve other than the personal attendance by persons on the individual concerned and monitors and electronic devices might be provided which would supplement the necessary care. We would not wish to see that possibility excluded but it will depend on the facts of each case as to what necessary care can be provided in the case of a person requiring constant personal attention.
>
> The discretion could extend also to the cost of the 24-hour care both as to hourly rate and such things as one caregiver being available to care for more than one such person. ...

[42] *Campbell* has not been interpreted to mean that one on one personal care over 24 hours is necessary, though the care must be "constant" so some level of care or monitoring is required over 24 hours, as is clear from the decision of the High Court and Court of Appeal in the case of *Matthews* (citations below).

[43] In the High Court (*Matthews v Accident Compensation Corporation* HC Wellington, CIV-2004-485-2143, 31 March 2006), MacKenzie J said:

> [18] I do not consider that [*Campbell*] is properly to be regarded as authority for the proposition that the term "constant personal attention" necessarily means that personal attention on a 24 hour per day basis is required and that nothing less can meet the test. ...
>
> [19] The term "constant personal attention" does require a high level of care. Mr Millard draws attention to the following definition of the word "constant", in the *Oxford English Dictionary*:
>
> > Of actions, conditions, processes, etc.: Continuing without intermission or cessation, or only with such intermissions as do not interrupt continuity
>
> He submits that the level of attention involved can fluctuate, but that the word "constant" requires some level of attention over the full 24-hour period and that attention is provided only with such interruptions as do not interrupt continuity. As to the level of attention required by the use of the word "personal", Mr Millard submits that that means individual, one on one attention.
>
> [20] The question whether constant personal attention is required is one to be resolved on the facts of each particular case. As *Campbell*, recognises, the level of care required may vary throughout the day, and the discretion available to ACC as to the rate to be paid may accommodate that variation. That involves a factual inquiry, based on the circumstances of the particular case. It is undesirable to

> place a gloss on the words of the statute. Whether a case which involves individual, one on one attention for part of each 24-hour period, and a lesser level of attention for other parts of the day, meets the test is to be determined more by a close examination of the facts than by a close dissection of the plain words of the section.
>
> [21] Applying those principles to the facts here, the evidence is that throughout much of the relevant period, if not all of it, Brent has been able to carry on a substantially normal life, attending school, playing sport, socialising, and the like. He was able to do so, subject to a level of attention and care from his mother in particular which was greater than the level of attention which would be required for a child who had not suffered such injuries. A mother may be expected to give personal attention to a young child for significant periods during the day. That is insufficient to qualify, since the "constant personal attention" required must be necessitated by the injury. The question is whether the heightened level of maternal attention in the supervision of childhood activities which was required in this case was of such a level as to amount to constant personal attention.

[44] The requirement for some level of personal care over 24 hours, albeit with a fluctuating level of care, was made clear by the Court of Appeal in Mr Matthews' case (cited as *Simpson v Accident Compensation Corporation* [2007] NZCA 247):

> [23] We are satisfied that this phrase means that an injured person requires some level of personal care over a 24 hour period. The level of care can fluctuate over the 24 hour period: *AIRC v Campbell* [1996] NZAR 2789 at 285 (HC). The phrase does not mean that nothing less than 24 hour per day attention will meet the test. However, as noted by MacKenzie J, "the word 'constant' requires some level of attention of the full 24-hour period and that attention is provided only with such interruptions as to not interrupt continuity": at [19]. The focus is on the level of care required by the injured person and not on who provides it. The fact that a person goes to a respite place or school does not break continuity if the injured person needs constant attention during that period. The applicability of s80(3) is a factual inquiry of whether the heightened attention required is of such a level as to amount to constant personal attention.

[45] The "place of abode" at which the constant personal attention is provided can be the person's house.

ASSESSMENT

Jurisdiction

[46] In his submissions of 4 May, Mr Ward seeks "an independent review of [Mr Reid's] whole file", so the Corporation can consider discretionary payments including loss of earnings and lump sum payments. Mr Reid, in his brief of evidence, invites me to make a wide range of orders against the Corporation. My jurisdiction, however, is confined to the matters decided by the reviewer on 27 May 2013, which in turn arose out of the Corporation's decision of 18 January 2006, and no other matters. Accordingly, it is only Mr Reid's entitlement to attendant care which is at issue here.

[47] The period of attendant care relevant to my jurisdiction is from October 1983 (discharge from the rehabilitation centre) to 30 June 1992 (expiry of the 1982 Act). My understanding is that there is a concurrent appeal in the District Court concerning the period commencing 1 July 1992.

Attendant care

[48] Mr Reid seeks from the Authority compensation for attendant care which he contends should have been provided by the Corporation in the period from October 1983 until 30 June 1992.

[49] While the reviewer dismissed the application for review on the basis of a lack of jurisdiction, as the review had been filed late, the most important factor in assessing a late application for review is the merits of the underlying claim; *McDougall* at 88. The reviewer's assessment of the merits was superficial. The reality is that there was no assessment at all. The reviewer found that Mr Reid had been unable to point to relevant evidence in late emerging documents (which is more about justifying the delay, than the merits of the substantive claim), so found that there were no merits. There was no discussion whatsoever of the underlying claim for attendant care.

[50] Furthermore, while the reviewer found prejudice to the Corporation caused by delay, I do not accept that. As Mr McBride rightly conceded, there is only general prejudice by effluxion of time, not any specific prejudice. The Corporation's file appears to be intact. The reviewer was also unduly focused on the overall delay since 1982, whereas the delay in filing the review was only six years. Little prejudice can have arisen out of that later period of delay.

[51] The real issue here is not delay in seeking attendant care or review of the Corporation's decision, nor prejudice to the Corporation, but whether Mr Reid can make good his claim for attendant care from October 1983 until June 1992. It is the merits of that claim which I will assess.

[52] The first point to note is that this claim concerns what Mr Reid was entitled to and not what was actually provided at the time by his then partner and/or mother and/or others. What was actually provided by way of attendant care cannot be determinative, otherwise the Corporation would be rewarded for failing to provide it at the time it was needed. However, the care actually provided is still highly relevant in assessing what his needs were, and therefore what he should have been provided with.

[53] It is straightforward to dispose of the first part of the claim, under section 80(2)(b) of the 1982 Act. That subsection requires "identifiable and reasonable expenses or losses incurred" by the person in giving help to the injured person. There is no evidence that his mother or anyone else incurred any expenses or losses for attendant care, so he cannot prevail under that subsection. Mr Reid does not contend on appeal that he can succeed under this subsection.

[54] This brings me to the claim under section 80(3).

[55] I have set out the relevant principles above. Attendant care is "constant personal attention". It requires a high level of personal care or supervision in daily life. It must be constant, that is, uninterrupted. This means 'round the clock' (168 hours weekly), day and night care. It will usually be 'one-on-one' care, but the authorities accept the level of care can fluctuate. It will typically be less at night.

[56] Mr Reid explained to me the nature of the care he needed. It is set out in considerable detail in the comprehensive report of Dr Haywood.

[57] Dr Haywood regarded Mr Reid's injuries as serious. That is obvious from the high level of whole person impairment he found (69%), consistent with that of Dr Fulton (77%). It is, however, immediately apparent from Dr Haywood's report that Mr Reid did not require what is regarded as 'attendant care', but instead required considerable 'home help'. The other medical reports, Corporation documents and even Mr Reid's own evidence confirm this, as does Mr Reid's DVD.

[58] Attendant care ("constant personal attention") may include assistance with and supervision of tasks such as feeding (including cooking/food preparation), personal hygiene, toileting, dressing, medication, the physical tasks of daily living such as transferring in/out of bed or a wheelchair or a vehicle, as well as supervision and monitoring of the safety of the injured person and sometimes supervision for the protection of others (as can occur when brain injuries cause behavioural issues).

[59] Mr Reid did not need such assistance on a 24-hour basis or even for the greater part of the day, let alone at night. The evidence before me is clear that Mr Reid was largely independent in personal care, hygiene, toileting, dressing, medication, mobility (with the use of aids), eating and recreation. He could independently use crutches, drive a car and later (when provided with one) drive a motorised scooter. He could take himself out of the house to travel to the city or

town centre, and to stay with friends or relations (though required home help from them, as much as from his mother). Mr Reid did not need assistance at night, except for occasional incontinence.

[60] The DVD certainly depicts the difficulties Mr Reid even now continues to face with daily activities, particularly mobility (transferring from one place to another), but it shows him doing so without the aid of others. I appreciate it shows him achieving these tasks today, not during the relevant period, but the evidence contemporary with the relevant period does not establish any greater degree of dependence in that period from October 1983 to June 1992.

[61] What it was that Mr Reid largely required then (and now) was assistance with household tasks, such as cleaning of the house (particularly the bathroom), vacuuming, dusting, laundry and gardening. This is not attendant care. Such assistance does not amount to "personal attention", let alone "constant personal attention".

[62] The attendant care Mr Reid needed was not significant. It included cooking/food preparation (in the absence of a modified kitchen) and some personal hygiene tasks (washing and drying the lower leg, nocturnal incontinence). This could not be regarded as even close to constant or uninterrupted care.

[63] The conclusion reached by Dr Haywood is compelling. While acknowledging that Mr Reid could not be left on his own for 24 hours without *some* assistance or supervision, he "did not require 24 hour supervision" (p32). For most of the day and virtually the entire night, Mr Reid could safely look after himself and did so.

[64] Credit for this independence must go to Mr Reid himself. He is a remarkable person who, despite serious injury and disability, has exhibited a fierce determination to get on with life and be as independent as he could possibly achieve. It is apparent that he did so with inadequate assistance from the Corporation for many years. Dr Haywood's plea to the Corporation was for greater assistance with home help and aids of various types, but not for attendant care as such.

Conclusion

[65] I conclude that the Corporation's decision declining attendant care was correct. Most of the assistance Mr Reid required is not of a type that amounts to attendant care. Even if that home help is added to the attendant care that he did

require, it does not amount to “constant” personal attention. Unfortunately, I must find that Mr Reid fails to satisfy the high threshold required by a clear margin. Despite the errors made by the reviewer, the outcome in terms of declining the claim for attendant care was correct.

OUTCOME

1. The appeal is dismissed and the outcome of the review decision is therefore confirmed.

2. Leave is reserved concerning costs. A party may seek costs within 21 days. If so, the other party shall respond within 14 days.

_____

D J Plunkett