

**Steven Brink Homes**

Applicant

**ACCIDENT COMPENSATION  
CORPORATION**

Respondent

**Before:**

D J Plunkett

**Counsel for the Appellant:**

A Beck

**Counsel for the Respondent:**

A Barnett

**Date of Decision:**

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## **DECISION**

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### **INTRODUCTION**

[1] This is an application by Steven Brink Homes for leave to appeal to the High Court against the decision of the Authority of 1 February 2013.

[2] Mr Homes has a brain injury. He originally appealed to the Authority against a decision of a reviewer but then withdrew that appeal. Many years later, he applied to reinstate the appeal, claiming that it was withdrawn due to a misunderstanding as to the nature of a withdrawal. He thought it was only a suspension. The Authority did not believe his evidence and dismissed the reinstatement application. The essential issue for the Authority now is whether, in finding Mr Homes was not credible, it should have had regard to the effect of the brain injury on his level of understanding of a withdrawal.

### **BACKGROUND**

[3] Mr Homes suffered serious head injuries in a motorcycle accident on 5 January 1977 and cover was granted by the Corporation.

[4] On 29 July 1985, the Corporation assessed Mr Homes' permanent incapacity to earn at 28%, pursuant to section 114 of the Accident Compensation Act 1972 ("the 1972 Act").

[5] A neurologist reported in 1991 that Mr Homes still had "major neurological difficulties", with memory being "a major difficulty" for him (Dr Pollock, 13 December 1991).

[6] On 3 May 1993, the Corporation reassessed Mr Homes' permanent incapacity to be 46%, with the effective assessment date being 15 July 1987. The Corporation increased his incapacity to 50% on 9 January 1994.

[7] That decision was upheld by a reviewer on 7 February 1997. The reviewer incorrectly refers to the Corporation's decision of 3 March 1993, whereas it was on 3 May 1993 (though was subsequently revised). The applicant appeared unrepresented at the hearing before the reviewer. According to the reviewer, the assessment of 50% in January 1994 was based on the report of Mr Mellor, psychologist, of 23 May 1989 advising that Mr Homes could work 20 hours per week.

[8] Mr Homes then made his first appeal to the Authority within time, on 10 March 1997, challenging the decision of 7 February 1997 (Authority file no. ACA 15/97). He filed the appeal in person.

[9] On 15 June 1998, a solicitor acting for Mr Homes, Mr Cadenhead, wrote to the Authority advising that he had "received instructions from Mr Homes that he wished to have this appeal withdrawn". He enquired as to whether an appearance would be required (the Authority having set the appeal down for a hearing). The Authority wrote to Mr Cadenhead on 17 June 1998 acknowledging that the appeal had been withdrawn and advising that no appearance would be required.

[10] In 2005, Mr Sara, the applicant's present solicitor, applied on his behalf to the Corporation for interest on the backdated earnings compensation. The right to interest from 15 July 1987 arose following the primary decision of 3 May 1993. There was no challenge at this time to the primary decision itself (as revised in 1994), namely a 50% incapacity, with the date of assessment being 15 July 1987.

[11] The Corporation declined interest but Mr Homes sought a review, which was successful and interest was awarded (review decision 9 August 2006).

[12] In 2009 or 2010, Mr Homes instructed Mr Sara to challenge the adequacy of the 50% incapacity.

[13] On 22 November 2011, Mr Sara, on behalf of Mr Homes, filed a second appeal in the Authority against the decision of the reviewer of 7 February 1997. Mr Sara acknowledged that he would need leave to lodge the appeal, which was well out of time. Mr Sara was not aware that the applicant had previously filed such an appeal (on 10 March 1997) and then withdrawn it in the following year.

[14] The Authority, noting that such an appeal had already been filed and withdrawn, directed Mr Homes to file an application to reinstate his earlier appeal, which was duly filed on 4 July 2012 (ACA 9/11).

[15] The application to reinstate the first appeal, together with the second appeal (effectively an application for leave to appeal out of time), were heard by the Authority (Ms Bedford) on 4 and 5 September 2012. A decision was issued on 1 February 2013 ([2013] NZACA 2). The Authority dismissed both applications, also deciding that there would be no order as to costs. It did not accept as credible the evidence of Mr Homes that he was under the mistaken belief, at the time the first appeal was withdrawn, that it was merely to be put on hold and that he thought he could come back to it. Furthermore, the Authority considered the merits of the appeal did not favour Mr Homes.

[16] It is this decision of 1 February 2013 which Mr Homes seeks the leave of the Authority to appeal against to the High Court.

## **CASE ON APPEAL**

[17] There are submissions from Mr Homes of 5 March and 8 May 2014. It is contended that the Authority's decision is wrong in law and fact.

[18] The Corporation's submissions are dated 7 April 2014. The Corporation opposes leave to appeal.

## **ASSESSMENT**

[19] By virtue of section 391(1) of the Accident Compensation Act 2001, the Authority has jurisdiction to hear this application. It is to be determined pursuant to section 111 of the Accident Compensation Act 1982 ("the 1982 Act"):

### Appeal to High Court

- (1) Where any party is dissatisfied with any order or decision of the Accident Compensation Appeal Authority, that party may, with the leave of the Authority, appeal to the High Court against that order or decision:

Provided that, if the Appeal Authority refuses to grant leave to appeal, the High Court may grant special leave to appeal.

- (2) The Appeal Authority or the High Court, as the case may be, may grant leave accordingly on a question of law or if in its opinion the question involved in the appeal is one which by reason of its general or public importance or for any other reason ought to be submitted to the High Court for decision.

### *Leave to appeal - principles*

[20] The principles and factors applicable in considering leave to appeal on the ground of a question of law were all conveniently listed by the District Court, following a number of High Court authorities, in *O'Neill v Accident Compensation Corporation* DC Wellington Decision No 250/2008, 8 October 2008 at [24], as follows:

- (i) the issue must arise squarely from the decision challenged and not from *obiter* comments;
- (ii) the contended point of law must be capable of *bona fide* and serious argument;
- (iii) care must be taken to avoid allowing issues of fact to be dressed up as questions of law;
- (iv) where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law;
- (v) a decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with the decision or the true and only reasonable conclusion on the evidence contradicts the decision;
- (vi) whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law.

[21] It is not necessary to show that the decision-maker was wrong, only that there is a *bona fide* arguable question of law, a "modest test"; *Bondarenko v*

*Accident Compensation Corporation* HC Wellington CIV 2006-485-555, 23 February 2007 at [3] & [23] (while a case concerning special leave, the same threshold applies to leave applications).

[22] The Authority's jurisdiction is not merely confined to questions of law, since leave can be granted where, "for any ... reason", there is a question which ought to be submitted to the High Court, including by reason of its general or public importance.

[23] In exercising its discretion, the Authority is mindful of the proper use of the scarce resources of the High Court. Leave is not given as a matter of course; *O'Neill* at [25].

[24] Such an applicant seeks an indulgence, so the onus rests on him or her to satisfy the Authority that, in all the circumstances, the interests of justice require that leave be given; *Kenyon v Accident Compensation Corporation* [2002] NZAR 385 at [15].

[25] The matter determined by the Authority on 1 February 2013 was an application to reinstate the first appeal made on 10 March 1997 within time. There was also the second appeal, made well out of time on 22 November 2011, but this panel of the Authority agrees with the decision of 1 February 2013 that, if the reinstatement application fails, so must leave to appeal out of time be refused for the second appeal.

#### *Reinstatement of withdrawn appeal - principles*

[26] The Authority (now differently constituted) agrees with the earlier decision that it does have jurisdiction to grant a reinstatement application. This power was impliedly approved in *Miller v Accident Compensation Corporation* HC Whangarei A339/97, 10 September 1998. It was accepted by the Authority in *Adair v Accident Compensation Corporation* [2010] NZACA 5. It arises from section 108(11) of the 1982 Act, being the power to determine its own procedure (*Adair* at [86]).

[27] The principles applicable are as follows. The question is whether the withdrawal occurred by virtue of a mistake or there was a lack of intent on the part of the withdrawing appellant (*Adair* at [94]). In such circumstances, the withdrawal is regarded as a nullity. The Authority should not, however, reinstate where it would amount to an abuse of process (*Adair* at [93](b)). That would be the case if an appellant had merely changed his or her mind concerning pursuing an appeal.

The remedy is available to avoid miscarriages of justice, where it would not conflict with legislation to the contrary; *Ben View Farms v GE Capital* [2002] 1 NZLR 698 at [6] - [8].

[28] The Corporation submits that the threshold for reinstating a withdrawn appeal is very high, but no authority is cited for this proposition (submissions 7 April 2014, para 6). It is not accepted. The Authority would not describe the threshold as very high, high or low, since if the criteria are satisfied, reinstatement can occur. Rather than speak of a very high threshold or a threshold higher than for leave to appeal out of time, it would be more accurate to describe the criteria to be satisfied as narrow. The circumstances in which leave to appeal out of time could be granted would be wider.

*Applicant's brain injury*

[29] Counsel for the applicant contends that it is undisputed that Mr Homes suffered severe brain damage, yet the Authority found on 1 February 2013 that this was irrelevant in assessing the credibility of the reason he gives for withdrawing the appeal. According to counsel, no reasoning was provided to justify the conclusion that Mr Homes should not be accorded a "lesser standard of understanding" (at [50] of the Authority's decision):

I cannot accept Mr Sara's submissions that Mr Barnett made too much of Mr Homes' evidence, or on the evidence presented, that Mr Homes should be held to a lesser standard of understanding, or credibility, than an adult with normal faculties.

[30] It is difficult to understand what point is being made by the Authority here. The applicant had the burden of establishing, on the balance of probabilities (the requisite standard of proof), that he was mistaken as to the nature of the withdrawal of his earlier appeal. It was his evidence that he thought the appeal was merely to be put on hold, to be reinstated when his then financial and family troubles had settled down. The Authority found against him on this critical factual issue, on the basis that his evidence was not credible.

[31] It is to be remembered that the whole basis of Mr Homes' incapacity for which the Corporation provides earnings-related compensation (at 50% incapacity according to the Corporation but 95% he contends) is the mental consequences of severe head injuries. Accordingly, it seems seriously arguable (if not plain) that his degree of understanding of what he had done in withdrawing the appeal in 1998 is critical. That being the case, so is his brain injury and the mental consequences of it. Yet, while the Authority certainly recognised the brain injury

(after all, even the sentence quoted acknowledges his less than normal faculties), there is no discussion at all of his mental capacity or cognitive functioning in the assessment of the credibility of his contention that he misunderstood the nature of the withdrawal.

[32] The Authority can accept that there is no lesser standard of credibility. In other words, evidence must be credible to be accepted as the truth, whether or not that person is mentally disabled. Furthermore, the standard of proof, the balance of probabilities, remains the same for all. However, the statement that Mr Homes should not be accorded a lesser standard of understanding than an adult with normal faculties may not be correct. The Authority appears to be stating that his brain injury and mental functioning are irrelevant to the assessment of the credibility of his evidence concerning his understanding of the nature of withdrawal. That is arguably wrong. The applicant's lawyer at the hearing before the Authority (Mr Sara) had emphasised the relevance of this factor in his final submissions following the hearing (undated submissions, para 6).

[33] Counsel for the Corporation, Mr Barnett, makes the valid point that the Authority heard the applicant's evidence *viva voce* at considerable length and addressed it in detail in the decision. It is contended that only the Authority can assess the credibility of Mr Homes. It had the advantage of hearing the evidence and observing his demeanour. Counsel submits that the finding that Mr Homes lacked credibility, in his evidence as to mistake or lack of intention to withdraw, was open to the Authority and is not susceptible to an appeal to the High Court.

[34] It is correct that the Authority had the advantage of hearing and observing Mr Homes, but that advantage is undermined when the assessment fails to have regard to a highly material factor, namely his brain injury.

[35] The Authority's rejection of the credibility of the applicant's evidence concerning his understanding of the nature of withdrawal was essential to the dismissal of his reinstatement application ([2013] NZACA 2 at [52]).

[36] The failure of the Authority to accept Mr Homes' brain injury as relevant to the assessment of his credibility concerning his understanding of the nature of withdrawal, may be a fundamental flaw in the Authority's decision. If so, it would be an error of law.

*Merits – issue as to date of assessment or hours or both?*

[37] The Authority also found that the merits of Mr Homes' substantive underlying claim – challenging the number of hours he could work weekly as part of the assessment of his permanent earnings incapacity – did not favour him.

[38] The Authority did consider though that there was merit to a challenge to another factor used in that assessment, being the date of assessment chosen by the Corporation (1987). However, according to the Authority, that had not been the “real issue” presented to it ([2013] NZACA 2 at [51]). Instead, said the Authority, the appeal rested upon challenging the number of hours Mr Homes could work.

[39] Counsel for the applicant, Mr Beck, submits this is not correct, since the date of assessment was always an issue in the earlier appeal submissions (Mr Beck's submissions of 5 March 2014, para 24). Counsel is correct (see, for example, Mr Sara's submissions 14 June 2012, paras 147-148). Again, Mr Sara (counsel for Mr Homes at the hearing) had made clear in his final submissions that there remained an issue as to the date, though had conceded that the “real issue” was with the hours flowing from the date (undated submissions, paras 9 & 13).

[40] The Authority was correct as to the “real” or main issue, but misunderstood the breadth of the applicant's challenge to the Corporation's section 114 assessment.

[41] This member of the Authority agrees with the member who made the decision on 1 February 2013 that there is some merit to the challenge to the effective date of assessment, if not to other aspects of the assessment of permanent incapacity. In determining the reinstatement application, and even less in this application for leave to appeal that decision, the Authority is not deciding the merits of the applicant's underlying application (the challenge to the section 114 assessment), only assessing whether there is a serious argument. There is such an argument, as even the decision of 1 February appears to accept.

*Prejudice to Corporation*

[42] The Corporation contends it would be prejudiced if it had to revisit a decision made more than 20 years ago on 3 May 1993 (submissions 7 April 2014, para 17).



[43] This was not advanced by the Corporation in the context of the reinstatement or late appeal applications, beyond stating that prejudice is a relevant factor (see the Corporation's submissions 8 August particularly at para 54, submissions 22 November 2012). There was no contention then that the Corporation was prejudiced, let alone any particulars of prejudice.

[44] The Corporation concedes it need not be addressed on the reinstatement application (submissions 7 April 2014, para 16). It will not be, but the Authority would have thought that with all the documentation and medical evidence still available, there would be little material prejudice to the Corporation. It is, after all, for Mr Homes to establish ultimately that the assessment of his incapacity should be different from that determined by the Corporation. The delay may actually be more prejudicial to him.

[45] The Authority also agrees with Mr Beck's submission that prejudice relating to this application (the absence of Mr Cadenhead's file in relation to withdrawal) is not material, as the prejudice that might be relevant would be that concerning the substantive section 114 assessment (see applicant's submissions 8 May 2014, para 17).

### *Conclusion*

[46] The Authority concludes that the decision of 1 February 2013 may be flawed as to the finding that Mr Homes was not credible in his alleged misunderstanding of the nature of withdrawal, given that no account was taken of his brain injury. This would be an error of law. Furthermore, there is some merit to the underlying challenge to the section 114 assessment, the breadth of which was misunderstood in the Authority's decision. The interests of justice require that leave be given.

[47] In granting leave, the Authority does not say that Mr Homes is to be believed, with the Corporation's submissions of 22 November 2012 pointing to real obstacles in accepting his evidence.

[48] It is unfortunate that the challenge by Mr Homes to the reviewer's assessment of his permanent incapacity has become bogged down in legal procedure, with the merits of the substantive appeal having never been considered by a judicial body. In saying that, no fault is attributed to any party.

## **OUTCOME**

[49] There is a question of law for submission to the High Court:

Should the assessment of the credibility of the statement of Mr Homes, that he believed the withdrawal of his appeal was only a suspension of it, have regard to his brain injury and its consequences in terms of his cognitive functioning?

[50] The applicant is therefore given leave to appeal to the High Court against the Authority's decision of 1 February 2013.

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D J Plunkett