

Murray Grant Byrnes
Appellant

**ACCIDENT COMPENSATION
CORPORATION**
Respondent

Before: D J Plunkett

Counsel for the Appellant: P Schmidt

Counsel for the Respondent: D Tui

Date of Hearing: 11 August 2014

Date of Decision: 20 August 2014

DECISION

INTRODUCTION

[1] This is an appeal by Murray Grant Byrnes against the decision of a review officer on 13 September 2013.

[2] Mr Byrnes injured his back working as a carpenter in 1976. Following a period of full-time duties, he was incapacitated from July 1985. Mr Byrnes resumed carpentry work with the same employer, albeit doing different, lighter work on reduced hours, for only a month in August 1986 before becoming incapacitated again. The primary issue for the Authority is whether his entitlement to earnings related compensation after August 1986 should be on the basis of his pay rate at July 1985, or the higher rate in August 1986.

BACKGROUND

[3] On 29 October 1976, Mr Byrnes injured his lower back while pushing a heavy beam at his work as a carpenter for Fletcher Construction ("Fletchers").

[4] A claim for accident compensation was accepted at some point by the respondent Corporation. It is not apparent to the Authority what work he did in the immediate aftermath of the injury, but it appears that he received earnings related compensation at various times in the period from November 1976 to May 1979.

[5] In May 1979, Mr Byrnes returned to full-time normal duties as a carpenter with Fletchers.

[6] Mr Byrnes then became totally incapacitated as a carpenter from 15 July 1985. The Corporation resumed payment of earnings related compensation from that date, based on his then current earnings (at July 1985). The Corporation considered a number of options for the rate of payment, adopting the figure most favourable to Mr Byrnes of \$323.36 weekly.

[7] The next development was that Mr Byrnes returned to carpentry work at Fletchers in the period from 4 to 31 August 1986. It was lighter duties only. He worked the reduced hours which follow, with his weekly earnings set out:

Week ending 10 August 1986 – 28 hours, earning \$315.68

Week ending 17 August 1986 – 32 hours, earning \$353.40

Week ending 24 August 1986 – 16 hours, earning \$164.17

Week ending 31 August 1986 – 32 hours, earning \$368.20

[8] A letter from Fletchers to the Corporation (dated 22 August 1986) stated that during the August 1986 period, Mr Byrnes would have earned \$421.69 weekly had he worked a 40-hour week.

[9] While the hourly rate paid to Mr Byrnes in August 1986 was considerably higher than what he had previously earned, as a result of the reduced hours, he still received top-up earnings related compensation from the Corporation.

[10] Mr Byrnes worked a few days in September, but Fletchers finally terminated his employment on 26 September 1986.

[11] On 10 December 1986, the Corporation advised Mr Byrnes that it would cease earnings related compensation from 18 January 1987, since it regarded his incapacity as no longer related to the 1976 injury.

[12] The Corporation's decision was in due course challenged by Mr Byrnes. On [deleted], the Authority (Ms Bedford) issued a decision quashing the Corporation's decision of 10 December 1986 and reinstating Mr Byrnes' entitlement to earnings related compensation from 18 January 1987 ([deleted]).

The Authority also determined how the compensation should be calculated, directing the Corporation to base it on the August 1986 figure.

[13] The Corporation issued two decisions setting out the back-dated compensation payable to Mr Byrnes as a result of the Authority's decision. On 3 October 2012, he was advised of compensation of \$93,481.31 for the period from 1 January 1988 to 3 April 1997. Then, on 12 November 2012, Mr Byrnes was advised that compensation of \$83,226.53 (WINZ benefits having been deducted) would be paid for the period from 4 April 1997 to 16 September 2012. Both sums were based on his July 1985 wages, increased to take into account inflation. It appears not to have been backdated to January 1987 as Mr Byrnes had earnings through 1987 in an unrelated occupation higher than the earnings related compensation he would otherwise have been entitled to.

[14] Mr Byrnes challenged the Corporation's calculation, largely on the basis that it should have used his August 1986 earnings figure and not the July 1985 figure. He contended that the later higher figure had been directed by the Authority in its decision on 4 May 2012.

[15] On review, a review officer dismissed the appellant's challenge to both the 3 October and 12 November 2012 assessments, in a decision issued on 13 September 2013. The review officer found that neither the resumption of light duties in August 1986, nor the subsequent termination of Mr Byrnes' employment in September 1986, constituted the commencement of a new period of incapacity, in terms of the legislation. Accordingly, the Corporation was not required to assess relevant earnings based on the later August 1986 wage figure. While there had been a change in the degree of incapacity, from total to partial, when Mr Byrnes resumed employment on 4 August, he had nevertheless remained incapacitated (albeit partially) in terms of the statutory definition.

[16] Mr Byrnes duly appealed to the Authority against the review decision of 13 September 2013.

THE CASE ON APPEAL

[17] The Authority received from the appellant submissions (20 February 2014), a paginated bundle of documents, a bundle of authorities (and further loose authorities) and a schedule of Orders in Council.

[18] The respondent filed submissions (16 April 2014), a paginated bundle of documents and a paginated casebook. At the Authority's request, further

evidence was produced by the respondent immediately prior to the hearing.

[19] The parties' contentions are discussed later. In essence, the appellant says there was a new employment and new incapacity in August/September 1986, hence the August 1986 wage rate (and allowances) should be used to calculate the long-term earnings related compensation. The Corporation submits there was no such new employment or incapacity. The incapacity was continuous from July 1985, hence the July 1985 wage rate should be used.

THE LAW

[20] An appeal lies to the Authority against certain decisions of a review officer (sections 101, 107 Accident Compensation Act 1982 – "the Act"). Such an appeal lies in this case. An appeal is by way of a rehearing, with all findings of fact and law at large.

[21] Notwithstanding the repeal of the Act (and its predecessor, the Accident Compensation Act 1972), the Authority continues to have jurisdiction over certain claims arising from personal injury by accident occurring on or before 30 June 1992 (section 391 Accident Compensation Act 2001).

[22] The relevant provision of the Act at issue here is section 53:

53. Relevant earnings

...

(9) Where any period of an earner's incapacity for work does not commence on the date of the accident, and the Corporation is of the opinion that relevant earnings ascertained in accordance with the foregoing provisions of this section do not fairly and reasonably represent the earner's normal average weekly earnings at the time of the commencement of the period of incapacity for work, the Corporation may, notwithstanding the foregoing provisions of this section, determine an amount which, in its opinion, would fairly and reasonably represent his normal average weekly earnings at the time of the commencement of the period of incapacity for work, having regard to such information as it may obtain regarding his earnings before the time of the commencement of the period of incapacity for work and his earnings at the time of the commencement of that period, and the period of his residence in New Zealand before the time of the period of incapacity for work and his work history, and such other relevant factors as the Corporation thinks fit; and any amount so determined shall be treated as if it was his relevant earnings for the purpose of assessing earnings related compensation during the particular period of incapacity for work:

Provided that any determination made under this subsection shall not bind or prejudice the Corporation or limit or restrict its discretions or powers with regard to any assessment or determination of that person's relevant earnings or loss of earning capacity during any other period of his incapacity for work to which the determination does not relate.

...

[23] It is also relevant to have regard to the definition of “incapacitated” in section 2(1) of the Act:

“Incapacitated” means suffering from total or partial incapacity; and “incapacity” has a corresponding meaning.

ASSESSMENT

Whether earlier direction of Authority relevant

[24] It is recorded that the parties are agreed that the direction of the previous Authority on [deleted] as to how the earnings related compensation should be calculated does not bind the current Authority. The calculations by the Corporation in October and November 2012 did not use the August 1986 figure of \$421.69 per week, as the Corporation regarded the figure as inconsistent with the relevant statutory provision (section 53(9)). The Corporation interpreted the direction as conferring a discretion on the Corporation as to whether it relied on the later figure or not.

[25] It seems clear to the present Authority that no such discretion was intended to be conferred by the direction of the previous Authority. It was intended as a mandatory direction to base the calculation of his post-January 1987 earnings related compensation on the figure of \$421.69 weekly. Notwithstanding the non-compliance by the Corporation with that direction, the parties agree that the issue for the Authority now is whether the direction was consistent with the Act. The Authority is now in effect determining whether the decisions of 3 October and 12 November 2012 correctly calculated the earnings related compensation payable to Mr Byrnes for the period from January 1988 to September 2012, not whether it should have followed the earlier direction. The direction appears to be *obiter* and no analysis of the facts in terms of section 53(9) preceded it.

Whether section 53(9) applicable

[26] Mr Schmidt, counsel for Mr Byrnes, submits that the real issue for the Authority is what would amount to fair compensation for the period in question from January 1988 to September 2012. He says that Mr Byrnes was working in August 1986. This was a new employment. He did not return to his old duties as a leading hand on a construction site, but instead undertook lighter duties for the same employer at one of their yards. The fairest measure of his earnings following that period of employment must be the earnings during that period, not what he had earned in his old job more than a year before.

[27] Mr Schmidt accepted that he could maintain this argument only if section 53(9) was applicable. He submitted there was a new incapacity in August/September 1986, in terms of that subsection.

[28] Mr Tui, for the Corporation, says that subsection (9) is not applicable to the August/September 1986 period as there was no new incapacity. He says that Mr Byrnes remained continuously incapacitated from July 1985 onwards. Even when he returned to work in August 1986, he struggled and could only perform lighter duties with reduced hours. He never returned to full-time work and never returned to heavy duties, as he had been doing pre-accident (and even in July 1985). There was, he says, no new employment. The August 1986 work was as a carpenter with Fletchers, though the duties and site were different, just as the July 1985 and indeed pre-accident employment were as a carpenter for Fletchers.

[29] Counsel for Mr Byrnes correctly describes the work in August 1986 as a trial period (submissions 20 February 2014, para 19). The medical evidence at the time of the trial shows that he never became fit for work, even for lighter duties (see medical certificates of Dr Jackson 19 August & 9 September 1986, Mr Hawes 2 September 1986, Dr Butler 16 September 1986).

[30] The Authority accepts the Corporation's submission that there was no new employment and that no new period of incapacity commenced in August or September 1986. At best, there was a change in the degree of incapacity in the sense that prior to 4 August Mr Byrnes had been totally incapacitated (in terms of his pre-accident carpentry work), whereas in the period from 4 to 31 August he might be considered only partially incapacitated as he was able to perform lighter duties on reduced hours. However, even this concession in his favour is somewhat doubtful, given the short period, the recurring pain and departure for that reason. There was in reality no change in the degree of incapacity.

[31] Even if a change of degree of incapacity is accepted, it was the same incapacity in terms of the statutory definition of "incapacitated". The arguably partial incapacity during August 1986 was not different from the July 1985 incapacity in terms of the statutory definition and, as noted above, nor was the employment in August 1986 a different or new employment. He remained a carpenter for Fletchers.

[32] In terms of section 53(9), the Authority finds that no new period of incapacity arose when he commenced employment in early August 1986 or when he left at the end of August or when Fletchers terminated his employment in

September.

Assessment of earnings related compensation

[33] Turning then to the calculation of Mr Byrnes' earnings related compensation, the Corporation had correctly used the July 1985 rates to calculate compensation from July 1985 to August 1986. This is because there was a new incapacity, in terms of the opening words of section 53(9), following Mr Byrnes ceasing work on about 15 July 1985. His incapacity then had not commenced on the date of the accident. In the period from 15 July 1985, Mr Byrnes' pre-accident (1976) earnings could not have fairly and reasonably represented his earnings at the commencement of the period of incapacity in July 1985.

[34] That July 1985 incapacity remained the same incapacity in the following years, through and beyond the short trial period on restricted hours in August 1986. The Corporation therefore correctly used the July 1985 wage figure from July 1985 onwards. The payment of earnings related compensation was as continuous as the incapacity, since neither ceased during August or September 1986. The rate did escalate though with the rate of inflation, so the actual figure used was much higher in the subsequent years.

[35] Counsel submits that the purpose of the assessment under section 53(9) is to fairly determine Mr Byrnes' long-term loss of earnings at the time his employment with Fletchers was terminated, not when he was first incapacitated for heavy work, which was in July 1985 (submissions 20 February 2014, para 27). This submission is in essence correct, but it must be remembered that the assessment of loss of earnings after August/September 1986 must comply with the relevant statutory provisions, including section 53. The assessment of fair long-term compensation is not at large. In accordance with the opening words of subsection (9), the incapacity for work arising from the 1976 accident commenced in July 1985 and not in August or September 1986. The fair and reasonable compensation from January 1988 onwards will, in accordance with section 53, be based on the July 1985 wage rate.

Conclusion

[36] There was no new employment in August 1986. Mr Byrnes' permanent incapacity for work arose in July 1985 and not August or September 1986. In accordance with section 53(9), the July 1985 rates are applicable for the assessment of his earnings related compensation for the period from January

1988 to September 2012.

OUTCOME

[37] The appeal is dismissed. The decision of the review officer is confirmed.

D J Plunkett