**IN THE DISTRICT COURT**
**AT WELLINGTON**

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

**[2021] NZACC 143** **ACR 345/18**

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| UNDER | THE ACCIDENT COMPENSATION ACT 2001 |
| IN THE MATTER OF | AN APPEAL UNDER SECTION 162 OF THE ACT |
| BETWEEN | STEPHEN MONK<br>Applicant |
| AND | ACCIDENT COMPENSATION CORPORATION |

Hearing: On the Papers

Judgment: 22 September 2021

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**JUDGMENT OF JUDGE AA SINCLAIR**
**[Application for leave to appeal: s 162 Accident Compensation Act 2001]**

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[1] The applicant, Stephen Monk, lodged a claim with the Accident Compensation Corporation ("the Corporation") in May 2016 for a work-related gradual process injury. Mr Monk had worked as a spray painter and sandblaster for 27 years and claimed to have suffered occupational diseases due to his employment involving exposure to toxic solvents and toxic metals. Following investigation, the Corporation declined the claim for cover on 5 January 2017. The Corporation's decision was upheld at review.

[2] Mr Monk lodged an appeal to the District Court. In a decision issued on 12 January 2021, Judge Henare dismissed his appeal. Mr Monk now seeks leave to appeal to the High Court.

**District Court Judgment**

[3] Mr Monk sought cover for an occupational disease listed under Schedule 2 of the Accident Compensation Corporation Act 2001 ("the Act"). Pursuant to s 30(3) of the Act, in the event that Mr Monk established that he had suffered an occupational disease of a type described in Schedule 2 from work exposure then a presumption operated in respect to causation and other criteria under s 30(1).

[4] Judge Henare discussed the case law in which the relevant provisions (s 30(3) and s 60) had been considered and identified the issue for determination in the appeal as follows:

> [66] The primary issue in the appeal is whether Mr Monk has suffered a physical injury. In accordance with *Priddle*[1] the evidence requires there to be both a Schedule 2 disease of a type generally accepted by the medical profession as caused by arsenic or mercury or lead and their toxic compounds, or the diagnosis of lung cancer caused by elements (specifically cadmium) and workplace exposure, before the onus shifts to the Corporation under s 60.

[5] The medical evidence filed on behalf of the Corporation was from Dr Monigatti (Occupational Medical Specialist), Dr Shaw (Neuropsychologist) and the Corporation's Toxicology Panel. A report from Dr Emrys (Occupational Medicine Specialist) was provided following the hearing. In summary, this evidence was to the effect that Mr Monk had not suffered a physical injury from his exposure to metals in his workplace.

[6] Mr Monk relied in support of his claim on the medical evidence of his General Practitioner, Dr Wojcik (including his post hearing report dated 4 July 2020). It was Dr Wojcik's opinion that Mr Monk had suffered lead toxicity as well as other forms of toxicity from exposure to other metals in the workplace.

[7] Judge Henare undertook a detailed review of the competing evidence. She considered that the only objective factors were the blood tests and urinary tests taken in July 2014. This testing was performed about two weeks after Mr Monk had left

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[1] In the *Estate of Priddle and Ors v Accident Compensation Corporation* [2006] NZCA 297 at [32].

his employment as a sandblaster and spray painter and was relatively close in time to the last exposure. The blood lead test showed "normal".

[8] Further tests were undertaken in October 2014 following provocation by the use of DMSA chelation. Dr Wojcik also arranged for a hair sample. The urinary lead levels were high while the lead level on the hair sample testing was also "very high".

[9] Dr Monigatti and Dr Emery were of the view that this evidence was unreliable. After referring to their evidence and other matters raised by Dr Wojcik, Judge Henare concluded:

> [87] It is apparent from this opinion, the only objective factors were the blood tests which were normal, urinary tests which were normal for lead levels, in July 2014, before chelation provocation, and hair sample testing. Dr Wojcik placed importance on hair sample testing, the result of which he described as "highly significant". However, Dr Emery stated that while this is a test known to be available "it has not found any utility in monitoring workers exposure to metal".

[10] In reaching her findings, Judge Henare also took into account the specialist qualifications and experience of all the medical practitioners giving evidence. While noting that Dr Wojcik was not only a general practitioner but also a forensic physician and clinical metal toxicologist, Her Honour went on to state:

> [92] .... However, the Court cannot ignore the considerable body of opinion from the occupational medicine specialists, the toxicologist specialists of longstanding experience on the Toxicology Panel as well as the neuropsychologist opinion in this case, all of whom share [the] consistent view that the evidence does not support the claim for cover for heavy metal toxicity diagnosed by Dr Wojcik.

[11] On the basis of all the evidence before the Court, Judge Henare concluded that Mr Monk had not suffered a personal injury under s 30(3) because he had not established on the balance of probabilities that he had suffered a disease that was of a type generally accepted by the medical profession as caused by the metals identified under items 7, 8, 9 or 31 of Schedule 2 of the Act.

**Case for the Applicant**

[12] Mr Monk's written submissions are contained in emails dated 23 February 2021, 1 March 2021, 18 March 2021 and 28 July 2021 and are summarised as follows:

- Mr Monk is critical of the Corporation and its evidence and considers that he has a lawful claim for toxic poisoning. He contends that the Court was distracted by the Corporation's evidence.

- The Corporation has no evidence the toxins are from Mr Monk's non-work activities. Instead it has focused on pre-existing conditions accentuated by the toxins. Mr Monk contends that this is misleading.

- Mr Monk is critical of the investigation undertaken by the Corporation and in particular, he says that the Corporation has not investigated to any material extent, any of his former employment conditions.

- The report provided by Dr Wojcik contained many references to articles in medical journals written by professionals not associated with the Corporation. Mr Monk submits that as such it contained far more knowledge and outweighed the evidence presented by the Corporation.

- Mr Monk contends that there is sufficient evidence from the investigations by Dr Wojcik to support the fact of toxicity and that the only explanation for the presence of those compounds in his body was his exposure to such metals in his employment.

**Discussion**

[13] A party who has been unsuccessful on appeal to the District Court may apply for leave to appeal to the High Court on a question of law pursuant to s 162 of the

Act. The question of law must be one capable of bona fide and serious argument to qualify for the grant of leave.[2]

[14] In the present case, Mr Monk has not identified any particular question of law. Rather the issues raised by him involve matters of fact.

[15] A fact-finding court's treatment of facts can amount to an error of law for the purposes of s 162 where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of the decision or the true and only reasonable conclusion on the evidence contradicts the decision.[3]

[16] Mr Monk identifies a number of issues in his submissions where he is critical of the Corporation's investigation and the Court's analysis of the medical evidence. Overall, he contends that the Court should have relied on the opinion of Dr Wojcik and not preferred the evidence given by the specialists on behalf of the Corporation.

[17] Judge Henare undertook a careful analysis of all the medical evidence before the Court in reaching her findings and decision. I am satisfied that those findings were clearly open to her on the evidence.

[18] Importantly, it was only after Judge Henare had undertaken this analysis that Her Honour rejected Dr Wojcik's opinion and determined on balance that the weight of evidence before the Court did not show that Mr Monk had suffered a personal injury under s 30(3) of a type described in Schedule 2 as contended by Mr Monk.

[19] On this basis, I am satisfied there has not been any factual error of a nature which it could be seriously argued amounted to an error of law so as to qualify for the grant of leave.

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[2] *Impact Manufacturing Ltd v Accident Rehabilitation and Compensation Insurance Corporation* HC Wellington AP 266/00, 6 July 2001.

**Result**

[20] The application by Mr Monk for leave to appeal to the High Court is dismissed. There is no issue as to costs.

AA Sinclair
District Court Judge

Solicitors: Medico Law Limited, Auckland for the Respondent.

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[3] *Edwards v Bairstow* [1955] 3 All ER 48,57; and *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [26].