IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 27 **ACR 325/19**

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

Hearing: 26 November 2020
Heard at: Dunedin/Otepoti District Court

Appearances: The appellant in person
Mr I Hunt for the respondent

Judgment: 4 February 2021

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Whole Person Impairment Part 4 – Schedule 1,
Accident Insurance Act 1998]

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[1] This is an appeal in respect of the Corporation's decision, dated 23 January 2019, that the appellant was no longer entitled to receive an independence allowance because the level of his whole person impairment was assessed as being 5%, less than the 10% threshold.

Background

[2] In 1993, the appellant suffered a workplace head injury. On 21 April 2001, Dr Tudor Caradoc-Davies assessed the appellant's whole person impairment as 24%.

Dr Caradoc-Davies made the same whole person impairment assessment of 24% in November 2003.

[3] In 2010, the appellant was referred for a neuropsychological assessment with consultant clinical psychologist, Dr James Heggarty. In his report of 10 July 2010, Dr Heggarty said, amongst other things, that he could see no clear relationship between the appellant's reported injury and his ongoing symptoms of fatigue, poor memory and inability to cope. Dr Heggarty also recommended that the appellant be referred to a neurologist for an assessment of the possibility of a neurological disorder.

[4] In a neurological assessment, dated 30 November 2010, neurologist, Dr du Plessis concluded:

> Even if Mr Williams had sustained a mild concussion there is no reason for him to have ongoing symptoms 17 years post event. The only cause in my opinion for his ongoing symptomology is underlying psychological and psychosocial factors.

[5] On 11 February 2011, based on the reports of Dr du Plessis and Dr Heggarty, the Corporation suspended the appellant's entitlement to weekly compensation.

[6] A further impairment assessment report was undertaken by Dr Schousboe, an ACC accredited impairment assessor, in June 2014. This concluded a final whole person impairment of 5%.

[7] Following this, on 14 June 2014, the Corporation determined that the appellant was no longer entitled to an independence allowance.

[8] Although that decision was upheld at review, it was appealed to the District Court and in a decision dated 9 February 2018, the Corporation's decision was quashed. Judge Powell directed that a further independence allowance assessment be undertaken as soon as possible with the appellant receiving his independence allowance in the meantime.

[9] A further impairment assessment report was carried out by Dr Rosy Fenwicke and dated 22 July 2018. She assessed a whole person impairment of 5% and noted:

> This injury is stable and permanent being that it is unlikely to improve in the next 12 months.

[10] On 2 August 2018, Dr Kanji of Sportsmed Limited carried out a peer review of the impairment assessment report and recommended that the Corporation accept a whole person impairment of 5% as per Dr Fenwicke's report.

[11] In its decision letter of 3 August 2018, the ACC claims manager said:

> Your level of impairment was assessed as being 5%, less than the minimum 10% level that is required for an allowance. As such we cannot make any further independence allowance payments.

[12] The appellant sought to review that decision. In a decision dated 6 January 2019, the Reviewer quashed the decision of 3 August 2018.

[13] The Reviewer directed that:

> … ACC must ask Dr Fenwicke to clarify in writing what rating she would give each "non injury related impairment" – if she has in fact identified non injury impairment. If Dr Fenwicke considers Mr Williams has no "non injury related impairments" she must explain that and provide detail.
>
> However, if there are non injury related impairments, Dr Fenwicke must provide a rating, then apportion out that impairment; in line with the ACC user handbook.

[14] Dr Fenwicke responded with an amended report dated 14 January 2019. Dr Fenwicke concluded a final whole person impairment score of 5% and noted:

> This injury is stable and permanent being that it is unlikely to improve in the next 12 months.

The Appellant's Submissions

[15] In written and oral submissions, the appellant made these points:

[a] He submits that there was no reason for any reassessment of his independence allowance as he believes the impairment assessment is a

permanent impairment rating and used when a lump sum payment is not available. ACC has used the impairment rating of 24% from Dr Caradoc-Davies since 2001.

[b] He submits that if a reassessment is necessary, it should be because of overwhelming medical evidence. He says the reason ACC requested a reassessment was because of Dr Heggarty's 2010 neuropsychological report, which stated that the appellant had no ongoing symptoms from his 1993 head injury. The appellant says this was an incorrect conclusion.

[c] He refers to the flaws identified by Judge Powell in Dr Schousboe's report that resulted in the reassessment of his whole person impairment by Dr Fenwicke.

[d] He describes the assessment of Dr Fenwicke as bizarre and containing a lot of inaccuracies when compared with previous reports.

[e] He says the whole reassessment by ACC is based on a lie by Dr Heggarty with he and Dr Fenwicke finding impairments and attributing them to non-existent past conditions.

[f] The appellant said there is no evidence of any medical problems prior to his accident in 1993.

The Respondent's Submissions

[16] Given that the appellant's personal injury was suffered before 1 July 1999, Mr Hunt refers to pt 4 of sched 1 to the Accident Insurance Act 1998 (the 1998 Act).

[17] He refers to cls 58 to 63 in pt 4 of sched 1 to the 1998 Act, which regulate the assessment and payment of independence allowances. Clause 58(1) provides that ACC is liable to pay a claimant an independence allowance if "[a]n assessment carried out under clause 60 establishes that that personal injury … has resulted in a degree of whole-person impairment of 10% or more".

[18] He refers to the decision of *W v Accident Compensation Corporation* where Judge Hole summarised the relevant principles when dealing with a challenge to an independence allowance with reference to earlier decisions of this Court: [1]

[a] A mere difference of opinion between specialists is not sufficient to unseat the advice of an appointed assessor: there needs to be some compelling factor which makes it clear that the assessor has overlooked some material factor.

[b] It is not for the Court to form an opinion as to whether or not the AMA Guides have been correctly applied: this is the province of duly qualified medical practitioners. The Court must rely on the evidence of the medical practitioners in this regard.

[c] In order to succeed in an appeal of this nature, it is for the appellant to establish on the balance of probabilities that the assessment was in some way flawed or incorrect. This requires credible expert evidence directed at the specific aspects of the assessment which are said to be incorrect.

[d] In order to upset an assessment, the Court does not necessarily have to be provided with an alternative assessment from a duly qualified expert. It is sufficient if there is expert compelling evidence either that the AMA Guides have not been correctly interpreted or that the assessor has failed to take into account all relevant factors of impairment.

[19] Mr Hunt says that a person's impairment may deteriorate or improve and, therefore, impairment assessments are not permanent. The Corporation may require an appellant to undergo a further assessment, at the Corporation's expense, as provided for in s 72 of the Accident Compensation Act 2001 (the Act).

[20] In this case, a further impairment assessment was carried out by Dr Schousboe in 2014, which concluded a 5% whole person impairment. Although that decision was found to be flawed by the District Court, an assessment by Dr Fenwicke and a peer review by Dr Kanji both supported a final whole person impairment of 5%.

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1 *W v Accident Compensation Corporation* DC Wellington 284/2004, 15 September 2004 at [7].

[21] The Corporation's decision of 3 August 2018 followed, halting further independence allowance payments. However, it was quashed on a review dated 6 January 2019. The Corporation was to ask Dr Fenwicke to clarify, in writing, what rating she would give to each, if any, of the "non injury related impairment[s]". Any impairment would then need to be apportioned out in line with the ACC User Handbook. If Dr Fenwicke considered the appellant had no injury related impairments, she should explain that and provide detail.

[22] Mr Hunt submits that Dr Fenwicke followed the Reviewer's direction in her amended report of January 2019 and that it was carried out in accordance with the AMA Guides to the Evaluation of Permanent Impairment 4th Edition. In Dr Fenwicke's report, she concluded that the appellant's injury was stable and permanent with a whole person impairment confirmed at 5% from the 1993 injuries of traumatic brain injury and hyperacusis.

Decision

[23] The appellant sustained a head injury on 7 January 1993 while at work.

[24] The earliest report relating to this in the present bundle of documents is an impairment assessment by Dr Caradoc-Davies, physician in rehabilitation medicine, dated 18 April 2001. Under the heading "history" the following is noted:

> Eric sustained a head injury in 1994 (sic) when he walked into a conveyor belt at work and his head hit the ground. There was a question of loss of consciousness, and he reported to his GP the next day.

[25] The assessment of Dr Caradoc-Davies concluded a whole person impairment of 24%.

[26] Given that the whole person impairment was in excess of 10% the appellant was paid an independence allowance.

[27] Section 72 of the Act provides that a claimant who receives any entitlement must, when reasonably required to do so by the Corporation, undergo assessment by

a registered health professional specified by the Corporation. The assessment would be at the Corporation's expense.

[28] A further impairment assessment report dated 3 June 2014, was undertaken by Dr Schousboe, who assessed the appellant's final whole person impairment as 5%. On 12 June 2014, ACC made its decision that the appellant was no longer entitled to receive the independence allowance.

[29] The appellant was unsuccessful at review to overturn that decision.

[30] The appellant appealed against this decision to the District Court and Judge Powell, in a judgment of 9 February 2018, concluded that there was a significant flaw on the face of Dr Schousboe's assessment and, therefore, the Corporation's decision of 12 June 2014 could not stand. Judge Powell directed that a further independence allowance assessment should be undertaken as soon as possible. On 22 July 2018, Dr Fenwicke completed a further impairment assessment report concluding a whole person impairment of 5% and commenting "this injury is stable and permanent being that it is unlikely to improve in the next 12 months". A peer review of 2 August 2018 supported Dr Fenwicke's conclusions.

[31] A decision of the Corporation, issued on 3 August 2018, said that the appellant was no longer entitled to receive the independence allowance.

[32] The appellant took this decision to review. In a decision dated 6 January 2019, the Corporation's decision was quashed and the Reviewer directed that the Corporation ask Dr Fenwicke to clarify in writing what rating she would give each "non injury related impairment" – if she has in fact identified non injury impairment.

[33] Dr Fenwicke provided a further impairment assessment report, dated 14 January 2019, in which she again concluded a whole person impairment of 5% and that the injury was stable, permanent and unlikely to improve in the following 12 months.

[34] As a consequence, the Corporation, in a decision dated 23 January 2019, advised the appellant that he was no longer entitled to receive an independence allowance.

[35] The appellant sought to have that decision reviewed and the Reviewer, Ms Coddington, dismissed the appellant's application in a decision of 26 September 2019.

[36] In so doing, she said:

> I acknowledge Mr Williams does not agree with Dr Fenwicke's rating of his impairment. However, case law shows that a claimant's own belief about his or her level of impairment is not persuasive because it does not have the authority of medical expertise. Furthermore, Mr Williams did not provide any objective medical evidence to support his position. Therefore, in the absence of cogent medical evidence to the contrary, both ACC and I must accept Dr Fenwicke's assessment of his impairment.

[37] In submissions before this Court, the appellant went back over some of the history of what has occurred since his injury. He notes that in 2001 and 2003, an impairment rating of 24% was accepted and this continued until 2014.

[38] The appellant is critical of an assessment made in 2010 by Dr Heggarty. Likewise, he highlights the errors that were made by Dr Schousboe and Dr Fenwicke.

[39] However, the challenge that the appellant faces on this appeal is simply that the errors that he refers to have now been corrected and the only medical evidence that he is able to point to in support of a whole person impairment of more than 10% is that of Dr Caradoc-Davies from 2001 and 2003.

[40] The appellant's reasoning appears to be that those historical assessments should still stand.

[41] Mr Hunt refers to the decision of *W*,[2] where Judge Hole states at paragraph [7]:

> (a) A mere difference of opinion between specialists is not sufficient to unseat the advice of an appointed assessor: there needs to be some compelling factor that makes it clear that the assessor has overlooked some material factor.
>
> (b) It is not for the Court to form an opinion as to whether or not the AMA Guides have been correctly applied: this is the province of duly qualified medical practitioners. The Court must rely on the evidence of the medical practitioners in this regard.
>
> (c) In order to succeed in an appeal of this nature, it is for the appellant to establish on the balance of probabilities that the assessment was in some way flawed or incorrect. This requires credible expert evidence directed at the specific aspects of the assessment which are said to be incorrect.
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> (d) In order to upset an assessment, the Court does not necessarily have to be provided with an alternative assessment from a duly qualified expert. It is sufficient if there is expert compelling evidence either that the AMA Guides have not been correctly interpreted or that the assessor has failed to take into account all relevant factors of impairment.

[42] In this case, no flaw or counter evidence of the kind referred to by Judge Hole has been produced to challenge Dr Fenwicke's impairment assessment report of 14 January 2019 and accordingly the Court must accept it. The report concluded a whole person impairment of 5% which, in turn, supports the Corporation's decision of 23 January 2019 that the appellant is no longer entitled to receive an independence allowance.

[43] Accordingly, I must dismiss the appeal.

[44] There is no issue as to costs.

Judge C J McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch for the respondent

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2 *W v Accident Compensation Corporation*, above n 1.