

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2021] NZACC 48 ACR 424/17

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPEAL TO THE HIGH COURT
PURSUANT TO S 162 OF THE ACT

BETWEEN KELLY PHELPS
Applicant

AND ACCIDENT COMPENSATION
CORPORATION BODY CORPORATE
DULY CONSTITUTED UNDER THE
PROVISIONS OF THE SAID ACT
Respondent

Hearing: On the papers

Judgment 15 March 2021

**JUDGMENT OF JUDGE M-E SHARP
[On application for leave to appeal to the High Court]**

Introduction

[1] Pursuant to s 162 of the Act the applicant (Mrs Phelps) seeks leave to appeal to the High Court on a question of law against a decision of Judge CJ McGuire of 19 December 2019. The parties were directed to file submissions following which the application would be determined on the papers.

The appeal

[2] Mrs Phelps submits that there was a causal nexus between her ongoing problems in May 2017 and her covered injuries suffered on 8 May 2011 and 8

November 2004; therefore the Court's finding at para [71] "that the effects of the mild head injury of 2011 and the effects of the 2014 injury are spent and that her current presentation is not causally related to these two injuries" is not sustainable on the medical information available.

Background

[3] Mrs Phelps fell from a horse on 8 May 2011 sustaining a mild head injury for which she received cover. After seeing a neuropsychologist in June 2011 she returned to work. Mrs Phelps suffered a second injury on 8 November 2014 when she was knocked over by a horse. Since then she has received treatment from Dr Gil Newburn, neuropsychiatrist. She has had a number of ongoing symptoms including headaches and migraines.

[4] The Corporation arranged for a number of assessments from 2015 including those of Dr Alison King, neurologist, Karen Mitcheson, neuropsychologist, occupational specialist Dr Ruttenberg, Dr Lynch, neurologist, Dr Jane O-Dwyer, psychiatrist. In late 2016 the Corporation sought specialist advice from an external medical multi-disciplinary panel comprising an occupational medical specialist Dr John Elchin, a psychiatrist Dr Mark Davis, a neurologist Dr Rosamond Hill, and an orthopaedic surgeon Mr Peter Welsh. That panel opined that Mrs Phelps' ongoing migrainous headaches were not caused by the accidents that she had suffered. The panel recommended either a neuropsychological or neuropsychiatric assessment to investigate whether Mrs Phelps was suffering any ongoing impairment from her previously covered head injuries.

[5] Mr Ron Dick, neuropsychologist, prepared a report in May 2017 (arranged by the Corporation) advising that there was no evidence of cognitive impairment.

[6] The Corporation issued its primary decision on 15 May 2017 in which it suspended Mrs Phelps' entitlements on the basis that her ongoing problems were not due to her covered personal injuries. She lodged a review and produced reports from Dr Newburn in support. Mr Dick responded and the review was dismissed.

[7] On appeal Dr Newburn made further comment.

Legal principles

[8] Section 162(1) of the Act: an applicant is only entitled to appeal to the High Court on questions of law. In *O'Neill v ACC* [2008] NZACC 250 Cadenhead DCJ discussed the principles relevant to the exercise of the Court's discretion:

[24] The Courts have emphasised that for leave to be granted:

- (i) the issue must arise squarely from "the decision" challenged e.g. *Jackson v ACC* unreported HC Auckland, Priestley J, 14 February 2002, AP 404-96-01; *Kenyon v ACC* [2002] NZAR 385. Leave cannot for instance properly be granted in respect of obiter comment in a judgment: *Albert v Arcic* unreported, France J, HC Wellington, AP 287/01, 15 October 2002;
- (ii) the content of point of law must be "capable of bona fide and serious argument" to qualify for the grant of leave: eg *Impact Manufacturing* unreported, Doogue J, HC Wellington, HP 266/00, 6 July 2001;
- (iii) care must be taken to avoid allowing issues of fact be dressed up as questions of law; appeals on the former being proscribed: e.g. *Northland Co-operative Dairy Co Ltd v Rapana*, [1999] 1 ER NZ 361-363 (CA);
- (iv) where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law: *CIR v Walker* [1963] NZLR 339, 354;
- (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, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision: *Edwards v Bairstow* [1995] 3 All ER 48, 57;
- (vi) whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law: *CIR v Walker* [1963] NZLR 339, 353-354 (CA); *Edwards v Bairstow* [1995] 3 All ER 48, 57.

[25] Even if the disqualifying criteria are made up, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law e.g. *Jackson v Kenyon* above.

The applicant's case

[9]

- Mrs Phelps argues that Dr Wolveridge's statement in his 2014 report is inaccurate; accordingly the external panel's opinion on the cause of Mrs

Phelps' headaches and migraines, relying as they did on Dr Wolveridge's statement, is unsafe and should have been disregarded by the Court.

- Mrs Phelps relies on the reports of Drs Newburn, O'Dwyer and King, which she says confirm that Ms Phelps had not recovered from the effects of the 2011 head injury.

Late application for leave

[10] Mrs Phelps' application for leave was out of time, however the Corporation waives the time limit.

The Corporation's position

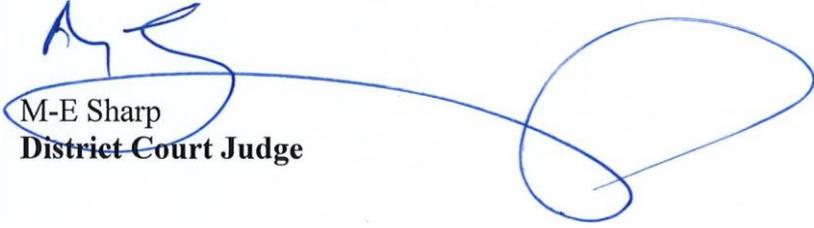
[11] There was evidence available to permit Judge McGuire to determine that Mrs Phelps' covered personal injuries were spent and there was no causal nexus between her ongoing problems in May 2017 and her covered personal injuries. The Corporation relies on reports from Drs Lynch and Ruttenberg as well as the reports of the external panel and Mr Dick.

[12] In his judgment Judge McGuire recognised the dispute over the matter but was content to rely on the opinions from the external panel and Mr Dick for its decision that the covered symptoms were in essence spent.

Conclusion

[13] The Court preferred the evidence for the Corporation. It was entitled to do so. The Court's determination was supported by the facts and evidence that was before it. This is not an appeal where there has been an error of law because there is no evidence to support it, or the evidence is inconsistent with and contrary of the decision or the true and only reasonable conclusion of the evidence contradicts the decision. The Judge was entitled to prefer the evidence of the panel having properly identified the issue for determination and correctly analysed the key arguments made on behalf of Mrs Phelps. No question of law has been identified which should be

referred to the High Court and the application for leave is dismissed accordingly.
There is no issue as to costs.



M-E Sharp
District Court Judge