IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 68 ACR 24/19

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

Hearing: 14 April 2021
Held at: Auckland/Tāmaki Makaurau

Appearances: The appellant represents himself
L Hawes-Gandar for the Accident Compensation Corporation

Judgment: 27 April 2021

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Suspension of entitlement for non-compliance – ss 72(1) and 117(3), Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 5 December 2018. The Reviewer dismissed an application for review of the decision of the Corporation suspending Mr Robinson's weekly compensation for non-compliance.

Background

[2] Over the years, Mr Robinson has suffered a number of injuries, and has received cover for the treatment required.

[3] On 27 July 2010, Mr Robinson had surgery on his right shoulder, a procedure funded by the Corporation.

[4] On 26 July 2017, Mr Robinson underwent further surgery on his right shoulder to remove screws which were installed during the 2010 surgery and were thought to be causing irritation. This surgery was also funded by the Corporation.

[5] On 4 December 2017, Mr Robinson was seen by his treating surgeon, Mr Matthew Brick. Mr Brick noted Mr Robinson reported that his shoulder, though gradually improving, had been painful, and pain relief was not particularly helpful. Mr Brick wrote to the Corporation recommending resistance and strength training supervised physiotherapy, to improve Mr Robinson's strength and shoulder function.

[6] On 28 December 2017, the Corporation asked Mr Robinson if he had a preferred physiotherapy provider for the supervised resistance and strength programme.

[7] On 17 January 2018, in the absence of a reply, the Corporation repeated its request. Mr Robinson then requested that the programme be completed through his osteopath, Adrian Turner. On 18 January 2018, the Corporation advised that this was not possible as Mr Turner was not approved by the Corporation to provide the required programme; and once again asked Mr Robinson to advise his choice of providers for the supervised physiotherapy programme.

[8] On 23 January 2018, the Corporation advised Mr Robinson that he had been referred to an agency for his strengthening programme, and that compliance with the programme would be expected. On 24 January 2018, Mr Robinson replied "No way! My programme is being handled by Adrian Turner as the preferred specialist".

[9] On 24 January 2018, the Corporation wrote to Mr Robinson, warning him that his weekly compensation could be suspended if he did not participate in the strengthening programme recommended by his surgeon. The Corporation then arranged for the strengthening programme to be organised by Richard Bedwell, occupational therapist, and supervised by physiotherapist, Haldane Blank.

[10] On 10 February 2018, Mr Robinson arrived in Vanuatu, where he remained until 21 February 2018.

[11] On 24 February 2018, Mr Robinson requested an updated Initial Medical Assessment (IMA). On 26 February and again on 5 March 2018, the Corporation declined this request.

[12] On 16 March 2018, Mr Blank reported on Mr Robinson's condition. Mr Blank noted that Mr Robinson felt that the strengthening programme would have little to offer him (given past experiences with treatment and extended period of time living with pain). Mr Robinson felt that exercising would increase his baseline pain measures and he would then not wish to continue. However, Mr Blank planned a 12-week strengthening programme, also noting that Mr Robinson would be overseas from 4 April 2018 to 16 May 2018.

[13] On 19 March 2018, the Corporation sent Mr Robinson an Individual Rehabilitation Plan which included the strengthening programme to assist him with the recovery of strength in his right shoulder. The due date for completion of the programme was set at 31 August 2018.

[14] On 19 March 2018, the Corporation's case manager emailed Mr Robinson, advising that he was required to remain in New Zealand to be available for and engaged in all required sessions. The case manager advised that Mr Robinson's planned trip overseas, as well as any other overseas trips planned for the remainder of the programme, would need to be postponed. The programme was expected to run until 4 June 2018. The case manager referred to the letter of 24 January 2019, advising Mr Robinson of the "implications" if he did not participate in the strengthening programme.

[15] On 19 March 2018, Mr Robinson replied to the case manager, stating that he travelled to Vanuatu on a regular basis, and the tickets were booked well in advance, as the hotter climate was recommended by medical personnel. He advised that he would attend the required programme, but not at the expense of what was proven to

beneficial, and any request to stop proven therapy would be unreasonable and unacceptable.

[16] On 21 March 2018, Mr Robinson signed the Individual Rehabilitation Plan.

[17] On 29 March 2018, Mr Robinson was examined by Dr Simon Wilkinson, who noted that Mr Robinson needed to start strengthening his external rotators in a very gentle, graduated way. Dr Wilkinson noted that Mr Robinson reported that travelling to warmer weather was very beneficial to his pain levels. Dr Wilkinson also noted that the physiotherapist had a comprehensive and specific programme, and Mr Robinson planned to be in regular contact with his physiotherapist while he was away.

[18] On 3 April 2018, Mr Robinson attended a strengthening session with Mr Blank. He noted that Mr Robinson would be travelling overseas the following day for six weeks and asked for a time to be made available each week for a telephone conference to discuss his progress with his exercises. Mr Blank advised the Corporation of Mr Robinson's request.

[19] On 4 April 2018, Mr Robinson arrived in Vanuatu, where he remained until 16 May 2018.

[20] On 9 April 2018, the Corporation advised Mr Blank that Mr Robinson's programme would be placed on hold until he returned, and he would then have the option to re-comply.

[21] On 10 April 2018, Mr Robinson telephoned Mr Blank for an appointment, who advised Mr Robinson that his programme had been put on hold.

[22] On 11 April 2018, Mr Blank advised the Corporation that Mr Robinson was unhappy that his programme had been put on hold. Mr Blank said that the disagreement between the Corporation and Mr Robinson and trying to manage a programme from overseas by telephone were making things very difficult. Mr Blank requested the programme be managed by another provider.

[23] On 12 April 2018, the Corporation advised Mr Robinson that his weekly compensation was suspended in view of his current non-participation in the strengthening programme. The Corporation advised Mr Robinson that weekly compensation would be reinstated when he attended a face-to-face meeting with the physiotherapist.

[24] On 20 April 2018, Mr Robinson asked the Corporation to reinstate his weekly compensation immediately and source a new physiotherapist. He also requested that the Corporation's decision to suspend his entitlements be reviewed. On 25 July 2018, the Corporation's decision to suspend weekly compensation was upheld in a review decision.

[25] On 26 April 2018, the Corporation advised Mr Robinson that his weekly compensation would be reinstated once he returned to New Zealand and attended a face-to-face meeting to discuss re-commencement of his physiotherapy strengthening programme.

[26] On 16 May 2018, Mr Robinson returned to New Zealand and met with Mr Bedwell. Following this meeting, an appointment was arranged with a new physiotherapist, Ms Roseanna Yovich.

[27] On 21 May 2018, the Corporation advised Mr Robinson that his weekly compensation would be reinstated once he had physically participated in the next session with the physiotherapist.

[28] On 30 May 2018, Mr Robinson met with Ms Yovich. Following this appointment, Ms Yovich advised the Corporation that Mr Robinson was "openly adverse to participating in a functional strengthening programme". He was not prepared to experience increased pain at this stage, which he reported as being the outcome of his past two programmes. Ms Yovich, therefore, suggested an orthopaedic review.

[29] On 7 June 2018, the Corporation contacted Ms Yovich's office to clarify whether her recommendation was based on Mr Robinson's opposition to the strengthening programme or her professional opinion.

[30] On 8 June 2018, the Corporation received confirmation that it was not Ms Yovich's professional clinical opinion that Mr Robinson did not need to continue with or would not benefit from the programme. The Corporation was advised that Ms Yovich was going ahead with the programme, and that there were appointments available the following week. Ms Yovich tried that day to call Mr Robinson to commence the programme, but his cell phone number did not have a message service and his home telephone "cut off". Ms Yovich advised the Corporation of this development. The Corporation then sent Mr Robinson an email advising that its expectation was that he would contact Ms Yovich and book an available appointment for the following week. The Corporation reminded Mr Robinson that failure to continually attend might result in a further stop of his weekly compensation.

[31] On 9 June 2018, Mr Robinson arrived in Vanuatu, where he remained until 24 June 2018.

[32] On 14 June 2018, the Corporation wrote to Mr Robinson warning that his weekly compensation would be suspended if he did not make contact with Ms Yovich by 15 June 2018, make all required future appointments with her, and engage in such appointments. The Corporation also advised that it would cover the period dating from 16 to 29 May 2018.

[33] On 19 June 2018, Mr Robinson contacted the Corporation and advised that he was "away". He claimed that he had been told by Ms Yovich that there was nothing further that she could do. Later that day, the Corporation called Mr Robinson who advised that he had had to move out of his home and had taken a cheap flight to Vanuatu. He said that he had seen everyone that he was supposed to see and that the physiotherapist had said that she was writing to the Corporation advising that she could not do anything more. He had asked her if there was another appointment and

she said “no”. He said that he did not need the Corporation’s permission to travel overseas and he felt that he had met all of his obligations.

[34] On 19 June 2018, the Corporation advised Mr Robinson that it had suspended his weekly compensation on the basis that he had failed to contact Ms Yovich by 15 June 2018, and advised that weekly compensation would be reinstated once he physically attended the next physiotherapy appointment available.

[35] On 25 June 2018, Mr Robinson contacted Ms Yovich. He advised that he was back in New Zealand, but he had become unwell in Vanuatu and did not consider he was fit to engage in the strengthening programme.

[36] On 26 June 2018, the Corporation advised Mr Robinson that it would reinstate his weekly compensation from 3 July 2018, this being the first available appointment which he could have attended with Ms Yovich, had he not been unwell. The Corporation subsequently received a medical certificate (dated 25 June 2018) from Mr Robinson's GP, certifying him as unfit to undertake the physiotherapy programme for at least 2 weeks.

[37] On 28 June 2018, Mr Robinson lodged a review of the Corporation’s decision suspending his weekly compensation.

[38] On 23 October 2018, review proceedings were held. The Corporation advised the Reviewer that the Corporation’s decision was effective from 18 June to 3 July 2018. On 5 December 2018, the Reviewer dismissed the review, on the basis that Mr Robinson had shown an unwillingness to participate in the strengthening programme, and was well aware of the consequences of failing to participate.

[39] On 21 January 2019, a Notice of Appeal was lodged, seeking “reinstatement of weekly cover for this period”.

[40] On 18 January 2021, the Corporation wrote to Mr Robinson advising him that it had decided to reinstate his weekly compensation for the two-week period 19 June to 3 July 2018.

[41] On 17 February 2021, a telephone conference was held, attended by Mr Robinson and Mr Hawes-Gandar representing the Corporation. Mr Robinson confirmed that the Corporation had reinstated his weekly compensation for the two-week period (18 June to 3 July 2018) for which he had claimed relief in his appeal lodged on 21 January 2019. Mr Robinson nevertheless wished to pursue his appeal on the basis that the reasons for the previous non-payment needed to be addressed. Mr Hawes-Gandar noted that the Corporation would be seeking costs of the hearing, should Mr Robinson's appeal be dismissed.

[42] In a memorandum dated 28 March 2021, Mr Robinson asked the Court to consider a large ex-gratia payment. This was because of the Corporation's alleged continued and blatant disregard for correct process which had allegedly led to years of continued stress and harm to his chances of the best possible recovery from injuries sustained. The financial cost was estimated to range between $75,000 and $100,000.

Relevant law

[43] Section 72(1) of the Accident Compensation Act 2001 (the Act) provides:

> (1) A claimant who receives any entitlement must, when reasonably required to do so by the Corporation, …
>
> > (g) undergo assessment of present and likely capabilities for the purposes of rehabilitation, at the Corporation's expense:
> >
> > (h) participate in rehabilitation.

[44] Section 117(3) of the Act provides that the Corporation may suspend or cancel an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.

[45] In *Accident Compensation Corporation v Peck*, the majority of the Court of Appeal found that the Corporation had the discretionary power permanently to

decline the respondent's entitlements for the period of her unreasonable refusal to submit to a medical examination.[1] Justice McGrath stated:[2]

> The purpose of s 116(3) in this context is to provide a mechanism that the Corporation can use in appropriate cases to ensure compliance by persons who have entitlements with their duties to keep the Corporation informed about their condition when required. This enables the Corporation to maintain the integrity of the statutory scheme by ensuring only those eligible receive benefits under it. The terms of s 116 reflect the legislature's perception of the scope of powers needed by the statutory body with principal responsibility for the administration of the Act.
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> Thus the power to decline to provide an entitlement, which is conditional on a person entitled acting unreasonably in the manner outlined in s 116(3), is an enforcement power given in the public interest. It is available where there has been a breach of duty. It is not given for punitive purposes but in order to ensure that the duties of persons entitled are observed, so that the scheme operates effectively.
>
> The effective management of the scheme would be frustrated if the Corporation were not empowered to refuse to pay entitlements permanently during a period of default. That could create the anomalies pointed to by Mr Barnett, where persons prolonged their entitlements by refusing to comply with requirements for periods of time. That result would in our view be inconsistent with the purpose of the legislation.

[46] In *Thirring v Accident Compensation Corporation*, Judge Barber observed:[3]

> The law is clear that where a claimant unreasonably fails to comply with a requirement prescribed by the Act, ACC is entitled to suspend any entitlements available to the claimant. This approach is consistent with the philosophy of the Act which couples rights of a claimant with responsibilities to engage with ACC, and ensure the effective running of the scheme.

[47] The onus is on the Corporation, where it makes a decision under section 117(3), to show that the claimant's failure or refusal was unreasonable, the test being an objective one.[4] In *O'Malley-Scott v Accident Compensation Corporation*, Judge Barber observed:[5]

> There is no dispute that the reasonableness of the respondent's decision to decline entitlements is to be judged at the date of that decision, namely, 8 August 2008.

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[1] *Accident Compensation Corporation v Peck* (2005) 7 NZELC 97,712 (CA).
[2] At [32] – [34].
[3] *Thirring v Accident Compensation Corporation* [2012] NZACC 23 at [47].
[4] *Sad v Accident Rehabilitation and Compensation Insurance Corporation* DC Wanganui Decision 222/97, 10 November 1997.
[5] *O'Malley-Scott v Accident Compensation Corporation* DC Wellington Decision 135/2009, 5 August 2009 at [27].

> What may have happened since then should not impact upon the correctness of Work Aon's decision. Accordingly, the relevant communications between the parties are those between 9 July and 8 August 2008, rather than subsequently.

[48] In *Woolley v Accident Compensation Corporation*, Judge Beattie stated:[6]

> From a purely legal perspective, I find that a decision made pursuant to section 117(3) is not a decision which is required to be made only after an explanation of the failure to attend has been sought, where the evidence is clear that the appellant was aware of his obligations and of the consequences of failure to comply, and where the statutory provision itself does not require reasonable written notice of the proposed cessation

Discussion

[49] The issue which founded Mr Robinson's appeal to the District Court is no longer a live one. As noted above, Mr Robinson appealed against the decision of the Reviewer dated 5 December 2018, which held that the Corporation was correct to suspend Mr Robinson's entitlements during the period 18 June to 3 July 2018. In his appeal against this decision, Mr Robinson stated that the relief that he sought was the reinstatement of weekly cover for this period. Subsequent to the appeal being lodged, the Corporation wrote to Mr Robinson, advising him that it had decided to reinstate his weekly compensation for the two-week period 18 June to 3 July 2018.

[50] The Court finds that, in view of the fact that the relief sought by Mr Robinson in lodging this appeal has been met, this appeal must be dismissed.

[51] However, for completeness, in the interests of justice being seen to be done, the Court will briefly assess the further submissions that Mr Robinson has now lodged in this proceeding. Central to his submissions is his claim that the Corporation did not follow correct processes, in that the Corporation unreasonably proceeded with a rehabilitation plan without first seeking an up-to-date medical assessment. Mr Robinson states that the medical assessment would have highlighted multiple injuries requiring attention. Mr Robinson claims that, as a result, the Corporation's actions have resulted in stress and harm to his health, requiring monetary compensation.

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[6] *Woolley v Accident Compensation Corporation* [2012] NZACC 146 at [30].

[52] The rehabilitation programme prescribed for Mr Robinson involved strengthening physiotherapy. The recommendation that Mr Robinson have this programme was made by Mr Brick, the surgeon who had performed the surgery on Mr Robinson in July 2017. Mr Brick reported:

> I think that John would certainly be a good candidate for a supervised physiotherapy programme. The tenodesis now is fully strong and John would be at a very low risk of reinjuring the shoulder. Global shoulder strengthening would be very useful, as well as introducing healthy patterns of movement and healthy muscle firing patterns.

[53] The strengthening programme was then organised by Mr Bedwell and duly referred to Mr Blank, who planned a 12-week course. The plan was incorporated into an Individual Rehabilitation Plan to assist Mr Robinson with the recovery of strength in his right shoulder, and Mr Robinson signed this Plan. A medical practitioner, Dr Wilkinson, examined Mr Robinson and noted that Mr Robinson needed to start strengthening his external rotators. Dr Wilkinson also commented that the physiotherapist had a comprehensive and specific programme. The programme was later referred to another physiotherapist, Ms Yovich, who then made efforts to proceed with the programme as she thought that this would be of benefit to Mr Robinson.

[54] The Court concludes from the above that it was reasonable for the Corporation to require Mr Robinson to participate in the strengthening physiotherapy rehabilitation. Section 72(1)(h) of the Act provides that a claimant who receives any entitlement must, when reasonably required to do so by the Corporation, participate in rehabilitation. Mr Robinson, as the receiver of weekly compensation from the Corporation, was under a statutory duty to participate in his strengthening physiotherapy rehabilitation.

[55] There is no evidence that the Corporation failed to follow correct processes. It was unnecessary for the Corporation to require an "up to date medical assessment" given the clear recommendation of Mr Robinson's treating surgeon for the rehabilitation programme. The programme was supported by a medical practitioner, agreed to by Mr Robinson, and planned and organised by competent physiotherapists. Throughout the process, the Corporation provided Mr Robinson with sufficient information about the programme and his need to participate therein.

Conclusion

[56] The relief sought by Mr Robinson in lodging his appeal was the reinstatement of weekly cover for the two-week period 18 June to 3 July 2018. Subsequent to the appeal being lodged, the Corporation reinstated his weekly compensation for this period. Mr Robinson's appeal, therefore, no longer presents a live issue, and so the appeal is dismissed.

[57] The Court notes, for the sake of completeness, that the Corporation acted reasonably in requiring Mr Robinson to attend a rehabilitation programme. Therefore, the Court finds no reason to award the financial relief that Mr Robinson has subsequently claimed.

[58] By a narrow margin, the Court makes no order as to costs against Mr Robinson. The Court accepts that Mr Robinson's insistence that the matter be heard, when his claim for relief was no longer a live issue, could be seen to be an abuse of process, justifying the award of costs against him. However, the Court finds that it is in the interests of justice being seen to be done that the legitimacy and appropriateness of the Corporation's actions in relation to Mr Robinson be evaluated.

P R Spiller
District Court Judge

Solicitors: Medico Legal Law Limited, Auckland for the respondent.