

**IN THE DISTRICT COURT
AT NELSON**

**I TE KŌTI-Ā-ROHE
KI WHAKATŪ**

[2022] NZACC 221

ACR 285/18

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

Hearing: On the papers

Appearances: Mrs V Gibson together with the Appellant Mr G Gibson
Ms S Churstain for the respondent

Date of Judgment: 29 November 2022

**JUDGMENT OF JUDGE C J McGUIRE
[Costs]**

[1] This appeal was settled following it being part heard before Judge Henare at Nelson on 23 June 2021.

[2] Costs are sought by the appellant both in respect of the Review Hearing and the Appeal.

[3] I have no jurisdiction to make a costs award in respect of the review hearing. The issue of costs at Review was not referred to in the appellant's notice of appeal and is not therefore part of this appeal.

[4] As to costs on appeal, this claim arises in the context of a part heard hearing at Nelson on 23 June 2021. Mrs Gibson appeared with her husband at the appeal and the transcript shows that it was she rather than her husband, who argued the case on his behalf.

[5] Judge Henare concluded that the appeal was not ready for Judgment and the parties were directed to provide further information to the court.

[6] During this process the respondent instructed counsel for the respondent to offer settlement in part.

[7] The appellant's response on 22 February 2022 was that the settlement offer would not be accepted until the respondent awarded costs to the appellant for both the review and the appeal. An invoice dated 22 February 2022 was tendered on behalf of the appellant. That invoice has since been amended and filed with the appellant's costs submissions dated 20 September 2022.

[8] The appellant seeks the following costs on the basis of Category 2 under Rule 14.3 of the District Court Rules, with time allocations as per column B under schedule 4, as follows:

[a]	Item 21-Commencement of appeal	.5 day	\$955.00
[b]	Item 24 -Preparing case on appeal	.5 day	\$955.00
[c]	Item 24A -Preparation of written submissions	1.5 days	\$2865.00
[d]	Item 25 -Appearance at hearing	.25 day	\$477.50

Total - \$5252.50 less 50% in accordance with *Carey* = \$2626.25

[9] The appellant's position is that the costs were reasonably incurred and proportionate to the service delivered.

[10] The appellant's submissions refer extensively to the case of *Carey*.¹ Highlighted are paragraphs 40 to 43 of that decision and the acknowledgement of the role of a representative in s 155 of the Accident Compensation Act.

[11] Reference is made to paragraph 85 where the court says that good advocates should be encouraged in view of the problems that ACC claimants have obtaining legal assistance.

[12] Mr Gibson submits that if Mrs Gibson had not provided this service, justice would not have been served and the system would have failed him.

¹ *Accident Compensation Corporation v Carey* [2021] NZHC 748.

[13] He says it is not for ACC to assume that the service provided by Mrs Gibson is or should be pro bono.

[14] In a memorandum of counsel dated 25 July 2022 Ms Churstain sets out ACC's response which includes a history of the steps taken in this case, which amongst other things include an ex gratia offer, not accepted, to settle all outstanding costs matters in this appeal.

[15] Ms Churstain refers to rule 14.2 of the District Court Rules which provides that an award of costs should not exceed the costs incurred by a party claiming costs. She submits that the information provided by the appellant does not establish that the costs claimed by the appellant have been or will be incurred by him. Therefore, she submits that there is no legal basis for the award of costs.

[16] Judge Henare concluded that the appeal was not ready for Judgment and the parties were directed to provide further information to the court.

[17] During this process the respondent instructed counsel for the respondent to offer settlement in part.

[18] The appellant's response on 22 February 2022 was that the settlement offer would not be accepted until the respondent awarded costs to the appellant for both the review and the appeal. An invoice dated 22 February 2022 was tendered on behalf of the appellant. That invoice has since been amended and filed with the appellant's costs submissions dated 20 September as set out at paragraph [8] above.

[19] Ms Churstain refers to a number of cases where the court has turned down claims for costs by family members or friends who have assisted the appellant at an ACC appeal hearing in the District Court.²

[20] As Judge Henare said in *Nikora* at paragraphs 14-15:

This Court is bound by *Carey*.

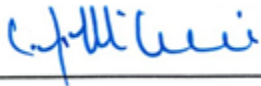
² *Howard v Accident Compensation Corporation* [2005] NZACC 154; *Peeters v Accident Compensation Corporation* [2006] NZACC 95; *Goh v Accident Compensation Corporation* [2014] NZACC 36; *Dickson-Johansen v Accident Compensation Corporation* [2018] NZACC 36; *Arbuckle v Accident Compensation Corporation* [2019] NZACC 88 and *Nikora v Accident Compensation Corporation* [2021] NZACC 78.

The advocate must produce a bill of costs and confirm that the fees have been or will be incurred. If fees are not incurred, no award is appropriate.

[21] Whilst acknowledging the assistance that Mrs Gibson has given her husband in this case, I find that it has not been established that Mrs Gibson was an advocate in this case, in the way that that role has come to be recognised by the courts. The late presentation of a schedule of review and appeal costs by Mr Gibson with the appellant's submissions dated 20 September 2022 does not establish that he has throughout been liable to his wife for those costs.

[22] The argument that such costs should be payable is acknowledged. However, for now, the state of the law is that a person in Mrs Gibson's position, who I find, set out to support her husband's claim, as so many spouses do, has not established that she satisfies all the essential elements of what the law presently requires of an advocate.

[23] I therefore must dismiss her claim for costs.



C.J. McGuire
District Court Judge

Solicitors: Ford Sumner Wellington for the respondent