

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 83

ACR 120/21

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

Hearing: 27 April 2022

Heard at: Christchurch District Court

Appearances: Mr I Stryder appeared in person (via telephone)
Mr I Hunt for the Respondent

Judgment: 10 May 2022

**RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Costs on review]**

[1] This is an appeal against a review decision dated 12 May 2021 in which the reviewer determined that she did not have jurisdiction to consider a decision of the respondent dated 1 February 2021 declining to grant cover for a left finger injury, on the basis that on 14 April 2021, the respondent had issued a decision accepting a cover for such injury, thereby revoking its decision dated 1 February 2021.

[2] The appellant also appeals against the reviewer's decision not to reward costs.

Timeline

[3] On 4 October 2020, Mr Stryder suffered a finger injury.

[4] On 8 January 2021, Mr Stryder consulted his general practitioner Dr Sia. Dr Sia recorded that the appellant had tripped and fallen on 4 October hurting his left middle finger. An X-ray was ordered, and Dr Sia lodged a claim for cover with ACC for a left finger sprain and left finger fracture caused by an accident on 20 October 2020.

[5] On 21 January 2021, ACC wrote to Mr Stryder saying it needed more time to consider his claim for cover.

[6] On 29 January 2021, ACC's clinical advisor Nigel Gardiner, physiotherapist, considered Mr Stryder's claim. He said the sprain or fracture of the finger suffered in October would have healed by the time Mr Stryder saw his GP in January.

[7] Also, on 29 January 2021, Mr Stryder underwent another X-ray of his left middle finger. The X-ray noted:

Small flecks of bone associated with the collateral ligaments and joint capsule of the left third DIP joint consistent with avulsion injuries, age indeterminate.

[8] On 1 February 2021, ACC declined Mr Stryder's claim for cover saying:

... there is insufficient evidence to support a causal link between the reported accident and any finger sprain first seen approximately 12 weeks later. There is also insufficient clinical evidence of a fracture in the first incidence.

[9] The letter also added:

If you have any more supporting information, please send this to us and I will see to it that we reconsider your application with this information.

[10] On 2 February 2021, Mr Stryder wrote to ACC to request a review of this decision.

[11] On 6 April 2021, ACC Clinical Advisor Mr Gardiner considered the report from Mr Stryder's X-ray of 29 January 2021. Mr Gardiner said that the reported

accident in October was the most likely cause of the avulsion fracture seen on the X-ray.

[12] On 9 April 2021, Ms Roberts-Thomson advised Mr Stryder and the reviewer that based on the X-ray and Mr Gardiner's advice, ACC would be issuing a new decision approving cover for Mr Stryder's finger injury.

[13] On 14 April 2021, ACC issued a new decision accepting cover for a left finger sprain and a left finger fracture.

[14] The letter of 14 April 2021 explained that ACC had requested the X-ray from Dr Sharr that the appellant had advised was taken, and on the basis of that X-ray, on balance, ACC was supportive of causation. The letter went on to say that ACC could help the appellant with some of the costs relating to his injury. It also provided an 0800 number saying:

Most questions relating to your injury claim can be answered quickly by calling us.

[15] The review of ACC's original decline decision dated 1 February 2021 was scheduled to be heard on Wednesday 21 April 2021.

[16] On that day, the hearing was convened by telephone conference. The reviewer records that Mr Stryder was present as was Ms Roberts-Thomson representing ACC.

[17] The reviewer released her review decision on 12 May 2021. Her decision was that ACC's decision granting cover dated 14 April 2021 was a fresh decision on the matter and it superseded ACC's decision of 1 February 2021 declining cover.

[18] Relying on the decision of *O'Leary v ACC*,¹ the reviewer found that she had no jurisdiction to consider a decision revoked by ACC before the review hearing "as there was, therefore, nothing to decide at the review hearing".

¹ *O'Leary v Accident Compensation Corporation* [2004] NZACC 153 at [19].

[19] Before the substantive review decision was released on 12 May 2021, ACC made a decision dated 10 May 2021 relating to the appellant's claim for costs. The costs claimed were as follows:

- (1) Participation in case conference: \$68.18
- (2) Preparation of case for review: \$409.07
- (3) Disbursements: \$22.75
- (4) Specialist's report: \$50.00

[20] The decision addressed the issue of the appellant's mother, Ms Barr's involvement. The decision of 10 May 2021 notes:

Ms Barr advised ACC in the case conference that she was acting as a supporting person and not an advocate. We are therefore not satisfied that you have incurred actual costs for her involvement in the review. Nor have ACC been provided with the specialist report or an invoice for the specialist's report.

As such, ACC award the following costs:

Disbursements: \$22.75.

Total: \$22.75.

[21] On 12 May 2021, the substantive review decision was released by the reviewer.

[22] The reviewer found at [33] and [34]:

In the light of the above, I find that the second decision was a fresh decision on the matter and that it superseded the first decision.

It follows that I do not have jurisdiction to review the first decision, as there is no live issue to be determined.

[23] In this regard, the reviewer referred to *O'Leary v ACC*, where the Court confirm that a reviewer had no jurisdiction to consider a decision revoked by ACC before the review hearing, as there was, therefore, nothing to decide at the review hearing.

[24] In the substantive decision, the reviewer also referred to *Howard v ACC*,² where the Court held that a claimant assisted by a family member cannot claim representation costs.

² *Howard v Accident Compensation Corporation* [2005] NZACC 154.

[25] Prior to the ACC decision dated 10 May 2021, relating to costs, there had been a case conference. In the decision of 10 May 2021, ACC confirmed that Ms Barr had advised ACC in the case conference that she was acting as a support person and not an advocate.

[26] This is elaboration in the reviewer's decision of 12 May 2021 at [35] where the reviewer says:

Mr Stryder claimed representation costs. Mr Stryder's mother, Nelly Barr, attended the case conference relating to this matter, but described herself as a support person and did not speak for Mr Stryder at any time during the conference. Ms Barr did not attend the review hearing.

[27] The reviewer also noted in her decision dated of 12 May 2021:

[36] The part of award costs to an applicant is set out in s 148 of the Act. Section 148(3) states that if a review application is made and ACC revise its decision fully or partly in favour of the applicant before a review is heard, then ACC must award costs and expenses on the same basis as the reviewer would have.

[37] The types of costs that can be awarded are set out in Schedule 1 of the Accident Compensation (Review Costs and Appeals) Regulations 2002. Those regulations also set out the maximum amount that can be awarded for each type of cost.

[38] There is no evidence that Mr Stryder has incurred any costs which can be reimbursed under the regulation. To the extent his mother has assisted him, that is not representation within the meaning of the Regulations.

Appellant's submissions

[28] Mr Stryder submits the following:

- [1] ACC refuses Mr Stryder's advocate Nelly Barr's \$550 review costs for review 7319195 heard 21.4.2021.
- [2] Under s 148 of the ACC Act – if a review application is made and ACC revises/revokes its original declined decision fully or partly in favour of the applicant before a review is heard, then ACC must award costs and expenses on the same basis as the reviewer would have, as per Schedule 1 of Review Costs Regulations 2002.
- [3] ICRA reviewer Lindsay Edmondson and ACC refuse to award/pay advocate Nelly Barr's \$550 review costs as per Nelly Barr's review invoice dated 21.4.21.

- [4] On 1.2.2021, ACC declined Mr Stryder's and GP Dr Sia's claim for a confirmed sprained/fractured left middle finger.
- [5] On 2.2.2021, Mr Stryder requested a review.
- [6] On 14.4.2021, ACC revised/revoked their original decline decision of 1.2.2021 and accepted Dr Sia's claim of a confirmed sprained/fractured left finger from an accident on 20.10.2020.
- [7] Seeking ACC ordered to pay advocate Nelly Barr her \$550 review costs/specialist hand physio report cost for review 7319195 as per the ACC Act s 148.

Respondent's submissions

[29] Mr Hunter refers to *Stockan v ACC*,³ where Judge Ongley said:

The basis for this appeal has been overtaken by a favourable decision by the respondent. Nevertheless, Mr Grove for the appellant sought a hearing in order to ventilate complaints about the review process. The Court does not have power to provide the kind of remedy that the appellant seeks because it is limited by s 161 of the Injury Prevention Rehabilitation and Compensation Act 2001 to dismissing the appeal or modifying or quashing the review decision. The subsequent decision by the Corporation in favour of the appellant has rendered the appeal question redundant or moot.

[30] Accordingly, Mr Hunt submits that the reviewer was correct to determine that she had no jurisdiction to review the decision of the respondent dated 1 February 2021, because, prior to the review hearing, the respondent had revoked that decision and replaced it with a decision granting cover for left finger injury, thereby revoking the 1 February 2021 decision.

[31] He also submits that reviewer was correct to determine that in those circumstances she did not have any power to award costs. This conclusion followed her determination that she did not have jurisdiction to review the 1 February 2021 decision, including as to the question of costs.

[32] Mr Hunt also notes:

[20] The respondent did make a decision on costs on 10 May 2021. Obviously, this could not have been considered by the reviewer at the time of the review, because it was after the hearing of the review (which was on 21 April 2021).

³ *Stockan v Accident Compensation Corporation* [2006] NZACC 233.

[21] The decision itself was clearly one made in terms of s 148(3) of the Act given the appellant the direct right of appeal to this Court.

[22] As to the respondent's refusal to award costs to the applicant, the respondent's position was (and is) that the appellant's mother, Ms Nelly Barr, in whose name an invoice has been rendered, did not assist or provide representation for the appellant in connection with the former review (7131915). Its reasons are fully expressed in the decision of 10 May 2021 itself.

[33] Mr Hunt submits that costs can only be awarded where those costs have been incurred by the applicant and for reasons set out in the decision of 10 May 2021, the respondent was not satisfied that was so.

Decision

[34] In its decision on costs dated 10 May 2021, the review specialist Ms Roberts-Thomson noted that the power to award cost to the applicant is set out in s 148 of the Act and that costs must be awarded if ACC are satisfied an applicant acted reasonably in applying for the review. Ms Roberts-Thomson went on to say that she was satisfied that the appellant had acted reasonably in applying for the review.

[35] However, she noted that Ms Barr advised ACC in the case conference that she was acting a support person and not an advocate. Accordingly, Ms Roberts-Thomson said:

We are therefore not satisfied that you have incurred actual costs for her involvement in the review. Nor have ACC been provided with the specialist's report or an invoice for the specialist's report. The letter relating to an item for which \$50 is sought for "specialist hand physiotherapist report 3.2.21 – Kevin Deng."

[36] In respect to the letter, Ms Roberts-Thomson noted that ACC had not been provided with the specialist's report nor an invoice for the specialist's report.

[37] Accordingly, the only costs that Ms Roberts-Thomson allowed were disbursements of \$22.75.

[38] It is noted that the "tax invoice" from Nelly Barr is dated 21 April 2021, the date of the review hearing. The tax invoice does not contain an IRD number.

[39] The invoice seeks \$68.18 for participation in the case conference. The reviewer has recorded that at the case conference Ms Barr described herself as a support person and did not speak for Mr Stryder at any time during the conference.

[40] The reviewer also notes that Ms Barr did not attend the review hearing. Nevertheless, an amount of \$409.07 is sought by Nelly Barr for “preparation of case for review”.

[41] Given what Ms Edmondson has said in her review decision relating to role of Ms Barr during the conference and also her non-attendance during the review hearing, neither of which has been challenged before me, I must conclude that on the balance of probabilities that Mr Stryder has not established that he has incurred those costs for the case conference or the review hearing.

[42] In its decision of 10 May 2021, ACC has agreed to pay disbursements to the appellant of \$22.75 as claimed.

[43] The cost of \$50 claimed is described in the tax invoice dated 21 April 2021 as “specialist hand physio therapist report 3.2.21 – Kevin Deng”. In its decision on costs of 10 May 2021, it is noted that ACC was not provided with the specialist’s report or an invoice for the specialist’s report. If the appellant were to provide the same, then it would be reasonable for ACC to reconsider its refusal to pay this amount.

[44] Accordingly, I must find that, on the balance of probabilities, it has not been established that such report costing \$50 was obtained for the purposes of the review.

[45] Should the appellant be able to provide ACC with an invoice from Mr Deng for a report of 3 February 2021, it would be fair for ACC to reconsider its refusal to pay this amount.

[46] I find therefore that ACC’s decision on costs, as it presently stands is fair.

[47] Likewise, I find on the basis of *O’Leary*, in respect of the remainder of the matters that were originally the subject of Mr Stryder’s review application, that as

ACC granted cover to Mr Stryder's injury on 14 April 2021 the reviewer was left with no jurisdiction to review the respondent's decision of 1 February 2021 declining cover, because it had been revoked and replaced by a decision granting cover.

[48] Accordingly, the review application is dismissed.

[49] There is no issue as to costs.



Judge C J McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch