

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 94 ACR 272/20

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF
THE ACT

BETWEEN JEREMY BLACK
Appellant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: 28 April 2022
Heard at: Christchurch/ Ōtautahi

Appearances: Appellant in person
Mr D Russ for the Respondent

Judgment: 19 May 2022

**RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Calculation of weekly earnings – s 40 Accident Rehabilitation and
Compensation Insurance Act 1992]**

[1] At issue on this appeal is whether the respondent’s decision of 30 October 2019 on the calculation of Mr Black’s entitlement to weekly compensation is correct.

Background

[2] On 25 January 1997, Mr Black was a victim of an assault. He suffered serious head injuries and was hospitalised. It was accepted that he was incapacitated from date of injury.

[3] On 31 January 1997, because Mr Black was unable to communicate, his father, on his behalf completed an application for entitlement to weekly compensation, transport costs and treatment costs.

[4] His father listed Canterbury Cartons as the appellant's employer.

[5] Canterbury Cartons Limited also completed an employee earning certificate on 5 February 1995. The certificate noted that the appellant started with Canterbury Cartons Limited on 14 October 1996 as a full-time employee and that if it were not for the injury the appellant would have continued to receive earnings for another 52 weeks.

[6] The file notes a handwritten record of a call to the ACC case officer on 7 February 1997 from the appellant's father. The note reads:

Father rang for Jeremy. He is off work and queried for weekly compensation. They completed forms at the hospital with case manager. I advised I would request the file and send an ARC/3 to Jeremy's employer. Jeremy has another ARC/18 and they will post this in. IP (injured person?) is residing in Rolleston. Employer Canterbury Cartons Co Ltd 122 Antigua St, ChCh. DOI 25-1-97 according to father.

[7] The file contains a short-term assessment of weekly compensation dated 12 February 1997 effective from 1 February 1997 to 28 February 1997 and a long-term assessment of weekly compensation effective from 1 March 1997 to 18 April 1997.

[8] On 12 February 1997, ACC issued a decision on weekly compensation assessment advising Mr Black that his short term and long term gross weekly rates were \$413.13 and \$339.01 respectively.

[9] On 2 June 1999, the ACC filed records that an ACC internal audit identified errors in the calculation of the appellant's weekly compensation and as a result, ACC credited the appellant's bank account with a difference on Monday 19 July 1999.

[10] Mr Black requested and received his ACC file in 2016 or 2017 and began enquiring about the calculation of his weekly compensation payments.

[11] There were numerous communications between Mr Black and ACC from 19 April 2018. In its correspondence with Mr Black, ACC set out the way in which it carried out the calculations for weekly compensation and included that it was based on employment with Canterbury Cartons Limited where he had commenced full time employment on 14 October 1996. ACC noted that Mr Black had worked a total of 15 weeks before his injury on 25 January 1997 and set out various calculations of how the weekly compensation calculation was reached.

[12] On 21 December 2018, Mr Black provided an IRD earning summary for the years commencing 1 April 1990 through to 31 March 1999.

[13] Of particular relevance to this case was the income details for the tax years ended 31 March 1996 and 31 March 1997. This is because s 40 of the Accident Rehabilitation and Compensation Insurance Act 1992 dealing with the calculation of weekly earnings as employee is focused on 12 months immediately preceding the commencement of the period of incapacity, that is to say the 12 month preceding at 25 January 1997.

[14] The Inland Revenue summary does not include commencement and end dates of employment. For the tax year ended 31 March 1996, the appellant received accident compensation corporation claimant's compensation of \$3,347.89 and income support service benefits of \$3,887.36 and income from Kiwi Packaging Limited of \$619.65.

[15] For the following tax year ended 31 March 1997, the summary discloses that the appellant received accident compensation corporation claimant's compensation of \$2,406.84, New Zealand income support service benefits of \$4,471.16; income from New Zealand Carton Company Limited of \$6,558.65 and income from AC Body in JEK Peters of \$642.50.

[16] To form part of the calculation of the appellant's weekly compensation calculation, ACC had to be satisfied that earnings shown in the IRD summaries were earned in the 12 months preceding Mr Black's incapacity. That is to say, the income had to be earned in the period 25 January 1996 to 24 January 1997.

[17] That meant that for the tax year ended 31 March 1996, the amount of \$619.65 earned from Kiwi Packaging Limited would be included in ACC's s 40 calculation of earnings during the 12 months immediately preceding the commencement of the period of incapacity if it was earned between 25 January 1996 and 31 March 1996.

[18] Likewise, income earned in the tax year from 1 April 1996 to 31 March 1997 could be included in the s 40 calculation if it were in between 1 April 1996 and 24 January 1997 (the day before the accident). The two lots of earnings for that year recorded in the Inland Revenue Summary namely, New Zealand Carton Company Limited of \$6,558.65 and AC body in JEK Peters of \$642.50 plainly qualify, as the appellant's injury on 25 January 1997 rendered him incapacitated.

[19] ACC was able to obtain sufficient information to be satisfied that Mr Black was due more weekly compensation than he had been paid and by decision dated 30 October 2019 paid Mr Black arrears of \$60,446.70.

[20] On 1 November 2019, Mr Black sought review of ACC's decision of 30 October 2019.

[21] ACC sought information from Kiwi Packaging and Mr Black to clarify the time period during the tax year ended 31 March 1996, that the appellant worked for Kiwi Packaging Limited.

[22] The matter was considered by ACC's weekly compensation discussion group who issued comment on 22 July 2020. The panel referred to two prior accidental injuries claimed by Mr Black that saw him paid weekly compensation from 11 April 1995 to 17 April 1995 and 30 April 1995 to 30 July 1995. The only income disclosed for the purpose of those payments was that from Kiwi Packaging. The Panel concluded that Mr Black could only have qualified for the level of payments that he received if income in the 1996 tax year had been earned in April 1995 well before the commencement of the critical 12 months period preceding the appellant's injury on 25 January 1997.

[23] Mr Black was advised by ACC that if he were able to supply information which would enable the period of earnings for Kiwi Packaging Limited to be determined, ACC would reinvestigate the matter.

Legislation

[24] Mr Black's claim for weekly compensation was lodged under the Accident Rehabilitation and Compensation Insurance Act 1992. This statute continues to apply to Mr Black's entitlement for weekly compensation (see *Frewen v Accident Compensation Corporation*).¹

[25] Section 39 of this statute provides that compensation for loss of earnings is payable to an earner who is incapacitated as a result of a personal injury (other than an injury occurring at work). Calculation of the weekly earnings is undertaken using the criteria and formula in Part IV of the Act (where applicable).

[26] Section 40 of that Statute provides:

- (1) This section applies only to earners who are earners immediately before the commencement of the incapacity and who, during the 12 months immediately preceding the commencement of the period of incapacity, had earnings as an employee and who did not also have earnings other than as an employee.
- (2) The weekly earnings of any person to whom this section applies shall be-
 - (a) ...
 - (b) In respect of any weekly period of incapacity after the period referred to in paragraph (a) of this subsection, if the person was in permanent employment immediately before the commencement of the incapacity, the person's earnings as an employee during the 52 weeks immediately before the commencement of the incapacity, divided by –
 - (i) The number of full or part weeks during which the person earned those earnings as an employee during that 52 weeks period;
 - (ii) ...

¹ *Frewen v Accident Compensation Corporation* DC Dunedin 154/02, 5 June 2002

Appellant's submissions

[27] Mr Black says that if someone had looked at his employment records at the time, they would have determined what his income was prior to the assault on 25 January 1997. He reminds the Court that he suffered a serious head injury and was incapacitated from that date.

[28] He reminds the Court that because of the seriousness of his injury, his parents had to sign the necessary forms back in 1997.

[29] He mentioned that bank statements for the period are no longer available.

[30] He referred to ACC not being truthful, and he has filed a significant list of documents that detail his complaints with ACC.

[31] He asks how does ACC get to say earnings were more likely than unlikely to be at the end of certain periods, without the evidence.

[32] He reminds the Court that he produced Inland Revenue information as proof of earnings but because it is not accurate enough showing the exact dates worked, it is not good enough to rely on.

[33] He notes that ACC have stated that they have lost parts of his file so he says that there is nothing that would have alerted ACC to the possibility of other income earned by him at the relevant time.

Respondent's submissions

[34] Mr Russ acknowledges the challenges that this case had presented given the time that is lapsed since the appellant's injury on 25 January 1997.

[35] From the records that are available, it is clear that the appellant was indeed badly injured, and this is evidenced by the fact that his application for entitlement dated 31 January 1997 was signed by his father.

[36] Mr Russ points out that since then, paper files that once existed no longer exist, but a number of skilled people have endeavoured to reconstruct what the appellant's earnings were in the year prior to his injury on 25 January 1997.

[37] He notes ACC does not have the right to access income tax records and the appellant, having obtained those records in December 2017, has greatly assisted in the reconstruction of what had occurred in the 12 months prior to his injury.

[38] Mr Russ submits the appellant has not established, on the balance of probabilities, that the calculations made by ACC are wrong.

Decision

[39] While the issue on appeal is whether the respondent's calculation of the appellant's weekly compensation is correct, the specific focus of this appeal is on whether the amount of \$619.65, earned by the appellant from Kiwi Packaging Limited during the tax year 1/4/1995 to 31/3/1996, should be included in ACC's calculation of weekly compensation payable to the appellant following his injury on 25 January 1997.

[40] To form part of the calculation of the appellant's weekly compensation calculation, ACC had to be satisfied that the appellant's earnings occurred within the 12 months preceding Mr Black's incapacity. That is, the income was earned in the period 25 January 1996 to 24 January 1997.

[41] More specifically, it is the earnings during the income tax year 1 April 1995 to 31 March 1996 of \$619.65 from Kiwi Packaging Limited that are in issue.

[42] It is noted the Inland Revenue summary provided on 21 December 2017 discloses that the appellant worked for Kiwi Packaging Limited for part of the year ended 31 March 1992. In that year, he earned \$7,291.12. He worked for Kiwi Packaging Limited again in the year ended 31 March 1993, and in that year, earned a total of \$10,279.41. He again worked for Kiwi Packaging Limited in the year ended 31 March 1995, earning a total of \$9,501.40.

[43] Such records that ACC have been able to find disclose that in the following tax year, that is from 1 April 1995 to 31 March 1996 the appellant earned a total of \$619.65 from Kiwi Packaging Limited. As mentioned, it is this particular tax year that is the focus of this appeal.

[44] Section 40 of the Accident Rehabilitation and Compensation Insurance Act 1992 provides that entitlements to weekly compensation are based on the person's earnings in permanent employment for the 52 weeks immediately before the commencement of the incapacity.

[45] Therefore, so far as it is relevant, for the tax year ended 31 March 1996, the issue is what did the appellant earn as an employee from 25 January 1996 (the date that is 12 months prior to his injury) and the 31 March 1996.

[46] Refining the issue, the enquiry is whether or not the appellant earned the \$619.65 from Kiwi Packaging Limited during the period 25 January 1996 to 31 March 1996, in which case, it would be included in the calculation of weekly compensation, or whether it was earned prior to 25 January 1996, in which case it would be excluded from weekly compensation consideration, by virtue of s 40 of the Act.

[47] Because of the paucity of information that is available now relating to the relevant period for calculation of his earnings relevant to the calculation of weekly compensation, that is to say for the period 25 January 1996 to 24 January 1997, ACC has made attempts which I accept have been done conscientiously and in good faith, to understand what occurred back during that period.

[48] In a 19-page memorandum dated 26 June 2019, Technical Specialist, Mr Palmer, from ACC, attempted to elucidate matters. At page 9 of his report, he recommended that enquiries be made as to whether Kiwi Packaging still existed and whether it still held any earnings information from 1996 and 1997.

[49] No such information has become available.

[50] At page 11 of his report, Mr Palmer said:

In the absence of information from Kiwi Packaging Limited, it is difficult to ascertain whether the \$619.65 earned between 1 April 1995 and 31 March 1996 on the Inland Revenue record lies within the relevant earnings period of 25 January 1996 to 24 January 1997.

[51] The matter was referred to ACC's weekly compensation discussion group and its recommendation of 22 July 2020 included the following:

... The weekly compensation discussion group has been asked to consider this issue again, following conciliation and following a code complaint finding.

The weekly compensation discussion group noted that the client received weekly compensation on two prior accidental injury claims. On Claim B1502729007, the client was paid compensation from 11 April 1995 to 17 April 1995 (gross weekly compensation of \$335.70 per week); On Claim B1502729008, the client was paid weekly compensation from 30 April 1995 to 30 July 1995 (gross weekly compensation of \$301.97 per week from 30 April 1995 to 26 May 1995 and gross weekly compensation of \$200.48 per week from 27 May 1995 to 30 July 1995).

The information from Inland Revenue department shows that the only earnings as an employee the client had in the 1996 tax year were the earnings from Kiwi Packaging of \$619.65. The weekly compensation discussion group concluded that the client could only have qualified for weekly compensation on Claim B1502729007 and Claim B1502729008 by virtue of his earnings from Kiwi Packaging, they being the only earnings as an employee the client had in the 1996 tax year. This would place the client's earnings from Kiwi Packaging in and around April 1995, well before the period 27 January 1996 to 24 January 1997.

Given that the amount paid to the client by Kiwi Packaging was \$619.65, and given the weekly compensation rates paid to the client by ACC in 1995, these earnings are very likely to have been for a matter of a number of weeks' work, not a matter of a number of months' work. That is, it is not considered likely the earnings were earned in April 1995 and then at some date on or after 27 January 1996.

[52] Given the extremely scant information we are presently left with, the Panel's conclusion is not unreasonable.

[53] The information available also invites the inference that the appellant, having earned a total of \$9,501.40 working for Kiwi Packaging Limited in the year ended 31 March 1995, was working for Kiwi Packaging at the end of that 1995 financial year and continued this employment into April 1995 until he received the injury (claim B1502729007) for which he was then paid weekly compensation commencing 11 April 1995.

[54] The calendar for 1995 shows that between the beginning of the month and the 11th of the month, the date on which weekly compensation was first paid, there were six weekdays available for work assuming a five day working week.

[55] The amount that he was actually paid by way of weekly compensation for the period commencing 11 April 1995 was \$335.70 per week representing 80% of weekly income. On these figures, the appellant's weekly income would have amounted to \$419.62 per week.

[56] For reasons that are now unclear, there was a break in weekly compensation from 17 April until 30 April 1995 when it commenced again and continued until 30 July 1995.

[57] These figures would mean that the total amount earned by the appellant from Kiwi Packaging Limited of \$619.65 for the year ended 31 March 1996 would equate to approximately a week and a half's full-time employment.

[58] It follows that I agree with the Weekly Compensation Discussion Group's view that it is likely that the earnings totalling \$619.65 (or at least most of those earnings) were earned in April 1995 (to qualify the appellant for weekly compensation) which then commenced on 11 April 1995.

[59] I acknowledge that although the appellant passionately believes otherwise, I regret that I am unable to agree with him. On the evidence that is presently available, no other conclusion is plausible.

[60] Accordingly, I must dismiss the appeal.

[61] There is no issue as to costs.



Judge C J McGuire
District Court Judge

Solicitors: Fletcher Vautier Moore, Nelson for the respondent.