

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 67

ACR 45/22

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

Hearing: 24 March 2023
Heard at: Auckland/Tamaki Makaurau
Appearances: The Appellant in person
Ms K Anderson for the Respondent
Judgment: 4 May 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Section 6 “Earner”; Weekly Compensation, Clause 32 – First Schedule
Accident Compensation Act 2001]**

[1] This appeal arises out of Ms Martin’s serious back injury in January 2021 while working in Australia.

[2] She had back surgery in Sydney on 17 April 2021 and returned to New Zealand on 2 May 2021.

[3] She applied for cover for her back injury immediately on her return. Cover was granted by ACC in June 2021.

[4] ACC funded treatment in New Zealand for the appellant’s covered injury. Following spinal fusion surgery in October 2021, Ms Martin applied for weekly compensation. It is

ACC's decision of 26 October 2021 to decline Ms Martin's claim for weekly compensation that is the subject of this appeal.

[5] The issue to be determined is whether Ms Martin meets the criteria of the Act for having "earnings" at the time of her covered injury.

Background

[6] The appellant left New Zealand and had been working in Sydney, Australia, for just under six months when, on 7 January 2021, she injured her spine at the L5/S1 level when a lawnmower she was putting onto ramps slid off, damaging her back.

[7] At the time she was working for Koala Landscapes, Sydney. After enduring months of pain, CT scans, epidural and MRI, it was found that she needed a discectomy. She had the surgery in Sydney on 17 April 2021. After the surgery she made a decision to come back to New Zealand for her recovery, as the injury itself continued to cause her constant pain and she was unable to move. She felt like the Australian health system had failed her.

[8] She told the reviewer and this Court that she phoned ACC on several occasions prior to making the decision to move home, as she needed assurance that her injury would be covered by ACC. She said "I explained everything, where I was, what happened".

[9] She says that ACC informed her that everything to do with the injury would be covered if she returned home within a six month period. She said she based a life decision on the fact that she knew New Zealand would help and support her in her recovery.

[10] She returned to New Zealand on 2 May 2021.

[11] ACC records relating to interactions with Ms Martin after a claim for cover was lodged by her at the Torbay Medical Centre on 3 May record:

- (a) A text message was sent by ACC at 10.39 am on 5 May 2021 confirming Ms Martin's ACC claim had been received.

- (b) Ms Martin sent an email to ACC at 4.42 pm on 5 May 2021 enquiring about her claim. She said:

“I have just returned from Australia with a back injury that was operated on over there, however I have chosen to come back to Auckland to be with family for my recovery. I was in Australia for just under six months. I left 06/11/2020 and due to Covid, returned home on 02/05/21. I had back surgery on 17 April 2021. Would I be covered for any future injuries regarding the injury? And would I be able to get some physio help covered?”

- (c) Ms Martin called ACC on 6 May 2021 (12.38 pm) to ask if her GP had lodged her claim and how long a decision would take (and her phone number details updated).

[12] At 3.43 pm on 6 May 2021, ACC responded to Ms Martin’s 5 May 2021 email, advising her claim had been received and was awaiting a cover decision, and if cover was granted, ACC may be able to assist with treatment.

[13] Ms Martin telephoned ACC on 17 May 2021 at 10.44 am asking about a decision on her claim. She was transferred to the relevant person, who asked Ms Martin questions and as a result of the answers provided, she was advised that she met the “ordinarily resident” criteria and that ACC would seek GP’s notes. ACC sent an email requesting that Ms Martin provide a discharge summary relating to the Australian hospital stay and related medical notes, which Ms Martin promptly provided.

[14] ACC’s record on “cover assessment – initial call summary – spine” dated 17 May 2021 records that Ms Martin indicated she wanted ACC to help with “treatment costs ongoing” and “weekly compensation?”.

[15] ACC wrote to Ms Martin on 25 June 2021 approving cover for her Australian injury and confirming that it would contribute to the cost of her initial treatment.

[16] On 6 September 2021, Dr Exeter saw Ms Martin and ordered an MRI. Based on the MRI results, Dr Exeter arranged a transforaminal injection.

[17] On 20 October 2021, Dr Exeter certified that Ms Martin was fully unfit for work from 20 October 2021 to 7 December 2021.

[18] On 22 October 2021, Ms Martin's GP, Dr Thwaites, certified that she was fully unfit for work from 20 October 2021 to 31 October 2021.

[19] Ms Martin provided information in support of her weekly compensation claim on 22 October 2021. That information included that she had income in the four weeks prior to her injury and she was receiving income tested benefits from the Ministry of Social Development.

[20] ACC declined Ms Martin's application for weekly compensation on 26 October 2021. The reason stated was "this is because although working in Australia, you were not paying tax or ACC levies in New Zealand and therefore are considered a non-earner."

[21] ACC confirmed that it was able to offer other assistance towards her recovery and treatment costs.

[22] Ms Martin unsuccessfully sought a review of that decision and now appeals to this Court.

[23] In her written submission to this Court, the appellant said this regarding what occurred from a clinical perspective after she returned to New Zealand:

My back pain wasn't improving, so my GP decided I needed a specialist to look at it again in New Zealand. They requested all my clinical notes from Australia, which I have also provided to ACC. Dan Exeter was my specialist, who referred me to Dr John Ferguson, Spine Surgeon, where he recommended a spinal fusion. My surgery was May 30th 2022.

October 20th 2021 I had to have an epidural guided CT recommended by Dan Exeter, I had to have five-seven days off work, as it was a very painful and scary procedure. Prior to this, I made several phone calls to ACC to make sure I had the wage cover for this period off, as I had no sick leave, having recently found and returned to work.

I spoke to Ashley at ACC (I think that was her name). I made contact on 22 October 2021 to send in my wage slips etc. Come Monday the 25th October 2021, I ring to check how things are going and she told me I wasn't entitled. This cost me a week of wages, where I had to use Work and Income plus my mother to keep my bills paid. I was upset and furious because if I would have known, I would have returned to work regardless of pain the next day to save my finances, as I had no choice.

[24] She said she had no choice but to return to work only four weeks after spinal fusion:

If I knew Work and Income wasn't going to support me, I would have had no choice but to pull out of study or just not bother with surgery at all because I would have had no financial support from both ACC and Work and Income. I would be homeless and having a spinal infusion? How is that fair or even possible?

I feel so defeated. I should have stayed in Australia if I knew getting support in my home country would have been this ridiculous and unfair. I have worked since I was 15 years old, paying tax and ACC etc. I only left New Zealand for six months and have come home to no help or support at all.

I fight the reviewer's decision and ACC decision because I think it is unfair and I do worry about further problems with my spine as a result of this injury and worry I will never be supported financially if anything were to happen. I am only 28 years old and have unfortunately sustained an injury that will affect me my entire life. I am still to have children and worry about further issues with my injury and the financial hardship it brings, with no support. The fact I based a whole life decision in the return back to New Zealand with false promises from ACC.

Respondent's Submissions

[25] Ms Anderson acknowledges that the advice she received from ACC prior to her return to New Zealand, that she would be eligible for cover, was correct. Her injury was a covered injury.

[26] She says however that the issue of entitlement to weekly compensation in respect of the covered injury is a separate matter. She says it is unclear whether Ms Martin was specifically advised that she would be eligible for weekly compensation. However, she submits that in any event there is no legislative basis on which weekly compensation can be paid, even if Ms Martin did receive incorrect advice, as that cannot provide a basis for entitlement to weekly compensation.

Decision

[27] Clause 32 of the First Schedule to the Accident Compensation Act 2001 provides:

[1] The Corporation is liable to pay weekly compensation for loss of earnings to a claimant who –

- (a) Has an incapacity resulting from a personal injury for which he or she has cover; and
- (b) Was an earner immediately before his or her incapacity commenced.

...

[28] “Earner” is defined in Section 6 of the Act:

Earner means a natural person who engages in employment ...

[29] Section 9 provides:

Earnings as an employee, in relation to any person and any tax year, means all PAYE income payments to the person for the tax year.

[30] The case of *Gabites v Accident Rehabilitation and Compensation Insurance Corporation*¹ considered the same question that is at issue in this case, namely whether the appellant’s earnings from employment in Australia qualified as earnings as an employee for the purposes of eligibility for weekly compensation under the ACC legislation.

[31] In that case, the appellant returned to New Zealand in early 1992, having ceased work in Australia in June 1991 as a consequence of the onset of industrial deafness.

[32] The appellant applied for weekly compensation.

[33] In his judgment in that case, Judge Beattie said:

I accept the reasoning of Her Honour in the *Blower’s* case and the submissions of Counsel for the respondent herein. The whole thrust of the interrelationship between the ARCI Act and the Income Tax Act is that only earnings and income that are subject to the latter are to be considered as relevant or applicable to the former.

If that were not the case, the appellant’s Australian employer would be an “employer” for the purposes of the ARCI Act. That would then lead to the Australian employer being liable to pay employee premiums under s 101 of the Act.

That such is plainly not the case, nor intended to be, reinforces the view that it is only income or earnings which are subject to New Zealand income tax law which can be considered as determining entitlement to weekly compensation under the ARCI Act.

It follows that the appellant was not an earner and did not have earnings which would give an entitlement to weekly compensation under s 40 of the Act.

[34] Ms Anderson also refers to *Humphries*², which addresses the point as to whether there could be a discretion to award weekly compensation in deserving cases.

¹ *Gabites v Accident Rehabilitation and Compensation Insurance Corporation* [1997] NZACC 218

² *Humphries v Accident Compensation Corporation* ² [2014] NZACC 123 at [17].

[35] Judge Powell said:

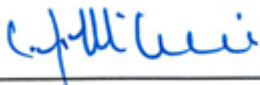
Finally, I note for completeness that in written material filed by the appellant, he also raised the issue of whether “some kind of discretion to exercise mercy” could be exercised in what he considers to be a “unique situation”. Unfortunately for the appellant, however, that with regard to entitlement to weekly compensation, the legislation is both clear and precise, and leaves no residual discretion to allow weekly compensation if the legislative requirements are not met.

[36] In this case, it is common ground that she made enquiries with ACC before she returned to New Zealand to ensure that she had cover for her injury. I accept that it is possible in the course of those enquiries, she was led to believe that she would have full cover, which she understood to include weekly compensation.

[37] Ultimately, the appellant’s position is that she had no taxable earnings falling within New Zealand’s income tax laws, in that she had no relevant earnings for the purposes of s 9, which describes earnings as an employee as meaning all PAYE income payments of the person for the tax year.

[38] Accordingly, therefore I must find that the respondent’s decision of 26 October 2021 that the appellant did not qualify for weekly compensation is correct. I therefore must dismiss this appeal.

[39] Costs are reserved.



CJ McGuire
District Court Judge

Solicitors: K Anderson, Barrister, Auckland