

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 174 ACR 235/22

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

Hearing: 20 September 2023
Heard at: Auckland/Tāmaki Makaurau

Appearances: Mr B Hinchcliff for the Appellant
Mr L Hawes-Gandar and Ms F Becroft for the Respondent

Judgment: 26 October 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Cover –Incapacity s 103; Backdated Weekly Compensation
Accident Compensation Act 2001]**

[1] In this appeal, the appellant takes issue with a decision by the Accident Compensation Corporation dated 30 May 2022, accepting retrospective incapacity and calculating Mr Wahabi's entitlement to backdated weekly compensation from 21 March 2021 to 27 February 2022.

[2] Also at issue is a letter from the Corporation dated 17 June 2022 advising Mr Wahabi that he would need to provide medical certification of incapacity if he wished to seek further weekly compensation for any period beyond 27 February 2022.

[3] On 6 November 2020, Mr Wahabi went to his GP, who completed an ACC injury claim form recording that an accident happened on 1 November 2020, described as follows:

Played sport, injured right hamstrings.

[4] At the time of the injury, Mr Wahabi's employment involved him working 50% of his time as a mechanic and 50% as a warrant of fitness inspector.

[5] A claim was lodged for a sprain of the left hamstring and cover was granted.

[6] On 14 November 2020, Mr Wahabi returned to his GP and was certified unfit for his work for 21 days. The Corporation began paying weekly compensation.

[7] As is usual practice, Mr Wahabi continued to provide further medical certificates certifying his ongoing incapacity, with the Corporation providing him reminders of the need to provide further certification if he wished to continue receiving weekly compensation, when certification was near to ending.

[8] Further medical certificates were provided dated 30 November 2020, 15 December 2020, 22 January 2021, 15 February 2021 and 3 March 2021.

[9] The last medical certificate expired on 21 March 2021, when Mr Wahabi reported that he had returned to work.

[10] On 23 March 2021, Mr Wahabi saw Orthopaedic Surgeon, Mr Hadlow, who diagnosed a tear of the long head of the biceps femoris. Mr Hadlow recorded that his understanding was that Mr Wahabi had returned to work in early January, but then suffered a recurrence of symptoms when doing some heavy lifting.

[11] Mr Hadlow recorded that Mr Wahabi was largely recovered from that recurrence and was now "75 per cent better". He also noted that Mr Wahabi was sleeping well and taking no pain relief.

[12] He provided Mr Wahabi with a referral to physiotherapy.

[13] Mr Wahabi contacted the Corporation on 24 May 2021 advising that following his return to work on 21 March 2021, he had experienced ongoing discomfort and he had stopped working from 22 April 2021.

[14] He provided a medical certificate from his GP dated 22 April 2021 certifying that he was unfit for work 21 days from that date.

[15] Mr Wahabi was advised that the Corporation would need to investigate this request, given that there had been a gap in his medical certificates.

[16] The Corporation obtained copies of the GP notes and then arranged for an internal clinical review of the request for backdated compensation.

[17] On 23 June 2021, clinical advisor and physiotherapist, Kylie Hughes, noted that she would have expected Mr Wahabi's injuries to have resolved by then and that it was not clear why he was having ongoing symptoms. She found there was no clear causal link established between his symptoms and the covered injury.

[18] On 29 June, the Corporation issued a decision declining Mr Wahabi's request for further weekly compensation on the basis that there was insufficient evidence of a causal link between his ongoing incapacity and the covered injury.

[19] Although the Corporation declined weekly compensation, it advised Mr Wahabi that it would arrange a specialist assessment of the cause of his ongoing problems.

[20] In a report dated 27 July 2021, Mr Hadlow noted that it was unusual that Mr Wahabi was still symptomatic, so long after his injury and that he was therefore referring him for an MRI.

[21] An MRI was performed on 17 August 2021 and confirmed Mr Hadlow's previous diagnosis. Under the heading "Impression" is this:

Grade II tear left biceps femoris at the mid thigh with thickening and scouring of the central tendon as well as a small split.

[22] On 30 August 2021, Mr Hadlow advised Mr Wahabi's GP and the ACC clinical advisor as follows:

...

Adris tells me that following his MRI scan, his leg was worse. I told him I can't think of any scientific cause for this to be the case. He needs to manage his biceps tear by continual stretching, and I have suggested he might benefit from buying some Voltaren

Emulgel and rubbing it on the back of his thigh, twice a day for a couple of weeks. Other than that, it is just a matter of time and hopefully the scar tissue will soften.

[23] On 11 September 2021, Mr Wahabi's GP provided a further medical certificate stating that he was unfit for work from 11 September 2021 for 21 days.

[24] The Corporation obtained updated notes from the GP and arranged for a medical case review by Dr Burgess, occupational specialist, which was scheduled for 22 December 2021.

[25] Mr Wahabi failed to attend the scheduled appointment and on 22 December 2021, the Corporation issued a decision declining weekly compensation on the basis that there was insufficient evidence to establish a causal link between his incapacity and his covered injuries.

[26] The Corporation's decision letter noted that it would reconsider the decision if he made contact to arrange and attend a further assessment and supply further medical certificates to fill in the gaps and establish continuous incapacity from 21 March 2021.

[27] A further assessment was arranged with occupational specialist, Dr Walls. In a report dated 3 February 2022, Dr Walls noted, under the heading "Diagnosis":

The diagnosis is of a left biceps femoris tear which has healed but would appear to have had some superficial nerve entrapment in the scar tissue.

[28] In answer to ACC's question: "What aspects of their specific pre-injury role can they not currently undertake safely?" Dr Walls responded:

Mr Wahabi can undertake most of the tasks of his pre-injury role as a mechanic, but probably should avoid prolonged periods of straining and heavy work in the short term, until he has regained confidence, perhaps after the completion of an activity based programme.

[29] In response to the question about Mr Wahabi's ability to substantially engage in his pre-injury role, Dr Walls said:

I would suggest Mr Wahabi can substantially engage in the pre-injury role after the completion of an activity based programme.

At this time, I would estimate he can achieve 65 to 70 per cent of the pre-injury role (warrant of fitness assessments and light mechanical work) and steadily increase the involvement with medium and heavy work over the next four weeks.

[30] On 10 February 2022, Amy Josephs, recovery partner from ACC contacted Mr Wahabi to advise that based on Dr Walls' assessment, it appeared that he was able to safely return to work. However, Mr Wahabi advised that his employment had come to an end. Ms Josephs once again, advised him that there were gaps in the certification of his incapacity and he would need to obtain further medical certificates if he wished the Corporation to consider backdated weekly compensation.

[31] In email correspondence with his counsel on 22 February 2022, the Corporation again advised of the gaps in certification of incapacity for which further medical certificates were required if Mr Wahabi wished the Corporation to consider backdated weekly compensation, from March 2021.

[32] On 24 February 2022, Mr Wahabi's counsel sent through a number of medical certificates. These were all copies of the same medical certificates which the Corporation had already received, and which have been referred to. However, the year on the certificate of 15 February 2021, was misread as 2022, and was taken as a new medical certificate.

[33] On 23 March 2022, a request for backdated weekly compensation was considered by branch medical advisor, Dr Sefton Moy. Based on his review of the contemporaneous notes and reports, Mr Moy advised he thought it likely that Mr Wahabi had been fit when he had returned to work in March 2021 and did not think backdated incapacity was established.

[34] The claim was subsequently considered by technical specialist, Nick Eaden, who noted that he largely agreed with Dr Moy's analysis, but suggested that the evidence was arguable either way and could be seen as suggesting incapacity for at least some periods. He noted that there were still some gaps in medical certificates, but recommended that the Corporation take a generous and pragmatic approach and accept that Mr Wahabi had been continuously incapacitated during those gaps.

[35] On 30 May 2022, the Corporation issued a decision accepting that Mr Wahabi was entitled to backdated weekly compensation from 21 March 2021 to 27 February 2022.

[36] It appears that the decision to pay weekly compensation through to 27 February 2022 was based on the mistaken belief that the medical certificate provided to the Corporation on

24 February 2022 had been a new one, certifying the appellant being unfit until that date. In fact, the last dated medical certificate provided by Mr Wahabi had expired in October 2021. On this basis, therefore, Mr Wahabi was mistakenly paid almost four months of additional weekly compensation, which, the Corporation confirms, it will not seek to recover.

[37] On 17 June 2022, the Corporation contacted Mr Wahabi and advised him that he needed to provide further medical certificates if he wished to claim weekly compensation beyond 27 February 2022. Mr Wahabi advised he would talk to his GP about it.

[38] On the same day, the Corporation sent Mr Wahabi a letter confirming that he needed to provide medical certificates regarding any additional periods for which he wished to seek weekly compensation.

[39] On 17 June 2022, an application for review was lodged in respect of the Corporation's decision of 30 May 2022. At the review hearing, Mr Wahabi was asked why he had not provided any further medical certificates if he wanted to seek weekly compensation. His response was that his GP had been unwilling to provide certificates as he believed that he had recovered from his injuries.

[40] In her decision dated 7 December 2022, the reviewer dismissed the appellant's application to review the Corporation's decision of 30 May 2022 on the basis that the Corporation had correctly determined his entitlement to weekly compensation from 21 March 2021 to 27 February 2022.

[41] The reviewer also dismissed the application to review the Corporation's letter of 17 June 2022 on the basis that the letter did not suspend or decline weekly compensation as claimed by Mr Wahabi.

Appellant's Submissions

[42] Mr Hinchcliff refers to an assessment by Dr Walls undertaken pursuant to s 103 of the Act to determine Mr Wahabi's incapacity. He notes that Dr Walls suggests that an activity based programme to build up Mr Wahabi's confidence would be appropriate and that at the completion of this, it would be "comfortable for him to re-start his work as a motor mechanic (with care and caution of course)".

[43] Mr Hinchcliff refers to an email sent to ACC on 22 February 2022, where he says:

Why has ACC not paid weekly compensation for the initial periods of incapacity? My client has been waiting for over a year. It is not reasonable to live without any money.

[44] Mr Hinchcliff refers to the decision of Justice Muir in *Tonner*¹ where the judge said:

But the Court also emphasised that every retrospective claim will turn on its own facts and circumstances. What may in one case require specialist occupational therapists report will not in another. In *Terry*, for example, the mechanical severity of the injury was such that it almost self-evidently resulted in incapacity beyond the acute post-accident period. An informed assessment could be made by a medical practitioner in terms of the effects the injury would have had. That is what occurred. By contrast, Mr Tonner did not suffer any necessary or self-evident incapacity after the acute period.

[45] Mr Hinchcliff submits that when Dr Walls made his s 103 assessment on 1 February 2022, Mr Wahabi was still incapacitated.

[46] Mr Hinchcliff refers to *Harris*² where Judge Ongley noted that:

... The Corporation will often fail to request information by making an unjustified assumption that the claimant would provide further information if he believed himself still to have incapacity from pre-injury employment.

...

I find that this is a case in which the appellant should not be penalised for failure to provide information that has not been requested by the Corporation.

[47] Mr Hinchcliff submits that in the case comes down to reasonableness, and that it was not reasonable for ACC on 17 June 2022 to suspend weekly compensation from 27 February 2022 due to the lack of medical certification.

Respondent's Submissions

[48] Mr Hawes-Gandar notes that the issue is whether ACC correctly declined weekly compensation. In its decision of 30 May 2022, ACC agreed to pay backdated weekly compensation for the period 21 March 2021 to 27 February 2022.

[49] The decision includes advice from the Corporation:

¹ *Tonner v Accident Compensation Corporation* [2019] NZHC 1400 at [57].

² *Harris v Accident Compensation Corporation* [2014] NZACC 328 at [54] and [56].

If you would like to talk about this decision or have any questions, please get in touch with me using the contact details below.

[50] The letter also outlines what Mr Wahabi could do to have the decision reviewed.

[51] The next advice from the Corporation appears to have been in early June 2022. The file note includes the following:

I advised that if he were to get a further medical certificate, then this would be classed as an investigation, we would need further notes and guidance and if he were eligible, then I would be putting in a BWT programme ASAP. Explained that he needs to continuously provide certification to show that his injury is still incapacitating him. Discussed recent sprain claim as well, advised to go get physio ASAP.

Adris will talk with his GP if getting a further medical certificate is appropriate.

[52] Mr Hawes-Gandar then refers to ACC's letter of 17 June 2022 advising that compensation has ended because:

Your most recent medical certificate has expired. To continue paying weekly compensation to you, we need an updated medical certificate to show us you are unable to work because of your injury.

[53] Mr Hawes-Gandar also refers to *K*³ where Judge Powell says:

[28] There can be no dispute that the primary purpose of the ACC 18 is to certify for the purposes of s 102(2)(a) whether the claimant is incapacitated in terms of s 103 of the Act. ...

[29] There can equally be no dispute that the ACC 18 form also serves a number of other functions. For example, changes in the injury diagnosis on an ACC 18 can lead to further investigations as to whether additional injuries should be added to those for which a claimant has been given cover.

[54] Mr Hawes-Gandar submits that the pragmatic thing for Mr Wahabi to do is to get a further medical certificate.

[55] In reply, Mr Hinchcliff submits that Mr Wahabi did comply with ACC's requests. He acknowledges that medical certificates are generally required, but the situation is different in the case of retrospective medical certificates because of a bad decision by ACC.

³ *K v Accident Compensation Corporation* [2016] NZACC 243 at [28] and [29].

Decision

[56] Mr Wahabi appeals against ACC's decision of 30 May 2022 agreeing to pay weekly compensation until 27 February 2022. He further appeals against ACC's decision of 17 June 2022 suspending weekly compensation from 27 February 2022 due to the lack of medical certification.

[57] He suffered an injury on 1 November 2020 while playing cricket. Cover was initially granted for a sprain of the left hamstring tendon and weekly compensation was paid until 21 March 2021.

[58] On 26 May 2021, Mr Wahabi again made a request for additional weekly compensation and enquiries were commenced.

[59] On 30 May 2022, ACC advised Mr Wahabi that it accepted that he was incapacitated between 21 March 2021 and 27 February 2022 and as a result paid him weekly compensation for that period in the sum of \$18,724.69 (before tax).

[60] On 17 June 2022, ACC advised Mr Wahabi that it was unable to continue to pay him weekly compensation as his most recent medical certificate had expired. It advised him that it needed an updated medical certificate "to show us you are unable to work because of your injury".

[61] The intent of the statutory regime was discussed in *Harris*⁴ by Judge Ongley, where His Honour said:

Payment of weekly compensation depends on medical certificates of unfitness. Payments ceased when the appellant provided no more medical certificates. This situation poses a difficult problem for the Corporation. It appears that the vast majority of weekly compensation payments probably cease when no further certificates are provided. The Corporation does not then issue a formal decision. Short periods of incapacity immediately following injury represent an acute or recovery phase, during which the effects of an injury may prevent a claimant from working. The Corporation is not called upon to investigate ongoing incapacity once medical certificates of unfitness cease. Certificates of unfitness concern ability to work, which is not always equivalent to ability to engage in pre-injury employment, so the Corporation does not obtain information concerning ongoing incapacity.

⁴ *Harris* note 2 above at [49].

[62] The practical problem appears to be that Mr Wahabi ceased obtaining medical certificates from his doctor in October 2021. However, it would appear that one of the medical certificates that did exist was misread by the Corporation, and therefore backdated weekly compensation was paid from 21 March 2021 to 27 February 2022.

[63] At the review hearing, the reviewer asked Mr Hinchcliff what efforts had been made to obtain backdated medical certificates on behalf of Mr Wahabi. The response was that Mr Wahabi had tried to get them, but that his GP was refusing to provide them.

[64] The most helpful evidence for Mr Wahabi at a practical level is the assessment made by Dr Walls after consultation with the appellant on 1 February 2022. This was a s 103 assessment to allow the Corporation to determine whether a claimant is unable, because of his or her injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

[65] Dr Walls found:

Mr Wahabi can undertake most of the tasks of his pre-injury role as a mechanic, but probably should avoid prolonged periods of straining and heavy work in the short term until he has regained confidence, perhaps after the completion of an activity-based programme.

[66] Dr Walls also said:

At this time I would estimate that he can achieve 65 to 70 per cent of the pre-injury role (warrant of fitness assessments and light mechanical work) and steadily increase the involvement with medium and heavy work over the next four weeks.

[67] In essence therefore, this report of 3 February 2022 allowed ACC to meet its obligation under s 103 to determine whether Mr Wahabi was unable because of his personal injury to engage in employment in which he was employed when he suffered the personal injury.

[68] The report assesses Mr Wahabi as being able to achieve 65 to 70 per cent of his pre-injury role and to steadily increase involvement with medium and heavy work over the following four weeks.

[69] If Mr Wahabi considered this report unrealistic or unachievable, it was a matter that he could take up with his GP or with ACC, or even his former employer.

[70] In this appeal, Mr Wahabi takes issue with ACC's decision of 30 May 2022. As Mr Hawes-Gander submits, it is self-evident that this decision does not address entitlement to weekly compensation for any additional period. This decision made by the Corporation is one wholly in favour of Mr Wahabi and therefore any appeal against it must be refused on that account.

[71] As to the letter from the Corporation dated 17 June 2022 advising Mr Wahabi that he would need to provide medical certificates of incapacity to support a claim for weekly compensation beyond 27 February 2022, this is not a decision capable of review/appeal. The letter simply sets out the requirements for continued payment of weekly compensation.

[72] As Judge Ongley said in *Harris*:

The Corporation is not called upon to investigate ongoing incapacity once medical certificates of unfitness cease.

[73] The onus therefore was on Mr Wahabi to provide further medical certificates or such other evidence that would satisfy the Corporation of the appellant's incapacity for the claimed period. As this has not occurred, the Corporation was unable to be satisfied as to his incapacity for that period.

[74] Mr Wahabi's challenge to the Corporation's letter of 17 June 2022 must also fail as the letter was one of advice to Mr Wahabi as to what he must do to claim weekly compensation. It was not a decision that may be challenged by review or appeal.

[75] Accordingly, I must dismiss the appeal.

[76] Costs are reserved.



C J McGuire
District Court Judge

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