

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 214 ACR 161/22

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

Hearing: On the papers

Submissions: S Winter for the Appellant
C Light for the Accident Compensation Corporation (“the
Corporation”)

Judgment: 19 December 2023

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for costs on appeal, Part 14, District Court Rules 2014]**

Introduction

[1] The parties in this matter have settled this appeal, with the exception of costs, which have not been agreed.

Background

[2] On 7 November 2018, Mr Packer suffered a covered injury of an open wound of the left lower leg, when he grazed his leg on a piece of timber and it became infected. The Corporation subsequently granted additional cover for a non-pressure ulcer of the lower limb.

[3] By July 2019, when Dr Nicholas Yarnall assessed Mr Packer, his ulcer had healed, but he had ongoing left leg swelling. Dr Yarnall considered that the left leg swelling was not due to the original injury, but he noted that the cause was unclear. He said that Mr Packer was incapacitated for work as a builder because of the leg swelling.

[4] On 12 August 2019, the Corporation suspended Mr Packer's entitlements with effect from 23 August 2019, because his ongoing incapacity was not due to a covered injury. His weekly compensation payments therefore ended.

[5] On 7 September 2021, deemed cover was recognised for Mr Packer's deep-vein thrombosis and pulmonary embolism because the Corporation had failed to make a cover decision within the statutory period. Cover was revoked in the same decision.

[6] On 3 November 2021, the Corporation declined weekly compensation for incapacity because of the deemed cover injuries, as Mr Packer was not an earner when he suffered these injuries. The issue turned on the date on which Mr Packer had suffered the deemed cover injuries. If Mr Packer had suffered the deemed cover injuries before 23 August 2019 (when the weekly compensation ended), he would be deemed an earner under clause 48 of Schedule 1 to the Act because he was already receiving weekly compensation. If, however, Mr Packer had suffered the deemed cover injuries after 23 August 2019, then he would not be an earner and he would therefore not be entitled to weekly compensation.

[7] The Corporation's position, which was upheld by the Reviewer, was that, although Mr Packer was examined regularly over July, August and September 2019, there was no diagnosis of deep-vein thrombosis and pulmonary embolism before 13 September 2019 (the date of the Christchurch Hospital admission). The Corporation's view was that Mr Packer was not an earner on that date and therefore he was not entitled to weekly compensation. Mr Packer filed an appeal against the Reviewer's decision.

[8] On 27 January 2023, submissions were filed on behalf of Mr Packer. The principal argument for Mr Packer was that the date of injury for the deemed cover injuries should be the same date as the original injury, that is, 7 November 2018. Mr Packer was an earner on that date and therefore was entitled to weekly compensation.

[9] In February 2023, the Corporation made a settlement proposal because the Corporation took a different view of the medical evidence already on file. Although the position was not entirely clear on the medical evidence, it was likely that the symptoms of the deemed cover injuries developed on or before July 2019. At that time Mr Packer was still a deemed earner, and therefore entitled to weekly compensation.

[10] In July 2023, settlement was reached except for the issue of costs.

Relevant law

[11] Rule 14.1(1) of the District Court Rules 2014 provides that the award of costs is at the discretion of the Court if they relate to costs of a proceeding, or incidental to a proceeding, or a step in a proceeding.

[12] Rule 14.3(1) provides for the categorisation of proceedings in relation to costs:

Category 1 proceedings Proceedings of a straightforward nature able to be conducted by counsel considered junior.

Category 2 proceedings Proceedings of average complexity requiring counsel of skill and experience considered average.

Category 3 proceedings Proceedings that because of their complexity or significance require counsel to have special skill and experience.

[13] Schedule 5 provides that the following are the appropriate daily recovery rates for the categories of the proceedings referred to in rule 14.3:

Category 1 proceedings	\$1,270 per day
Category 2 proceedings	\$1,910 per day
Category 3 proceedings	\$2,820 per day

[14] Rule 14.5(2) provides that a determination of what is a reasonable time for a step in a proceeding must be made by reference to:

- (a) band A, if a comparatively small amount of time for the particular step is considered reasonable;
- (b) band B, if a normal amount of time for the particular step is considered reasonable; or
- (c) band C, if a comparatively large amount of time is considered reasonable.

[15] Schedule 4 provides for the time allocations for each step in general civil proceedings, according to categories A, B and C.

[16] Rule 14.12(2) provides that a disbursement may only be included in a costs award to the extent that the disbursement was approved by the Court for the purposes of the proceeding, specific to and necessary for the conduct of the proceeding, and (2) reasonable in amount.

[17] In *Carey*,¹ Grice J stated:

[91] Non-lawyer advocates will vary in their expertise and experience. The Judge should not have to go into detail in each case analysing expertise and experience and then move on to consider the assistance, which has or has not been provided. Instead a Judge should be entitled to start with a percentage based on the scale costs. If the Judge has been assisted by the non-lawyer representative in a straightforward case, it would, as a guideline, generally be appropriate to set a daily rate set at 50 per cent of the daily lawyer rate based on category 1. Under the District Court Rules, category 1 relates to “proceedings of a straightforward nature able to be conducted by counsel considered junior”. ...

[96] ... The level of qualification and skill of the advocate in ACC law would be a factor to the extent that was evident. The Judge should not be required to scrutinise the qualifications and experience of the non-lawyer representative. If a level of assistance was provided, the appropriate daily rate percentage for the non-lawyer advocate would be 50 per cent of the scheduled daily rate. ...

[120] [Substitution of 50% of Category 1 instead of Category 2 costs] reflects that [the representative] was of reasonable assistance to the Court in a straightforward appeal that was successful.

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

Discussion

[18] As noted above, Rule 14.1(1) of the District Court Rules 2014 provides that the award of costs is at the discretion of the Court if they relate to costs of a proceeding, or incidental to a proceeding, or a step in a proceeding. This Court, in exercising its discretion, has taken into account the submissions of Mr Winter for Mr Packer and Mr Light for the Corporation.

[19] In this matter, this Court finds that costs should be awarded according to category 2 (\$1,910.00 per day, for proceedings of average complexity requiring counsel of skill and experience considered average) and band B (a normal amount of time is considered reasonable). In terms of the High Court's judgment in *Carey*,² because Mr Packer was represented by a non-lawyer, 50 per cent of the scheduled daily rate is awarded.

[20] In light of the above considerations, the Court allows the following schedule of costs, based on category 2 band B (with units of days in brackets):

21 Commencement of Appeal (0.5):	\$955.00;
24A Preparation of written submissions (1.5):	\$2,865.00;
Total costs (2 days at \$1910):	<u>\$3,820.00;</u>
Less 50 percent:	<u>\$1910.00</u>

[21] This Court notes that Mr Packer has claimed has disbursements of \$200 for office photocopying, emails and texts. No receipts or other documents were provided in support. However, in view of the small sum being claimed, and the reasonable likelihood that disbursements in the nature of photocopying and fees in support of electronic communications were incurred, the amount of \$200 is allowed.

² *Carey*, above note 1, at [96].

Conclusion

[22] This Court directs that the Corporation pay the appellant, Mr Packer, costs of \$1,910.00 and disbursements of \$200 (totalling \$2,110.00).

A handwritten signature in dark ink, appearing to read 'P R Spiller', with a stylized, cursive script.

P R Spiller
District Court Judge

Solicitors for the Respondent: Shine Lawyers NZ Ltd.