

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 028 ACR 220/18

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

Hearing: On the papers

Submissions: S Winter for the Appellant
 C Hlavac for the Accident Compensation Corporation

Judgment: 1 March 2023

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for costs, Accident Compensation Act 2001 (“the Act”)]**

Introduction

[1] This judgment concerns costs relating to Mr Hughes’ appeal of 18 July 2018. The appeal is against the decision of a Reviewer who dismissed a review of the Corporation’s decision declining entitlement to funding for revision back surgery. The substantive matter was finally settled, leaving only the question of costs.

Background

[2] On 4 November 2015, Mr Hughes injured his lower back while playing cricket. A few months later, a claim for cover was submitted to the Corporation for a back sprain injury, and this claim was registered.

[3] On 3 March 2017, Mr J Evison, Orthopaedic Surgeon, diagnosed Mr Hughes with a disc prolapse caused by the cricket incident. Mr Evison proposed surgery in the form of a L4/5 discectomy.

[4] On 26 July 2017, the Corporation advised Mr Hughes that it would not fund the proposed surgery. On 26 June 2018, a Reviewer, dismissed Mr Hughes' application for review of the Corporation decision. The Reviewer found that the cricket incident had not caused the disc prolapse and that non-covered degeneration and spinal stenosis were the incriminating factors.

[5] On 17 July 2018, Mr Hughes filed a notice of appeal against the review decision.

[6] On 21 September 2018, the Corporation provided a report from its Clinical Advisory Panel advising that that there had been no acute disc prolapse and that Mr Hughes' symptoms were caused by non-covered spinal stenosis.

[7] On 27 September 2019, Mr Hughes' advocate introduced a further report from Mr Evison, and proposed that the matter be settled in light of the report. However, the Corporation did not settle the matter.

[8] On 22 November 2019, Mr Hughes' advocate provided a report from Dr Q Reeves, Musculoskeletal Radiologist, who agreed with the views and findings of Mr Evison.

[9] On 28 February 2020, the Corporation issued a revised decision in which it agreed to fund Mr Hughes' surgery.

[10] On 13 March 2020, Mr Hughes' advocate sought a "fair and reasonable" award of costs. Thereafter, considerable correspondence passed between Mr Hughes' advocate and counsel for the Corporation on the issue of costs, but they were unable to agree on this matter.

[11] On 23 November 2022, Mr Winter and Mr Hlavac filed a joint memorandum noting that the substantive issue in this appeal had been settled in favour of

Mr Hughes, leaving only the question of costs payable to Mr Hughes. The parties had been unable to agree on costs, and it was proposed that the matter be dealt with on the papers, with a suggested timeframe for the filing of submissions. The Court then directed that submissions be filed by both sides in terms of a timetable that was outlined, with final submissions from Mr Winter due by 14 February 2023.

[12] On 23 December 2022, Mr Winter sought costs of \$2435.25, plus disbursements of \$115. The amount of \$2435.25 was calculated on the basis of 1.7 days x \$1,910.00 (category 2) = \$3,247.00, less 25%. In the alternative, Mr Winter sought costs of \$1948.20, plus disbursements of \$115. The amount of \$1948.20 was calculated on the same basis, less 40%.

[13] On 24 January 2023, Mr Hlavac for the Corporation replied that costs should be awarded to the extent of \$1295.40. This amount was on the basis of 1.7 days x \$1,270.00 (category 1) = \$2,159.00, less 40%.

[14] On 14 February 2023, Mr Winter reiterated that costs should be awarded on the basis of \$2435.25 or \$1948.20. Mr Winter proposed a further alternative, that costs could be awarded on the basis of \$1650.00, roughly half-way between \$1948.20 and \$1295.40, equivalent to a hypothetical category 1.5.

[15] On 21 February 2023, Mr Hlavac provided a further reply in relation to two precedents relied upon by Mr Winter.

Relevant law

[16] Rule 4.1.1 of the District Court Rules 2009 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.

[17] Rule 4.3 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.

[18] Schedule 3 of the Rules provides for sub-categories A, B and C of the above categories, according to estimated time allocations. Rule 4.5.2 provides that a determination of what is a reasonable time for a step in a proceeding must be made by reference to: band A, if a comparatively small amount of time for the particular step is considered reasonable; band B, if a normal amount of time for the particular step is considered reasonable; or band C, if a comparatively large amount of time is considered reasonable.

[19] 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] ... (a) 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] ... an award based on the District Court schedule of daily rates based on 50 per cent of the category 1 rate is appropriate. This reflects that [the representative] was of reasonable assistance to the Court in a straightforward appeal that was successful.

Discussion

[20] It is accepted by both parties and the Court that disbursements of \$50 should be awarded to Mr Hughes.

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

[21] It is further accepted by both parties and the Court that an allocation of 1.7 days should be assigned for the purpose of calculating costs. This allocation is on the basis that:

- (a) 0.5 of a day be allocated for commencement of appeal (as per band B, a normal amount of time);
- (b) 0.2 of a day be allocated for case management (as per band B, a normal amount of time); and
- (c) 1 day be allocated for preparing the case on appeal (as per band C, a comparatively large amount of time).

[22] There are two issues, outlined below, where there is a divergence between Mr Wood, the advocate for Mr Hughes, and Mr Hlavac, counsel for the Corporation. This Court notes that considerable attention has been given by the parties to previous decisions of this Court on costs matters. This Court will not devote time to an analysis of these previous decisions, as each case relating to costs must be decided on its own facts in light of relevant legal principles.

Appropriate Category

[23] Mr Wood submits that category 2 (\$1910) is appropriate, and Mr Hlavac submits that category 1 (\$1270) is appropriate.

[24] As noted above, category 1 proceedings are those of a straightforward nature able to be conducted by counsel considered junior, and category 2 proceedings are those of average complexity requiring counsel of skill and experience considered average.

[25] This Court observes that the present case, involving the question of whether Mr Hughes' condition was traumatic in origin or the result of a pre-existing degenerative condition, might well have been straightforward in nature. There was the considered view of Mr Hughes' treating Orthopaedic Surgeon, Mr Evison, that Mr Hughes' disc prolapse was traumatic in origin. The Corporation then countered this evidence with that of its Clinical Advisory Panel, based on a paper review.

Mr Evison's view was later confirmed by a further report from him, and then by a report from Dr Reeves, Musculoskeletal Radiologist. In light of this evidence, the Corporation finally agreed to fund Mr Hughes' surgery. This Court also observes that Mr Winter showed enterprise and perseverance, drawing on his experience, in pursuing this matter and obtaining further medical reports.

[26] This Court concludes that the prolonged nature of the proceedings in this matter, including the stance of the Corporation, raises the proceedings from category 1 (of a straightforward nature able to be conducted by counsel considered junior), to category 2 proceedings (those of average complexity requiring counsel of skill and experience considered average).

Non-lawyer advocate deduction

[27] In *Carey*,² the High Court stated that, 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.

[28] This Court acknowledges that Mr Winter has legal qualifications, skills and experience that are valuable to the role of an advocate in the ACC jurisdiction. To this end, the Court will allow a higher allocation of costs than to a lay advocate without such qualifications, skills and experience. The Court will allow a daily rate set at 60 per cent of the daily lawyer rate.

Conclusion

[29] In light of the above considerations, the Court allows the following schedule of costs:

Commencement of Appeal (0.5, band B, category 2):	\$955.00;
Case Management (0.2, band B, category 2):	\$382.00;
Preparing Case on Appeal (1.0, band C, category 2):	\$1910.00;
Total costs:	<u>\$3247.00</u>
Non-lawyer rate at 60%:	<u>\$1948.20</u>

² Above note 1, at [91] and [96].

[30] Mr Hughes is awarded costs totalling \$1948.20, in addition to the agreed disbursements of \$50.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller
District Court Judge

Solicitors for the Respondent: Young Hunter