

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2024] NZACC 006 ACR 109/22

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	MARJAN HRISTOVSKI Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Submissions: The Applicant is self-represented
T Gee for the Corporation

Judgment: 12 January 2024

**JUDGMENT OF JUDGE P R SPILLER
[Leave to Appeal to the High Court – Section 162
Accident Compensation Act 2001]**

Introduction

[1] This is an application for leave to appeal against a judgment of Her Honour, Judge Henare, delivered on 29 September 2023.¹ At issue in the appeal was whether the Court had jurisdiction to hear Mr Hristovski’s appeal. The Court dismissed the appeal, for the reasons outlined below.

¹ *Hristovski v Accident Compensation Corporation* [2023] NZACC 159.

Background

[2] Mr Hristovski resides in Macedonia.

[3] On 19 August 2009, while in New Zealand, Mr Hristovski had an accident. As a result, he has cover for sprain and contusion of the right shoulder and elbow.

[4] In January 2018, Mr Hristovski applied for lump sum compensation due to permanent disability. The Corporation obtained an impairment assessment report from Dr Meads which concluded there was a 20% whole person impairment.

[5] On 27 July 2018, the Corporation issued a decision awarding lump sum compensation on the basis of Dr Meads' assessment of 20% whole person impairment. Mr Hristovski challenged the 20% assessment and applied for a review.

[6] In July 2019, Mr Hristovski's review application was dismissed. He then lodged an appeal against the Reviewer's decision (appeal ACR 321/19).

[7] Mr Hristovski later asked the Corporation to reassess his whole person impairment. On 18 and 25 August 2020, the Corporation advised Mr Hristovski that he was not eligible for reassessment without medical evidence of a change in his level of physical functioning, and because he could not have his impairment reassessed more than once in a 12-month period. Mr Hristovski applied to review this decision. On 26 November 2020, a Reviewer dismissed the review. Mr Hristovski lodged a further appeal (ACR 270/20).

[8] On 17 February 2021, submissions from the Corporation, in relation to appeal ACR 321/19, were filed. Later, on 17 February 2021, Mr Hristovski lodged a third review application in respect of a "decision" of the same date.

[9] On 26 May 2021, Mr Hristovski filed further medical evidence including a report advising that his condition had deteriorated since his assessment in 2018. As a consequence, the Corporation voluntarily obtained a reassessment of Mr Hristovski's whole person impairment.

[10] On 3 August 2021, Dr Meads concluded that Mr Hristovski's whole person impairment had deteriorated to 35%, but that the deterioration was due, not to his covered injuries, but to independent degenerative conditions. Accordingly, his covered impairment remained at 20%.

[11] On 17 February 2022, Mr Hristovski's third review application was dismissed for lack of jurisdiction. The Reviewer noted there was no Corporation decision issued in respect of the claim, and that the issue that he had raised had been previously dealt with in the July 2019 and November 2020 reviews. Mr Hristovski lodged a third appeal (ACR 51/22).

[12] On 10 March 2022, Judge McGuire dismissed Mr Hristovski's first two appeals (ACR 321/19 and ACR 270/20).² Judge McGuire found:

[57] ... I must conclude in respect of appeal ACR 321/19 that ACC's decision of 27 July 2018 assessing a lump sum entitlement on the basis of 20% whole person impairment is correct and that the lump sum paid to the appellant of \$8,926.97 is the correct sum allowed for under the legislation in these circumstances.

[58] As mentioned earlier appeal ACR 270/20 is against ACC's refusal in 2020 to undertake a reassessment of the appellant's whole person impairment. The appeal against this refusal has been rendered nugatory on account of the respondent going ahead and obtaining a further impairment assessment report on 3 August 2021.

[13] On 2 February 2023, Judge McGuire dismissed Mr Hristovski's third appeal (ACR 51/22).³ Judge McGuire found:

[27] Both ACR 321/19 and ACR 270/20, were dismissed in my judgment dated 10 March 2022.

[28] The present appeal in substance remains the same as the above two appeals already decided, namely the lump sum assessment of 20 per cent covered impairment is incorrect.

[29] Mr Gee raises the issue of *res judicata*. That is, that the matter before the court today has already been decided by the court. *Res judicata* prevents re-opening questions that have been decided by the Court with binding effect and refers to *Shann*.

[30] He is correct in doing so, as the substance of this appeal remains the same as it was in ACR 321/19 and ACR 270/20.

² *Hristovski v Accident Compensation Corporation* [2022] NZACC 33.

³ *Hristovski v Accident Compensation Corporation* [2023] NZACC 15.

[31] The second reason that this appeal must fail for lack of jurisdiction is because here, there is no decisions to appeal. The “decision” under appeal was not a reviewable “decision” under the Act. What appears to be the subject of this appeal is submissions filed on behalf of ACC in respect of appeal ACR 321/19, on 17 February 2021.

[14] On 27 June 2023, Judge Spiller dismissed Mr Hristovski’s application for leave to appeal to the High Court against Judge McGuire’s judgment.⁴ Judge Spiller noted that the issue before the Court in the present matter (ACR 51/22) was the same issue that was decided by Judge McGuire in relation to two previous appeals (ACR 321/19 and ACR 270/20). There was also the issue that Mr Hristovski’s present appeal related to submissions filed by the Corporation in relation to an earlier appeal, and not a decision made by the Corporation as defined by section 6 of the Act.

[15] Mr Hristovski filed a further review application in respect of the Corporation’s decision of 27 July 2018. The review was dismissed for lack of jurisdiction. Mr Hristovski appealed to the District Court (ACR 109/22). On 29 September 2023, Judge Henare dismissed the appeal for lack of jurisdiction, for the reasons outlined below.

[16] On 17 October 2023, Mr Hristovski filed an application for leave to appeal against Judge Henare’s judgment to the High Court.

[17] On 17 October 2023 Judge Spiller issued a Minute as to Mr Hristovski’s application for leave to appeal, requiring Mr Hristovski to file his submissions by 14 November 2023 if he wished to proceed with his application. Despite several reminders, no submissions were filed. Finally, on 7 December 2023, the Court confirmed with Mr Hristovski that his application for leave would be based on the submissions and evidence that were provided in support of his appeal. On 18 December 2023, the Court received submissions from the Corporation. Mr Hristovski provided a reply on 20 December 2023.

⁴ *Hristovski v Accident Compensation Corporation* [2023] NZACC 100.

The Court's judgment of 29 September 2023

[18] Judge Henare accepted the submission of counsel for the Corporation that Mr Hristovski's appeal must fail for three reasons, each of which was sufficient to determine the Court had no jurisdiction to hear it:

- (a) Mr Hristovski's appeal was against the same decision (decision of 27 July 2018) whose correctness has already been determined by this Court. Accordingly, *res judicata* applied and there is no jurisdiction to hear the appeal.
- (b) The substance of Mr Hristovski's appeal remained the same as in ACR321/19 and ACR270/20, namely, that his lump sum assessment of 20% covered impairment was incorrect. That matter has already been decided and so issue estoppel applied and the matter could not be raised again.
- (c) This appeal relitigated whether the Court had jurisdiction to rehear the substantive issue identified above. The Court had already determined that there was no such jurisdiction.

[19] Judge Henare then reiterated that Mr Hristovski's appeal must fail for lack of jurisdiction because the decision under appeal had already been determined to be correct, accordingly *res judicata* applies:

- (a) The substance of Mr Hristovski's appeal had already been determined in ACR321/19 and ACR270/20, accordingly, issue estoppel applied in relation to that substantive issue; and/or
- (b) The question whether the Court had jurisdiction to rehear the same substantive matter has already been determined in [2023] NZACC 15. Therefore, issue estoppel applies in relation to that jurisdictional issue.

Relevant law

[20] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[21] In *O'Neill*,⁵ Judge Cadenhead stated:

[24] The Courts have emphasised that for leave to be granted:

- (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of obiter comment in a judgment ...;
- (ii) The contended point of law must be "capable of bona fide and serious argument" to qualify for the grant of leave ...;
- (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed ...;
- (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law ...;
- (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision ...;
- (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law

[25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law

[22] In *Gilmore*,⁶ Dunningham J stated:

[55] I accept that, for the purposes of leave, it is not necessary to show that a decision was wrong, but only that there is an arguable question of law which is of sufficient importance to outweigh the cost and delay of a further appeal. However, in this case I consider no seriously arguable question of law arises, nor can it be said there is any factor which the District Court did not take into account. Instead, I consider the matters sought to be raised are, in substance, questions of fact and where the findings made were open to ACC, and to the District Court Judge, on the materials before them. For that reason, I do not

⁵ *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

⁶ *Gilmore v Accident Compensation Corporation* [2016] NZHC 1594.

need to go on to consider whether, in the exercise of my discretion, leave should be granted.

[23] In *TR*,⁷ Isac J stated:

[24] ... the threshold for an appeal against factual findings on the basis of an error of law is very high. The challenged factual finding must be one that, on the evidence, was not open to the decision-maker. Put another way, TR must establish that the factual conclusion of the District Court was so clearly untenable that application of the law required a different answer ...

The applicant's submissions

[24] Mr Hristovski's submissions are summarised as follows. The Corporation once assessed his whole person impairment as 10%; it later assessed his whole person impairment as 20%; and it now assesses his whole person impairment as 35%. He is unhappy with the Corporation's decision dated 27 July 2018 because it does not give him the compensation he needs as an invalid for the rest of his life. He had to sell his house to pay for medical treatment from France and Switzerland. He attached documents from specialists which were put in evidence in his previous appeals.

Discussion

[25] It is evident from Mr Hristovski's submissions, in support of his present application for leave to appeal, that his application is:

- (a) against a Corporation decision (of 27 July 2018) which has been upheld in a previous appeal;
- (b) based on the same grounds as in previous appeals (ACR 321/19 and ACR 270/20), which were dismissed; and
- (c) relitigates the jurisdictional issue previously determined against Mr Hristovski in this Court.

[26] Judge Henare, in her judgment against which Mr Hristovski seeks leave to appeal, clearly and correctly explained why, in light of the above submissions, the

⁷ *TR v Accident Compensation Corporation* [2023] NZHC 2991.

Court did not have jurisdiction to entertain his current appeal. Judge McGuire had, in an earlier appeal by Mr Hristovski, correctly ruled against him on the basis of lack of jurisdiction.

[27] In these circumstances, and for the same reasons, this Court is required to dismiss Mr Hristovski's application for leave to appeal.

The Decision

[28] In light of the above considerations, the Court finds that Mr Hristovski has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. Mr Hristovski has not established that Judge Henare made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources and the finality of litigation. This Court is not satisfied as to the wider importance of any contended point of law.

[29] By a very narrow margin, costs are reserved. Mr Hristovski's repeated, unfounded appeals have occupied valuable time and resources of the Corporation and the New Zealand court system. Should Mr Hristovski continue to pursue the same cause of action without success, he will face the real prospect of costs being awarded against him.

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

Judge P R Spiller,
District Court Judge