IN THE DISTRICT COURT
AT WELLINGTON

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

[2024] NZACC 57 **ACR 251/20**

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

Hearing:	21 June 2023
Further evidence/ submissions filed:	Appellant 18 July 2023 Respondent 25 July 2023
Heard at:	Christchurch
Appearances:	Mr K Murray for appellant Mr I G Hunt for respondent
Judgment:	4 April 2024

RESERVED JUDGMENT OF JUDGE I C CARTER
[Weekly Compensation, earner, earnings as employee, Accident Compensation Act 2001, ss 6, 9, 100, Schedule 1, clauses 32, 33, 34, 35, 36, 42, 43]

Table of Contents

Paragraph

Introduction ... [1]
Issue ... [4]
Further post-hearing evidence and submissions ... [5]
Facts ... [10]
Appellant's submissions ... [61]
Respondent's submissions ... [68]
Common feature of submissions ... [76]
Law ... [77]
Analysis ... [110]
Conclusion ... [122]
Result ... [129]
Costs ... [133]

Introduction

[1] This is an appeal against a Review Decision dated 2 November 2020 ("the Review Decision") which confirmed the Corporation's earlier decision dated 11 February 2020 ("the Corporation's Decision). Both decisions determined that Mr Houghton was not entitled to weekly compensation after suffering serious injuries in a car accident on 14 December 2011 in which he suffered serious injuries, resulting in him becoming tetraplegic. The Reviewer found that Mr Houghton was not entitled to weekly compensation based on her assessment of the evidence that Mr Houghton did not receive PAYE income payments immediately before his accident and incapacity.

[2] The appeal is by way of re-hearing and a general appeal, which means that the District Court is required to undertake its own evaluation of the evidence and merits generally.[1] The Review Decision is considered, but the Court may come to a different conclusion.[2]

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[1] *Accident Compensation Corporation v Bartels* [2006] NZAR 680 at [65]; *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142 at [23]; *BL v Accident Compensation Corporation* [2023] NZACC 106.

[2] *Wildbore v Accident Compensation Corporation* [2009] NZCA 34, [2009] 3 NZLR 21 at [29].

[3] On an appeal to the District Court, the legal burden is on the appellant to demonstrate that the requirements of the Act are satisfied and to establish his or her case on the balance of probabilities. That means showing that the probability of causation is more probable than not and higher than 50 per cent. However, the courts do not engage in mathematical calculations, but rather form a general impression of the sufficiency of the evidence and the presumptive inference which a sequence of events inspires in a person with common sense.

Issue

[4] The issue on appeal is whether Mr Houghton is entitled to payment of weekly compensation. To resolve that issue, it is necessary to determine whether Mr Houghton:

(a) was an earner at the date of his accident and incapacity, on 14 December 2011; and

(b) was in receipt of earnings within the meaning of the statutory definition (including within the 28 days prior to Mr Houghton's accident[3]; and

(c) was in receipt of "earnings as an employee" within the meaning of the statutory definition,[4]

so as to be entitled to weekly compensation.

Further post-hearing evidence and submissions

[5] In the course of the hearing of the appeal, Mr Murray referred to some documentary evidence that was before the Reviewer, but not before the court. He also referred to other medical reports, including a psychologist's report, which he suggested was relevant to whether Mr Houghton had capacity to complete or sign certain Accident Compensation forms in the months following his accident. I directed the appellant to file the further evidence and any additional submissions and the Corporation to file any evidence and submissions in response after the hearing. This additional material was filed in late July 2023.

[3] Schedule 1, cl 43.
[4] Section 9.

[6] The additional material filed by Mr Murray for the appellant was:

(a) Christchurch Hospital, Intensive Care Unit, Clinical Summary, 5 January 2012, Dr Aidan Hodges.

(b) Christchurch Hospital, Orthopaedics, Discharge Summary, 6 January 2012, Dr Elly Lesser.

(c) Statutory Declaration of Owen Michael Vincent, 10 October 2020. Mr Vincent stated he was a co-worker of Mr Houghton, working for the same employer.

(d) Affirmation of Ms Lisa Houghton, Mr Houghton's sister, affirmed 17 July 2023.

[7] No psychologist's report and no additional submissions were filed on behalf of the appellant. The evidence described in subparagraphs (a) to (c) were before the Reviewer. Ms Lisa Houghton's affirmation is new evidence filed in the appeal.[5]

[8] Mr Hunt, for the Corporation, filed:

(a) Orthopaedic operation note, 15 December 2011, Mr Rowan Schouten, Orthopaedic Surgeon.

(b) Christchurch Hospital file note, 9 January 2012.

(c) Additional submissions in reply on behalf of the Corporation containing a critique of the additional material filed on behalf of Mr Houghton.

[9] I have carefully considered all this additional material, together with the evidence and submissions advanced at the hearing.

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[5] No objection was raised about the timing of filing. The Corporation commented on Ms Houghton's Affirmation in its submissions in reply and Ms Houghton's evidence is relevant.

Facts

[10] The principal area where the evidence is in dispute concerns the nature of Mr Houghton's working arrangements at the time of his accident. I set out my findings of fact below after carefully considering and weighing the evidence. As the finder of fact on appeal, it is for me to decide what evidence I accept or do not accept on the balance of probabilities. I may accept part of what a witness says and reject other parts. It is up to me to decide what weight or importance I put on any evidence, or on different parts of the evidence.

[11] Mr Houghton suffered a car accident on 14 December 2011 sustaining serious injuries. He is tetraplegic and wheelchair bound as a result.

[12] A claim form was completed by an ambulance paramedic on Mr Houghton's behalf on 14 December 2011, the day of the accident. In relation to "Occupation", the box "I am not in paid employment" was ticked. No boxes relating to type of work (sedentary, light, medium etc.) were ticked. The form records the time of the accident as 12.30pm. There is no indication of what time the form was filled out, although it was plainly filled out sometime after the accident. Ms Lisa Horton stated in her 17 July 2024 affirmation that she was told by a hospital staff member that Andrew was extremely combative at the crash site and it had been necessary to sedate him heavily fairly quickly to get him to calm down.

[13] I take into account that on 14 December 2021 Mr Houghton had suffered catastrophic injuries, including a head injury, for which he had been heavily sedated and was receiving emergency hospital treatment over several days. The "I am not in paid employment" box was ticked by a person other than Mr Houghton. I do not regard the form, as completed, as a reliable indication of Mr Houghton's employment status or circumstances at the time of the accident and do not put very much weight on it.

[14] Clinical notes made by a House Surgeon at Christchurch Hospital on approximately 6 January 2012 record:

> SH: Jib [sic] fixer
>
> Buying & selling cars/motorbikes

[15] This is consistent with Mr Houghton's later account of his work background, in particular that his primary occupation for several years prior to the accident was as an employee engaged in gib fixing, with the later period running up to the accident involving being paid cash "under the table". He acknowledged an interest and hobby of restoring cars and motorbikes (which I infer may have involved buying and selling occasionally) but denied that this was the primary way he made a living.

[16] At this point, it is useful to refer to the two sets of Christchurch Hospital notes filed by Mr Murray and dated 5 and 6 January 2012. They indicate that from the date of the accident through until discharge to the Burwood Spinal Unit in early January 2012, Mr Houghton was administered with a large number of medications, including for sedatives and pain relief. This followed intubation, difficulties with respiratory wean and the necessity for a tracheostomy.

[17] The ACC 4204 form, "Client Information Collection: adult" records:

> **Employment details**
>
> | | |
> |---|---|
> | Work status at time of injury | Not in paid employment |
> | Occupation prior to injury (if applicable) | Not obtainable |
> | Current work status | Not in paid employment |
>
> **Living situation**
>
> Currently IP in BSU. <u>Prior to injury was earning by buying and selling vehicles (no taxes paid)</u> is now having difficulty getting invalids benefit. He does have a health insurance approx $55000. Andy was upset re his new injury and so were his family so a lot more information will be gathered at goal setting meeting once recovered from todays surgery.
>
> **Important people and places**
>
> List hobbies and pasttimes client enjoys now or in the past (eg bicycle or horse riding, video games, rock music, reading, cultural activities such as kapahaka)
>
> Loved buying and selling cars and motorbikes.
>
> <u>(emphasis added)</u>

[18] There is a typewritten statement at the top of the first page that:

> The ACC Service/Support Coordinator uses this form to record a client's injury history and background information. This information is used to complete assessment and other service referral forms.

[19] The ten page form was signed by Brenda Wilkins, Support Co-ordinator with the Corporation in Christchurch. As its name suggests, the form is concerned with the collection of information by the Corporation. All of the quoted statements in paragraphs [17] and [18] above are contained in "Part One: Background Information" and it is stated "The ACC Service/Support Coordinator completes this section."

[20] It is unclear what the specific timing or process was to complete the ACC 4204 form It does not have a signature page, but one of the entries in it suggests that it was filled out on 25 January 2012, about 1½ months after the accident. Mr Houghton's injuries are recorded as head injury, closed fracture thoracic vertebra, open wound of scalp with the outcome being high level tetraplegia. Other evidence (which I will come to) later confirms that Mr Houghton's head injury caused significant memory loss. The form records that Mr Houghton was at this time an inpatient at Burwood Hospital Spinal Unit and he was about to have further surgery later that day because he had been dropped at the Burwood Spinal Unit and this had put his rehabilitation back. Mr Houghton is specifically recorded as being upset about his new injury, as were his family.

[21] An associated three page form is signed by Mr Houghton's sister, Ms Lisa Houghton, as his representative. The answer recorded to the question "Why is the client unable to sign this form?" was "No hand function". The declaration that Ms Houghton was asked to sign as her brother's representative was not to confirm the truth or accuracy of the information in the ten page form, but was rather in terms that:

> I declare that I have authority to consent to the collection and disclosure of information on behalf of the client, and I provide this consent.

[22] There are two points recorded on the ten page form that are against Mr Houghton's interest - that he was not in paid employment at the time of injury and that prior to injury he was earning (no taxes paid) by buying and selling vehicles. But in the circumstances in which the form was completed, these two things cannot reliably be taken as absolutes, and I do not give them very much weight.

[23] At the time the notes were recorded on the form, it was 1½ months after the accident, intensive treatment and rehabilitation was ongoing and the life-changing nature of the catastrophic injuries was no doubt still being adjusted to. Both Mr Houghton and his sister

were recorded as upset on the day. Most importantly, the form as a whole and a specific recorded note of the Support Coordinator makes it clear that this was an initial collection of information with much more to be obtained in the future – "… so a lot more information will be gathered at goal setting meeting once recovered from today's surgery".

[24] Further, Mr Houghton is also recorded to have indicated in a later part of the form – dealing with family/social/occupational matters - "loved buying and selling cars and motorbikes". This is more consistent with a hobby or pastime rather than a primary source of income.

[25] About three months after the accident and prior to Mr Houghton's discharge from Burwood Hospital Spinal Unit, Christchurch, an inter-disciplinary progress meeting of health professionals involved in Mr Houghton's treatment and rehabilitation was held on 23 March 2012. The stated purpose was to review goals previously set, discuss achievements, and document outstanding goals to be achieved before safe and effective discharge. The Progress Meeting Report dated 23 March 2012 records those present as Mr Houghton, a Key Worker/Chairperson, Nurse, Physiotherapist, Occupational Therapist, Doctor (Mr Raj Singhal), Psychologist (Tom Marshall), family member (Lisa Houghton, Mr Houghton's sister), and ACC Support Co-ordinator, Ms Wilkins.

[26] A note attributed to Mr Singhal, the treating specialist, contained the comment:

> Andy sustained a significant head injury. His neurology has improved, but is slow. For 18 months to two years, progress can still be seen.

[27] Under the heading "Psychosocial" were the following notes of comments primarily made by Mr Marshall, Psychologist:

- Tom [Tom Marshall, Psychologist] will meet Andy and family on an ongoing basis re memory issues.
- Andy has sustained a head injury and this has affected his memory.
- Recently Tom and Aften [Aften Jones, Occupational Therapist] have started testing Andy and these tests can be used later in Andy's stage to compare results to see if there has been an improvement.
- Andy's distant memory is good – he can remember past events very well. For example, his work as a jib (sic) fitter.

- He can still figure out what's going on and is good at reading people and clearly he continues to learn, though more slowly than before.

- Verbal memory – Andy has problems remembering information delivered verbally, such as in a (sic) stories. During the tests he was only able to remember a small fraction of detail straight away and less after 30 minutes …

…

- Narrative memory – when Andy forgets parts of information or events, he sometimes combines bits from several events together or fills in gaps with information that is not accurate. This is common when people have memory problems like his and try to reassemble the fragments they do remember. Memory is a reconstructive process so mistakes can be made. This error process is called confabulation.

…

- Episodic memory – Andy may forget a complete event such as a visit by someone, so his family and friends my [sic] need to help him fill in gaps.

…

- Most likely, Andy's head injury will have major implications for him later on in terms of his care needs and work opportunities.

[28] It is clear from this that Mr Houghton's serious head injury had significant effects on his memory. To my mind, this raises doubt about the reliability of responses attributed to Mr Houghton in the forms completed during the three month period following the accident.

[29] The Progress Meeting Report dated 23 March 2012 also contains a list of questions from Mr Houghton and answers from the Corporation by Brenda Wilkins, Support Coordinator. The answers were emailed to Mr Houghton after the progress meeting. One question and answer was:

> Q <u>I was getting paid under the table as work was hard to come by with the earthquakes.</u> Now, I get only $140/week. <u>How will ACC assist me with my income</u>?
>
> A <u>As Andy was not working in paid taxable employment</u> at time of injury ACC is unable to pay Weekly compensation or assist with vocational rehabilitation.
>
> <u>(emphasis added)</u>

[30] Mr Houghton's question about income assistance from the Corporation is prefaced with the statement that for an unspecified period he "…was getting paid under the table…". That suggests cash payments for work which were not taxed at source by deduction of PAYE. That of itself does not in my view necessarily exclude the possibility of income received from

employment which was subject to and liable for tax. The Support Co-ordinator's answer however seems to accept that Mr Houghton was working, but that he did not pay tax on his earnings. The answer assumes that if no tax was actually paid on income derived from employment, there was no possible entitlement to weekly compensation.

[31] Further, the statement attributed to Mr Houghton on the face of it seems more consistent with regular income from continuing employment as a gib fixer ("… work was hard to come by with the earthquakes.") than with earning income by buying and selling cars and motorbikes. This taken together with the fairly regular payments evidenced by Mr Houghton's bank statements leads me to accept Mr Houghton's statement in his statutory declaration that he was not earning money buying and selling cars, is incorrect, and that the only income source he had at the time of his accident was the payments received from the business that he associated with HiTech.

[32] Unfortunately, it appears that a small number of responses recorded in two forms, completed a short time after Mr Houghton suffered catastrophic injuries and at times of considerable physical and emotional distress and trauma, probably when sedated and/or receiving pain relief. The recorded responses are of doubtful reliability given Mr Houghton's subsequently confirmed memory loss due to head injury, negatively coloured the Corporation's assessment of eligibility for weekly compensation.

[33] I acknowledge the general principle that facts disclosed at the outset of a claim are, because they are recorded at a time when compensation issues are not the focus, often more reliable than later evidence after questions of compensation have become significant.[6] This carries weight in situations such as a consultation at a general practitioner's or medical specialist's clinic or at a physiotherapist's office. But it cannot reasonably be applied in the immediate aftermath of a catastrophic accident and injuries or a few weeks later when significant treatment and medication, adjustment to an entirely different life and memory difficulties are ongoing.

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[6] *Accident Compensation Corporation v Mehrtens* [2012] NZACC 250; *Lucas v Accident Compensation Corporation* [2015] NZACC 216.

[34] It appears that the initially intended further investigation of Mr Houghton's employment status did not occur after the three month period between mid-December 2011 and March 2012.

[35] Faced with the rather stark indication by the Corporation in late March 2012 that it was unable to pay weekly compensation, Mr Houghton did not further pursue weekly compensation for some time. It was not until seven years later that Mr Houghton sought professional advice from Mr Murray. Mr Murray made an application for weekly compensation on Mr Houghton's behalf on 8 July 2019.

[36] I do not see that elapse of time as warranting any criticism of Mr Houghton or his primary family supports – his sister Ms Houghton and her partner. It is plain from Ms Houghton's affirmation that Mr Houghton and his family had a lot to cope with in the years following the accident. Mr Houghton spent a year in care after his accident and for several years after that Mr Houghton lived in his own home but still needed a lot of help around day-to day activities, until eventually he was able to wean himself off most of his medication and look after himself fairly independently.

[37] In his statutory declaration dated 18 January 2020, Mr Houghton said that:

(a) He commenced employment with Hi Tech Fixers Limited (Hi Tech Fixers) on or about 9 September 2009 on a fulltime basis.

(b) He received regular payments until shortly after the September 2010 earthquake. From then his payments became irregular.

(c) He received payment for his wages from an S J Ross, who he understood to be Gavin Ross's son, along with cheques.

(d) He believed that the payments were made net of income tax and his KiwiSaver deductions.

(e) He continued to work for Gavin Ross until his car accident, which occurred on 14 December 2011.

[38] Bank records provided by Mr Houghton to the Corporation show earnings from Hi Tech Fixers until 18 October 2010. After that date, the records show that he began to receive payments in varying amounts at fairly regular intervals, although not always strictly every week or fortnight, prior to the accident date. The account transactions end in December 2011.

[39] After October 2010, payments were made to the account by what appear to be cash deposits at different Westpac branches. It appears that cash deposits were made over the counter or by way of bank machine and there are no identifying references as to the person(s) who made the payment.

[40] During the period leading up to the accident, cash deposits were made at the following branches, which are mainly in the Christchurch area:

0814	New Brighton
0854	Papanui
1594	Barrington
1597	Parklands
1584	Halswell
1591	Eastgate
0579	Wellington IPC[7]

[41] The only transactions for which payee names are given after October 2010 are:

(a) A payment on 1 March 2011 in the amount of $695.80 by way of a direct credit for holiday pay paid by the liquidator of Hi Tech Fixers;

(b) A WINZ benefit payment on 2 March 2011 in the amount of $120;

(c) A direct credit made by Mr Houghton on 30 March 2011 in the amount of $500;

(d) A payment by N Barrie by direct credit in December 2011 (date obscured) in the amount of $1,000.

[7] The deposits to the Wellington IPC branch may have been by way of bank machine deposits, but it is not clear.

[42] The available IRD records did not record for Mr Houghton any earnings from employment with PAYE income tax and Accident Compensation levies deducted, as at the date of his accident or in the year prior.

[43] On 11 February 2020, the Corporation declined Mr Houghton's application for weekly compensation on the basis that he was not an earner. ACC stated:

> ACC has carefully assessed all the information available and finds that we're unable to accept your request for Weekly Compensation. I have explained the reasons below.
>
> Under ACC legislation, for a person to have entitlement to weekly compensation they must have been an earner immediately before the commencement of the incapacity. An earner is defined as a person who is receiving taxable earnings as either an employee, self-employed or shareholder employee immediately prior to their incapacity.
>
> It has been established that immediately prior to 14/12/2011 you were not in receipt of any earnings either as an employee, self-employed person or shareholder employee which means that you were not an earner immediately prior to the date of your incapacity. This has been established from the IRD summary of earnings for the tax year 1 April 2011 to 31st March 2012 provided to ACC by yourself.
>
> A question raised by yourself in a Burwood Spinal Unit progress notes (extract below) that you were not in receipt of declared earnings immediately before the commencement of the incapacity.

[44] Mr Houghton sought a review of the Corporation’s decision arguing that he was entitled to weekly compensation. In the Reviewer's decision dated 2 November 2020, the Reviewer found that:

> I accept evidence has been produced showing Mr Houghton was carrying out work for a company called Hi Tech Fixers and had regular money paid into his bank account up to the day of the accident. However, regardless of whether Mr Houghton was working and being paid, <u>there is no evidence Mr Houghton was in receipt of PAYE income payments immediately before his incapacity</u>. Unfortunately for Mr Houghton, whether or not he knew of his employer's failings regarding tax payments, <u>he cannot show he was receiving earnings as an employee immediately before his accident</u> and his application must fail.
>
> [emphasis added]

[45] It is apparent from the highlighted statements in the Reviewer’s decision that it was assumed that employee tax had to be deducted and paid to IRD to be “PAYE income payments”.

[46] After the unfavourable review decision dated 2 November 2020, Mr Murray obtained, on behalf of Mr Houghton, what is stated to be on its face a “certificate of employment” dated

21 February 2022. It is headed "TO WHOM IT MAY CONCERN", "Andrew Houghton". It states:

> I hereby confirm that Andrew was employed by HiTech Fixers Ltd & Plasterboard Lining Services Ltd.
>
> Andrew was employed at HiTech Fixers Ltd from 3 September 2009 to May 2011 when his employment moved to Plasterboard Lining Services Ltd until 22 December 2011, his position was full time and permanent.

[47] It is signed "Your faithfully, PP [illegible signature], Gavin Ross, Director". This is said to be signed by Mr S J Ross, Mr Gavin Ross's son. It appears that Mr Gavin Ross died sometime during 2021. It is also inconsistent with Mr Houghton's bank statements, which show regular payments by HiTech Fixers into Mr Houghton's bank account from 10 September 2009 through to 18 October 2010. I attach little weight to this document.

[48] In his statutory declaration dated 18 January 2020 of Mr Houghton, in support of his application to the Corporation for weekly compensation, said he was employed by Hitech Fixers Limited of Christchurch at the time of the accident, having started work with them on 9 September 2009. He last worked on the day of his accident on 14 December 2011. He was employed as a full time gib fixer, initially being paid $19 per hour, rising to $20, then to $25 per hour. He was paid regularly until the September 2010 earthquake. After that, his pay became less regular, although he still worked full time. He said these wages were his only source of income.

[49] Mr Houghton said that at all times he believed he was properly employed with his employer paying Kiwisaver and PAYE income payments. He had since discovered that this was not the case for the last year of his employment. I do not accept Mr Houghton's evidence that he believed his employer had been making all necessary deductions for PAYE tax, Accident Compensation levies and Kiwisaver contributions. That is implausible. Mr Houghton has consistently acknowledged throughout that the way he received payments for work changed and this is reflected in his bank statements. He described it as being paid under the table. The payments were made in cash. The payments credited to his account as recorded in his bank statements were generally for higher amounts than during the period when he was paid amounts from which PAYE had been deducted. In these circumstances I think it is more likely that Mr Houghton knew that the payments received in the year prior to his accident were made without deduction of tax or other levies.

[50] Mr Houghton provided copies of his bank statements from January 2009 to 1 December 2011. These showed regular weekly deposits from Hitech Fixers Limited of around $500, starting in September 2009 to around October 2010. Thereafter, regular deposits continued up to the date of the accident, but from an unnamed Westpac bank account.

[51] Mr Houghton also provided the Corporation with IRD summaries of earnings for the years ending 1 April 2009 to 31 March 2012. Those summaries showed that in the tax year ending 31 March 2011, Mr Houghton received $13,178 from Hitech Fixers between 1 April 2010 and 31 July 2010, and $860 from Hitech Fixers between 1 October 2010 to 31 March 2011. Hitech Fixers Limited was placed in liquidation on 18 October 2010. As far as Mr Houghton was concerned, the Ross family continued to employ and pay him up until his accident.

[52] Ms Lisa Houghton, Mr Houghton's sister, provided an affirmation affirmed on 17 July 2023 [post hearing] in which she summarised Mr Houghton's history following his 14 December 2011 accident and subsequent treatment. She stated:

> 2. Andrew had his accident on the 14th of December 2011. I was contacted by Nelson hospital on the day of the accident and was informed of the incident, they were at the time trying to get him transferred to Christchurch hospital.
>
> 3. It was a state of emergency in the area from severe weather at the time. They found a pilot who was willing to fly in the atrocious weather and Andrews was the last flight out.
>
> 4. Whoever I spoke to (did not get his name) said Andrew was extremely combative at the crash site and they had to sedate him heavily fairly quickly to get him to calm down, he was also intubated at Nelson hospital.
>
> 5. I went up to Christchurch's intensive care where he was intubated and was in traction to align his spine can (neck).
>
> 6. On or about the 22nd of December 2011, he was given a tracheotomy as every time they had tried to get him off intubation it had not been successful.
>
> 7. I was with him on Christmas day, and he could not speak due to the tracheotomy but could mouth words, some of which we understood, but not all.
>
> 8. Eventually the tracheotomy was removed, and we could communicate normally.
>
> 9. It was around the 6th of January 2012, that he was transferred to Burwood spinal unit.

10. He started physio there, his hands were in splints as his hands, particularly his right hand were very affected by his injury.

11. On the 19th of January 2012, he was dropped in the toilet area at Burwood unit and had to be put in a whole chest splint as it dislodged his screws in the plate in his neck that had been put in when his accident first happened, I remember this because it was my birthday.

12. On the 25th of January 2012, he had further surgery to correct this.

13. Andrew suffered a significant head injury in the initial accident and had noticeable changes to his personality and behaviour.

14. He had severe memory issues, also he was very 'paranoid' and said some very strange things, including thinking there were cameras in the lights above his bed that were recording him and watching him, also thinking he was part of a gang so he had to be secretive about his life, which is where I think the confusion about work arises.

15. I knew Andrew had been working prior to his accident, I did not know many details as I was busy with my own family and three children.

16. Andrew has always worked and never got an income of selling and buying cars and motorbikes.

17. At a goal setting meeting on the 23rd of March 2012, Andrews severe head injury was discussed, he had had tests by the psychologist that had confirmed his memory loss and there was an at length discussion about whether he would even be able to live independently.

18. I raised my concerns around statements Andrew was making about not being correct, but ACC just wanted to believe everything Andrew said but he was not mentally aware of what he was saying.

19. He was given no further help re his head injury after this as Burwood's main goal with Andrew was physical independence as much as possible.

20. Andrew was often combative and difficult to deal with for Neil and myself. We knew it was a result of his head injury.

21. We had to organize storage of his belongings, someone to rent his house that he was renting, and I had to organize his bank accounts and his winz payments. Even though I knew he had always worked I did not know enough detail to challenge ACC on Andrews entitlements.

22. After Burwood Andrew went to a facility in 11am, Laura Ferguson trust, as there was no home for him yet, where he was extremely miserable, he was away from friends and family and had extreme neuropathic pain, he often was confined to bed where he would have rigid spasms for hours at a time, he had a lot of medications, I'm unsure what they actually were. He slept a lot and was often confused.

23. After around six months of Andrew being there Neil managed to secure him a Housing New Zealand home in Aranui where he still resides.

24. Overall, he was a year in care after his accident.

> 25. For a few years in his new home Andrew was still very sleepy and needed a lot of help around day-to-day activities, dealing with his memory loss. It was not until he got help from a behaviour therapist that Andrew weaned himself off most of his medication and started to have clarity of thought.
>
> 26. At present his memory has improved and he can look after himself fairly independently, i.e.: paid his own bills and cook for himself with some help from family.
>
> 27. He also has some carers help a few days a week.

[53] Mr Houghton's position as set out in his statutory declaration is that he was continually employed as a gib fixer from 9 September 2009 until the day of his accident on 14 December 2011. So far as he was concerned, he was employed in substance by the same employer, but the employing company changed (although he was unaware of it at the time). Arrangements for deduction and payment of tax and other deductions also changed part way through the period of nearly two years of employment. A Mr Gavin Ross employed Mr Houghton as a gib fixer on a full-time basis at an hourly rate of $19 per hour. Mr Gavin Ross gave Mr Houghton a pay rise after some time, but Mr Houghton was unsure what his actual hourly rate was by the time of his accident. He believes it was between $20 to $25 per hour, depending on the type of work undertaken.

[54] Mr Gavin Ross was a director of a company named HiTech Fixers Limited. Bank statements provided with Mr Houghton's statutory declarations show regular weekly payments from 10 September 2009 to 18 October 2009 from HiTech Fixers into Mr Houghton's bank account. These are for variable amounts between approximately $200 to approximately $600 (the highest payment during this payment being for $693.80). According to the bank statements, two of these payments were from "ROSS S J". S J Ross was Mr Gavin Ross's son. These are consistent with the IRD summary of Mr Houghton's earnings provided to the Corporation for the tax year ended 31 March 2011, which show gross income and PAYE deductions by HiTech Fixers Limited. Mr Houghton's summary of earnings for the previous tax year ended 31 March 2010 also show gross income and PAYE tax deductions by HiTech Fixers Limited and three other companies, the names of which suggest continuing engagement in the gib fixing trade.[8]

[8] Interior Dry Liners, South Island Fixers Limited, SR Fixing Limited.

[55] HiTech Fixers Limited appears to have got into financial difficulty in late 2010. It went into liquidation on 18 October 2010, Mr Houghton was paid out preferential holiday pay of $695.80 on 1 March 2011 and the company was ultimately removed from the Companies Register in 2013.

[56] This is consistent with Mr Houghton's explanation that HiTech Fixers Limited made regular payments as his employer into his bank account until October 2010, just after the 4 September 2010 Christchurch 7.1 earthquake. Mr Houghton said that Mr Gavin Ross assured him that there would be a lot of work doing earthquake repairs and the business was busy. There was further work disruption with more earthquakes in the Christchurch area, including the major earthquake on 22 February 2011. Mr Houghton said that he continued to work full time for approximately 40 to 50 hours per week, along with other employees.

[57] Mr Houghton's bank statements show that he continuously received payments into his bank account from 21 October 2010 through to 12 December 2011 for variable amounts. Mr Houghton himself, in his statutory declaration, and Mr Hunt and Mr Murray at the hearing, all described these payments as "irregular". I think the payments are more accurately described as fairly regular payments. From 21 October 2010 through to 27 May 2011, the payments were approximately weekly and were for amounts mostly between $500 to $600. From 9 June 2011 through 12 December 2011, the payments were roughly fortnightly and for generally higher amounts of between approximately $900 to $1,000. Although it is clear that required tax and other deductions were not made from 21 October 2010, and the figures were generally higher during this later period, they are not so high as to be totally inconsistent with the figures on the bank statement for the earlier period when tax and other deductions were correctly made.

[58] Mr Houghton states in his statutory declaration that a statement recorded in one of the Accident Compensation forms to the effect that he was earning money buying and selling cars, is incorrect, and that the only income source he had at the time of his accident was the payments received from the business that he associated with HiTech. I accept Mr Houghton's evidence on this issue. The payments shown in his bank statements are too regular and too small to reflect income received as a result of buying and selling vehicles.

[59] In the statutory declaration of Mr Owen Vincent, Mr Vincent confirms that he was a co-worker with Mr Houghton employed by the same business at the material time. Mr Vincent started his employment with the business when HiTech Fixers Limited started trading. Mr Vincent was employed as a gib fixer by Mr Gavin Ross, a Director of HiTech Fixers Limited. Mr Vincent was employed on a full-time basis at an hourly rate of $22 per hour. Mr Vincent stated that at the time of Mr Houghton's accident on 14 December 2011, Mr Houghton was paid at the same rate of $22 per hour. Mr Vincent confirms that he introduced Mr Houghton to Mr Gavin Ross, who employed Mr Houghton from approximately September 2009 through until Mr Houghton's car accident on 14 December 2011. Mr Vincent recalled that the day before Mr Houghton's car accident, the pair of them were working on a property in Rolleston and the work required special noise reducing material.

[60] Overall, I consider that most of Mr Houghton's evidence about his work arrangements up to the time of the accident is plausible and consistent with other evidence which I accept. In particular, the fairly regular payments received by Mr Houghton shown in his bank statements, Mr Vincent's evidence and the overview provided by Ms Lisa Houghton's evidence.

Appellant's submissions

[61] Mr Houghton had a serious car accident, resulting in very serious injuries. The initial Accident Compensation claim form was completed by a paramedic, and a second form completed by a Corporation client service support co-ordinator was signed by Mr Houghton's sister, because Mr Houghton did not have any hand function at the time. The responses in those forms attributed to Mr Houghton cannot be relied on, bearing in mind the serious head and spinal injuries that he had suffered and the medication that he was on.

[62] The self-reporting by Mr Houghton which was recorded to state that he bought and sold cars for a living is not correct. Mr Houghton's evidence is supported by the declaration of his co-worker, Mr Vincent, and is consistent with the bank statements showing regular payments up until the time of his accident.

[63] Mr Houghton did not seek professional advice regarding his eligibility for weekly compensation until he approached Mr Murray some time in 2019. Mr Murray applied for weekly compensation on 8 July 2019.

[64] Mr Houghton was employed and paid by Hitech Fixers Limited until about October 2010, around the time of the Christchurch earthquake. He continued to work full time as a gib fixer but was paid in cash by other companies associated with the same family as employer or employers were not deducting tax. Mr Houghton was receiving compensation for his work as an employee, but the employer did not make tax deductions.

[65] Mr Houghton was adamant that he was an employee paid wages and did not suggest that he was a contractor and was not self-employed.

[66] Mr Houghton should not suffer the consequence of being denied weekly compensation because his employer failed to deduct tax payments.

[67] Mr Houghton was receiving regular deposits into his account immediately prior to his accident. The copies of Mr Houghton's 2011 bank statements show that he was paid deposits approximately weekly of around $500 to $600.

Respondent's submissions

[68] The respondent's position is that Mr Houghton was not an earner, nor was he in receipt of earnings as an employee and is therefore not entitled to weekly compensation.

[69] The primary basis of the Review Decision, as well as the Corporation's Decision of 11 February 2020, was that Mr Houghton was not an earner because he was not in receipt of PAYE income payments.

[70] The conclusion that there were no PAYE income payments was in turn based on the premise that the relevant Inland Revenue Department records did not show that any PAYE income tax deductions were made by Mr Houghton's employer and no net PAYE income was received by Mr Houghton at any relevant time prior to the date of his incapacity.

[71] The Act presumes that a person receiving PAYE income/earnings as an employee will be receiving such remuneration on a taxable - that is, subject to source deduction payments - basis.

[72] The Corporation submitted that that the approach of both the Corporation and the Reviewer were correct. The submission is in substance that if income has not been declared for tax purposes and/or no income tax has been paid by and employer or employee, including by PAYE source deductions, there can be no "PAYE income payments" to form the basis of calculation of an employee's weekly compensation. The key written submissions were:

> The appellant was not in receipt of PAYE income … - that is, Inland Revenue records do not indicate that the appellant received PAYE earnings, at any relevant time prior to the date of his incapacity.
>
> The Act presumes that a person receiving PAYE income/earnings as an employee will be receiving such remuneration on a taxable - that is, subject to source deduction payments - basis.
>
> As noted by Mallon J in *Drage* (supra), weekly compensation is funded from either the work account - for work related injuries, or the earners account - for non work related injuries.
>
> Levies must be paid by employers into these accounts. In addition, as an employee, a person's salary or wages is subject to PAYE which is a source deduction the Income Tax Act requires to be made by an employer.
>
> As noted, the Reviewer's finding was that the appellant was not in receipt of PAYE income payments before his incapacity. Nor is it evident that the appellant either filed tax returns, claimed refunds of tax, or had any presence as far as the Inland Revenue Department was concerned, whatsoever.

[73] In oral submissions the Corporation's position was stated in terms that the scheme of the Act is that compensation is based on what a claimant says. There is an element of self-policing and where the basis for claiming weekly compensation is earnings derived from working as an employee, the claimant has to show that at the relevant time the claimant was receiving taxable income and the income had been taxed.

[74] The Corporation's overall submission is, in effect, that where no income has been declared and no tax paid by an employer or employee, there are no "PAYE income payments" and therefore no "earnings as an employee" on which to calculate weekly compensation. The Review Decision relied on the cases of *Drage*[9] and *Davidoff*[10] and the Corporation's submissions cited *Drage*[11] and *Nicholas*[12].

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[9] *Drage v Accident Compensation Corporation* CIV-485-2010-1419, High Court Wellington, 14 September 2010 (Mallon J).
[10] *Davidoff v Accident Compensation Corporation* [2009] NZACC 54 (14 April 2009).
[11] *Drage v Accident Compensation Corporation* CIV-485-2010-1419, High Court Wellington, 14 September 2010 (Mallon J).
[12] *Nicholas v Accident Compensation Corporation* [2008] NZACC 110.

[75] The further main argument for the Corporation was that there is insufficient evidence to establish whether Mr Houghton was an employee and earner and whether he was in receipt of earnings as an employee. That is, the evidence does not establish on the balance of probabilities that Mr Houghton was:

(a) in fact an earner at the time of his accident and his incapacity;

(b) engaged in employment, being work carried out for the purposes of pecuniary gain or profit;

(c) in receipt of earnings as an employee.

Common feature of submissions

[76] Neither party's submissions contained any analysis of the inter-relating provisions of the tax legislation and accident compensation legislation, including the correct interpretation of "PAYE income payment". No case was cited or analysis of relevant provisions given which would require a conclusion that where no source deductions are made at source for tax and/or levies, there can be no "PAYE income payments", no earnings and no earner for the purposes of calculating weekly compensation.

Law

[77] There may be an Accident Compensation entitlement (such as weekly compensation) where a claimant has cover for a personal injury and is eligible under the Act to entitlements in respect of the personal injury.[13]

[78] In a claim for the entitlement of weekly compensation, the starting point is s 100 of the Accident Compensation Act 2001 (the Act), which sets out the criteria for entitlement to weekly compensation. The claimant must have an incapacity for employment and be eligible under one of the provisions of s 100(1)(a)-(d) of the Act.

[79] The particular provision which applies in Mr Houghton's circumstances is s 100(1)(a) requiring the claimant to be incapacitated and eligible for weekly compensation under

[13] Section 67.

clause 32 of Schedule 1. The combined effect of these provisions is that Mr Houghton must be an earner at the time of the incapacity.

[80] So far as is relevant to Mr Houghton, s 103(1)(a) of the Act requires the Corporation to determine the incapacity of a claimant who was an earner at the time he suffered the personal injury. It must be established whether, because of the personal injury, Mr Houghton was unable to engage in employment in which he was employed when he suffered the personal injury. *Accident Compensation Corporation v Vandy*[14] held that a claimant is only entitled to weekly compensation if he or she was an earner *both* as at the date of the injury *and* as at the date of the incapacity.

[81] Section 6 of the Act defines "earner" to mean:

> (a) … a natural person who engages in employment, whether or not as an employee; and
>
> (b) includes a person to whom clause 43, 44, or 44A of Schedule 1 applies.

[82] "Employment" means work engaged in or carried out for the purposes of pecuniary gain or profit.[15]

[83] Clauses 32 to 36, 42 and 43 of Schedule 1 to the Act contain provisions relating to the entitlement to and calculation of weekly compensation.

[84] Clause 32 is the primary clause relevant to Mr Houghton and provides that where a claimant was an earner at the time of his accident and incapacity, weekly compensation is calculated as 80% of the claimant's weekly earnings. Clauses 33 and 34 govern the calculation of earnings as an employee in permanent employment immediately before incapacity. An important factor in calculations is the claimant's earnings as an employee in the 52 weeks immediately before his incapacity commenced.

[85] Clauses 35, 36, 42 and 43 provide for different methods of calculating weekly earnings where, at the time of incapacity, the claimant was in employment that was not permanent, or the claimant was in full-time employment but earned less than a defined statutory minimum

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[14] *Accident Compensation Corporation v Vandy* [2010] NZHC 2453; [2011] 2 NZLR 131.
[15] Accident Compensation Act 2001, s 6.

or a claimant ceased to be in employment before the commencement of incapacity. These clauses do not apply to Mr Houghton's circumstances.

[86] "Earnings" means earnings as an employee, as a self-employed person, or as a shareholder-employee.[16]

[87] An "employee" means a natural person who receives or is entitled to receive any amount that is treated as income from employment, as defined in paragraph (a) of the definition of income from employment in section YA 1 of the Income Tax Act 2007; or any salary, wages, or other income to which section RD 3B or RD 3C of the Income Tax Act 2007 applies.[17]

[88] "Earnings as an employee" is defined in s 9 of the Act to mean:

> In relation to any person and any tax year, means all PAYE income payments of the person for the tax year.

[89] "PAYE income payment" has the same meaning as in section RD 3(1) of the Income Tax Act 2007. So far as is relevant to Mr Houghton, "PAYE income payment" is defined by s RD 3(1)(a)(i) to mean a payment of "salary or wages" which is in turn defined[18] to mean "a payment of salary, wages, or allowances made to a person in connection with their employment".

[90] "Tax year" is defined, in relation to any person, to have the same meaning as in section YA 1 of the Income Tax Act 2007 for the purposes of furnishing a return of income under the Tax Administration Act 1994. Section YA 1 defines "tax year" to generally mean "a period starting on 1 April and ending on 31 March".

[91] The PAYE rules and PAYE income payments provisions in ss RD 1 to RD 24 of the Income Tax Act 2007 establish obligations and liabilities on employers for the calculation and withholding of tax on income earned by employees, for payment to the Commissioner of Inland Revenue and the timing of those payments. Employers may be subject to penalties and interest for failing to deduct PAYE from payments made to employees and pay the

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[16] Above n 7.
[17] Above n 7.
[18] Income Tax Act 2007, s RD 5.

Commissioner by each due date. Employers may also be liable for prosecution for a criminal offence.

[92] If for any reason, some or all of the amount of tax for a PAYE income payment is not withheld by and employer, the *employee* is subject to an obligation provide relevant income information to the Commissioner and pay the amount of any deficiency.[19]

[93] Employees are also liable to interest and penalties on unpaid PAYE deductions. An employee is under an obligation to pay the Corporation an Earner's Levy. As this was probably not deducted and paid to the Corporation for the period when Mr Houghton was "paid under the table", that would also need to be paid to the Corporation plus any applicable interest and penalties.

[94] The statutory scheme provides separately for deduction and payment of taxes and levies and expressly provides for sanctions in the form of interest and penalties in the event of non-payment. The scheme does not negative eligibility for weekly compensation on the sole basis that source deduction payments have not been made.

[95] It was submitted for the Corporation, citing *Nicholas v Accident Compensation Corporation,*[20] that the overall scheme for the calculation of weekly compensation is with reference to the claimant's earnings by reference to their taxable earnings. One of the paragraphs cited from *Nicholas* states:

> [25] As was noted by Ms Scott in her submissions, the appellant has neither paid tax on the income which he now seeks to have considered for the purposes of Clause 39, nor has he paid the ACC levy which would be calculated on that income. I find it inconceivable that the legislation would allow for some arbitrary figure to be put up for consideration as being earnings, when those earnings have not been returned for income tax purposes, or had ACC levies paid which are commensurate with those earnings.

[19] Income Tax Act 2007, s RD 21.
[20] *Nicholas v Accident Compensation Corporation* [2008] NZACC 110 at [24]-[26].

[96] However *Nicholas* was not dealing with the situation of an ordinary employee whose income would ordinarily be taxed at source by PAYE deductions. If it was intended to imply that an employee cannot have eligible earnings to calculate weekly compensation where no PAYE tax has been deducted or accident compensation levy paid, *Nicholas* does not support that proposition.

[97] *Nicholas* was a shareholder-employee case where different considerations apply compared to those that apply to employees subject to PAYE income tax and accident compensation levy deductions. The argument in *Nicholas's* case was that although a shareholder-employee's relevant income tax return declared a $60,000 shareholder salary for the relevant tax year, Mr Nicholas's earnings for the purpose of calculating weekly compensation should be $109,600, based on Mr Nicholas's estimate of the value of his services. Judge Beattie characterised the difference as arbitrary and an amount on which no tax or accident compensation levies had been paid in the situation where Mr Nicholas was seeking to depart from the company's relevant tax return and related accounts, which did not support the additional claimed shareholder-employee earnings. The Judge held that the relevant tax return was generally what determined shareholder-employee earnings unless the amount in the tax return was in some way artificially "loaded" because of the fact of incapacity.[21]

[98] *Drage v Accident Compensation Corporation*[22] is not authority for the proposition that a claimant has to show that at the relevant time not only that taxable income was received, but also that the income had been taxed. The *Drage* judgment does not determine that untaxed employee income – where no PAYE was deducted and paid to the Commissioner – is excluded as earnings during the relevant period for the purpose of calculating weekly compensation. In *Drage,* tax had been paid and it was unnecessary to consider what were the legal consequences if it had not.

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[21] *Nicholas* at [26].

[22] *Drage v Accident Compensation Corporation* CIV-485-2010-1419, High Court Wellington, 14 September 2010. (Mallon J)

[99] The sole issue in *Drage* was whether Mr Drage's status was that of an employee or a self-employed independent contractor when he worked as a stuntman in the film industry. This mattered to Mr Drage as the calculation of his earnings for compensation purposes would have been higher if he had been taxed as an employee, as his earnings had been higher in the 12 months immediately prior to his incapacity. As it happened, he had been treated by the film company as a self-employed independent contractor and had been taxed on that basis. This meant that his earnings were calculated for the 12 months ending on 31 March in the year before his incapacity – which produced a lower earnings figure.

[100] The High Court held that if Mr Drage wished to challenge his tax status for the purpose of calculating weekly compensation, he had to follow a procedure through the Commissioner of Inland Revenue and the Taxation Review Authority. That conclusion was in part based on the scheme of the Act whereby weekly compensation is funded by levies paid by employees and self-employed persons into the Work Account (for work related injuries) and the Earners Account (for non-work related injuries). If a person could claim weekly entitlements based not on how their income had been treated under the Income Tax Act, levies paid to the Work Account and the Earners Account would be incorrect and would lead to distortions and unintended administrative difficulties.

[101] However tax and levies had been paid by Mr Drage as a self-employed contractor and when contrasting the scenario of an employee involved in similar work, the High Court assumed that PAYE income tax deductions were paid to Inland Revenue.[23] The Corporation's submissions relied on statements in *Drage* at paragraphs [14] and [17] relating to calculation of weekly compensation of *employees.* To the extent these suggest that tax and levies must have been deducted and paid before there can be "earnings as an employee" which can form part of a weekly compensation calculation, they are *obiter dicta* statements made in a leave to appeal judgment,[24] and not binding on the District Court. In the sense relied on by the Corporation, they do not withstand analysis of the relevant provisions of the tax and accident compensation legislation, so far as relevant to Mr Houghton's circumstances.

[102] Mr Houghton's situation is quite different in that he is not seeking a change of status – he maintains he was an employee throughout – and that PAYE income tax deductions were

[23] *Drage* at [14], [16, [17], [18].
[24] Which does not determine a substantive issue of law.

not made and paid to Inland Revenue. Nothing in the *Drage* decision applies to Mr Houghton's circumstances.

[103] A further difficulty with the *Drage* decision is that the High Court appears to conflate the concept of deriving income that is subject to income tax, with the actual payment of income tax deductions to the Inland Revenue Department. No distinction is made between the two different things.[25] The Review Decision appears to do the same thing in the quoted part of the of the Review Decision set out in paragraph [44] above.

[104] The definition of "PAYE income payments" requires only that a payment received is correctly characterised as derived income, as distinct from a capital or other non-taxable receipt. In practice, this is initially a characterisation made by the Commissioner of Inland Revenue, but ultimately is a question of law for determination by the Courts.

[105] As observed by the High Court in *Drage*, the definition of "employee" in ss 6 and 9 of the Act refers to amounts received by a person that are "treated as income from employment under the Income Tax Act". But to treat a payment as income is merely to characterise the payment. The details of the mechanics of who, how and when the correct income tax is to be deducted and paid and sanctions for non-compliance, are all left to the PAYE Rules and the PAYE income payments provisions.

[106] So far as is relevant to Mr Houghton, PAYE income payments are therefore payments received by a claimant/taxpayer, which are properly characterised as in the nature of income in the form of wages made to a person in connection with their employment. This is irrespective of whether or not the correct tax and levies were deducted and paid to the Inland Revenue Department and the Corporation.

[107] This is clear from a textual reading of the relevant sections of the Accident Compensation and Income Tax legislation, interpreted in light of the legislative purpose, and context, as required by s 10 of the Legislation Act 2019. A key purpose in s 3(d) of the Accident Compensation Act 2001 is to provide for a fair and sustainable scheme for managing personal injury by ensuring that, during their rehabilitation, claimants receive fair

[25] See for example *Drage* at [14].

compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment.

[108] The Review Decision also relied on *Davidoff v Accident Compensation Corporation*[26]. This case does not establish any general principle that income payments received by an employee from an employer must have had the correct tax deducted and paid to the Inland Revenue Department before there can be eligibility for weekly compensation. The case concerned a claimant for weekly compensation on the basis that he did short term casual work for several different employers on a casual basis around the time that he suffered a back injury while at work. The claimant was generally paid cash.

[109] Mr Davidoff's appeal was determined entirely on its own facts. His case was that his back injury occurred while working on a casual basis, for which he received $100, and that he worked for a day or two after that for different people. The claimant resided in a backpacker hostel for a considerable period of time and he had been engaged on casual work for a number of employers on a day by day basis. His employment was at all times of a casual nature. On the undisputed facts as found by the Court, the Court concluded that Mr Davidoff was not an earner immediately before the date of his incapacity and in addition, he was not an earner for the extended period before incapacity as provided in clause 43 of Schedule 1 of the Act.

Analysis

[110] The issue is whether Mr Houghton was an earner prior to his accident. Mr Houghton must establish that he was an earner both at the date of his injury and as at the date of his incapacity and that he had earnings as an employee, on the balance of probabilities.

[111] It is not disputed that from the date of his accident on 14 December 2011, Mr Houghton suffered serious covered injuries caused by the accident and he was incapacitated from that date.

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[26] *Davidoff v Accident Compensation Corporation* [2009] NZACC 54 (14 April 2009)

[112] The Review Decision and the Corporation were incorrect in finding that Mr Houghton was not an earner on the basis that he was not in receipt of PAYE income payments before his incapacity. That was on the basis that in the 52 weeks prior to his injury and incapacity on 14 December 2011, the payments received from his employer had not had PAYE tax and levies deducted. That was in turn primarily based on Inland Revenue records which did not show deduction of PAYE tax or levies during that 52 week period.

[113] While it is true that in the 52 weeks prior to the accident Mr Houghton had not had PAYE tax or levies deducted or filed tax returns, that is not what is required by the definition of "PAYE income payment".

[114] The question is whether Mr Houghton was an earner, firstly, and whether he was in receipt of earnings as an employee, as required by s 9 of the Act. Whether Mr Houghton was an "earner" is a question of fact.

[115] The evidence must be weighed in order to determine if Mr Houghton was in fact an earner at the time of his accident and his incapacity, that is, whether he was engaged in employment, being work carried out for the purposes of pecuniary gain or profit, and whether he was in receipt of earnings as an employee.

[116] The Corporation properly accepted, as did the Reviewer, that there is evidence that Mr Houghton was receiving payments which suggest he was working for pecuniary gain or profit as an employee of a gib fixing business operated by successive corporate entities. The explanation of the origin and basis of these payments is consistent with the evidence which I have accepted, which was given by Mr Houghton, his sister, Ms Lisa Houghton and his co-worker Mr Owen Vincent.

[117] The Corporation relied heavily on statements recorded on ACC forms and attributed to Mr Houghton and which cannot in my view be safely regarded as reliable, bearing in mind the time and circumstances in which they were recorded. I give them little weight.

[118] On balance, the reliable evidence available satisfies me that Mr Houghton was working at the time of his accident and over at least the preceding two years. It is clear that Mr Houghton was engaged in work for the purpose of pecuniary gain or profit. The evidence

establishes on the balance of probabilities that Mr Houghton was an "earner" for the purposes of entitlement to weekly compensation. I am also satisfied that Mr Houghton was in receipt of "earnings" which meet that definition (including within the 28 days prior to Mr Houghton's accident),[27] or "earnings as an employee", in terms of s 9 of the Act.

[119] I am also satisfied that Mr Houghton had been a full-time employee of what was effectively the same business operation for at least two years prior to the accident and would likely have continued to receive earnings from that employment for a continuous period of more than 12 months after his accident.

[120] Mr Houghton is accordingly entitled to weekly compensation calculated on the basis of the payments credited to his bank account in the 52 weeks prior to his accident, injuries and incapacity on 14 December 2011. Most of those payments are gross amounts and have not had tax or levies deducted and paid to IRD by either Mr Houghton's employer or by Mr Houghton himself. The total amounts received by Mr Houghton during the year from 14 December 2010 to 14 December 2011 (most of which were not taxed) is approximately $22,800.00.[28] Deduction of tax and levies may need to be factored into the calculation of Mr Houghton's weekly compensation.

[121] There may remain an outstanding liability on Mr Houghton to pay any taxes and levies (in particular, income tax and accident compensation levies) that should have been paid by his employer or Mr Houghton himself but were not. There may also be interest and penalties incurred, subject to any discretion available to reduce or waive interest and/or penalties after taking into account Mr Houghton's individual circumstances. These are things on which Mr Houghton should obtain professional advice.

Conclusion

[122] Although for more than a year prior to his accident Mr Houghton had not had PAYE tax or levies deducted or filed tax returns, that is not what is required by the definition of "PAYE income payment".

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27 Schedule 1, cl 43.

28 The actual total may be different as some dates were obscured on the copy bank statements provided in evidence and a small number of payments received during this period (preferential holiday pay and WINZ) were taxed.

[123] As a matter of fact, Mr Houghton was an earner for several years prior to his accident and was an earner at the time of his accident, injuries and his incapacity.

[124] He was in receipt of earnings as an employee, as required by s 9 of the Act and was continuously employed by, in effect, the same business engaged in the gib fixing trade. He received fairly regular payments for his work without tax or levies deducted and as reflected in his bank statements for 2009, 2010 and 2011.

[125] Mr Houghton was engaged in work for the purpose of pecuniary gain or profit.

[126] Mr Houghton was in fact an earner at the time of his accident and his incapacity, in that he was engaged in employment, carried out work for the purposes of pecuniary gain or profit, and was in receipt of earnings as an employee.

[127] Mr Houghton is accordingly entitled to weekly compensation calculated on the basis of the payments credited to his bank account in the 52 weeks prior to his accident, injuries and incapacity on 14 December 2011.

[128] Mr Houghton had been a full-time employee of what was effectively the same business operation for at least two years prior to the accident and would likely have continued to receive earnings from that employment for a continuous period of more than 12 months after his accident.

Result

[129] The appeal is allowed.

[130] The Corporation's Decision and the Review Decision are quashed.

[131] Mr Houghton was an earner at the time of his injury and incapacity on 14 December 2011, and is eligible for weekly compensation for so long as his incapacity continues.

[132] This judgment now requires the Corporation to make a calculation of Mr Houghton's weekly compensation entitlement based on his income as an employee for the relevant year as reflected in the bank statements provided in evidence in this appeal.

Costs

[133] Mr Houghton is successful on appeal and is entitled to an order for costs. Unless the parties can agree on costs, costs memoranda are to be filed by each party by 19 April 2024.

I C Carter
District Court Judge

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