

**BEFORE THE ACCIDENT COMPENSATION APPEAL AUTHORITY  
AT WELLINGTON**

[2014] NZACA 6

NZACAA Decision No. 169/85

**IN THE MATTER**

of the Accident Compensation Act  
1982

**AND**

**IN THE MATTER**

of an application for recall of  
judgment and rehearing pursuant  
to s 108(11) of the Act

**BETWEEN**

**TREVOR SMITH**  
Appellant

**AND**

**ACCIDENT COMPENSATION  
CORPORATION**  
Respondent

**HEARING ON THE PAPERS**

**AUTHORITY**

Robyn Bedford

**COUNSEL**

Mr Forster, advocate for appellant; Mr Hunt, counsel for respondent

**DECISION**

[1] This application was made following the Authority's decision in *Smith v ACC* NZACA [2014] 3, dated 27 January 2014 (the 2014 decision). In that decision I determined that the relevant earnings amount of \$211.84 per week at the date of accident calculated by ACC in the decision dated 15 August 1988 for the purpose of paying Mr Smith earnings related compensation for the period from 6 May 1981 to 29 March 1992, was incorrect. The correct figure was set at \$237.79 per week and ACC was directed to recalculate Mr Smith's earnings related compensation for the period and pay him arrears.

[2] On 12 February 2014, Mr Forster filed an application for recall of judgment and rehearing in respect of the 1995 decision. The grounds are summarised as follows:

- The subject of the dispute in the 1995 decision was whether Mr Smith continued to suffer a loss of earnings after 29 March 1992 because of his accident and the decision was necessarily made by reference to ACC's assessment of Mr Smith's relevant earnings amount.
- The 2014 decision determined that the relevant earnings figure of \$211.84 had been wrongly calculated and set the new figure of \$237.79 per week.

- Therefore, the 1995 decision was based on an error of fact and Mr Smith's rights of appeal were exhausted.
- The Authority may recall its judgment under s 108(11) through the power to determine its own procedure.
- The categories of cases that may be recalled are: where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and higher authority; where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and where for some other very special reason justice exists.
- The "*perfection*" of the 1995 decision did not restrict the Authority's powers.
- Special reasons that were in the interests of justice were sufficient in Mr Smith's case to justify the Authority's exercise of its discretion to recall and rehear the 1995 decision.

[3] Mr Hunt opposed the application on ACC's behalf and the grounds are summarised as follows:

- The Authority should apply the Guidelines for Recall of Judgments in Civil Proceedings: a formal application must be made, the Authority will deal with it on the papers and will usually give only brief reasons.
- The 1995 decision was made primarily on medical evidence, not by reference to Mr Smith's relevant earnings.
- The decision did not address the calculation of relevant earnings, there was no direct comparison of relevant earnings amounts and the level of Mr Smith's relevant earnings was not relevant.
- The issue was decided under s 59(1) and turned on whether Mr Smith was unable to work due to personal injury.
- The 1995 decision has been perfected and cannot be recalled.
- The Authority may, however, reopen an appeal on very narrow grounds: a significant injustice has probably occurred and there is no alternative effective remedy; and the extent to which the complaining party is the author of his own misfortune is also important.
- The test for re-opening a judgment is more stringent than the test for recall.
- The application is misconceived, as the 1995 decision was not based on an error of fact, but on medical and other evidence that Mr Smith's loss of earning capacity was not a result of personal injury but rather his election not to work on a full time basis.

### *The 1995 decision*

[4] The chronology set out by Judge Middleton shows that Mr Smith's relevant earnings were assessed in August 1988 based on his pre-accident earnings as then calculated by ACC, which was the decision before me on appeal. Up to 29 March 1992, ACC paid Mr Smith ERC calculated using relevant earnings of \$211.84 per week as at the date of accident, abated for his earnings at Japanese Diesel Repairs and Sales Limited while he was working, and after he left on the basis of what he was capable of earning if he had continued to work there.

[5] ACC stopped paying Mr Smiths' ERC in a decision made on 4 April 1992, effective from 29 March 1992, because he failed to keep ACC informed of his earnings. Mr Smith subsequently provided the earnings details, but by this time ACC had arranged for him to be examined by Mr Swan, Orthopaedic Surgeon, to give his opinion on Mr Smith's current condition, prognosis and work-capabilities. Mr Swan assessed Mr Smith's condition as being attributable to his covered injury, and said he was unsuitable for manual labour and it would be unreasonable for him to be returned to this type of work if his livelihood depended on it.

[6] Judge Middleton based his decision on the assumption that Mr Smith was "*fit to do work other than bush work or work of a very heavy nature*", he had demonstrated over a number of years that he had a capacity to work, and he had chosen not to work full time because he wanted to have access to makeup earnings for the balance of his income. He had not demonstrated a loss of earning capacity as a result of his personal injury, but only that from time to time he had suffered temporary loss of earnings.

[7] Judge Middleton said the issue falls squarely under s 59(1), but under subs (2) an earner's temporary loss of earning capacity is defined by deducting his earnings for the time being from his relevant earnings. Mr Smith was not medically assessed as being able to return to his pre-accident employment as Mr Hunt has suggested, he was assessed by reference to his relevant earnings calculated by ACC in the decision of 15 August 1988, which I have found to be wrong because it was set too low as the divisor used was 52 weeks, not the 46.29 weeks that I found was the correct divisor. Moreover, Judge Middleton seems to have made his decision under the repealed proviso to s 59(2), which until September 1985, allowed ACC to take into account factors such as whether in ACC's opinion Mr Smith was not working in paid employment to the extent to which he was a capable, or if the only factor affecting his employment was his injury.

[8] Applying the criteria enunciated in *Horophenua County v Nash(No 2)*<sup>1</sup> I am satisfied first, that the 2014 decision is relevant to the 1995 decision because it demonstrates that the decision was based on a mistake of fact and secondly, that there were no appeal rights available to Mr Smith, as s 111 only provides the right to apply for leave to appeal on a question of law. Even if Mr Smith had tried to appeal against the mistake of law that appears to have been made in terms of the test under s 59, this would not have affected the relevant earnings figure and the appeal may well have been pointless.

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<sup>1</sup> [1968] NZLR 632

[9] I am also satisfied that as was held by the Supreme Court in *Saxmere Company Limited v Wool Board*<sup>2</sup>, there are very special reasons sufficient to justify recalling and rehearing the 1995 decision. That the fact that the decision has been perfected should not operate to bar this course as it is in the interest of justice that Mr Smith's entitlement to receive compensation for loss of earnings based on the correct relevant earnings figure is reconsidered by the Authority.

#### *Decision*

[10] The application is granted and the decision made by the Authority under *Smith v ACC* Decision No. 169/95 on 1 June 1995 is recalled.

[11] The appeal against the review decision upholding the Corporation's decision of 2 April 1992 will be reheard.

#### *Directions*

[12] Mr Forster is to file submissions within 21 days.

[13] Mr Hunt has a further 21 days to file submissions with a view to the appeal being heard in the Auckland circuit in the week commencing 14 April 2014.

[14] Mr Forster and Mr Hunt are to inform the Registry within 7 days whether the appeal can be heard in Auckland, as I have just completed a Dunedin circuit and the appeal will not be heard there in the foreseeable future.

[15] If the appeal cannot be heard in Auckland, then a decision will have to be issued on the papers and the timetable for filing submissions may be extended to 28 days in each case, and Mr Forster will have a further 14 days to reply.

[16] Leave is reserved to seek further directions as needed.

**DATED** at Wellington this 6<sup>th</sup> day of March 2014

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R Bedford

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<sup>2</sup> [2009] NZSC 122