BEFORE THE ACCIDENT COMPENSATION APPEAL AUTHORITY
AT WELLINGTON

[2014] NZACA 7

ACA 9/12

IN THE MATTER	of the Accident Compensation Act 1982
AND **IN THE MATTER**	of an appeal pursuant to s.107 of the Act
BETWEEN	**KAREN FAYE YOUNG** Appellant
AND	**ACCIDENT COMPENSATION CORPORATION** Respondent

HEARING
17 February 2014 at Dunedin

AUTHORITY
Robyn Bedford

COUNSEL
Mr Sara, counsel for appellant; Mr Barnett and Mr Evans, counsel for respondent

DECISION

[1] This appeal concerns the correctness of the Corporation's decision of 18 September 1980, whereby it ceased Ms Young's entitlement to earnings related compensation because it considered that her injuries received in the accident she suffered on 16 September 1978 no longer prevented her from carrying out a part-time job of a similar nature to that which she undertook prior to her accident.

Background

[2] Ms Young was injured in a motor vehicle accident on 16 September 1978, which resulted in the below knee amputation of her left leg in October 1978 and her right leg in May 1979. Cover was accepted under the Accident Compensation Act 1972. At the time of her accident Ms Young was working part-time as a cleaner at a local cinema. Her set hours were 4 hours one week and 11 hours the next week, which ACC averaged to 7.5 hours per week and paid ERC calculated on relevant earnings of $25.44 per week.

[3] Mr Dykes, Orthopaedic Surgeon, reviewed Ms Young's condition on 11 October 1979 and said:

> *"PRESENT CONDITION:*
> *Mrs Young is keeping house for herself and her husband. She walks around the shops with the aid of one stick after being driven there. She has actually never had a driving licence herself. She is an epileptic. Round the house she can walk without a stick but uses one stick whenever she goes outdoors. A few days before this*

examination, she had gone a whole day without any stick, but the legs felt just so exhausted and weak after this that she had to use two sticks for all the day. In an average day one hour on her feet is the limit after which she has to rest up. Two months ago she was fitted with the second pair of limbs, but it was only slowly that she got used to these and she had finally been walking in them only a fortnight when I saw her.

…

<u>OPINION:</u>
Mrs Young is making good progress after bilateral below knee amputation, the second just five months before this review. At the time of her accident she was doing part time cleaning work in a cinema and does not feel or look fit to do even that amount of work at present. She keeps house, but really would only be fit for a sitting job, but has no experience in that line.

She requires extra experience and coaching in walking on the stumps and building up of strength in the knees and thighs… She is therefore fit for only very selected work at this stage, which pretty well amounts to unfit for anything available unless some very easy and suitable job did happen to eventuate in Gore."

[4] Ms Young received ERC based on medical certificates by Mr Dykes and the last certificate dated 1 November 1979 certified her as unfit for work for three months from 5 October 1979. Mr Dykes did not certify her as fit for selected work, but he did note that she could do very selected sedentary work. As this was a motor vehicle injury, State Insurance paid Ms Young's compensation as recommended by ACC. Following receipt of Mr Dykes' medical certificate ACC reviewed Ms Young's situation and Mr Bellett, the ACC liaison officer, recommended that the certificate was accepted as a normal unfit for work certificate. Mr Bellett spoke with Ms Young and confirmed that it was impractical for her to start looking for work. She was awaiting a new set of limbs and the work she used to do was physically demanding, either as a shop assistant or a cleaner at the local theatre. She could not walk to the town to take on any sedimentary clerical orientated work and she did not drive a car. Mr Bellett recommended that ERC was continued meanwhile as he was quite sure that Ms Young had no opportunity or skill at this point to earn an income.

[5] On around 30 April 1980, Mr Bellett visited Ms Young to check her progress towards employment. Ms Young was till unable to spend any length of time on her artificial limbs and with the other restrictions noted above, ACC decided to give Ms Young more latitude in adjusting to her artificial limbs and to find employment. Mr Bellett discussed Mrs Young's medical certificate with her and although it had expired, ACC and Ms Young agreed to wait until July 1980, when Mr Dykes returned from holiday. Because Ms Young's ERC was so low, Mr Bellett recommended that no further action should be taken until an appointment was arranged with Mr Dykes on his return.

[6] The appointment was arranged and Mr Dykes was asked to comment on Ms Young's present fitness and her incapacity since 8 April 1980, when her last medical certificate expired. In his 18 August 1980 report, Mr Dykes said:

Mrs Young is now well settled in her bilateral below knee artificial limbs, although she has had recurrent trouble from the scar on the right and a recent boil on the left which kept her out of her limbs for a week and threw extra strain on the right, so that its scar

played up again. Her present limbs are working loose and new ones are being made for her in Dunedin.

She now only finds the need for a stick the day after she has had a big day walking around the shops which causes pain, particularly in the right stump. Her present plans are not to return to work in the near future as after a recent check up from her family Doctor, she hopes to have a family in the near future. She is not yet pregnant.

…

<u>OPINION</u>
Mrs Young's condition is now relatively stationary and she has reached a good stage of rehabilitation where she probably would be able to return to a light job if she did not have plans to have a family. She is limited in what she can do and cannot drive a car because in addition to the results of this accident, she suffers from epilepsy. The scar on her right leg continues to give trouble from time to time whenever it has any extra recent pressure when the left stump is painful. I have therefore given her a note to Professor Jeffrey who she will be seeing at the Dunedin Limb Fitting Centre within the next week or two, asking if he thinks it would be to Mrs Young's advantage to have this troublesome piece of scar removed by operation or whether we should wait to see how it settles down in the new limbs.

[7] Mr Bellett considered Ms Young's situation in light of Mr Dykes' comments and spoke with Ms Young to see what her views were. In his memorandum of 1 September 1990, he recorded that Ms Young:

"…agrees with both myself and Mr Dykes that she is no doubt fit to do a light job if this were practical and available. It is highly likely however that she will have a family and really is not too serious about finding a job. She did hope recently to obtain the cashiers job at the local picture theatre but was unsuccessful. She clearly agrees that if something suitable was available she would be able to cope for a short period at least, and at least earn an equivalent of her relevant earnings.

Mrs Young has quite a lot of difficulty up to the present with managing her artificial limbs and has made a number of trips to Dunedin. During this disruptive period I would recommend that ERC be paid up until the present and then terminated. Please accept Mr Dykes report as evidence of her incapacity up to the time of his report. Claimant has agreed that this would be a fair way of treating her."

[8] ACC issued a decision on 18 September 1980 to cease Ms Young's earnings related compensation (ERC) retrospectively from 18 August 1980. The letter referred to Ms Young's recent discussions with Mr Bellett and Mr Dykes' report of 18 August 1980 and said that it was clear that her injuries would no longer prevent her from carrying out a part time job of a similar nature to that which she undertook prior to her accident. No right of review was given, but Ms Young made a late application to review the decision in 2011, which ACC accepted out of time. ACC then made two further decisions in respect of Ms Young's entitlement to ERC. The first decision dated 15 June 2011 stated:

"***This is to confirm*** *that the decision to suspend Weekly Compensation on 18 September 1980 issued by ACC was incorrect.*

ACC are happy to investigate the queries raised by the lodged review, and have forwarded the information to Wellington to seek guidance on outstanding entitlements.

ACC may contact you for earnings information and medical certificates for the duration of the period from when your WC entitlement ceased, until the current date, however this depends on the medical evidence that has been supplied to ACC.

We will contact you when we have a further update and await your confirmation of the withdrawal of your review."

[9] ACC did not investigate Ms Young's entitlements, but instead issued the second decision dated 16 September 2011, which said it could now confirm that the 18 September 1980 decision to cease ERC was correct and that under s 113(2) of the Accident Compensation Act 1972, compensation was continued only so long as a person had a loss of earning capacity as a result of their personal injury by accident. It was established that Ms Young was capable of returning to a job of similar earnings capacity to that of her pre-injury job and ERC was rightly ceased. ACC gave the right of review under the Accident Compensation Act 2001. Following an email exchange with Mr Sara, ACC agreed that the letter of 16 September 2011 was essentially confirming the correctness of the 1980 decision and Ms Young's late review application was heard under Part 9 of the 1982 Act.

The review decision

[10] Ms Young gave evidence at the review hearing that she had not applied for a job as a cashier at the same picture theatre at the time of the assessment and that she had been offered the cashiers job before her accident, but could not take it because of the accident when the lady who held the position left a few days later (Ms Young confirmed through counsel at the appeal hearing that the liaison officer's statement that she intended to take up a job as a shop assistant before her accident was not correct, and that her intended job was as a cashier).

[11] Mr Greene, the Review Officer, considered only the decision letter of 18 September 1980. He held that s 113(2) did not apply because ACC had made no reference in the decision to an amount to be deducted from Ms Young's relevant earnings figure as provided under that subsection. Because ACC had simply said that Ms Young was no longer prevented by her injuries from carrying out a part–time job of a similar nature to her pre-injury job, ACC had decided that Ms Young no longer had a loss of earning capacity. According to Mr Greene's analysis, the test of incapacity under the 1972 Act was whether a claimant had a loss of earning capacity and ACC had decided on 18 September 1980 that Ms Young no longer had a loss of earning capacity.

[12] Mr Greene took into account Ms Young's modest pre-accident earning capacity in dollar terms, the medical evidence ACC had at the time and the file memoranda by the ACC liaison officer, and the fact that as noted by the liaison officer, Ms Young might not have wanted to return to employment because she intended to have children. Mr Green said that it mattered not whether Ms Young could or could not return to her particular employment at the time of her accident, or whether the employment was light or heavy, and that she did not have to receive a clearance to return to work as a cleaner. He found that the decision was correct and made an award of costs of $1,600.00, which was roughly 50% of Mr Sara's costs.

The notice of appeal

[13] The appeal is brought against the whole decision on the ground that the review officer erred in law in determining that Ms Young did not have a loss of earning capacity at the time her weekly compensation was ceased. The relief sought is that the decision of 18 September is quashed and ACC is directed to calculate and pay compensation from the date of that decision. An increased contribution to the award of $1,600.00 was also sought.

The appellant's case

[14] Mr Sara submitted that Mr Greene was correct that the decision did not mirror the statutory wording of s 113(2) and that the 1980 decision was not made under s 113(2) as asserted by ACC. He said there were four ways ACC could cease ERC: a) the claimant is assed for permanent loss of earnings under s 114; or b) they made a full recovery and were no longer incapacitated; or c) their post incapacity earnings exceeded their pre-incapacity earnings; or d) the proviso to s 113(2) was applied and ACC set a notional figure on what the claimant might earn from alternative employment. Ms Young was not cleared to work as a cleaner and nor was she working when compensation was stopped on 18 September 1980. ACC did not apply the proviso to 113(2), because ACC did not turn its mind to the employment it considered Ms Young might be able to do and the level of earnings she might be able to derive. Ms Young's compensation was stopped wrongly and she should have been assessed under s 114, as she could not return to her pre-injury employment.

[15] Speaking to Mr Barnett's submissions, Mr Evans said that ACC did not rely on any of the four possible ways of ceasing ERC identified by Mr Sara and backtracked from the view ACC expressed in the letter of 16 September 2011, namely that s 113(2) had been applied. Mr Evans relied instead upon a "*fifth and fundamental ground*", which was that entitlement to ERC only arises where there is a loss of earning capacity "*as a result*" of the covered personal injury. Mr Evans referred to various decisions to the effect that there must be a causal connection between the injury and the temporary loss of earning capacity and submitted that if the causal connection was not present, there was no need to look at s 113(2). The written submissions quote the following passage from the decision of the High Court in *Smith v ARCIC*[1], which concerned s 59 of the Accident Compensation Act 1982, which is of the same effect as s 113 of the 1972 Act:

> "*The proper approach, as explained by Robertson J in Wicks, is to weigh and assess the available evidential material relating to the events between the time of the injury and the time of the alleged temporary loss of earning capacity. Naturally, evidential material relating to the time of when it is alleged that there has been a loss of earning capacity will be relevant. From this overall picture a judgment can be made as to whether the necessary causal link has been established*."

[16] ACC's case is essentially that the onus is on the appellant to establish a right to the entitlement; ACC is not bound by a medical certificate and does not need a medical certificate that the appellant is fit to return to work in pre or post injury employment, so the fact the Ms Young had not been cleared to work as a cleaner does not establish her ongoing entitlement. The evidence does not establish that Ms Young was incapable as a result of her covered injury from working her pre-employment hours or earning her pre-employment wages; she had no current medical certificate that she was unfit for work, and

[1] M68/97 4 September 1997, Chisolm J

this puts a heavy onus on Ms Young to demonstrate that she was unfit to earn $25.00 per week. In light of Mr Bellett's comments and Mr Dykes' reports, Ms Young's agreement that she was fit for light work, and the evidence that she was planning to have another child and was not serious about finding work, she could not meet the onus of showing that she suffered a continuing incapacity "*as a result*" of her covered injury.

[17] Mr Evans advised the Authority that there was no job description for Ms Young's work as a cleaner on the ACC file, nor any comparison with any other actual occupation and possible earnings. Mr Evans also agreed that Ms Young should have been paid up to the date of the decision of 18 September 1980 and that ACC should not have retrospectively ceased payment.

Discussion

[18] In his 1978 decision in *Fletcher*[2], which concerned the question of whether the commission was entitled to terminate Mr Fletcher's ERC, Blair J said regarding the interpretation of s 113 (1) and (2):

> "*I agree with Mr Arndt that subsection (1) imposes an obligation on the Commission to pay earnings related compensation based on loss of earning capacity. Until an assessment (if any) is made under s 114 the rate payable is 80% of the loss of earning capacity due to the injury. The loss of earning capacity is determined pursuant to the subsection by calculating the "relevant earnings" (see s 104) for any period while the accident victim remains incapacitated on account of the injury and deducting from his earnings (if any) for a like period. Normally in the case of a salaried person this exercise presents no difficulty*." (The deeming takes place under subsection (2)).

[19] In Mr Fletcher's case, he was a seaman but had not worked onboard ship for over three months before his accident and the decision was not made to terminate Mr Fletcher's ERC due to him having regained a post accident earning capacity, but because having reviewed the original decision to pay compensation, the Commission decided that Mr Fletcher did not have a loss of earning capacity on account of his injury, but on account of his pre injury drunkenness and years of heavy exposure to alcohol. Blair J found that he was unlikely to be employed for long as a seaman with or without his accident, because he was a danger to the ships company and unless he modified his personal habits it was doubtful if he could be considered as even employable. Blair J held that apart from the proviso to subs.(2) the Commission was entitled on the information available to find as a fact that because of the particular circumstances Fletcher's loss of earning capacity was not due to the accident but to the impact of the disease of alcoholism and the associated deterioration on his working ability. On this point Blair J said:

> "*In my view once the commission can properly decide that an injured persons incapacity to earn is the result of factors not caused by the accident, then the Commission is bound to terminate or reduce earnings related compensation. The right to earnings related compensation continues only while the loss of earning capacity can be related to the accident. By December 1976 the Commission was in my opinion entitled to say that Mr Fletchers' unemployability was the result of his drunken habits and character.*

[2] Decision No.129

> *It follows from what I have said that I do not think that the Commission was obliged to resort to the proviso of s 113(2) in order to end the payments. In any event, however, on the material available I think that "having regard to the medical and other evidence available" the Commission was entitled to make a finding that Fletcher was not working to the extent to which he would have been able to do so if the only factor affecting his ability to work were his incapacity due to the injury*".

[20] In his 1980 decision in *Adern*,[3] Blair J considered the correctness of a notional earnings assessment under the proviso to 113(2). Mr Adern was injured in 1975 and following a medical opinion that he could return to the lighter aspects of his pre injury employment as a butcher, and from June 1977 he worked for 20 hours per week as a butcher and was paid $50.00 per week. In October 1979 the Commission told Mr Adern that it considered he should be getting approximately $83.60 for a 20 hour week. On review it was assumed that the $50.00 per week was set on the basis of the award at the time, and the Hearing Officer held that whatever the same position attracted in 1979 must be deemed as the amount he was now capable of earning. Blair J said:

> "*There is no doubt that in cases like the present one the commission has a duty under s 113 to review its assessment of earning capacity from time to time. The amount of earnings related compensation payable is, of course, related to the degree of loss of earning capacity. It follows that in October 1979 the Commission had a responsibility to measure the loss of earning capacity of the appellant and I feel bound to say that in making this measure the Commission would be obliged, inter alia, to look at current wage rates*."

[21] Having determined that amount of $50.00 per week was set in relation to the then award rate applicable to Mr Adern's status and reduced hours, Blair J held that the current award was the starting rate, but it should take into account other circumstances which would justify fixing the new assessment of Mr Adern's working capacity at a rate higher or lower than the award.

[22] Following Blair J's approach and interpretation of s 113(1) and (2) and the proviso in *Fletcher* and *Adern* as a guide, I agree with Mr Evans that ACC was entitled to review Ms Young's entitlement to ERC in August 1980. Mr Dykes had to provide her with a retrospective medical certificate, her pre injury work was part time only and he thought she had reached a good stage of rehabilitation, so it was reasonable for ACC to investigate her circumstances and make a decision as to whether she still suffered a loss of earning capacity. However, I do not agree that ACC carried out the investigation into Ms Young's earning capacity correctly, or that the conclusion it reached that Ms Young's injuries would no longer prevent her from carrying out a part time job of a similar nature to that of a cinema cleaner that she undertook prior to her accident, can be justified under s 113(1) or (2) or the proviso.

[23] Ms Young did not have a clearance to return to work as a cleaner, and nor was she earning in another job, so her incapacity for work, if any, had to be measured against other criteria for determining loss of earning capacity. ACC first had to determine whether Ms Young had good medical grounds for not working, and if not, then the proviso to s 113(2) had to be applied to enable ACC to make a notional earnings assessment of her earning capacity for the exercise to be properly carried out under s 113(1) and (2). This process required ACC to have regard to the medical evidence and other evidence on file

[3] Decision 425

and determine whether there were other reasons apart from her injury affecting her ability to work, and ACC then had to clearly identify those reasons. If the reason for determining that Ms Young was not incapacitated from earning related to her personal circumstances, these had to be identified. If the reason related to her ability to perform other work, this work had to be identified and a comparison made between the amount she could be expected to earn and her relevant earnings figure.

[24] The medical evidence does not give a clear indication that Ms Young was no longer incapacitated by her injury. While Mr Dykes said on 18 August 1980 that Ms Young probably would be able to return to a light job if she did not have plans to have a family, this is premature and speculative. However, in my view Mr Dykes could not make any reliable assessment of Ms Young's ability to sustain any future work until such time as her new artificial limbs had been fitted. Mr Dykes said that Ms Young's current artificial limbs were working loose and another set of new ones were being made for her in Dunedin, but he did not say when the new limbs were likely to be ready, or how long it would take her to settle in to the new limbs.

[25] However, Mr Dykes said in his October 1979 report that Ms Young's second pair of new limbs was fitted two months earlier and that it was only slowly that she got used to them and she had only been walking for a fortnight when he saw her. These are the limbs that were working loose and needed replacing in August 1980, and it is reasonable to assume that it would take some time for the next set of limbs to become functional to the point where Ms Young could safely return to any form of work, particularly as she had to walk to work because she could not drive. Moreover, Mr Dykes said that Ms Young had a troublesome piece of scar on her right leg, which gave her trouble any time it was irritated or subject to pressure and that he was making inquiries as to whether further surgery was required.

[26] In light of this, it was premature for ACC to make any decision concerning Ms Young's loss of earning capacity or her capacity to work, until such time as the operation had either been performed and recovered from, or discounted, and the new limbs had been fitted and Ms Young had settled in to them. Once Ms Young's condition was stable again, which may have been months down the track if there were any further problems with her adjustment to her third set of limbs, then ACC had to identify the work that she was capable of doing physically and in terms of relevant skills, and carry out the comparison between the likely earnings in the particular jobs identified, and her relevant earnings. If Ms Young was to be considered able to return to a similar job to that which she had prior to her injury, then ACC had to know what the theatre cleaner's job entailed and identify similar jobs. In either case ACC then had to identify the level of pay applicable at the time of the assessment, and compare this to Ms Young's updated relevant earnings.

[27] Mr Evans said that ACC did not apply the proviso to s 113(2), but relied entirely on Mr Dyke's opinion that Ms Young had reached a good stage of rehabilitation and that her plans were not to return to work as she hoped to have a family. He also submitted that the fact that Ms Young did not have a current medical certificate was not conclusive, but it does leave her with a heavy onus to demonstrate that she was unfit to work and to earn $25.44 per week. However, it seems to me that in the absence of any actual earnings to prove objective earning capacity, any determination of Ms Young's earning capacity as a result of her injury that is not entirely based on medical grounds, must as Mr Sara submitted, be based on the proviso to s 113(2) and clearly, there was no attempt by ACC to identify a job that Ms Young could perform, nor to quantify her likely earnings so as to be able to say that they would have exceeded the $25.44 per week relevant earnings figure. Nor am I impressed by the argument that the lack of a medical certificate casts a

heavier than normal onus on Ms Young, when ACC was quite happy to leave Ms Young without a current medical certificate while Mr Dykes was on holiday, and he was only asked to comment on her incapacity from 8 April 1980 up to the date of his assessment and was not asked to provide any medical certification.

[28] Despite ACC's central argument that s 113(2) had not been applied, Mr Evans also relied upon Mr Dyke's comments that Ms Young had no plans to return to work because she wanted to become pregnant. This is only relevant if the proviso was applied, as it could have been considered as evidence that Ms Young was not endeavouring to work in paid employment to the extent of her capacity. However, if this was the reason for ACC stopping Ms Young's compensation, then it should have considered doing so in October 1879, because Mr Dykes first mentioned Ms Young's plan to become pregnant in his October 1979 report. In my view, the possibility of pregnancy at some time in the future is not sufficient to support a determination in August 1980, particularly when Ms Young was still not pregnant, that she was not endeavouring to work to the extent of her incapacity, or not working in paid employment to the extent to which she would be able to do so if the only factor affecting her ability to do was incapacity due to her injury. In any event, Ms Young may well have continued to work during her pregnancy, and she had worked with children to care for until her injury.

[29] I am satisfied that in Ms Young's case. First, the medical evidence did not support a determination that she had no loss of earning capacity under s 113(1) because she still had replacement limbs to be fitted and adjusted and there was the possibility of a further operation. Secondly, ACC did apply the proviso to s 113(2); thirdly, there was no good reason to determine that factors other than Ms Young's injury affected her ability to look for work, or to actually work; and fourthly, ACC did not carry out the necessary comparative exercise and to the extent that it based the decision on Ms Young's hope of having another child with her new husband, this was speculative and unreasonable.

The review costs

[30] Mr Sara submitted that Ms Young should be awarded what amounts to indemnity costs because the full factual and legal basis for the claim was set out from the beginning; the additional work (the review itself) was only required because ACC changed its mind about the revocation of the decision, and two hearings were required rather than one because Mr Greene changed his mind part way through about allowing ACC to attend as a party. Finally, Mr Green did not give reasons for his award of 50% of actual costs.

[31] I agree with Mr Barnett and Mr Evans that the award is within Mr Greene's discretion and that it is not realistically open to contend that in the circumstances he applied a wrong principle or otherwise misdirected himself. Mr Greene considered relevant authorities, and he applied the cushioning principle to award 50% of Ms Young's legal costs. There is no scale of costs in this jurisdiction, and in light of ACC's acceptance of the late application for review, I am unable to say that any actions by ACC unduly prolonged or complicated the review so that a higher award should be made on this account.

Decision

[32] The appeal against the Corporation's decision of 18 September 1980 is successful and the decision is quashed.

[33] The appeal against the costs awarded at review is dismissed.

[34] Ms Young is to be paid compensation for loss of earnings up to the date where the medical evidence confirms that her condition was stable in the sense that she had adjusted to her artificial limbs and no further operations were necessary on this account.

[35] The question of Ms Young's entitlement to compensation for loss of earnings from that date is returned to ACC to investigate in light of my findings as to what is required under s 113 of the Accident Compensation Act 1972 to determine her loss of earning capacity, if any and to calculate and pay any resulting compensation arrears.

[36] Ms Young is to provide the Corporation with all information she wishes to be taken into account as soon as practicably possible.

[37] The Corporation is to issue the necessary decisions in a timely fashion and the right of review is to be given under Part 9 of the Accident Compensation Act 1982.

[38] Should the matter proceed to a further review, Mr Greene is not to be appointed as the review officer because of his prior involvement in the claim.

Costs

[39] If costs and disbursements cannot be agreed then Mr Sara is to file submissions supported by invoices where possible within 28 days. ACC has a further 28 days to file submissions in reply and costs will be decided on the papers.

DATED at WELLINGTON this 18th day of March 2014

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R Bedford