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PROHIBITED BY S 160 OF THE ACCIDENT COMPENSATION ACT 2001
SEE Minute 19 March 2024 at end of judgment**

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 182 ACR 257/21

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

Hearing:	10 May 2023
Heard at:	Auckland
Appearances:	AU, appellant in person J Sumner and L Aitken for respondent
Judgment:	8 November 2023

RESERVED JUDGMENT OF JUDGE I C CARTER
[Impairment Assessment, Accident Compensation Act 2001, Schedule 1, Part 3]

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Introduction

[1] This appeal is from a Review Decision dated 27 October 2021 (the Review Decision), which confirmed the Corporation's decision dated 7 December 2020 (the Decision), declining the appellant's application for lump sum compensation on the that basis that her whole person impairment ("WPI") rating is zero per cent.

Facts

[2] The appellant, AU, has cover for several personal injuries arising from accidents sustained in April 2014, January 2017, and April 2018. Her covered injuries include the following:

- (a) Concussion, and neck and lumbar sprain injuries sustained in an accident on 30 April 2014 when her car was rear-ended by another car;
- (b) Low back injuries sustained in an accident on 9 January 2017; and
- (c) Right elbow lateral epicondylitis and sprain injuries to the neck and left hand and wrist sustained in an accident while working in **[Publication Prohibited]** on 30 April 2018.

[3] On 28 October 2020, Dr Stuart Armstrong met with AU and completed a WPI assessment, considering the covered personal injuries. Dr Armstrong concluded in his Impairment Assessment Report that AU presented with a zero per cent WPI rating for her covered personal injuries.

[4] On 5 November 2020, another MRI scan of AU's cervical spine was performed, which revealed: "Mild disc bulges are shown with associated instability across endplates. Facets are coronal and relatively stable without stenosis or nerve compromise."

[5] On 23 November 2020, Dr John Collier, psychiatrist, psychotherapist, and senior peer reviewer, completed a peer review of the Report. Dr Collier agreed with Dr Armstrong's history, examination and ratings in the Report. He also commented that impairment assessment had been correctly performed. He concluded that the final rating of zero per cent WPI for all injuries is correct.

[6] On 7 December 2020, in reliance on the Impairment Assessment Report and Dr Armstrong's findings, the Corporation made its Decision. The Decision advised AU that it could not pay lump sum compensation as AU's WPI was assessed to be less than 10 per cent. On 29 September 2021, a review was conducted before Reviewer Walker. In the Review Decision dated 27 October 2021, the Reviewer concluded that AU had not identified a fundamental flaw in Dr Armstrong's report. Accordingly, the review was dismissed.

[7] On 2 November 2021, the Corporation wrote to AU regarding her claim for cover for her post-concussion syndrome and chronic pain syndrome. The respondent stated that it was unable to accept her claim, as there was insufficient evidence to show the conditions were caused by accident.

[8] On 9 November 2021, AU filed a Notice of Appeal.

Appellant's submissions

[9] In her written and oral submissions, AU referred to a large number of documents and made several assertions, many of which were difficult to follow and understand.

[10] From her Notice of Appeal, written material filed in support of her appeal and oral submissions made at the hearing of the appeal I understand the substance of AU's arguments to be:

- (a) AU said she was unable to refer to things properly at the hearing because she did not have a Bundle of Documents, was not able to refer to documents properly and anyway there were a lot of reports missing from the Bundle of Documents. She said that she did not have a chance to provide all relevant reports, some of which she said were missing.
- (b) AU was critical of much of the medical evidence relied on by the Corporation. She was also critical of the Corporation's staff and claimed that a Corporation case manager somehow orchestrated doctors to produce reports that were based on only selective information.

- (c) There is clear and compelling evidence in the form of images and specialist/expert reports to support a more favourable WPI assessment. AU relied strongly on the medical assessments and reports of:
 - [i] Mr Choy, orthopaedic spinal and arthroplasty surgeon, and what he drew from MRI scan imaging from 2015.
 - [ii] Mr Durrant, orthopaedic surgeon, who in July 2022 diagnosed “Tearing of the common extensor origin right elbow”.
 - [iii] Dr Newburn, neuropsychiatrist, who in August 2022 diagnosed chronic pain disorder. AU says Dr Newburn is the only medical professional who took a full history from her.
- (d) The injuries¹ are ongoing and impact substantially on AU’s ability to carry out day-to-day activities.

Respondent’s submissions

[11] The Corporation argues:

- (a) The WPI assessment was undertaken in accordance with the Act.
- (b) The WPI assessment was undertaken by a suitably qualified assessor, Dr Armstrong, and confirmed in a peer review by Dr Collier.
- (c) In undertaking the WPI assessment, Dr Armstrong considered all covered aspects of AU’s impairment.
- (d) Dr Armstrong’s WPI assessment report was completed in accordance with all relevant legislative requirements.

¹ Cervical spine, lumbar spine, concussion (car accident injuries 2014), elbow injuries (2018), and two wrist injuries.

- (e) No material evidence as been advanced to support AU's position that the WPI assessment was flawed.

Issue

[12] The issue on appeal is whether the:

- (a) Corporation's decision dated 7 December 2020, declining AU's application for lump sum compensation on the basis that her whole person impairment ("WPI") rating is zero per cent ("the Decision"); and
- (b) Subsequent Review Decision dated 27 October 2021 ("the Review Decision") upholding the Decision;

are each correct.

Law

[13] For injuries suffered on or after 1 April 2002, the application for lump sum payment is determined under Part 3 of Schedule 1 ("Part 3") to the Accident Compensation Act 2001 ("the Act") and the Injury Prevention Rehabilitation and Compensation (Lump Sum and Independence Allowance) Regulations 2002 ("Regulations").

[14] Clause 54 of Part 3 states:

54 Lump sum compensation for permanent impairment

- (1) The Corporation is liable to pay the claimant lump sum compensation in accordance with this schedule, if—
 - (a) the claimant has suffered personal injury, after the commencement of this Part, for which he or she has cover; and
 - (b) the claimant—
 - (i) has survived the personal injury for not less than 28 days; and
 - (ii) is alive when assessed under clause 59; and
 - (c) an assessment carried out under clause 59 establishes that the claimant's personal injury has resulted in a degree of whole-person impairment of 10% or more.

- (2) To avoid doubt, there is no entitlement to lump sum compensation in respect of personal injury suffered before 1 April 2002 or in respect of any subsequent consequences of any such personal injury.

[15] Before any assessment can occur, clause 57 of Part 3 provides that the respondent must not assess a claimant's entitlement to lump sum compensation until it receives a medical certificate as to the stability of the claimant's condition.

[16] Clause 58 of Part 3 requires assessments only to be undertaken by an assessor appointed by ACC, while clause 59 of Part 3 states:

59 Assessment of entitlement to lump sum compensation

- (1) After the Corporation receives a certificate under clause 57, the Corporation must authorise an assessor to do an assessment of the claimant.
- (2) An assessor assesses the claimant's percentage of whole-person impairment.
- (3) In doing an assessment under this clause, an assessor must—
 - (a) assess the claimant in accordance with regulations made under this Act; and
 - (b) exclude from the assessment any permanent impairment—
 - (i) that does not result from personal injury for which the claimant has cover under this Act; and
 - (ii) arising from personal injuries suffered before the commencement of this Part; and
 - (c) include in the assessment any permanent impairment for which the claimant has received lump sum compensation under this Part.
- (4) Subclause (3) applies subject to any regulations made under this Act.
- (5) A claimant who has suffered more than 1 personal injury must be assessed by establishing, in accordance with regulations made under this Act, the combined effect of those injuries.

[17] Regulation 4 of the Regulations states:

Assessment tool for assessing eligibility for lump sum payments and independence allowance

- (1) Assessment of a person's whole-person impairment, for the purposes of determining the person's eligibility to receive lump sum compensation or an independence allowance, must be carried out by an assessor using the assessment tool prescribed by sub clause (2).

- (2) The assessment tool comprises—
 - (a) the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition); and
 - (b) the ACC User Handbook to AMA4.
- (3) The ACC User Handbook to AMA4 prevails if there is a conflict between it and the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition).

[18] The ACC User Handbook to the AMA “Guides to the Evaluation of Permanent Impairment” 4th Edition (“ACC User Handbook”) sets out:

Apportionment

An impairment May be the result of multiple conditions, not all of which are covered by ACC. In this situation, apportion the percentage into covered and non-covered impairments.

<i>Method</i>	<i>Description</i>
<i>Deduct Pre-existing Impairment</i>	<p><i>If possible, analyse the impairment that existed prior to the covered condition occurring, using the following method:</i></p> <ul style="list-style-type: none"> • <i>Calculate the pre-existing percentage (base on medical records).</i> • <i>Calculate the percentage that currently exists (from the combination of covered and non-covered conditions).</i> • <i>Deem the difference between the two to be the impairment apportioned to the covered condition.</i> • <i>Note that one figure is deducted from the other. Don't attempt a “reverse combine”.</i>
<i>Use Clinical Judgment</i>	<ul style="list-style-type: none"> • <i>If it's not possible to calculate the pre- existing impairment, base the apportionment on your clinical judgement, using historical records and your own clinical evaluation.</i> • <i>Very occasionally, you won't feel you can confidently do this. If so, note this in your report.</i>

... Note: If you use apportionment, justify your decision in your report.

[19] In *Holmes v Accident Compensation Corporation*², Judge Barber held:

... it will almost always be impossible for the appellant, in the absence of contradictory medical opinion from a recognised expert, to show that an assessment process carried out by a duly appointed and authorised assessor has been conducted contrary to the requirements of the handbook and guides, and to set it aside on the basis, essentially of submission alone.

[20] In *Moloney v Accident Compensation Corporation*³, Judge Beattie highlighted the distinction between impairment and disability in the context of lump sum compensation. His Honour stated:

[14] The Court has noted the appellant's complaint that the assessment took no account of the physical limitations which her injury now placed on her in relation to her activities of daily living. The fact of the matter is that those are factors of disability rather than impairment.

[15] The difference between those two concepts is identified specifically in the AMA Guides where impairment is identified as being any deviation from the normal in a body part or organ system and its functioning, and where "disability" is defined as an alteration of an individual's capacity to meet personal, social or occupational demands or statutory or regulatory requirements because of an impairment. Disability refers to an activity or task that the individual cannot accomplish. It is the case, however, that impairment percentages in the Guides do not take account of the degree of physical restriction that is imposed by reason of the injury.

[21] In *Annandale v Accident Compensation Corporation*⁴, Judge Powell held:

The case law is well settled that in order to succeed in an appeal of this nature it is for the appellant to establish on the balance of probabilities that the assessment was in some way flawed or incorrect. This requires credible expert evidence directed at the specific aspects of the assessment which is said to be incorrect, but does not require a full alternative assessment. See for example *W v Accident Compensation Corporation* (284/2004) per Judge J D Hole issued 25 August 2004.

[22] In *Jones v Accident Compensation Corporation*⁵, Judge MacLean held:

[10] The Court is wary about trying to second guess the methodology used in the lump sum impairment area because it is a field requiring particular expertise and absent, as here, any cogent evidence to show any flaw in the process, the challenge to it is not sustained.

² *Holmes v Accident Compensation Corporation* [2009] NZACC 111

³ *Moloney v Accident Compensation Corporation* [2010] NZACC 144

⁴ *Annandale v Accident Compensation Corporation* [2013] NZACC 363

⁵ *Jones v Accident Compensation Corporation* [2015] NZACC 66

[11] Even if there was to be some adjustment to the overall results of the mathematical exercise, it severely stretches the imagination to imagine that there was ever any real possibility of the appellant being able to be assessed as having a whole person impairment of at least 79%, noting that the percentage impairment in respect to the previous lump sum payments, which was not challenged by Mr Jones was 69% and he would need to have thus a whole person impairment of at least 10% to qualify for an independence allowance.

[23] In *Crouchman v Accident Compensation Corporation*⁶, Judge MacLean stated:

[28] As was outlined in *W v Accident Compensation Corporation* [2004] NZACC 284 and *Robinson v Accident Compensation Corporation* [2008] NZACC 121, the principles underlying a challenge to an independence allowance assessment are well settled including:

- It is not for the Court to form an opinion as to whether or not the AMA Guides have been correctly applied - this is the province of duly qualified medical practitioners. The Court must rely on the evidence of medical practitioners in this regard.
- To succeed in an appeal it is for the appellant to establish on the balance of probabilities that the assessment was in some way flawed or incorrect. This requires credible expert evidence directed at the specific aspects of the assessment which are said to be incorrect.
- In order to upset an assessment the Court does not necessarily have to be provided with an alternative assessment from a duly qualified expert but it is sufficient if there is expert compelling evidence either that the AMA Guides have not been correctly interpreted or that the assessor has failed to take into account all relevant factors of impairment.

[24] The Court has consistently required alternative clinical opinion to satisfy it that an Independence Allowance Assessment may be unsound and that a whole person impairment requires reassessment: *Wyld v Accident Compensation Corporation*⁷, *Monaghan v Accident Compensation Corporation*⁸, and *Verhoef v Accident Compensation Corporation*⁹.

[25] In *D v Accident Compensation Corporation*¹⁰, Judge Henare stated:

[54] It is accepted, for the purpose of this appeal, that the appellant must establish on the balance of probabilities, her level of impairment is higher than the percentage that the Corporation has assessed.

⁶ *Crouchman v Accident Compensation Corporation* [2016] NZACC 29

⁷ *Wyld v Accident Compensation Corporation* [2011] NZACC 187

⁸ *Monaghan v Accident Compensation Corporation* [2011] NZACC 339

⁹ *Verhoef v Accident Compensation Corporation* [2012] NZACC 42

¹⁰ *D v Accident Compensation Corporation* [2017] NZACC 83

[55] As referred to in the 4 May 2016 review decision of Ms Vivekananthan:

To overturn the assessment completed by the duly appointed assessor, there must be clear and cogent evidence that the assessment was wrong; *Byrnes* (73/2004). This generally requires “credible expert evidence directed at the specific aspects of the assessment which are said to be incorrect”: *W* (284/2004).

[26] Judge Spiller stated in *Hoebrechts v Accident Compensation Corporation*¹¹:

It is for Ms Hoebrechts to establish on the balance of probabilities that Dr Armstrong’s assessment was in some way flawed or incorrect. Ms Hoebrechts is required to provide credible expert evidence directed at the specific aspects of the assessment which are said to be incorrect. **There needs to be compelling expert evidence either that the AMA guides were not correctly interpreted or that the assessor failed to take into account all relevant factors of impairment.** Ms Hoebrechts has not provided any such expert evidence.

Analysis of the medical evidence

[27] AU is a 59-year-old former **[Publication Prohibited]**. She has cover for several personal injuries arising from accidents sustained in April 2014, January 2017, and April 2018. Her covered injuries include the following:

- (a) Concussion, and neck and lumbar sprain injuries sustained in an accident on 30 April 2014 when her car was rear-ended by another car;
- (b) Low back injuries sustained in an accident on 9 January 2017; and
- (c) Right elbow lateral epicondylitis and sprain injuries to the neck and left hand and wrist sustained in an accident while working in **[Publication Prohibited]** on 30 April 2018.

[28] Her WPI assessment relates to these injuries. The three accidents and identified injuries are discussed below.

2014 injuries

[29] On 6 May 2014, AU presented to Dr W A Von Biel, General Practitioner, following a motor vehicle accident on 30 April 2014, when her car was rear-ended by another car.

¹¹ *Hoebrechts v Accident Compensation Corporation* [2021] NZACC 120 at [35]

Dr Von Biel diagnosed AU with a neck sprain, lumbar sprain and concussion. The Corporation confirmed cover for these injuries on 7 May 2014.

[30] On 9 May 2014, AU saw a physiotherapist, Courtney Wilkinson, who reviewed AU's neck pain and referred her for further investigations.

[31] In a report dated 5 June 2014, Mr Grant Cowley, Orthopaedic Surgeon, recorded that he had examined AU. Mr Cowley noted the results of X-ray imaging showed minimal disc space narrowing at C6/7.

[32] On 19 June 2014, AU had a brain MRI scan performed by Dr Gavin Davis, Radiologist, that did not reveal any abnormalities.

[33] On 17 July 2014, Dr Jack Ch'Ng, Vascular Registrar, confirmed the MRI findings in a letter to AU's GP, Dr Von Biel.

[34] On 15 January 2015, Dr Ch'Ng reviewed AU again and noted that further MRI and duplex carotid scans showed that the carotid arteries are completely normal on both sides. Dr Ch'Ng stated the MRI showed:

Vertebrobasilar is completely intact with no evidence of dissection. However, unfortunately, despite doing physiotherapy regularly for the last couple of months, she is persistently suffering from chronic neck pain.

[35] AU saw Mr Cowley again on 9 April 2015 regarding her cervical spine, noting her ongoing pain. Mr Cowley referred her for another MRI scan.

[36] AU underwent an MRI of her cervical spine on 16 April 2015. In an MRI report dated 17 April 2015, Dr Ian Best, radiologist, recorded that AU had been referred for imaging due to worsening neck pain following an injury. Dr Best compared the MRI with X-ray imaging taken in May 2014. He concluded that AU presented with minimal loss of disc height at C6/7 and a shallow central disc protrusion without definite focal neural compromise.

2017 injuries

[37] AU has cover for low back sprain, right and left, arising from an accident on 9 January 2017. Details of the accident were unclear on the evidence before me. AU

informed Dr Armstrong at the time of the WPI assessment that she had no recollection of an accident or injury in early 2017. She believed her accident compensation claim at the time related to injuries from the 2014 accident. However it is accepted by the Corporation that AU was covered for low back sprain, right and left, arising from an accident on 9 January 2017.

[38] AU was referred to a rheumatology clinic where she raised complaints about left wrist pain (and neck pain). She was subsequently referred to a back clinic.

[39] AU received various treatments to ease her neck pain, including acupuncture.

[40] In a CT scan report dated 26 January 2017, Dr Y Shen, radiologist, recorded that AU had been referred for imaging following a progressive problem with her memory. Dr Shen concluded that no cause for AU's cognitive decline could be seen.

[41] In February 2017 AU was referred to the Memory Service and the Waikato DHB, but she elected not to participate.

2018 injuries

[42] On 30 April 2018, AU reported that she injured her right arm while working in **[Publication Prohibited]**.

[43] On 17 May 2018, an x-ray was taken of AU's right elbow by radiologist, Dr D Sommerville. It was noted "No elbow joint effusion or bony injury is seen".

[44] On 22 May 2018, an ultrasound scan of AU's right wrist and elbow were performed. Dr Rebecca Hughes, Radiologist, reported:

Appearances were consistent with lateral epicondylitis with thickened and hyperaemic common extensor origin containing small intrasubstance tears.

[45] On 13 February 2019, Dr Michael Kahan, Occupational Medicine Specialist, provided a report to the Corporation following an initial medical assessment of AU. Dr Kahan noted that AU would suit light to medium work which did not involve heavy lifting or repetitive use of her right arm.

[46] Another MRI scan was performed on 8 August 2019. The report stated no elbow joint effusion was found.

[47] In a report dated 7 November 2019, Dr Anthony Morrison, Clinical Psychologist and Neuropsychologist, recorded that he had assessed AU in relation to a complaint of cognitive difficulties she reported during a return-to-work programme. Dr Morrison noted the history of a car accident in 2014 and her subsequent presentation to her GP. He concluded that she presented with intact cognitive functioning. Dr Morrison also noted that, given the contemporaneous notes from 2014, it was unlikely that any ongoing cognitive issues were due to injuries sustained in the 2014 accident. However, he also noted that mood and anxiety related issues could be playing a role in AU's ongoing presentation.

[48] In an MRI scan report relating to AU's cervical spine dated 11 June 2020, Dr Kevin Gilbert, Radiologist, concluded that AU presented with single level focal disc lesion at C6/7.

[49] In a letter dated 15 July 2020, Dr Kevin Bell, Sports and Exercise Physician, noted that his impression was that AU has a longstanding post traumatic right CEO tendinopathy. Dr Bell related this condition to AU's 2018 accident.

[50] On 21 July 2020, Dr Morrison provided an addendum to his 2019 report following AU providing Dr Morrison with additional information. Dr Morrison concluded that the additional information did not alter his original assessment.

Application for lump sum compensation

[51] In September 2020, Dr Shujaullah Kamali and Dr Mohamed Bahr, GPs, completed medical certificates stating AU sustained a concussion and injuries to her neck in April 2014, which had resulted in impairments which were stable and permanent.

[52] On 10 September 2020, AU applied to the Corporation for lump sum compensation.

[53] On 25 September 2020, the respondent instructed Dr Stuart Armstrong, Sports and Exercise Physician and Impairment Assessor, to complete a WPI assessment of AU. The instructing letter noted that the injuries to be assessed were AU's 2014, 2017, and 2018 covered personal injuries.

[54] On 20 October 2020, a SPECT-CT scan recorded that there was prominent narrowing of the C6/7 disc space with endplate sclerosis and irregularity and moderate prominent uptake on SPECT scanning. There was also narrowing of the neurocentral joints with negligible uptake of the joints.

[55] On 5 November 2020, Dr Gilbert performed another MRI. The subsequent MRI report noted “mild disc bulges” with “associated instability across endplates. Facets are coronal and relatively stable without stenosis or nerve compromise.”

The WPI assessment

[56] On 28 October 2020, Dr Armstrong met with AU and completed his WPI assessment. In his subsequent Impairment Assessment Report, Dr Armstrong noted that he had examined and assessed AU in relation to the following covered injuries: concussion, neck sprain, low back sprain, right elbow epicondylitis, and left hand/wrist sprain. Notably, chronic pain syndrome was not listed.

[57] Dr Armstrong laid out AU’s medical history, including details regarding each of her covered personal injuries.

[58] Dr Armstrong reported:

- (a) He had been provided with a schedule of ACC covered injuries, as well as other relevant notes relating to each of her covered claim injuries. Her clinical record described a history of various symptoms following her car accident in 2014 which included headache, neck pain and tinnitus. She had also experienced elbow pain since her accident in 2018;
- (b) He had viewed a comprehensive neuropsychological report. It did not demonstrate any evidence of ongoing impairment that could be attributed to concussion;
- (c) Although AU complained of symptoms relating to her neck and lower back, there were no clinical signs of a persisting injury condition; and

(d) AU did not have a rateable impairment for pain under chapter 15 of the Guides.

[59] In the Report, he noted that pain arising from physical injuries was included in the ratings for each of those conditions. Dr Armstrong concluded that AU presented with a zero per cent WPI for her covered personal injuries.

[60] On 5 November 2020, another MRI scan of AU's cervical spine was performed, which revealed:

Mild disc bulges are shown with associated instability across endplates. Facets are coronal and relatively stable without stenosis or nerve compromise.

[61] On 23 November 2020, Dr John Collier, Psychiatrist, Psychotherapist, and Senior Peer Reviewer, completed a peer review of the Impairment Assessment Report. Dr Collier agreed with Dr Armstrong's history, examination and ratings in the Impairment Assessment Report. He also commented that impairment assessment had been correctly performed. He concluded that the final rating of zero per cent WPI for all injuries was correct.

The Decision

[62] On 7 December 2020, in reliance on the Impairment Assessment Report and Dr Armstrong's findings, the Corporation made its Decision. The Decision advised AU that it could not pay lump sum compensation as AU's WPI was assessed to be less than 10 per cent.

[63] On 28 January 2021, AU applied to review the Decision and raised concerns that the radiology reports of 20 October 2020 and 5 November 2020 were not considered by Dr Armstrong when producing the Report.

Evidence post-decision

[64] On 29 March 2021, the Corporation emailed Dr Armstrong:

AU is concerned that you have not considered 2x radiology reports that came to ACC after the file was prepared for you.

I have herewith attached them (20/10/2020 and 05/11/2020) and kindly ask whether you would be kind enough to consider these reports and comment on whether it alters your assessment in any way?

[65] In an email dated 9 April 2021, Dr Armstrong responded:

Both those reports were available to me at the time of the assessment and were included in the relevant investigations on page 4. I have checked the assessment again and there is no change.

[66] In a report dated 12 April 2021, Mr Godwin Choy, Orthopaedic Spinal and Arthroplasty Surgeon, diagnosed AU with C6-C7 disc disease “secondary to previous whiplash injury”, and low back pain secondary to disc disease. Mr Choy noted AU’s history of the car accident in 2014, and her symptom presentation since that event. Mr Choy noted the results of MRI scan imaging from 2015, which showed a small disc bulge. In relation to the recent MRI scan findings, Mr Choy stated in part:

This demonstrates isolated disc disease with Modic changes at C6-C7. I would postulate given the isolated nature of this that she probably sustained an acute disc injury at the time of her accident. She is now having post-traumatic discogenic changes from this.

[67] In a report dated 12 April 2021, Dr Allison King, Neurologist, recorded that she had examined and assessed AU. Dr King concluded that AU probably sustained a concussion injury in her accident in 2014. Dr King noted that while most people recover within three months, some took longer. Dr King stated that where people continued to be symptomatic for up to seven years post-accident, then other causes needed to be entertained to explain the ongoing symptoms. Dr King stated there was nothing further she could add from a neurologic perspective.

[68] In a letter from Mr Choy dated 22 June 2021, he noted,

She does have ongoing axial back discomfort. I think it is very reasonable that this is attributable to her previous whiplash injury from her car accident. She does have ongoing axial neck pain from this. She did previously have a MRI scan demonstrating a disc bulge and I think this entirely accountable to her previous accident.

[69] On 5 July 2021, Dr Bahr lodged a medical certificate noting that AU was unfit for work from 5 July 2021 to 4 September 2021 because of an “added diagnosis of post-concussion syndrome and chronic pain syndrome”.

[70] On 29 July 2021, the Corporation requested medical information from Dr Bahr to assess whether the additional cover requested should be granted.

[71] On 21 October 2021, ACC Medical Advisor, Michael Ames, assessed whether it was appropriate to add cover for the requested diagnoses of post-concussion syndrome and chronic pain syndrome as a result of the accident event of 30 April 2014. Mr Ames did not recommend adding the diagnosis of post-concussion syndrome or pain syndrome on the basis that in his assessment the evidence did not support these diagnoses.

Review hearing

[72] On 29 September 2021, a review was held before Reviewer Walker. In his Review Decision dated 27 October 2021, Reviewer Walker concluded that AU had not identified a fundamental flaw in Dr Armstrong's report. Accordingly, the review was dismissed.

Cover for post-concussion syndrome and chronic pain syndrome declined

[73] On 2 November 2021, the Corporation wrote to AU regarding her claim for cover for her post-concussion syndrome and chronic pain syndrome. The Corporation stated that it was unable to accept her claim as there was insufficient evidence to show the conditions were caused by accident.

Notice of Appeal

[74] On 9 November 2021, AU filed a Notice of Appeal.

[75] On 2 February 2022, Rebekah Alabaster, Recovery Coordinator at ACC emailed AU and noted:

After consideration of your refusal to attend the Initial Occupational Assessment with Jenny Hartwell unless a copy of the assessment is provided via a USB stick please find attached your ACC noncompliance letter in relation to this matter ... I spoke with ACC Technical Specialist and they advised the following: "I confirmed that as with the client's request for the meeting being recorded was met, and there were a number of options available to address the way in which that recording would be obtained, that it is not reasonable for the assessment to be delayed any further or to arrange for another provider to conduct the assessment (who may or may not be able to provide the recording via USB as requested). I recommended ACC arrange for an IOA appointment and set expectations with the client"... It is ACC's expectation that you make contact with Jenny Hartwell to arrange this appointment; 027***** or *****@*****.co.nz. It is also ACC's expectation that you attend and complete the required assessment (Initial Occupational Assessment) by 5pm Wednesday 09th February 2022. Jenny is awaiting your contact." [email address/telephone number deleted]

[76] On 24 February 2022, AU underwent an Initial Occupational Assessment by Jenny Hartwell, Occupational Assessor.

[77] On 7 March 2022, AU emailed Ms Hartwell noting that she had not mentioned the car accident in 2014 or her arm injury in 2018.

[78] On 5 July 2022, Dr David Prestage, Consultant Occupational Physician, carried out an Initial Medical Assessment. Notably he did not diagnose AU with chronic pain disorder. However, Dr Prestage recommended the following assessments be undertaken:

- (a) Pain management assessment followed by a multidisciplinary pain management programme. This should include assessment and management by a psychologist;
- (b) Neuropsychological assessment to assess whether there is any objective evidence of cognitive dysfunction; and
- (c) Repeat initial medical assessment following the pain program and neuropsychological assessment.

[79] On 15 July 2022, AU provided comments on Dr Prestage's report via email to the Court.

[80] On 21 July 2022, Dr Adam Durrant, Orthopaedic Surgeon, diagnosed AU with "Tearing of the common extensor origin RIGHT elbow" following an MRI scan.

[81] On 26 July 2022, AU's recovery coordinator, Anna Crawford, emailed AU. She wrote that she had sent the comments AU made to Dr Prestage regarding the initial medical assessment report as requested. Dr Prestage noted that he had gone over the report and did not feel there was any need to amend the report. However, he was happy for her letter to be attached to his report so that it can be read together. Dr Prestage also advised that whilst he made recommendations for pain management and a neuropsychological assessment, on reflection, he did not think these programs or assessments would alter her current symptomology or capacity for work. Ms Crawford wrote:

ACC is giving you the option of whether you would like for us to refer you for these assessments. We are happy to do so if you think they are likely to be of benefit to you. The alternative is we will just continue to review your claim periodically [likely yearly] to see if your situation has changed or there is specific support you are requesting.

[82] On 28 July 2022, Ms Crawford sent a copy of Dr Prestage's assessment to Dr Bahr, AU's GP, as AU requested. She reiterated Dr Prestage's point that while he made recommendations for various assessments (noted above), he was not confident that these assessments would provide any change to AU's current symptoms and incapacity.

[83] On the same date, Ms Crawford also sent AU an email noting:

If you would like the pain management program or the neuropsychological assessment we can organise it but you have the choice as to whether you want to participate in this... If your answer is no, we just request that you provide medical certificates 3 monthly. This is so we have an assessment from your GP Quarterly should your situation change and he identifies assistance for us to consider.

[84] On 19 August 2022, Dr Gil Newburn, Neuropsychiatrist, carried out a video assessment of AU. Dr Newburn diagnosed AU with chronic pain disorder, as well as mild neurocognitive disorder due to traumatic brain injury, personality change and post-traumatic stress disorder. He wrote:

This is a reflection of chronic brain changes, and is also known as centrally modulated chronic pain syndrome. Under DSM4 TR terms it could be considered 'pain disorder associated with both psychological factors and a general medical condition' as tension, stress and other pressures will increase her pain experience. It is also well recognised that individuals who have chronic symptoms arising from brain injury will have a reduced threshold for development of a chronic pain disorder. This probably arises from altered function at the level of the anterior insula, the part of the salience network that is predominately responsible for addressing the emotional significance of interoceptive stimuli. This is likely associated with increased sodium channels in nerve fibres associated with the processing of the nociceptive stimulus.

[85] On 7 September 2022, Ms Crawford emailed AU noting that she had transferred her to the Corporation's Assisted Recovery Team for management of her claims.

Decision

[86] I am not satisfied that AU has established any error in the Decision or the Review Decision.

Access to Bundle of Documents and any other relevant documents

[87] I am satisfied that AU has had full access to all relevant documents filed in the evidence on appeal.

[88] The Review Decision was in October 2021. Since then, over a period of approximately 18 months, as the appeal progressed through the case management process, AU had access to all the relevant documents. There was no lack of time or opportunity for AU to prepare her case by reference to those documents.

[89] Relevant documentary evidence was collated into a bundle of documents to which AU had access several days prior to the hearing. It is clear from a memorandum filed by the Corporation the day before the hearing and from the copies of correspondence that accompanied it, that the Corporation's Counsel consulted extensively with AU regarding collation of the bundle of documents.

[90] Relevant medical records and communications between the Corporation and AU were included in the bundle of documents. The Corporation filed and served electronic copies of the bundle of documents in the Registry and on AU seven days before the hearing. The Corporation attempted to arrange delivery to AU's address of a hard copy of the bundle of documents and other material to AU six days prior to the hearing.

[91] AU initially asked that the bundle of documents be sent to the Corporation's Hamilton branch office for her to collect. There was then an exchange of emails between the Corporation and AU about practical delivery arrangements from 5 to 9 May 2023 regarding AU's preferred mode of delivery. The upshot was that the Corporation was not in a position to courier the hard copy bundle of documents to AU's nominated address until 9 May 2023. On that same day, AU was notified that the hard copy bundle of documents had been sent and provided her with the courier tracking number.

[92] AU had access to the bundle of documents in electronic form for a week prior to the hearing and had access to all those documents for many months prior to the hearing. During consultation about what documents were to be included in the bundle of documents, the only documents which were excluded by the Corporation's Counsel were those documents which AU had made handwritten notes on.

[93] In these circumstances, AU had a more than ample and reasonable opportunity to refer to relevant documents in preparation for the hearing of the appeal.

Criticisms of the medical evidence/Corporation staff

[94] AU was critical of much of the medical evidence relied on by the Corporation and was also critical of the Corporation's staff. She claimed that a Corporation case manager somehow orchestrated doctors to produce specialist medical reports that were based on only selective information.

[95] I do not see any flaw in the medical evidence relied on by the Corporation and in the Review decision. I am not satisfied on the evidence that AU's criticisms of the Corporation's staff are justified.

[96] I reject the assertion that Corporation case manager somehow orchestrated doctors to produce specialist medical reports that were based on only selective information, which is totally unsupported by evidence.

[97] In respect of the material provided by the Corporation to Dr Armstrong at the time of his WPI assessment, I do not accept that any relevant aspect of AU's medical history or communications with the Corporation were missing.

[98] Dr Armstrong was provided with all relevant information relating to AU's extensive medical history and that material was sufficient to make his assessment. His analysis was peer reviewed by Dr Collier and confirmed.

Medical assessments and reports of Mr Choy, Mr Durrant and Dr Newburn

[99] AU argued that there is clear and compelling evidence in the form of images and specialist/expert reports to support a more favourable WPI assessment. AU relied strongly on the medical assessments and reports of:

- (a) Mr Choy, Orthopaedic Spinal and Arthroplasty Surgeon and what he drew from MRI scan imaging from 2015.

- (b) Mr Durrant, Orthopaedic Surgeon, who in July 2022 diagnosed “Tearing of the common extensor origin right elbow”.
- (c) Dr Newburn, Neuropsychiatrist, who in August 2022 diagnosed chronic pain disorder. AU says Dr Newburn is the only medical professional who took a full history from her.

[100] Mr Choy’s report of 9 April 2021 referred to 2015 MRI scan imaging and “postulated” an acute disc injury at the time of her 2014 car accident. This does not clearly express a firm opinion that this was in fact the case. In a subsequent letter dated 22 June 2021, Mr Choy expressed in stronger terms the opinion that AU’s ongoing axial neck pain was reasonably attributable to her car accident. The material from Mr Choy post-dates the WPI assessment carried out by Dr Armstrong of October/November 2020. Had it been available at the time of the WPI assessment, it is unlikely to have made any difference and it does not now establish any flaw in the WPI assessment.

[101] Mr Durrant’s July 2022 diagnosis of “of the common extensor origin RIGHT elbow” post-dates the WPI assessment and the Review Decision. It does not establish any fundamental flaw in the WPI assessment.

[102] Dr Newburn’s report lists 43 categories of medical reports and notes and communications with the Corporation. He no doubt considered this material, which provided a comprehensive medical history of AU. The consultation with Dr Newburn was by video conference. The duration is unclear.

[103] While Dr Newburn raised chronic pain disorder as a diagnosis, this was after completion of the WPI report and assessment. There was no diagnosis of chronic pain disorder at the time of the WPI assessment and report.

[104] Although AU has consulted with or had the opportunity to consult with a large number of health professionals over many years, no other health professional except Dr Newburn had diagnosed a chronic pain disorder. Dr Newburn is described as a Neuropsychiatrist,¹² but it is

¹² Concerned with the psychiatric effects of disorders of neurological function or structure, including the correlation between demonstrable brain changes and the resulting effects on the mind. (*Oxford Concise Colour Medical Dictionary* 7th edn 2020)

unclear on the available evidence whether he is a pain specialist or is otherwise suitably qualified to diagnose chronic pain disorder. Further, Dr Newburn's consultation with AU was by video call - in contrast to the in-person consultations with other medical professionals. In particular, Dr Armstrong met, examined and assessed AU in person, as well as considering the relevant parts of her extensive medical history. In these circumstances, I take into account Dr Newburn's chronic pain disorder diagnosis but give it less weight than Dr Armstrong's assessments and those of the other medical professionals who conducted in-person consultations leading to diagnoses that were clearly within their areas of specialisation.

[105] More fundamentally, the opinions of Mr Choy, Mr Durrant and Dr Newburn do not establish any flaw in Dr Armstrong's analysis. It is insufficient for AU to assert that Dr Armstrong did not specifically consider the reports of Mr Choy, Mr Durrant or Dr Newburn (Mr Durrant and Dr Newburn having made assessments *after* Dr Armstrong's report). None of these reports establish any flaw in the specialist WPI assessment.

[106] Further, to the extent AU's medical condition has materially changed and is confirmed by new medical assessments, it remains open to AU to seek a further WPI assessment. It is noted in the Review Decision that AU had, by 27 October 2021, lodged further claims for mental injury and chronic pain syndrome.¹³

Injuries have an ongoing substantial daily impact

[107] AU argued that her injuries are ongoing and impact substantially on her ability to carry out day-to-day activities.

[108] I accept the evidence establishes that AU has accident compensation cover for many injuries, some of which continue to impact on aspects of her life. Generally, the ongoing impacts which AU describes do not form part of the WPI assessment. The injuries and their impact as described by AU do not amount to a competing medical opinion that establishes any flaw in Dr Armstrong's assessment.

¹³ Review Decision at page 7.

Correctness of the WPI assessment

[109] I assess the medical evidence in relation to each of the key legal requirements established by the Act as interpreted by the courts. In summary:

- (a) The WPI assessment was undertaken in accordance with the Act;
- (b) The WPI assessment was undertaken by a suitably qualified assessor, Dr Armstrong;
- (c) In undertaking the WPI assessment, Dr Armstrong has considered all covered aspects of AU's impairment;
- (d) Dr Armstrong's WPI assessment report has been completed in accordance with all relevant legislative requirements; and
- (e) No material evidence has been advanced to support AU's position that the WPI assessment is flawed.

WPI Assessment was undertaken in accordance with the Act

[110] I am satisfied on the evidence that Dr Armstrong's WPI assessment of AU was carried out in accordance with the Act and AU has not been able to sufficiently prove any flaw in his assessment. In particular:

- (a) Dr Armstrong assessed a WPI rating based on AMA4 and the ACC User Handbook. There is no medical evidence that calls into question Dr Armstrong's use of the AMA4 and ACC User Handbook in assessing AU's WPI;
- (b) Dr Armstrong examined AU in person and carefully canvassed AU's impairments by reference to the medical evidence reviewed, examination of AU and detailing AU's history of injuries;
- (c) As required by clauses 54(2) and 59(3)(b) of Part 3, in making his assessment, Dr Armstrong assessed AU in accordance with the Regulations;

- (d) In addition, a peer review of Dr Armstrong's WPI findings was completed by Dr Collier on 23 November 2020. As noted in paragraph [61] above, Dr Collier agreed with Dr Armstrong's history, examination and ratings in the Report. He also commented that the WPI assessment had been correctly performed.

WPI was undertaken by a suitably qualified assessor

[111] Dr Armstrong has the appropriate training in the application of the AMA Guides and ACC User Handbook to undertake the impairment assessment, as required by clause 58(2) of Part 3.

[112] Dr Armstrong holds a Bachelor of Medicine and Bachelor of Surgery and is a Fellow of the Australasian College of Sports Physicians.

All covered aspects of AU's impairment considered

[113] Dr Armstrong has assessed all AU's covered injuries under her 2014, 2017 and 2018 claims, and has justified his analysis of each.

[114] In the peer review of the WPI report, Dr Collier concluded that the final rating of zero per cent WPI for all injuries is correct.

No material evidence has been raised to support AU's position that the WPI is flawed

[115] The law is clear that AU bears the onus of establishing, on the balance of probabilities, that Dr Armstrong's impairment assessment is flawed.

[116] In the absence of a competing impairment assessment or compelling specialist medical evidence, the courts have consistently recognised that it is impossible for a claimant to successfully challenge an impairment assessment without expert evidence. As the Court has repeatedly found (in cases as such as *Holmes*, *Annandale*, *Jones*, *Crouchman*, *D* and *Hoeberechts* (supra)), it is not for the Court to form an opinion as to whether or not the AMA Guides have been correctly applied – that is the province of qualified medical specialists.

[117] AU has not provided any competing impairment assessment or cogent or compelling specialist medical evidence which calls into question Dr Armstrong's impairment assessment.

[118] Whilst AU raised concern that two radiology reports were not considered by Dr Armstrong when completing his Impairment Assessment Report, Dr Armstrong clarified that these reports were available to him and were considered when completing his Report. Dr Armstrong checked the two radiology reports again and confirmed that there was no change.

[119] In these circumstances, I am not able to identify any fundamental flaw in Dr Armstrong's application of the AMA Guides or ACC Handbook and his WPI assessment findings.

Conclusion

[120] On the evidence as a whole, the WPI carried out by Dr Armstrong is correct and was undertaken in accordance with the Act and was endorsed by Dr Collier in his peer review report. AU has not advanced cogent or contemporaneous evidence to establish that the WPI was flawed or incorrect.

Result

[121] The Decision and the Review Decision are correct in confirming AU's WPI assessment at zero per cent and that she is not entitled to lump sum compensation on the grounds advanced.

[122] The appeal is dismissed.

Costs

[123] Although AU is unsuccessful on appeal, I make no order for costs.



I C Carter
District Court Judge

Solicitors: AU in person representing herself
Ford Sumner, Solicitors, Wellington

**NOTE: PUBLICATION OF NAME AND OCCUPATION OF APPELLANT
PROHIBITED BY S 160 OF THE ACCIDENT COMPENSATION ACT 2001. SEE
<https://www.legislation.govt.nz/act/public/2001/0049/latest/DLM101854.html>.**

**IN THE DISTRICT COURT
AT WELLINGTON**

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

ACR 257/21

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

Telephone
conference date: 6 March 2024

Minute dated: 19 March 2024

Appearances: AU, appellant in person
J Sumner and E Gardiner for the respondent

MINUTE OF JUDGE I C CARTER

[1] AU's Accident Compensation appeal was heard in Auckland on 10 May 2023 and judgment was given on 8 November 2023.

[2] In approximately mid-February 2024, AU advised the registry that she sought orders restricting publication of identifying particulars in the judgment. No indication of this had been given by AU pre-hearing, at the hearing or in the four months after judgment was given.

AU's mid-February communications with the registry were not brought to my attention until late February. I directed that a telephone conference on 6 March 2024 be convened to ascertain the position of each party.

[3] In handwritten submissions emailed to the registry and clarified during the telephone conference, AU submitted:

- (a) The entire judgment dated 8 November 2023 should be prohibited from publication permanently in order to protect her privacy.
- (b) The judgment contains references to AU's personal health information and medical history, including references to mental impairment and mental health.
- (c) Her sensitive medical information should not be on the internet.
- (d) It should be obvious to anyone that she did not want her health information published on the internet.
- (e) The judgment was "not a true account", was one-sided, and did not highlight the medical evidence which she relied on.
- (f) AU posed the question "Who would want the judgment to be on the internet for everyone to see?" and that she felt exploited and subject to punishment.

[4] Mr Sumner's submissions on behalf of the Corporation were in summary:

- (a) It was accepted that the Court has power to make an order restricting publication of the judgment several months after judgment had been given.
- (b) The statutory criteria under s 160(2) - that it is necessary and appropriate to make an order prohibiting publication to protect the privacy of a claimant/appellant - is not satisfied on the evidence.

- (c) It is too late to make any order because “the horse has already bolted” and the judgment has been published in full for over four months on the Ministry of Justice website, NZLII and Westlaw.
- (d) The Court should be cautious when considering whether or not to make orders of the wide scope sought by AU. To counsel’s knowledge, there has never been an order made to prohibit publication of an entire judgment given in an Accident Compensation Appeal from the time when it was first published. This would be a step too far.
- (e) It was not accepted that AU was unaware that Accident Compensation appeal judgments are published, usually in full, and/or that it was open to AU to apply for an order restricting publication. AU represented herself throughout the appeal and actively engaged in the process. She frequently and regularly engaged in lengthy communications with the Corporation, Counsel for the Corporation and the District Court Registry.
- (f) Recognising that the judgment contains some limited references to mental health and mental impairment, and that the Court has a wide discretionary power in s 160, the most that should be ordered in the circumstances of this case is a prohibition on publication of name, address and occupation.

[5] It is not disputed that the power in s 160 to make an order prohibiting publication continues after judgment has been given and published. That is undoubtedly the correct starting point. The text of s 160 does not suggest that the power is limited in time. In contrast, it is clear from the terms of the power in s 159¹⁴ that it is confined to the *period during the hearing*. The express powers in subs (3)(b)(c) to renew an order or review an order at any time imply a power to make an order at any time. Further, ancillary to the Court’s powers on appeal under the Accident Compensation Act 2001, the Court has the powers necessary to enable it to act effectively within that statutory jurisdiction, including to regulate its own procedure to ensure fairness.¹⁵ The power to make a post-judgment order restricting publication of part or all of a judgment falls squarely within that principle.

¹⁴ Section 159 gives power to make an order restricting persons who may be present at an appeal hearing.

¹⁵ *Attorney-General v District Court at Otahuhu* [2001] 3 NZLR 740 (CA) at [16].

[6] Section 160 of the Act provides:

- (1) The court may make—
 - (a) an order forbidding publication of any report or account of the whole or part of—
 - (i) the evidence adduced; or
 - (ii) the submissions made;
 - (b) an order forbidding the publication of the name, address, or occupation, or particulars likely to lead to the identification, of—
 - (i) a party to the appeal; or
 - (ii) a person who is entitled to appear and be heard; or
 - (iii) a witness.
- (2) The court may make an order under subsection (1) if it is of the opinion that it is necessary and appropriate to do so to protect the privacy of a person referred to in subsection (1)(b), but the court may not make the order to protect the Corporation.
- (3) An order under subsection (1)—
 - (a) may be made for a limited period or permanently; and
 - (b) if made for a limited period, may be renewed for a further period or periods; and
 - (c) if made permanently, may be reviewed by the court at any time.
- (4) Every person who commits a breach of any order made under subsection (1) or evades or attempts to evade any such order commits an offence and is liable on conviction,—
 - (a) in the case of an individual, to a fine not exceeding \$1,000;
 - (b) in the case of a body corporate, to a fine not exceeding \$5,000.

[7] In *PV v Accident Compensation Cooperation*¹⁶, Judge Henare stated at [47]:

The paramount principle is that justice should be administered in the open and subject to the full scrutiny of the media to ensure transparency and accountability of members of the judiciary.

¹⁶ *PV v Accident Compensation Cooperation* [2018] NZACC183

[8] The Court held that the following matters (summarised) are relevant when considering a departure from the starting point:

- (a) Whether the appeal concerns sensitive matters such as fertility, mental health or sexual abuse.
- (b) Whether the publication of the appellant's name could give rise to effects or impacts on the appellant that outweigh the principle of open justice.
- (c) Whether there is evidence before the court that demonstrates it is necessary and appropriate to suppress publication of personal details.
- (d) Standing back, whether it is necessary and appropriate to make an order for name suppression.

[9] I add that there is an important access to justice reason why judgments in accident compensation appeals have been published for many years on NZLII, more recently on the Ministry of Justice Tribunal Decisions website and sometimes by commercial legal publishers such as Westlaw and Lexis Nexis. Publication is to enable lawyers, advocates and self-represented claimants/appellants to have ready access to accident compensation decisions for reference, research and for awareness of new developments and trends in an increasingly complex area of the law.

[10] The key test in s 160(2) is whether the Court is of the opinion that it is necessary and appropriate to order a restriction on publication to protect the privacy of a claimant/appellant such as AU.

[11] I take no account of AU's submission that the judgment was "not a true account", was one-sided, and did not highlight the medical evidence which she relied on. The judgment is final and I cannot re-visit it. AU did not apply for leave to appeal from the judgment and in the absence of a successful appeal the District Court's judgment is final.

[12] The Guidelines to Practice and Procedure for Accident Compensation Appeals in the District Court (“the Practice Guidelines”)¹⁷ that applied when AU filed her appeal, contained two relevant sections:

(a) Paragraph 7.3, headed “Publishing of Judgments” states:

All judgments will be published in the New Zealand Accident Compensation Appeals section of the New Zealand Legal Information Institute website, which is publicly available.

(b) Paragraph 5.9, headed “Suppression of a Party’s Name and Details”, describes the procedure available under s 160 to apply to the Court for an order restricting publication of a party’s name and other identifying details.

[13] The Registry emailed AU on 16 November 2021 acknowledging receipt of her notice of appeal and attaching a copy of the Practice Guidelines and invited her to please refer to them. The email also offered to post AU a paper copy of the Practice Guidelines if that was preferred.

[14] During the telephone conference, I asked AU if she recalled receiving that email. She responded in terms that she was not saying that she did not receive the email. However, she did not confirm whether or not she had read the Practice Guidelines. AU should have read the Practice Guidelines. I am sceptical at the suggestion that she may not have done so.

[15] New Zealand’s system of open justice is a matter of common knowledge, and I am also sceptical of AU’s claim that it did not occur to her that judgments are generally published in Accident Compensation appeals, or that she could apply to restrict publication. While AU added that her mental health issues had the effect on her that it takes a long time for her to process information, she regularly engaged with the Corporation, the Corporation’s counsel and the Registry in relation to her appeal. There was ample opportunity to raise the issue of publication and whether publication could be restricted.

[16] Most of the references in the judgment to AU’s medical history are to physical injuries, which do not ordinarily attract a high level sensitivity or a high expectation of privacy. There are however some references to mental health issues, including chronic pain disorder, post-

¹⁷ Issued by the Chief District Court Judge on 1 April 2017.

concussion syndrome, and mild neurocognitive disorder. AU said she had a sensitivity around others being able to read her personal health information in a judgment published online – particularly the references to her mental health issues, which she said created an additional level of stress for her which she felt may impede her recovery.

[17] I am prepared to accept by a fine margin that if the judgment was continued to be published in full in a way that linked AU to all of the health information and medical history described in the judgment, it would have the effect on AU of causing distress, anxiety and an increased sense of grievance. The appellant has identified consequences adverse to her which would justify the departure from the principle of open justice. On that basis, I am of the opinion that it is necessary and appropriate to order a restriction on publication to protect the privacy of the appellant.

[18] I do not consider that it is too late to restrict publication. The Corporation submitted that the horse has already bolted. I think the horse can be put back inside the gate in the particular circumstances of this case. The judgment breaks no new ground legally and turns on facts. It is unlikely to have been of interest to lawyers or advocates or more generally. If the judgment in its current form is removed from the small number of online sites where it may currently be accessed, and substituted with an appropriately anonymised version, AU's interest in protecting her privacy in relation to her health information and medical history will be protected. I think this will be sufficiently achieved through anonymising the appellant's name and redacting reference to her occupation.

[19] There is no justification for prohibiting publication of the judgment in its entirety. It is clear that it is necessary only to restrict publication of the appellant's name and occupation. There is no reference in the judgment to her address. Particulars of the appellant's medical history will not be attributed to AU when references to her name and occupation are removed. Particulars in the judgment of the appellant's health information and medical history, including the names of medical professionals who have treated or assessed the appellant, present no likelihood of identifying the appellant or a risk of interfering with her privacy.

[20] For the reasons given above I make an order prohibiting publication of the appellant's name and occupation under s 160 of the Accident Compensation Act 2001.

[21] In order to practically give effect to the order as soon as possible, a revised judgment is attached incorporating the order, anonymising the appellant's name wherever it appears, redacting the reference to the appellant's occupation and incorporating this Minute at the end of the judgment. I direct the Registry to:

- (a) Provide the parties with this Minute and a copy of the revised judgment incorporating this Minute.
- (b) Notify NZLII, Ministry of Justice Decisions online, Westlaw and LexisNexis of the order restricting publication, and the need to take down from any site the judgment given on 8 November 2023 and to substitute it with the revised/ anonymised/redacted judgment (including the order restricting publication and incorporating this Minute).

[22] Nothing in this Minute should be taken to encourage applications for orders restricting publication of a judgment *after* the judgment has been published online. The significant risk for an applicant making such a late application is the argument that the horse has already bolted and that a post-publication order restricting publication will have no effect. The Courts generally do not make orders that will have no effect. In this case, by a fine margin, I am satisfied that the orders I have decided to make will have a practical effect. I anticipate that it will generally be rare for the Court to make such orders post-judgment and post-publication.



Judge I C Carter
District Court Judge

Representation: AU in person, representing herself
Ford Sumner, Solicitors, Wellington, for respondent