

**PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A  
SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S  
NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT**

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2023] NZACC 126      ACR 233/22**

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

Hearing:            15 June 2023  
Heard at:           Wellington/Te Whanganui-a-Tara

Appearances:      The Appellant in person  
                         Mr P McBride for the Respondent

Judgment:          1 August 2023

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**JUDGMENT OF JUDGE C J MCGUIRE  
[Calculation of weekly compensation s 103; Clause 34  
Accident Compensation Act 2001]**

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[1] The issue in this case is one of quantum of weekly compensation arising from a 2004 covered event.

[2] In his notice of appeal dated 19 December 2022, the appellant takes issue with the calculation of weekly compensation.

## **Background**

[3] The event giving rise to the claim occurred in February 2004. The claim for cover was first made on 24 December 2020. The claim relates to an indecent assault at his place of work with the appellant being rendered unconscious and later regaining consciousness to find himself in the shower at his workplace.

[4] Initially the date of first treatment was 23 December 2020. This therefore was the deemed date of injury as provided for in S 36(1) of the Accident compensation Act 2001. After the receipt of the new information, the date of injury was revised to 10 February 2004.

[5] The appellant ceased working from 15 November 2004, therefore, ACC considered any backdated compensation to arise from this date.

[6] ACC obtained relevant documents from both the Inland Revenue Department and Work and Income New Zealand. After considering this information, ACC calculated the appellant's weekly compensation entitlement from 15 November 2004.

[7] ACC repaid WINZ the money the appellant had received from them, and then made a net additional payment to the appellant. The appellant took issue with the amount paid to WINZ.

[8] The appellant also took issue with the use of the November 2004 date contending that ACC should use as the basis of calculation a month of his regular earnings only and not take account of times when less money was earned.

## **Appellant's submissions**

[9] The appellant told the Court of a long and painful dispute with ACC over his sensitive claims. He said it was only following a 2020 legal dispute that ACC overturned its decision to decline his entitlement for weekly compensation.

[10] He said, as a result, he has been living as a Ministry of Social Development beneficiary and the effect on his health has been severe and has prevented him from returning to work.

[11] He says that ACC's decision to deduct MSD benefit payments from his entitlement is reprehensible and should not be accepted.

[12] He acknowledges that under s 252(4) of the Accident Compensation Act, ACC are required to pay back excess benefit payments to the Ministry of Social Development. However, he says that he is an exception with an independent circumstance. He says that ACC's decision to originally decline him weekly compensation was unlawful and he asks for the Crown's protection.

[13] He says that with MSD payments deducted, he is left with far less compensation to move forward with and reclaim the life that has been eroded.

[14] He told the Court his focus going forward is on his health and recovery for the rest of his life and that as his security is paramount, he requires relocation from the area in which he lives.

[15] He submits that 39% tax take is unjust. He says that this is the amount that he has been taxed on the entire backdated amount.

[16] He said that on receipt of his weekly benefit from MSD, the tax was taken out automatically each week. Accordingly, he says that ACC has now taxed him again and that it is an illegal double tax.

[17] He said that only after challenging ACC's decision to decline cover for weekly compensation in 2020 that ACC finally agreed to accept his 2004 sensitive claim.

[18] He believes that what ACC has done is highly objectionable and must be considered illegal.

[19] He referred the Court to page 76 of the bundle where ACC's payments assessor has recorded that from 1 November 2004 until 30 November 2004 the appellant had gross monthly earnings of \$5,951.60.

[20] He submits that this was earned in two weeks not over the whole month.

[21] He said that in 2004, his earnings were made up of a basic wage of \$14.42 per hour commission from sales.

[22] The appellant noted again that his best performing month was the two weeks in November 2004 and if ACC had applied this to the calculation of weekly compensation, it would be a stronger representation of his earnings.

### **Respondent submissions**

[23] Mr McBride submits that the issue in this case is a narrow one namely was his weekly compensation calculated correctly.

[24] Mr McBride next refers to the appellant's notice of appeal where the document records that the appellant appeals against the following aspects of the decision:

ACC weekly compensation payment fair representation of my earning and position/field of employment going forward.

ACC calculation of wages taken in consideration that earnings were after the date of first seeking treatment of mental injury.

[31] Also, in that notice of appeal, the appellant seeks the following orders:

The calculation of my earnings for WC to be the calculation given and used by MSD from ACC, that of my final month of earnings.

From 1/11/04 to 30/11/04 gross monthly earnings \$5951.60 totalling 52 weeks of \$71,419.20.

This calculation best reflects my earning prior to date of first seeking treatment for mental injury.

[32] Accordingly, Mr McBride frames the issue as being what the appellant claims his weekly compensation should have been.

[33] Mr McBride also notes that the appeal is not about whether ACC repays WINZ. Section 252 of the Act mandates that ACC must do that.

[34] He also submits that "tax is what it is" and that tax liability is not something that this Court embark on.

[35] Mr McBride also submits that this case is about the injury in February 2004, and not the appellant's other claims. Accordingly, Mr McBride submits that, given cover for that injury, the question is: "what entitlements does the appellant have in respect of this cover".

[36] Mr McBride notes that initially the deemed date of injury was 23 December 2020, but that was revised to 10 February 2004.

[37] He says therefore ACC had to go back 17 years to find out what the appellant's earnings position was at that time.

[38] Mr McBride notes that after obtaining the records from IRD and WINZ, ACC calculated the appellant's weekly compensation entitlement from 15 November 2004.

[39] Mr McBride therefore categorises the issues properly arising as follows:

Whether ACC has any power under the Act to do anything other than apply Clause 32 of Schedule 1 (which the reviewer answered in negative); and

If not, whether Clause 32 was properly applied here (as the reviewer concluded).

[40] Mr McBride notes that the reviewer also postulated the question as to whether there is any concept under s 103 of "partial incapacity" – that is, reduced earnings rather than inability to undertake the employment. However, as a matter of law, this is only properly answered in negative. In this regard, Mr McBride referred to *Barton*:<sup>1</sup>

First there are the requirements of the governing legislation. The Act stipulates that Mr Barton, as a claimant for weekly compensation, has to show that he was *unable* because of his personal injury to engage in employment in which he was employed before he suffered his injury.

[41] Mr McBride notes that it was from 15 November 2004 that the appellant was first certified to be incapacitated for work.

[42] Mr McBride refers to the report of ACC's payments assessor Mr Turner in an email dated 3 November 2002 where he said:

The calculation has been based on the appellant's earnings from Vodafone for the 52 weeks prior to 15/11/2004.

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<sup>1</sup> *Barton v Accident Compensation Corporation* [2021] NZACC 190 at [51].

These earnings have been obtained from IRD (document on file at 20/05/2002).

As there is previous incapacity during the 52 week period, the divisor has been reduced, and earnings during the period of incapacity have been removed from the calculation. This has been done as per technical guidance on 04/07/2022.

The client had incapacity for the period 17/02/2004 to 30/04/2004 (10.57 weeks). So the divisor has been reduced from 52 weeks to be 52 weeks less 10.57 weeks equals 41.43 weeks.

The total earnings showing with IRD for the 52 weeks are \$35,331.81, the earnings for the month of March and April 2004 totalling \$1,660.21 have been removed from the calculation to give a total of  $\$35,331.81 - \$1,660.21 = \$33,671.60$ .

So \$33,671.60 is divided over 41.43 weeks to give a rate of \$812.73 per week.

We reduce the divisor, and remove earnings during periods of incapacity, to not disadvantage the client for having lower earnings during periods of incapacity. If we just divide the client's total earnings of 52 weeks, it would give a lower rate ( $\$35,331.81/52 \text{ weeks} = \$679.46 \text{ per week}$ ).

[43] Mr McBride submits that the law relating to such calculation is a code and ACC can only do what the Act requires it to. Section 103 requires that the claimant be "an earner" at the relevant time. And because of the personal injury they are unable to engage in employment undertaken at the time of the personal injury.

[44] Mr McBride next refers to Clause 32 of Schedule 1 which says how calculations must be made.

[45] Mr McBride refers to page 72 of the common bundle where ACC has concluded that the appellant was permanently employed at the time. Following this, weekly compensation is calculated using Clause 34.

[46] He notes that Clause 34(3) requires that some specified periods are to be disregarded e.g. where there are other periods of compensation and in this case for earlier injuries.

[47] Mr McBride refers to Justice Kos' comment in *Murray*,<sup>2</sup> where he described the statutory regime as clear and crystalline and that the structure and approach is necessarily fixed.

[48] Therefore, Mr McBride says there can be no reference to 2003 remuneration levels.

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<sup>2</sup> *Murray v Accident Compensation Corporation* [2013] NZHC 2967.

[49] Mr McBride notes that the law requires that ACC repay WINZ. He also notes that taxation is fixed by the Crown so it must be paid.

[50] Mr McBride concludes by saying that the issue in this case is a narrow one. “Once the appellant was granted cover for the February 2004 injury, was he paid the right amount of money under the Act?” Mr McBride says that he was and that ACC had no choice but to do what it did. Therefore, the appeal must be dismissed.

### **Appellant’s reply**

[51] The appellant submitted that the law is unfair and that he will be seeking to have this unfairness remedied. He said it was very gruelling to go through the reviews and it was frustrating to deal with ACC. He said however that the medical support from both the psychologist and from ACC “does really help”. He said the injury gets suppressed because “you want to soldier on.”

[52] He said that the review process was gruelling and that it would be much easier just to hide from society when you have the sort of injury that he has.

### **Decision**

[25] The Court records its admiration for the hard work that the appellant has done to rehabilitate himself and get his life back to something reasonably normal after the shocking injury that he sustained, an injury that had to wait some 16 years before it could be addressed through the ACC system.

[26] As is set out in the background, the portion of this judgment, the reason for the 16-year delay was not the fault of ACC. Simply, the appellant brought the injury to ACC’s attention when he first felt able to do so.

[27] In this case, ACC having accepted that at the time of the injury, the appellant was in permanent employment for the purpose of Clause 33 of Schedule 1 of the Act, the detailed formula in Clause 34 applies.

[28] Mr McBride rightly referred to what Kos J said in *Murray*, that the statutory regime is clear and crystalline. In other words, Parliament has decided in enacting the Accident

Compensation Act 2001 that all permanent employees are to have their weekly compensation calculated using the same formula. That formula is set out in Clause 34 of Schedule 1, and as referred to by Mr McBride, the ACC payments assessor, Mr Turner set out the rationale for the calculations he did, in his email of 3 November 2022.

[29] I am satisfied that Mr Turner correctly applied Clause 32. He took into account that there was a period of incapacity of 10.57 weeks between 17 February 2004 and 30 April 2004, so he reduced the divisor that he used from 52 weeks to 41.43 weeks and used that divisor to conclude a weekly rate of \$812.73. He added:

We reduce the divisor, and remove earnings during periods of incapacity, to not disadvantage the client from having lower earnings during periods of incapacity. If we just divided the client's total earnings over 52 weeks, it would give a lower rate (\$35,331.81/52 equals \$679.46).

[31] There is simply no provision in the legislation that would allow ACC to apply what the appellant described as his best performing month namely the two weeks in November 2004 when his gross monthly earnings amounted to \$5,951.60.

[32] Mr McBride also reminds the Court that ACC has no ability to mitigate the tax liability on backdated weekly compensation in terms of the Income Tax Act and references three cases including *Pryce*.<sup>3</sup>

[33] It follows therefore that because the appellant has been unable to establish that ACC has failed to follow the provisions of the Act for assessment of weekly compensation, I must dismiss this appeal.

[34] Costs are reserved.

### **Suppression**

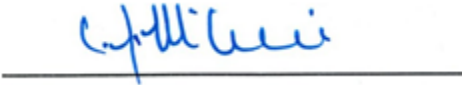
[35] The Court considers it is necessary and appropriate to protect the privacy of the appellant. This order, made under s 160(1) of the Accident Compensation Act 2001, forbids publication of the name, address, occupation, or particulars likely to lead to the identification

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<sup>3</sup> *Pryce v Accident Compensation Corporation* [2018] NZACC 154.



of the appellant. As a result, this decision shall henceforth be known as *BI v Accident Compensation Corporation*.



CJ McGuire  
District Court Judge

Solicitors: McBride Davenport James, Wellington.