

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2023] NZACC 66                      ACR 126/22**

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

Hearing:                                      20 March 2023  
Heard at:                                      Auckland/Tāmaki Makaurau  
Appearances:                                      Mr B Hinchcliff for the Appellant  
    Mr J Sumner for the Respondent  
Judgment:                                      3 May 2023

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**RESERVED JUDGMENT OF JUDGE C J MCGUIRE**  
**[Weekly compensation, s 100(1)(a); s 103(2)**  
**Accident Compensation Act 2001]**

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[1] The issue on this appeal is whether the respondent’s decision dated 23 December 2021 determining it was unable to continue with the appellant’s entitlement to weekly compensation from 11 February 2020 was correct.

[2] More specifically, Counsel have agreed that the question to be determined on appeal is whether the appellant has established, on the balance of probabilities, that he was unable, because of his covered treatment injury, to engage in employment in which he was employed in when he suffered the personal injury, for the period from 11 February 2020.

[3] The appellant has cover for a left foot non-union revision surgery. The date of his covered injury is 3 December 2018.

[4] On 29 January 2018, the appellant was reviewed by Chris Birks, Orthopaedic Surgeon. He noted the appellant had mid-foot arthritis. He referred the appellant for mid-foot fusion surgery.

[5] On 10 May 2018, the appellant underwent surgery at Dunedin hospital. The orthopaedic surgeon involved, Mr Bevan, recorded the operation as follows:

1. Right gastrocnemius lengthening;
2. Left tendo achilles lengthening, HOKE;
3. First, second, third tarsometatarsal joint fusion;
4. Lateral navicular cuneiform fusion;
5. Proximal tibial bone graft.

[6] Initial post-surgery reports indicated that the appellant was making good progress. However, on 3 December 2018, after seeing the appellant in clinic, Dr Ahuja, Orthopaedic Registrar, reported that it appeared the appellant had developed a non-union and “recurrent flat foot deformity”.

[7] On 29 January 2019, Dr Vidakovic, Orthopaedic Registrar, noted:

He has had ongoing worsening pain and arch collapse without any real alleviation of symptoms.

The xrays today showed progressive disruption of the TMT joint with bony loss without any secondary fusion occurring.

...

He is keen for further surgery after discussion.

[8] A CT scan of the appellant’s left foot on 27 February 2019 showed:

The screws crossing the first tarsometatarsal joint are broken. Joint space narrowing is seen particularly at the third tarsometatarsal joint and there is no complete bony fusion across this. Elsewhere mild joint space narrowing is seen in relation to the fourth and fifth tarsometatarsal joints. Multiple small bony fragments are seen in relation to the MTP joints.

[9] On 18 March 2019, a treatment injury claim was lodged with ACC. The claim stated the injury was a non-union of the appellant’s foot following surgery.

[10] Cover was initially declined by ACC on 25 July 2019, on the basis that the non-union was not caused by treatment and therefore did not constitute a treatment injury.

[11] On 19 September 2019, the appellant underwent revision fusion of the left midfoot at Dunedin Hospital.

[12] On 1 October 2019, the appellant sought review of ACC's decision declining cover for treatment injury. After an unsuccessful review, the appellant appealed to this Court. This appeal was allowed in a judgment dated 3 August 2021, finding, on the balance of probabilities, that the appellant had proved the non-union injury was caused by treatment.

[13] On 7 October 2019, Dr Davis, Orthopaedic Registrar, reviewed the appellant's progress after the revision surgery and noted:

Wounds are completely healed. No signs of infection. Neurovascularly intact.

We have recast him for weight bearing and he will be back in four weeks time for a cast off and review with xray on arrival.

[14] On 4 November 2019, Mr Bevan, Orthopaedic Surgeon, stated:

The actual physical structural changes in the tarsometatarsal joints that are now present, that were not present before, is a non-union of the intended fusion. With movement between the cuneiforms and the tarsometatarsal joints are through an area of fibrous tissue, rather than bone tissue.

[15] On 18 November 2019, the appellant was again reviewed by Mr Bevan, who noted:

Mr Bell is eight weeks since surgery, or just over this. He has been quite comfortable in the cast. The wound looks good.

Plan:

1. Moonboot.
2. Partial weight bearing in two weeks, full weight bear in two weeks.
3. Follow up in four weeks for clinical check and weaning out of moonboot.

[16] On 16 December 2019, the appellant was examined by Dr Fullarton, Orthopaedic Registrar, who said this:

I saw Mr Bell back in clinic today, just under three months following the above. He has been very comfortable. He has graduated to full weight bearing with no restrictions.

...

He is in a moonboot at the moment. Mr Bevan is happy to progress him out of this today into his normal footwear.

Gary can therefore wean out of his moonboot and off the crutches. We will plan to catch up with him in eight weeks time for clinical review only.

[17] On 19 December 2019, the appellant visited GP Dr Song. She noted:

Subjective

Just dropped in to ask for his work certificate.

Would like me to mention some detail in the certificate as below:

Next orthopaedic (fracture clinic) review on 10 February 2019.

Not confident to resume work and there is no light duty.

Works as a security guard at Dunedin Airport.

[18] Dr Song issued the appellant with a “off work certificate”.

[19] On 10 February 2020, Mr Bevan again saw the appellant. In his brief report, he said:

Mr Bell is five months following his surgery. His foot looks very good. He is looking at return to work today. He still has some residual swelling. His xrays look good.

**Assessment and Plan:**

I think Mr Bell is doing very well. I think he will continue to improve. I have not organised to see him again, but obviously happy to see him again as required.

[20] On 11 February 2020, the appellant returned to work at Dunedin International Airport.

[21] On 18 March 2020, the appellant gave notice of resignation from employment at Dunedin International Airport. His email to his employer read:

I give written notice to terminate my employment with one month’s notice as required from today the 18th March 2020.

Thanks.

Gary Bell.

[22] On 16 April 2020, the appellant resigned from his employment with Dunedin International Airport Limited. The employer’s ACC 040 form (Termination of Pay Information Request) stated the appellant’s last physical day at work was 17 March 2020,

“Due to Covid lockdown, Gary was paid after this, but as he was over 60 years old, he stayed at home.”. The form stated his official date of termination was 16 April 2020.

[23] On 3 August 2021, this Court found on the balance of probabilities that the appellant had proven that the non-union injury was caused by treatment.

[24] On 9 August 2021, the appellant’s GP, Dr Morris, wrote a medical certificate stating that the appellant was fully unfit to work from 9 August 2021 to 6 September 2021. Dr Morris recorded “other foot injury” as diagnosis, and “treatment injury”.

[25] On 17 August 2021, ACC approved cover for left foot non-union. The date determined to be the date of injury was 3 December 2018, being the date the non-union was identified.

[26] On 7 September 2021, the appellant was seen by Dr Kumud Dunn, GP. The appellant informed Dr Dunn that he needed an ACC form and wishes to be off work completely.

[27] On 27 September 2021, the appellant saw Dr Morris, GP, at the same medical centre. His notes record:

Subjective

Checking re times off work.

Had injury 3/12/2018.

He went back to work and carried on until 19/9/2019.

He was off work with the second operation 19/9/2019-16/2/20.

He went back to work 16/2/2020 and worked till 16/4/2020 – when he had to stop work.

He just couldn’t continue to work due to the pain and discomfort.

[28] Dr Morris issued a medical certificate, ACC18, stating the appellant was unfit for work from “27 September 2021 until 27 September 2021”. The ACC18 form listed diagnosis as “other foot injury” with comment “treatment injury”.

[29] The ACC18 (Patient copy) recorded the subjective notes from Dr Morris’ consultation.

[30] On 18 October 2021, Jesse Gibbs of Dunedin International Airport Limited, submitted an ACC100 form, noting the appellant was no longer employed and attaching a job description for the appellant's previous position as night operations coordinator.

[31] The appellant requested backdated weekly compensation from 19 September 2019 to 21 September 2021.

[32] The respondent sought written guidance on the appellant's claim. The guidance provided noted that the request is essentially backdated incapacity as a result of cover being determined by the District Court on 3 August 2021.

[33] On 21 October 2021, Ben Gregg, Technical Specialist for ACC, recommended:

As per MA comment, backdated incapacity is supported from 19/09/2019 and up until the day prior to the client returning to work in February 2020 (16/02/20?? RTM to confirm this date).

I note the request is for backdated incapacity through to 18/09/21, but as MA states, there is no evidence to support this based on the retrospectively covered injury. The client was not referred to the specialist at any stage between 2020 and September 2021, indicating that:

- (a) There is no need for specialist input; and
- (b) There is no further evidence/information for ACC to gather.

The client's employer has stated the reason for leaving employment was for reasons other than injury/function related reason, further supporting that there has been no further incapacity relating to the client's retrospectively covered injury beyond February 2020.

Any earnings in the supported backdated incapacity period will need to be abated.

[34] On 13 November 2021, the appellant underwent a whole person impairment assessment by Dr Alan Walker, who reported:

- (a) He retired in 2020.
- (b) He got back to work after his successful surgery. It took about five and a half months to get back.
- (c) He then stopped work at the start of Covid-19 outbreak in 2020.
- (d) He has a degree of ongoing pain in his left foot, which is present all the time, although it does vary.

[35] Dr Walker noted the appellant had the following impairment ratings:

- (a) 37% lower extremity for total hip replacement;

- (b) 11% lower extremity for movement impairment of the left ankle;
- (c) 10% impairment for the mid foot fusion.

[36] Using the apportionment method, Dr Walker found the appellant's final whole person impairment rating of zero per cent. He noted the appellant's covered injury was no longer present and the impairment was due to a combination of non-covered injuries.

[37] On 30 November 2021, the respondent advised the appellant that it owed backdated weekly compensation of \$14,075.85 for the period 9 September 2019 to 11 February 2020.

[38] On 3 December 2021, the respondent issued its decision advising the basis of the decision was:

The medical report information states that you returned to full duties on 11/02/2020. Your employer has stated the reason for leaving employment was for reasons other than injury/function related reasons. Further supporting that, there has been no further incapacity beyond 11/02/2020.

[39] On 6 December 2021, the appellant reviewed the decision.

[40] On 23 February 2022, the appellant provided a statement. He stated in part that his foot is still problematic, he went back to work because he needed the money, he left work to allow his foot to recover and did not need to file medical certificates as he is on superannuation.

### **Appellant's Submissions**

[41] Mr Hinchcliff refers to the decision of 3 December 2021 that is the subject of this appeal. He says that the statement in the decision that "you returned to full duties on 11/02/2020" is disputed.

[42] Following the appellant's successful appeal on the issue of a treatment injury, the respondent, on 17 August 2021, approved cover with the date of injury being 3 December 2018.

[43] He refers to the record of the appellant's consultation with GP Dr Song on 19 December 2019.

[44] Dr Song recorded:

Subjective

Just dropped in to ask for his work certificate.

Would like me to mention some detail in the certificate as below:

- New orthopaedic (fracture clinic) review on 10 February 2019 (2020?).
- Not confident to resume work and there is no light duty.
- Works as a security guard at Dunedin Airport.

Objective

Outbox: off work certificate

[45] Mr Hinchcliff next referred to Orthopaedic Surgeon, Mr Bevan's report of 10 February 2020. It says:

Mr Bell is five months following his surgery. His foot looks very good. He is looking at return to work today. He still has some residual swelling. His xrays look good.

**Assessment and Plan:**

I think Mr Bell is doing very well. I think he will continue to improve. I have not organised to see him again, but obviously happy to see him again as required.

I think Mr Bell is doing very well. I think he will continue to improve. I have not organised to see him again, but obviously happy to see him again as required.

[46] It appears that the appellant returned to work the following day, 11 February 2020.

[47] On 18 March 2020, the appellant gave his employer notice of termination of his employment "with one month's notice as required from today, the 18<sup>th</sup> March 2020".

[48] Mr Hinchcliff notes the appellant's notice to terminate his employment occurred just days before the Covid level 3 lockdown on 23 March 2020, which was almost immediately followed by the level 4 lockdown commencing on 25 March 2020.

[49] The next document Mr Hinchcliff refers to is an ACC18 medical certificate dated 9 August 2021 declaring that the appellant is fully unfit for work from 9 August 2021 until 6 September 2021.



[50] The certificate gives the reason for the appellant's unfitness to work as follows:

Note – Gary was off work from 10 May 2018 to 28 August 2018 + 25 September 2019 to 11 February 2020 due to his treatment injury – he is currently still off work – this certificate is to cover the dates above and further certificates to come.

[51] There was a further consultation on 6 September 2021, which records:

Subjective

Discussion re issues

Keep off work.

Review again in 1/52.

[52] There was a further consultation on 27 September 2021, which includes the following:

Subjective

Check re times off work.

Had injury 3/12 /2018.

He went back to work and carried on working til 19/9/2019.

He was off work with the second operation 19/9/2019-16/2/2020.

He went back to work 16/2/2020 and worked til 16/4/2020 when he had to stop work.

He just couldn't continue to work due to the pain and discomfort.

[53] Mr Hinchcliff notes that a job task analysis provided to ACC by the appellant's former employer showed that he worked 28 to 30 hours per week on average and that walking was required for 34-66% of each day.

[54] Mr Hinchcliff refers to a document that appears to be an accounting of the appellant's final pay. The pay period is shown as from 8 April 2020 to 21 April 2020. Over that period, he worked 16 hours of "night operations" and eight hours where he was paid time and a half.

[55] He next refers to the impairment assessment report of Dr Walker, who examined the appellant on 9 November 2021.

[56] Dr Walker noted that the patient reported that:

He has no pain at all in relationship to his left total hip replacement. He did get back to work after his successful surgery. It did take about five and a half months to get back. He then stopped working at the start of the Covid-19 outbreak in 2020. He has a degree of ongoing pain in his left foot, which is present all the time, although it does vary. He

describes a good day as sitting on the riverbank fishing. He can walk OK, but does get tired and sore in the left foot.

[57] Dr Walker noted on examination that the appellant:

... has bilateral hallux valgus and pes planus. He came along carrying a wooden walking stick. He is unable to walk on his toes. He can't walk on his heels. He can just perform a single heel raise on the right; he can't perform a single heel raise on the left.

[58] Under "impairment rating" Dr Walker noted that the left total hip replacement gave a 37 per cent lower extremity rating. His left ankle gave an 11 per cent lower extremity rating. The mid foot fusion gave a 10 per cent lower extremity impairment.

[59] Dr Walker added:

**Apportionment:**

The assessor is directed by the handbook to the AMA Guides to consider apportionment. The handbook states the impairment present may not all be due to the covered injury. The assessor is directed to use clinical judgment. In this case, the impairment present is due to a combination of a total hip replacement, which is not a covered injury, ankle range of motion impairment, and the mid foot fusion, which is now complete. The covered injury left foot non-union is no longer present.

Therefore, all the impairment present is due to non-covered factors. This means that there is no impairment due to the covered condition, which is no longer present.

[60] Mr Hinchcliff submits that in summary, the appellant was forced back to work due to money issues and that he was still having problems with his ankle.

[61] He also reminds the Court that it was only when this Court granted him cover for a treatment injury, that he could apply for backdated compensation for the two years that had elapsed.

**Respondent's Submissions**

[62] Mr Sumner submits that giving consideration to Dr Walker's vocational independence report is somewhat "artificial", as the enquiry before the Court is in respect of a claim for retrospective weekly compensation.

[63] Mr Sumner refers to the report of the Orthopaedic Registrar, Dr Davis, dated 7 October 2019 following his revision surgery the month before. Dr Davis noted:

Wounds are completely healed. No signs of infection. Neurovascularly intact.

[64] Mr Sumner referred to the next report of Mr Bevan, of 18 November 2019. Mr Bevan noted:

Mr Bell is eight weeks since surgery, or just over this. He has been quite comfortable in the cast. The wounds look good.

**Plan:**

1. Moonboot.
2. Partial weight bear for two weeks, full weight bear two weeks.
3. Follow up in four weeks for clinical check and weaning out of moonboot.

[65] Mr Sumner refers to the next report dated 16 December 2019 where Orthopaedic Registrar, Dr Fullarton says this:

I saw Mr Bell back in clinic today, just under three months following the above. He has been very comfortable. He has graduated to full weight bearing with no restrictions.

...

Gary can therefore wean out of his moonboot and off the crutches. We will plan to catch up with him in eight weeks time for clinical review only.

[66] Mr Sumner submits that the appellant was effectively “discharged” by Mr Bevan on 10 February 2020 when he recorded:

Mr Bell is five months following his surgery. His foot is very good. He is looking at return to work today. He still has some residual swelling. His xrays look good.

**Assessment and Plan:**

I think Mr Bell is doing very well. I think he will continue to improve. I have not organised to see him again, but obviously happy to see him again as required.

[67] Mr Sumner too notes the GP consultations of 6 September 2021 and 27 September 2021 and notes that each of the consultations records what the appellant has told his doctor under the heading “Subjective”.

[68] However, he submits that the inference to be taken from the record that exists is that the appellant resigned from his job of his own volition.

[69] He notes that the appellant told Dr Walker the following:

He has no pain at all in relationship to his left total hip replacement. He did get back to work after his successful surgery. It did take about five and a half months to get back. He then stopped work at the start of the Covid-19 outbreak in 2020. He has a degree of ongoing pain in his left foot, which is present all the time, although it does vary. He describes a good day as sitting on the riverbank fishing. He can walk OK, but does get tired and sore in the left foot. He tends to feel the pain under his first MTP joint and notices that this joint doesn't flex normally. He also has pain in the medial mid foot.

[70] Mr Sumner submits that the narrative that Dr Walker records is consistent with his brief resignation email of 18 March 2020.

[71] Mr Sumner submits that what the appellant says 17 or 18 months later must be accorded less weight because it is not supported by the medical evidence.

[72] Mr Sumner acknowledges that the appellant most likely does have foot issues including pain, but that that is very common following the type of surgery the appellant had.

[73] Ultimately, he submits that there is no evidence here of retrospective incapacity over the period in question.

[74] He also notes that in his final report on 10 February 2020, Mr Bevan noted that he would be happy to see the appellant again as required.

### **Appellant's Reply**

[75] In reply, Mr Hinchcliff submits that there is no evidence before the Court that the appellant fully recovered. He notes that Dr Bevan recorded that there was still some residual swelling, in his final report of 10 February 2020.

[76] Mr Hinchcliff also says there is no evidence to say the appellant was able to work, in the physical sense, after he tendered his resignation.

### **Decision**

[77] The respondent's decision of 23 December 2021 determining that it was unable to continue to pay the appellant's entitlement to weekly compensation from 11 February 2020 is challenged by the appellant on this appeal.

[78] Section 100(1)(a) provides that a person who has cover and who lodges a claim for weekly compensation is entitled to receive it “if the Corporation determines that the claimant is incapacitated within the meaning of s 103(2) ...”. S 103(2) states that the question the Corporation must determine is whether:

The claimant is unable, because of his or her personal injury to engage in employment in which he or she was employed when he or she suffered the personal injury.

[79] The ultimate focus of this judgment therefore is whether from 11 February 2020 the appellant satisfied the definition of s 103(2).

[80] Section 102 provides the procedure for determining incapacity under s 103:

- (1) The Corporation may determine any question under s 103 ... from time to time.
- (2) In determining any such question, the Corporation:
  - (a) must consider an assessment undertaken by a medical practitioner or nurse practitioner; and
  - (b) may obtain any professional, technical, specialised or other advice from any person it considers appropriate.

[81] In this case this issue did not fall to be determined until after this Court on 3 August 2021 found that the appellant had proven his injury as a treatment injury for the purposes of this Act.

[82] Accordingly, the focus of counsel has rightly been on the evidence that remains available that bears on whether the appellant was incapacitated for the purpose of the Act from 11 February 2020.

[83] Both counsel took the Court through the various relevant medical reports over the time in question.

[84] Following the appellant’s revision surgery in late September 2019, there are various reports relating to his recovery. The first is dated 7 October, which notes that his wounds are completely healed; there are no signs of infection and he is neurovascularly intact.

[85] Then follows a report from the operating surgeon dated 18 November 2019, some eight weeks after surgery. The surgeon, Mr Bevan, sets a plan for partial weight bearing for two weeks and full weight bearing for two weeks.

[86] Four weeks later, the planned follow up occurred and the orthopaedic registrar recorded that the appellant “is in a moonboot at the moment. Mr Bevan is happy to progress him out of this today into his normal footwear. At that stage, the plan was a further follow up in eight weeks time for “clinical review only”.”

[87] Three days later, the appellant obtained a further “off work certificate” from his GP. In this 19 December 2019 consultation, his GP recorded that the appellant was not confident to resume work as a security guard at Dunedin Airport.

[88] There was a further final consultation with orthopaedic surgeon, Mr Bevan, on 10 February 2020, where Mr Bevan noted:

He is looking at return to work today. He still has some residual swelling. His xrays look good.

**Assessment and Plan:**

I think Mr Bell is doing very well. I think he will continue to improve. I have not organised to see him again, but obviously happy to see him again as required.

[89] It appears that the appellant did in fact return to work on or about 10 February 2020, as he had advised his orthopaedic surgeon.

[90] The next document of note is the appellant’s email to his employer dated 18 March 2020 which simply said:

I give written notice to terminate my employment with one month’s notice as required from today the 18th March 2020.

[91] There is no indication at that point that there was any underlying injury related reason for the appellant’s resignation.

[92] Reference has been made to an impairment assessment report of 9 November 2021. The purpose of this report was to assess the appellant’s whole person impairment rating, which involved very technical apportionments of injury and non-injury related conditions.

I conclude that it is of very little value in determining the appellant's incapacity at 11 February 2020. If anything, the assessment report is unhelpful to the appellant's case in saying that the appellant did get back to work after his successful surgery and "he then stopped working at the start of the Covid-19 outbreak in 2020".

[93] The assessment report ranges over the whole of the appellant's presentation, which includes a left total hip replacement and arthritis.

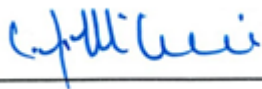
[94] Dr Walker concluded that all the impairment present was due to non-covered factors.

[95] The Court held in *Farrelly*:<sup>1</sup>

Incapacity is a precise concept, it requires evidence of the physical and mental demands of pre-injury employment and evidence of the nature and consequences of the injury, in sufficient detail to reach a conclusion whether the claimant could continue that employment. Determination of incapacity also requires reasonably precise dates in order to align a finding of incapacity with pre-injury employment tasks and earnings at the date of incapacity. Those fairly precise findings have to be identified in relation to a contemporaneous application for weekly compensation. A retrospective claim cannot be treated as requiring less evidence than a contemporaneous claim.

[96] Applying that dictum to this case, I must conclude on the evidence before me that it is insufficient to allow me to conclude on the balance of probabilities that the appellant was incapacitated from 11 February 2020. Accordingly, the respondent's decision of 23 December 2021, that it was unable to continue with the appellant's entitlement to weekly compensation from 11 February 2020, was correct.

[97] I make no order as to costs.



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CJ McGuire  
District Court Judge

Solicitors: ACC and Employment Law, Ellerslie  
Ford Sumner, Wellington

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<sup>1</sup> *Farrelly v ACC* [2013] NZACC 420