

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 61

ACR 123/20

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPEAL UNDER SECTION 162(1) OF
THE ACT

BETWEEN STEVEN CHAND
Applicant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Submissions: The Appellant is self-represented
H Ifwersen for the Respondent

Hearing: On the papers

Judgment: 11 April 2023

**JUDGMENT OF JUDGE P R SPILLER
[Leave to Appeal to the High Court
Section 162(1) Accident Compensation Act 2001]**

[1] This is an application for leave to appeal against a judgment of Her Honour Judge Henare, delivered on 30 November 2021.¹ At issue in the appeal was a decision of the Corporation dated 22 October 2019 declining Mr Chand's entitlement to an independence allowance, on the basis that his level of impairment was assessed at 5%, less than the minimum 10% level required for such an allowance. The Court dismissed the appeal, for the reasons outlined below.

¹ *Chand v Accident Compensation Corporation* [2021] NZACC 188.

Background

[2] On 28 March 2001, Mr Chand was granted cover for a right prolapsed lumbar intervertebral disc, due to an accident he suffered while lifting a garbage bag on 26 February 2001, while employed as a cleaner.

[3] On 14 May 2002, Mr Chand applied for an independence allowance. On 22 May 2002, he was assessed by Dr Colin Bennett and was found to have suffered Whole Person Impairment (WPI) of 5%. Mr Chand's claim for an independence allowance was declined by the Corporation on the basis his level of impairment was assessed as being 5%, that is, less than the minimum 10% level required for an allowance.

[4] On 10 September 2004, Mr Chand made a second application for an independence allowance. On 1 November 2004, Dr Desmond Wong assessed Mr Chand and found that he had suffered WPI of 5%. On 4 November 2004, Mr Chand's claim for an independence allowance was declined by the Corporation on the basis his level of impairment was assessed as being 5%, that, is less than the minimum 10% level required for an allowance.

[5] On 23 July 2019, Mr Chand made a third claim for entitlement to lump sum compensation and/or an independence allowance. On 16 October 2019, Dr Ben Cheesman (Consultant Occupational Physician) assessed Mr Chand. In his Impairment Assessment Report, Dr Cheesman found Mr Chand to have suffered from a WPI rating of 5%.

[6] On 22 October 2019, the Corporation declined Mr Chand's claim for entitlement to an independence allowance, on the basis his level of impairment was assessed at 5%, less than the minimum 10% level required for such an allowance. Mr Chand applied for a review of this decision.

[7] On 4 June 2020, a Reviewer dismissed Mr Chand's review of the Corporation's decision of 22 October 2019, on the basis that Mr Chand did not prove that the Corporation could not have placed reliance on Dr Chessman's report. Mr Chand appealed against the Reviewer's decision.

[8] On 21 August 2020, Dr Wong, Cardiologist at Middlemore Hospital, recorded that Mr Chand presented with atypical chest pain, which was described as non-cardiac and possibly related to a previous back injury. Mr Chand's chronic back pain was noted, and a plan was made for him to undertake a routine echocardiogram and "reassure".

[9] On 5 December 2020, the Corporation obtained a peer review of Dr Cheesman's 2019 report from Dr Alan Walker. The report confirmed Dr Cheesman's finding of a 5% whole person impairment for Mr Chand.

[10] On 30 November 2021, Judge Henare dismissed Mr Chand's appeal, for the reasons outlined below.

[11] On 8 December 2022, Mr Chand sought leave to appeal the Court's decision. His application was outside of the 21 days allowed by section 162(2) of the Accident Compensation Act 2001 to apply for leave to appeal the Court's judgment. However, it appeared that Mr Chand may not have been advised of the Court's judgment until well beyond the 21-day period, and the Corporation agreed to waive Mr Chand's non-compliance with the time limit specified in section 162(2). On that basis, on 15 December 2022, the Court allowed Mr Chand to apply for leave to appeal.

Relevant law

[12] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[13] In *O'Neill*,² Judge Cadenhead stated:

[24] The Courts have emphasised that for leave to be granted:

- (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment ...;

² *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

- (ii) The contended point of law must be “*capable of bona fide and serious argument*” to qualify for the grant of leave ...;
- (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed ...;
- (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law ...;
- (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision ...;
- (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law

[25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law

The Court’s judgment of 30 November 2021

[14] Judge Henare acknowledged that Mr Chand had a covered back injury, this had prevented him from working, and he continued to experience back pain. Her Honour noted that Mr Chand stated having received treatment, including rehabilitation and other entitlements since his accident in 2001, but that the level of entitlement had been inadequate to support his life.

[15] Judge Henare agreed with counsel for the Corporation’s submission that the process of assessing an entitlement to a lump sum is prescriptive. The circumstances where an impairment rating can be effectively challenged are limited. Essentially a claimant needs to show there is some material flaw or omission in the assessment, either by relying on expert evidence of same, or by finding an otherwise obvious flaw in the assessment.

[16] Judge Henare was satisfied that a careful and proper assessment was undertaken by Dr Cheesman, as peer reviewed by Dr Walker, who specifically noted that Dr Cheesman had considered “the impairing effect of pain”. There was no medical evidence in the appeal which countered Dr Cheesman’s assessment and no indication of any flaw in the assessment.

[17] Judge Henare noted that Mr Chand had provided a report from Dr Wong. However, the Court could give little weight to this report because the cause of Mr Chand's chest pain was not definitive, with an echocardiogram proposed at the time. Chest pain is a non-injury related condition and cannot be taken into account in the assessment for impairment, which assessed only the covered injury.

[18] Dr Cheesman noted Mr Chand's history of surgery in 2001, and that Mr Chand opted not to undergo further surgery following the second opinion from Mr Howie. Mr Chand explained that he did not undertake a second surgery because the medical advice was of paraplegia as a high-risk factor. Whilst this background was acknowledged, it did not form part of the impairment rating as set out by Dr Cheesman in his report. In the event, Mr Chand's impairment rating was assessed based on the AMA Guides.

[19] Judge Henare was satisfied that the evidence before the Court showed that Dr Cheesman's report, supported by Dr Walker, assessing Mr Chand's covered injury, using the correct formula and in respect to apportionment, had been properly undertaken. Dr Chessman had some 29 reports and other documents before him as well as examining Mr Chand. Dr Cheesman referred in detail to the basis of the deduction for the apportionment he made.

[20] Judge Henare concluded that, for the above reasons, the appeal could not succeed. Judge Henare added that Mr Chand was entitled to a reassessment every 12 months; but that he would be required to provide a certificate from a registered medical practitioner indicating that the impairment may have increased since the date of his last assessment.

The appellant's submissions

[21] The appellant submits that Judge Henare was not fair and favoured the Corporation and the doctors, and he should be getting an independence allowance and lump sum compensation.

Discussion

[22] The issue before Judge Henare was whether the Corporation correctly declined Mr Chand's claim for entitlement to an independence allowance, on the basis that his level of impairment was assessed at 5%, being less than the minimum 10% level required for such an allowance. The Corporation made this decision in light of the assessment of Mr Chand by Dr Ben Cheesman (Consultant Occupational Physician). He found that Mr Chand suffered from a Whole Person Impairment (WPI) rating of 5% by reference to the applicable American Medical Association ("AMA") Guides to the Evaluation of Permanent Impairment.

[23] The provisions pertaining to an assessment of a claimant's independence allowance require that the claimant's WPI must be assessed using the AMA Guides, and that the WPI must be more than 10% for such an allowance. In order for an appeal to succeed in overturning an assessment under the AMA Guides, an appellant must establish on the balance of probabilities, and with clear, credible and cogent expert evidence, that the assessment was in some way flawed or incorrect. There needs to be compelling medical 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.³

[24] As Judge Henare has pointed out, Mr Chand has not produced the required evidence to succeed in overturning Dr Cheesman's assessment supporting the Corporation's decision. On the contrary, Dr Cheesman's report was later peer reviewed and approved by Dr Walker. Further, this Court observes that there were two preceding assessment reports (in 2002 and 2004) which provided exactly the same assessment. Judge Henare's interpretation and application of the law reveal no error of law.

The Decision

[25] In light of the above considerations, the Court finds that Mr Chand has not established sufficient grounds, as a matter of law, to sustain his application for leave

to appeal, which is accordingly dismissed. Mr Chand has not established that Judge Henare made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources. This Court is not satisfied as to the wider importance of any contended point of law.

[26] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

Judge P R Spiller,
District Court Judge

³ *Crouchman v Accident Compensation Corporation* [2016] NZACC 29, at [28], referring to *W v Accident Compensation Corporation* [2004] NZACC 284, at [7](c) and *Robinson v Accident Compensation Corporation* [2008] NZACC 121, at [23].