

**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 75 ACR 253/21

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

Hearing: 6 April 2023
Heard at: Christchurch/Ōtautaki

Appearances: The Appellant in person
 Mr C Light for the Respondent

Judgment: 15 May 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Jurisdiction s 134 Accident Compensation Act 2001]**

[1] The appellant has appealed against a review decision dated 7 October 2021. In this decision, the reviewer concluded that the appellant's review application of 6 May 2021 was not in respect of a reviewable decision. The reviewer therefore dismissed the application for want of jurisdiction.

Background

[2] The appellant has cover for a physical injury and post-traumatic stress disorder suffered in a sexual assault on 22 April 2011.

[3] The appellant also has cover for a concussion injury and a traumatic amputation of the right finger suffered in an accident on 26 February 2011.

[4] The claim for cover for the physical injury suffered in the assault was made by the appellant on 16 January 2013. ACC approved exploratory surgery on 9 May 2013.

[5] ACC subsequently granted cover for post-traumatic stress disorder. However, in a decision dated 11 December 2013, ACC declined cover for the physical injury. It did so based on the advice of its medical advisor, Dr Dodwell, occupational physician, who provided a report on 14 November 2013.

[6] In his report, Dr Dodwell acknowledged that surgery for excision of a polyp had been carried out and “there is little doubt that this was a direct result of the rape”. Dr Dodwell also noted that there was underlying pathology and that if the condition requiring surgery were to recur, “then a formal cover decision would need to be considered at that time, with relevant evidence sought as to the underlying pathology”.

[7] There was then a lengthy delay until May 2017 when the appellant contacted ACC. ACC again investigated whether cover should be granted for the injury suffered on 22 April 2011.

[8] On 22 June 2019, a reviewer quashed ACC’s decision of 17 October 2018 declining cover for anal sphincter damage and substituted a decision of cover for this condition.

[9] Following an impairment assessment in 2020, lump sum compensation for the covered injuries on the basis of 39 per cent impairment was paid to the appellant.

[10] On 19 May 2021, ACC received a review application from the appellant. The review application referred to various issues, including that there was not an appropriate response from the police and ACC after he reported the assault, and the medical treatment was delayed and inadequate. The review application did not refer to an ACC decision. The appellant said he wanted to claim damages against ACC and he referred to baseline damages of 3 million dollars.

[11] An ACC review specialist, Logan McMullen, wrote to the appellant on 21 May 2021. Mr McMullen pointed out that a reviewer could only consider a decision made by ACC and the review application did not identify a decision made by ACC that he wanted to review. Mr McMullen requested the appellant to advise if he wished to review a specific decision and if so, to give him the date of the decision.

[12] No reply to this letter was received.

[13] A review hearing took place on 1 October 2021. In a decision dated 7 October 2021, the reviewer, Paul Wilson, dismissed the application, finding that the appellant's concerns about how the ACC claim was investigated or progressed by ACC could be addressed under the Code of Claimants' Rights, if the appellant made a complaint under the Code. However, the review application did not relate to a decision made by ACC and therefore the reviewer dismissed the application for want of jurisdiction.

[14] In his review decision of 1 October 2021, the reviewer acknowledged the following:

Covered injuries

[The appellant] has cover under sensitive claim ...070 for post-traumatic stress disorder, and under claim ...867 for an anal sphincter injury. Those injuries have a deemed date of injury of 22 April 2011.

He also has cover under claim ...162 for concussion and a traumatic amputation of the right finger. Those injuries were sustained on 26 February 2011.

[15] The reviewer's decision also records the following:

[The appellant's] case

[The appellant] explained the circumstances of both accident events leading to his covered injuries and the effects upon him.

He felt ACC and the police had not fully appreciated or investigated the circumstances and he felt let down. ACC had also failed to provide him with prompt and appropriate treatment.

He wanted those circumstances investigated properly and his legal rights provided for and respected.

He accepted his review application of 6 May 2021 did not relate to a specific decision made by ACC, however.

[16] The reviewer referred to s 134 of the Act, saying:

As s 134 of the Act makes clear, a reviewer has jurisdiction only to determine the accuracy or otherwise of “decisions” made by ACC.

[17] The reviewer concluded:

I am satisfied for the reasons set out below that [the appellant’s] review application of 6 May 2021 does not relate to reviewable decision.

I therefore dismiss the application for want of jurisdiction.

[18] In the course of his decision, the reviewer also said:

[The appellant] has raised concerns as to how his ACC claims were investigated and progressed by ACC.

There is no doubt that he suffered serious injury and two significant events in 2011 and he is, of course, entitled to raise any concerns he may have and to have those concerns investigated.

As was advised to me at the case conference of 23 July 2021 and submitted by Mr McMullen at the review hearing on 1 October 2021, those aspects fall under the Code of Claimants’ Rights.

If [the appellant] wishes those issues to be addressed, he must ask ACC to conduct an investigation into his concerns under the Code.

Appellant’s Submissions

[19] With the agreement of the Court, the appellant had a video played of an investigative programme that had as its subject, the deficiencies in the police inquiry into what had occurred to him in April 2011. Aspects of the programme strongly suggested that the police inquiry was deficient and cursory in a number of important respects.

[20] However, it appears from the programme that the police did not take a formal statement from the appellant until 2013. The appellant had also retained DNA evidence, which was provided to the police in 2013, but not tested.

[21] It seems that the alleged assailants were interviewed, however the police took the matter no further.

[22] The appellant was completely dissatisfied with the police investigation and felt that the police were, as I understand it, siding with the offenders.

[23] The appellant said that over the last 12 years, he had been through every complaint process, including the United Nations in Geneva and he said:

I feel ACC has just done what it wanted. It joined the two claims together. It caused me a lot of pain and suffering.

[24] The appellant said that he cannot get home help and that he cannot even get a counsellor to help him with what he is dealing with.

Respondent's Submission

[25] Mr Light noted that although the injury occurred in April 2011, the claim for cover for physical injuries suffered in 2011 by the appellant was not made until 16 January 2013.

[26] Mr Light noted that ACC approved exploratory surgery on 9 May 2013 and subsequently covered the appellant for post-traumatic stress disorder.

[27] Mr Light referred to Branch Medical Advisor, Dr Dodwell's, advice of 14 November 2013, which in essence left the door open to a further claim by the appellant should his condition that required surgery recur.

[28] Mr Light reminded the Court that in terms of the backdrop of what had occurred to the appellant, ACC's function was narrow and confined to whether there was cover for injuries and if so, what entitlements were.

[29] Mr Light notes that there was a lengthy delay until May 2017, when the appellant again contacted ACC. ACC then again investigated whether cover should be granted for injuries suffered on 22 April 2011.

[30] Mr Light notes that on 22 June 2019, a reviewer quashed ACC's decision of 17 October 2018 declining cover for anal sphincter damage and substituted a decision to cover this condition.

[31] Mr Light notes that following an impairment assessment in 2020, lump sum compensation for covered injuries on the basis of 39 per cent impairment was paid to the appellant.

[32] Mr Light again summarised the limits of ACC’s jurisdiction – that only a decision on a claim can be reviewed and that if ACC had declined an entitlement, that decision to decline is reviewable. Mr Light was also of the view, based on what the appellant has presented, that there appeared to be grounds for an entitlement to counselling.

Decision

[33] Based on what has been presented to the Court by the appellant, and on what has quite properly been acknowledged on behalf of ACC by Mr Light, the appellant has lived through an experience in 2011 that might be properly described as “nightmarish”.

[34] The appellant has taken the Court through what he has suffered in 2011 and following, and it is plain that he has greatly suffered physically and mentally since.

[35] Unfortunately for the appellant, Judges sitting on ACC appeals such as this one do not have unrestricted jurisdiction to make right all matters that are raised before this Court. Essentially, the jurisdiction of this Court is limited to considerations of decisions made by ACC on a claim before it, either for cover or entitlements, that decision having first been the subject of a review hearing under the provisions of the Accident Compensation Act 2001.

[36] Furthermore, the entitlements that a claimant may obtain are defined by the Accident Compensation Act 2001.

[37] As Winkelmann J said in *Accident Compensation Corporation v Algie*¹:

The benefit, monetary and otherwise, which an accident victim will now receive for his injuries is restricted by the terms of the legislation. The restriction is the price paid for having comprehensive cover available to all, regardless of fault, in place of full restitution available only for the few who can prove negligence.

[38] It is noteworthy that in the same judgment, Justice Winkelmann acknowledged that in effect the ACC regime was not perfect and in fact had caused hardships to claimants and their families. However, she also said in the decision:²

The Court could not mitigate this harm by adopting an interpretation ... that was unsupported by its [the Accident Compensation Act 2001] language and purpose.

¹ *Accident Compensation Corporation v Algie* [2016] NZCA 20 at [28]

² At [38].

[39] Having listened carefully to what the appellant has put before the Court, I can only agree that from his perspective the harm done to him has not been adequately remedied.

[40] As I endeavoured to explain to the appellant at the hearing, I have no power to start afresh to reinvestigate what happened to him in 2011. My jurisdiction is confined to hearing an appeal against a review decision as set out in section 149(1)(a) Accident Compensation Act 2001.

[41] In this case, the reviewer had found that the appellant's review application of 6 May 2021 was not in respect of a reviewable decision under the Accident Compensation Act 2001.

[42] The reviewer recorded this:

He felt ACC and the police had not fully appreciated or investigated the circumstances and he felt let down. ACC had also failed to provide him with prompt and appropriate treatment.

He wanted those circumstances investigated properly and his legal rights provided for and respected.

[43] In essence, the appellant asked the reviewer, and now this Court, for remedies that neither the reviewer nor this Court has the power to provide. Accordingly, the outcome of this appeal must be that it is dismissed.

[44] In the course of the hearing, Mr Light, very fairly, on behalf of ACC, expressed the view that the appellant should be entitled to counselling. I agree. The way forward in this regard would be for the appellant to lodge a claim or request with ACC for counselling, through his GP, Dr Dodge.

[45] It may well be that in consultation with his GP, other entitlements by way of treatment or otherwise may be identified. It therefore rests with the appellant to take that step as soon as he feels able.

[46] The decision of the reviewer that the appellant's application for review was dismissed for want of jurisdiction is upheld.

[47] Accordingly, the appeal is dismissed.

[48] Costs are reserved.

Suppression

[49] I consider 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 of the appellant. As a result, this decision shall henceforth be known as *DN v Accident Compensation Corporation*.



CJ McGuire
District Court Judge

Solicitors: Shine Lawyers NZ Limited