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 55 ACR 136/20

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

Hearing: 28 March 2023
Held at: Auckland/Tāmaki Makaurau

Appearances: P Schmidt for the Appellant
F Becroft for the Respondent

Judgment: 4 April 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Impairment assessment for independence allowance - Part 4, Schedule 1, Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 7 July 2020. The Reviewer dismissed an application for review of the Corporation's decision dated 17 July 2019 determining the appellant's entitlement to an independence allowance.

Background

[2] The appellant has cover for a sensitive claim, lodged in 2002, relating to childhood sexual abuse.

[3] In 2003, an independence allowance assessment was undertaken by Dr Collier, Psychiatrist, in relation to the sensitive claim. He noted that the appellant had had a difficult and violent upbringing but was at that stage functioning quite well. He arrived at an initial 10% WPI rating but, after apportionment of 50%, arrived at a final WPI rating of 5%.

[4] On 22 October 2003, the Corporation issued a decision declining an independence allowance on the basis that the appellant had been assessed below the statutory threshold for entitlement.

[5] The appellant challenged the independence allowance decision and sought further evidence from Dr Newburn, Neuropsychiatrist. Dr Newburn provided a report advising that the appellant had a WPI of 60%.

[6] The appellant's claim was subsequently reviewed by Dr Reeves, Psychiatrist, who concurred with Dr Collier's 50% apportionment.

[7] In September 2004, a further impairment assessment was undertaken by Dr Todd. Dr Todd advised that the appellant's functioning had deteriorated since she had been seen with Dr Collier. Dr Todd arrived at an estimated WPI rating of 45%, but apportioned 25% out due to the appellant's physical ill health, the environment in which she grew up, and multiple stressful life events. Dr Todd arrived at a final WPI rating of 20%.

[8] On 29 October 2004, the Corporation issued a further decision awarding an independence allowance based on a 20% WPI rating. The appellant sought to review that decision. At the review stage, the Corporation obtained a formal peer review from Dr Reeves.

[9] On 29 November 2004, Dr Reeves reported after comparing the Todd report to the earlier reports of Dr Collier and Dr Newburn. Dr Reeves' pre-apportionment rating was lower than Dr Todd's (35%) and, with apportionment in line with Dr Todd, arrived AT a WPI rating of 10%.

[10] In December 2004, the Corporation wrote to Mr Kenyan who was acting for the appellant at that stage, noting that the assessments of Dr Todd, Dr Collier and Dr Reeves all fell within 10% range of one another but were markedly at odds with Dr Newburn's assessment of 60%.

[11] In late 2004, the matter was considered at review and a new assessment was directed.

[12] In 2005, a further impairment assessment was undertaken by Dr Smales. She arrived at an estimated WPI of 55% with only 5% apportionment. Dr Smales agreed with Dr Newburn that the apportionment was minimal. The final WPI rating arrived at was 50%.

[13] In July 2005 Dr Smales' assessment was peer reviewed by Dr Schousboe. He did not think that Dr Smales had followed the appropriate criteria in the handbook, and did not recommend that the report be used for a determination of impairment.

[14] On 14 September 2005, the Corporation issued a decision confirming an independence allowance based on a 50% WPI rating. However, the Corporation declined to pay the appellant's independence allowance in a single payment for the next five years, because it was anticipated that the level of assessed impairment might change.

[15] In April 2010, the Corporation wrote to the appellant asking her to apply for a reassessment to ensure that she was receiving the correct amount of independence allowance. Applications and medical certificates were subsequently completed, and a new assessment was arranged.

[16] On 13 July 2010, a psychiatric assessment was undertaken by Dr Shuaib. He diagnosed post-traumatic stress disorder ("PTSD") and major depressive disorder. He linked the PTSD to the appellant's sexual abuse, but identified the causes of the major depressive disorder as multifactorial.

[17] On 1 November 2010, the Corporation issued a decision approving cover for PTSD.

[18] On 10 December 2010, an impairment assessment was undertaken by Dr Wright. He arrived at an estimated WPI rating of 35%, apportioning out 15%, leaving a final whole person impairment rating of 20%.

[19] In February 2011, Dr Collier peer reviewed Dr Wright's assessment, and recommended that it be accepted. Dr Collier noted the variable assessments:

> The apportionment is a significant feature and it would appear that there is a consistent finding of Dr Wright's with Dr Todd's assessment. Dr Todd found a 45% estimated whole person impairment and apportioned 25%, slightly more than half, with a final whole person impairment of 20%. Dr Reeves recommended a 10% impairment assessment. Dr Smales had a higher assessment at 50% with a very low apportionment of 5%. It is my opinion that the more appropriate apportionment by Dr Wright is the explanation for the drop in the whole person impairment.

[20] On 24 February 2011, the Corporation issued a decision awarding an independence allowance based on a 20% WPI rating. That decision was challenged at review.

[21] On 10 October 2011, Dr Newburn provided a further report. He agreed with the diagnosis of PTSD but also attributed the appellant's depression to her abuse. He arrived at a final WPI rating of 55%, with a 5% apportionment, making a final WPI rating of 50%.

[22] On 15 November 2011, Dr Collier provided a further report considering Dr Newburn's assessment. Dr Collier thought that Dr Wright had correctly classified the appellant's impairment as in the mild to mid zone, and confirmed various other findings made by Dr Wright on the basis of the explanations provided in the assessment. Dr Collier also endorsed Dr Wright's apportionment. Dr Collier thought that there were a number of issues that had not been adequately addressed by Dr Newburn, and noted that Dr Newburn did not have formal training in impairment assessments, nor was his assessment peer reviewed.

[23] In February 2012, the Corporation's decision was upheld at review. The Reviewer noted that Dr Newburn did not have formal training in impairment assessments, whereas Dr Wright's assessment had been peer reviewed.

[24] An appeal was filed against the Reviewer's decision. The appeal was ultimately settled on the basis that the appellant's independence allowance be reassessed, taking into account her physical injury claim.

[25] In October 2014, the appellant provided a statutory declaration to support the reassessment. The appellant noted her chronic pain, back injury, PTSD, and depressive disorder. The appellant stated that her condition had been stable and had not really changed, and asked that the new assessment take into account the whole picture.

[26] On 15 March 2017, the Corporation confirmed that it would be undertaking an independence allowance assessment relating to a February 1976 back injury (with degeneration and pain) and PTSD on the sensitive claim. The appellant was offered a choice of four assessors. She was also advised that a previous lump sum payment for the 1976 injury would be deducted from the final impairment rating.

[27] On 11 September 2017, Dr Newburn provided a further report, again identifying ongoing issues of major depressive disorder and PTSD, and a well-developed centrally modulated chronic pain disorder.

[28] On 11 December 2017, the Corporation issued a decision accepting deemed cover for major depressive disorder. The letter noted that the Corporation was in the process of arranging an updated mental injury assessment.

[29] In mid-2018, a psychiatric assessment was undertaken by Dr Lehany. He agreed with the diagnoses of PTSD and depressive disorder and thought that both were caused by the sexual abuse.

[30] In January 2019, the Corporation again confirmed cover for PTSD and major depressive disorder. The Corporation then commenced the previously agreed

independence allowance assessment, covering the 1976 back claim, the PTSD, and the newly covered major depressive disorder. Again, a list of assessors was offered.

[31] On 27 April 2019, Dr Marius Hill, GP, undertook an impairment assessment. He arrived at a 10% WPI rating for the back condition. He assessed WPI for mental injury as follows:

> *Activities of daily living*: the appellant is independent but in some areas is not particularly effective. She can do some of her ADL's but does depend more and more on Home Help and needs help with showering. She can drive a car but gets anxious leaving the house. She would be difficult to live with she states. She is rated at 38% in class III. She has several of the indicators in this class. She is not rated in the higher class as she can prepare meals, she doesn't need prompting to wear clean clothes.
>
> *Social functioning*: the appellant is independent but in some areas of functioning is not particularly effective. She finds it hard to socialise, she gets anxious leaving the house, she becomes irritable and is difficult to live with if she had people at home. She finds that people make her anxious. She is rated in Class II at 22%. She is not rated in Class III as she not completely socially isolated.
>
> *Concentration, persistence, and pace*: the appellant is independent but in some areas of functioning is not fully effective. She finds it hard to concentrate during the day, she tends to zone out and disassociate. She can be absent minded. She can however follow simple tasks. She is rated in Class II at 19%.
>
> *Deterioration or decompensation in work or work like settings*: [The appellant] has stress such that she seeks a less stressful environment. She often disassociates, takes substances. She is rated at 39% in Class II. She has several of the indicators in class III. She is not rated in Class IV she doesn't have three or more episodes a year of decompensation and loss adaptive functioning requiring support as she [sic].
>
> Estimated Whole Person Impairment for the Mental Injury 34%.
>
> *Apportionment:* She takes marijuana frequently and has a lot of pain; the pain is not covered by the mental injury. Pain lowers her threshold for resilience and causes her to decompensate easier. It also affects her concentration and motivation for social functioning. The chronic use of marijuana would lower her resilience, it can lower motivation for social functioning and cause loss of concentration. 10% is apportioned.
>
> 24% WPI for the mental injury.

[32] On 12 June 2019, Dr Hills' impairment assessment was peer reviewed by Dr Alan Walker, GP. He confirmed the impairment ratings, and stated:

> - Dr Hill has used the correct sections of the AMA guides and the Handbook to the AMA guides to calculate impairment.

- Dr Hill has correctly use[d] the diagnosis related estimate method and found a whole person impairment of 10% in relationship to the degenerative back condition.

- Dr Hill has used the chapter 14 mental injury impairment measuring tool and correctly found an estimated whole person impairment of 34%.

- Having found an estimated whole person impairment of 34% using the chapter 14 mental injury impairment measuring tool, Dr Hill is required by the Handbook to the AMA guides to consider apportionment for noncovered factors and to avoid duplicating the physical impairment rating.

- Dr Hill has explained how he has formed the opinion that apportionment of 10% is required because of the impairing effect of the client's regular marijuana use as measured by the chapter 14 mental injury impairment measuring tool.

- The handbook directs Dr Hill to apportion the noncovered impairment. This means that 24% is applied to the covered mental injuries. (34 - 10 = 24%) Apportionment is appropriate.

- Dr Hill has confirmed that the covered injuries are stable and have resulted in permanent impairment. The impairing effect of pain has been considered.

- The current chapter 14 mental injury impairment assessment is consistent with the impairment assessment undertaken by Dr S Wright in December 2010.

[33] On 17 July 2019, the Corporation issued a new decision which revoked its earlier decision of 24 February 2011 and awarded an independence allowance based on a 25% WPI rating. The letter noted that the appellant was assessed as having a 32% impairment with 7% deducted for the previous lump sum paid, making a 25% final impairment rating. The appellant applied for a review of the Corporation's decision.

[34] On 16 June 2020, review proceedings were held. On 7 July 2020, the Reviewer dismissed the review application, concluding that the assessment fairly took into account the appropriate information and was broadly consistent with previous assessments.

[35] On 10 July 2020, a Notice of Appeal was filed.

[36] On 23 August 2022, Dr Newburn reported, stating that there were clear and ongoing issues with PTSD and MDD, as well as issues arising from the appellant’s back injury and the development of a centrally modulated chronic pain disorder.

Dr Newburn suggested that these chronic stresses had led to brain changes. He assessed 10% WPI for the back injury. His assessment of WPI for mental injury was as follows:

> Activities of daily living: ... she is independent, but she is not effective in many areas of function. This places her at the lower end of Category 3, moderate impairment. 40%.
>
> Social functioning: … She remains independent, but is not effective in many areas of function. She does at times function in the upper areas of Category 2 mild impairment, but not uncommonly decompensates into Category 3 moderate impairment. In particular, this is associated with avoiding actively engaging with society at large while tolerating a close friend or family member. She should be rated at the lower end of Category 3. 40%.
>
> Concentration, persistence, and pace: … as in the past, she bounces between Category 2, mild impairment and Category 3 moderate impairment. She is independent but not effective in many areas of function, being best rated midway in Category 3, reflecting a mid-point of the range of impairments. 50%.
>
> Deterioration or decompensation in work or work like settings: She continues to suffer from a Major Depressive Disorder, a chronic Post Traumatic Stress Disorder, and a Pain Disorder. She requires treatment for these conditions which result in significant impairment. She does not need hospital care but does need a combination of more intensive pharmacological and psychological assistance. She remains chronically unwell resulting in three or more episodes a year of decompensation. During these times she falls short of a situation analogous with institutional living, although at times she may come close to this. These conditions significantly impede useful functioning and are best rated as moderately severe impairment (Category 4). 60%.
>
> Estimated Whole Person Impairment for the Mental Injury 50%.
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> Apportionment: … [The appellant] continues to present with significant symptoms consequent on sexual abuse. 24% WPI for the mental injury. … Furthermore, other issues developing, including the choice of poor relationships, educational difficulties and suchlike and relationship issues through childhood and adolescent years can all be seen to arise from the sexual abuse. … I have subsumed the centrally modulated chronic pain disorder within the mental injury, and therefore there should be no apportionment for this.
>
> 50% WPI for the mental injury.

[37] On 10 October 2022, Dr Hill reviewed and responded to Dr Newburn's report. Dr Hill questioned Dr Newburn's approach to impairment ratings, and felt that he rated beyond the covered injuries. Dr Hill also noted that Dr Newburn's assessment was a significant time later, and that a person's presentation could fluctuate with time.

Relevant law

[38] Clause 55 of Schedule 1 of the Accident Compensation Act 2001 reads:

> (1) A person who suffers mental injury by an act to which section 21(1)(c) applies is not entitled to lump sum compensation for permanent impairment under this schedule if the last act occurred before 1 April 2002.
>
> …
>
> (4) If a person's eligibility for lump sum compensation for permanent impairment under this schedule is excluded by this clause and the person has suffered personal injury for which the person has cover because of section 36 or section 37 or section 28, Part 4 of the Accident Insurance Act 1998 applies to the person for the purpose of deciding whether the person has an entitlement to an independence allowance.

[39] Section 378(1) of the 2001 Act sets out that ss 441 and 442 of the Accident Insurance Act 1998:

> … continue to apply to personal injury covered by this Part that was suffered before 1 July 1999, irrespective of when the claim for cover in respect of that personal injury was or is lodged.

[40] The effect of section 441 of the 1998 Act is that the application for an independence allowance is to be dealt with under Part 4 of Schedule 1 to the 1998 Act, subject to the modifications under s 441(3). The modification provision reads:

> (3) The modifications are as follows:
>
> …
>
> (c) Any assessment under clause 60 of Schedule 1, or reassessment under clause 61 of Schedule 1, must be done on the basis of whole-person impairment for the combined effect of all his or her personal injuries covered by the former Acts, and only 1 independence allowance is payable for all those injuries.

[41] The effect of the above modification is that each of the appellant's injuries suffered before 1 July 1999 is required to have the impairment ratings combined. Only one independence allowance is payable in respect to these injuries.

[42] The provisions pertaining to an assessment of an independence allowance are contained in part 4 of Schedule 1 to the 1998 Act, in clauses 58-63. The appellant's

WPI must be assessed using the 4th Edition of the American Medical Association ("AMA") Guides to the Evaluation of Permanent Impairment and the 4th Edition of the ACC User Handbook to these AMA Guides. Any prior lump sum awards must be deducted; and the remaining WPI must be more than 10%. The AMA Guides require an assessment of the following four aspects or areas of functional limitation with respect to mental impairment:

> Activities of daily living
>
> Social functioning
>
> Concentration, persistence, and pace
>
> Deterioration or decompensation in work or work like settings

[43] The ACC Handbook outlines five classes of impairment, as follows:

> Nil/minimal 0-9%
>
> Mild 10-35%
>
> Moderate 36-60%
>
> Marked 61-79%
>
> Extreme 80-100%

[44] The ACC Handbook also directs that, when impairment is due to a combination of factors some of which are not covered, the assessor is required to consider apportionment. The Handbook states that the assessor must be careful to avoid rating the same impairment twice.

[45] In *Crouchman*,[1] 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.

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1 *Crouchman v Accident Compensation Corporation* [2016] NZACC 29.

- 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.

Discussion

[46] The issue in this case is whether the Corporation's decision of 17 July 2019, advising the appellant that she was entitled to an independence allowance based on a whole person impairment (WPI) rating of 25%, was correct. The assessment of WPI with respect to the appellant's back injury is not in dispute. The difference between the parties is in regard to the assessment of mental impairment. In making an assessment, the assessor must use the AMA Guides to the Evaluation of Permanent Impairment (Fourth Edition). In order for an appeal to succeed in overturning an assessment under the AMA, the 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.[2]

[47] The Court notes that a number of WPI assessments were done of the appellant between 2003 and 2011. In view of the lapse of time since then, the Court does not place weight upon these reports. The Court proposes instead to examine and compare the two most recent reports, being those of Dr Hill, GP, on 27 April 2019 and Dr Newburn, Neuropsychiatrist, on 23 August 2022.

[48] Counsel for the appellant submits as follows. Dr Newburn's assessment is to be preferred, as it it aligns better with the classes of impairment as described in the AMA Guides and the Handbook. In particular, Dr Newburn's assessments of social

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[2] See n 2 *Crouchman* 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].

functioning, concentration, persistence, and pace, and adaptation/decompensation better reflect the appellant's moderate rather than mild impairment, taking into account matters such as inability to work, lack of regular driving, limited level of social engagement, and significant depression. Further, Dr Hill's apportionment is too speculative to be reliable.

[49] This Court acknowledges the above submissions. However, the Court points to the following considerations.

[50] First, there is no compelling evidence that Dr Hill failed to grasp the appellant's background and the impact that her sensitive claim, post-traumatic stress syndrome and major depressive disorder had on her ability to function. The Court also points to a measure of overlap in the assessments of Dr Hill and Dr Newburn in relation to the possible categories to be assigned to activities of daily living, social functioning, concentration, persistence, and pace. This Court finds that Dr Hill's report assessed the appellant's level of impairment in a balanced and thorough way in light of the AMA Guides.

[51] Second, Dr Hill's assessment was peer reviewed (within two months) by Dr Walker, GP, who confirmed Dr Hill's impairment ratings. Dr Walker stated that Dr Hill had used the correct sections of the AMA Guides and the Handbook to the AMA Guides to calculate impairment; had used the chapter 14 mental injury impairment measuring tool and correctly found an estimated whole person impairment of 34%; and had explained how he had appropriately formed the opinion that apportionment of 10% was required because of the impairing effect of the appellant's regular marijuana use as measured by the chapter 14 mental injury impairment measuring tool.

[52] Third, Dr Newburn's assessment took place three years and four months after Dr Hill's assessment, meaning that there was time for the appellant's level of functioning to change. The volatility in her levels of functioning was acknowledged by Dr Newburn. In relation to social functioning, where Dr Hill opted for category 2 and Dr Newburn chose the lower level of category 3, Dr Newburn observed that the appellant at times functioned in the upper areas of category 2. In relation to

concentration, persistence, and pace, where Dr Hill opted for category 2 and Dr Newburn chose the middle level of category 3, Dr Newburn observed that, as had occurred in the past, the appellant bounced between category 2 and category 3.

Conclusion

[53] This Court finds that the appellant has not established, on the balance of probabilities, and with clear, credible and cogent expert evidence, that Dr Hill's assessment of her impairment was flawed or incorrect.

[54] The Court therefore finds that the Corporation's decision dated 17 July 2019, determining the appellant's entitlement to an independence allowance, was correct. The result is that the decision of the Reviewer dated 7 July 2020 is upheld, and this appeal is dismissed.

[55] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors: Medico Law for the Respondent.