

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 94

ACR 180/22

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

Hearing: 26 May 2023
(Followed by written submissions received by 6 June 2023)

Held at: Wellington by AVL

Appearances: F Taylor for the Appellant
I Hunt for the Accident Compensation Corporation

Judgment: 8 June 2023

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for weekly compensation - Schedule 1, clause 52,
Accident Compensation Act 2001 (“the Act”)]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 18 July 2022. The Reviewer dismissed an application for review of the Corporation’s decision dated 4 March 2022 declining Mr Giddy’s request for weekly compensation.

Procedural matter

[2] Prior to the hearing of this appeal, the parties’ representatives were requested to provide an agreed statement of facts and issues in this appeal, and the Court

received this statement on 16 May 2023. During the course of the appeal hearing on 26 May 2023, Ms Taylor, the advocate for Mr Giddy, raised facts and issues which were not contained in the agreed statement provided. The Court did not consider that the new facts and issues were adequately addressed in the hearing. Therefore, following the hearing, the Court directed that Ms Taylor, by 31 May 2023, clearly present the new submissions and facts she wished to provide, with supporting documentation; and that Mr Hunt, counsel for the Corporation, by the close of 5 June 2023, provide submissions and any further facts, with supporting documentation. The Court's order was duly complied with by the parties' representatives.

Background

[3] On 1 April 1974, Mr Giddy injured his left knee, and the Corporation provided cover for osteoarthritis as a consequential injury.

[4] On 3 January 1998, Mr Giddy suffered a soft tissue injury to his left knee, for which he received cover.

[5] On 11 March 1998, Mr Giddy saw Mr Stewart Hardy, Orthopaedic Surgeon, who noted that Mr Giddy had sustained a left knee injury in the 1970s and had undergone meniscectomy surgery in respect of a bucket handle tear of the medial meniscus. Mr Hardy noted the presence of underlying degenerative arthritis, further to the partial meniscectomy surgery.

[6] On 21 August 1999, Mr Giddy received cover for an injury he suffered to his right knee when he slipped on a wet grass bank.

[7] On 13 October 1999, an x-ray of Mr Giddy's knee showed loss of joint space in the medial compartment, in keeping with osteoarthritis. Mr Hardy reported that Mr Giddy had experienced similar problems on the right side and had undergone left arthroscopic meniscectomy surgery in the past, and that he was suffering from bilateral knee arthritis.

[8] On 23 December 1999, an MRI showed severe articular damage in Mr Giddy's knee within the medial compartment, with extensive subchondral bone marrow changes.

[9] From 20 December 2000, Mr Giddy received weekly compensation in respect of his right knee.

[10] On 26 January 2001, the Corporation approved bilateral knee replacement surgery on Mr Giddy, that is, relating to both his left knee and his right knee.

[11] On 9 February 2001, Mr Giddy underwent bilateral knee replacement surgery.

[12] On 13 February 2001, the treating Orthopaedic Surgeon, Mr Hardy, certified that Mr Giddy was unable to work for 45 days from 9 February 2001 and referred to "surgery 9/2/01". On 28 February 2001, Mr Hardy certified incapacity to work for 45 days from 28 February 2001, and referred to "surgery 9/2/01". On 23 April 2001, Mr Hardy certified that Mr Giddy was unable to work for 90 days from 18 April 2001 and referred to "bilateral knee replacement".

[13] As a result, Mr Giddy was paid weekly compensation, from 9 February 2001 to 13 July 2001, due to incapacity as a result of the surgery. The weekly compensation was administratively listed under the right knee claim.

[14] On 18 June 2021, Mr Giddy turned 65 and began to receive National Superannuation payments.

[15] On 25 November 2021, the Corporation received a request to fund revision knee replacement surgery on the left side.

[16] On 20 December 2021, the Corporation's Written Guidance Transcript recorded that Mr Giddy was an earner at the time of his original injury, and that, if the Corporation approved surgery for the left knee in 2001, this revision was a consequence to the injuries sustained in his accident and he would be entitled to support.

[17] On 10 January 2022, the Corporation's Written Guidance Transcript recorded that the Corporation had approved funding for the left knee surgery in 2011 under the accident event of April 1974.

[18] On 17 January 2022, Mr Giddy underwent a total knee replacement of his left knee, the cost of which was met, as an entitlement, by the Corporation.

[19] Mr Giddy then sought payment of weekly compensation from the Corporation, for the period 21 November 2021 to 17 April 2022, consequential on his incapacity due to the left knee osteoarthritis and the replacement surgery he underwent in January 2022.

[20] On 25 February 2022, the Corporation technical specialist advised:

The client at the date of surgery on 17/01/22 (revision of L knee replacement) was over 65 years of age. Clause 52 of Schedule 1 states:

- (1) Subclause (2) applies to a claimant who-
 - (a) first becomes entitled to weekly compensation before reaching New Zealand superannuation qualification age; and
 - (b) has been entitled to it for 24 months or longer before reaching that age.
- (2) The claimant loses entitlement to weekly compensation on reaching that age.

The client has exhausted entitlements in respect of both knees as he first became ENTITLED to weekly compensation more than 24 months prior to turning 65 years of age.

While he might not have been paid weekly compensation on a left knee claim, he was paid weekly compensation following bilateral knee replacement surgery on 09/02/01 and so any ENTITLEMENT in respect of the left knee osteoarthritis, while it might not have been paid, commenced from the date of that surgery.

There have been some administrative errors made by ACC in allocating costs to the correct claims, but the evidence supports that the client sustained right and left meniscal injuries sometime before 1982 and developed bilateral osteoarthritis consequential on meniscectomy surgery.

While claim 10054316188 [the current claim] might have been established for the purposes of looking at a consequential injury in terms of the case law established by *Kingi*, the consequential injuries in this client's case are the osteoarthritis of the right and left knees, so he has already exhausted entitlement

regarding any consequential injuries he might have developed further to his bilateral knee injuries.

No weekly compensation is payable following on from the revision left knee replacement surgery of 17/02/22 and any request for weekly compensation should be declined on the grounds that the client has exceeded the period of entitlement at the time of reaching the NZ Superannuation qualifying age.

[21] On 4 March 2022, the Corporation declined Mr Giddy's request for weekly compensation, on the basis that he had exceeded the period of entitlement at the time of reaching the New Zealand Superannuation qualifying age.

[22] On 21 June 2022, review proceedings were held. On 18 July 2022, the Reviewer dismissed the review, on the basis that the Corporation had correctly interpreted and applied the relevant provisions of the Act and found Mr Giddy ineligible for the weekly compensation requested.

[23] On 6 October 2022, a Notice of Appeal was lodged. On 18 October 2022, leave was granted to Mr Giddy to file his appeal out of time.

Relevant law

[24] Section 3 of the Act provides that its purpose involves providing for a fair and sustainable scheme for managing personal injury, including fair determination of weekly compensation.

[25] Section 100 of the Act provides that a claimant 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 section 103(2)" and "is eligible under clause 32 ...".

[26] Section 103 provides:

103 Corporation to determine incapacity of claimant who, at time of personal injury, was earner, on unpaid parental leave, or recuperating organ donor

- (1) The Corporation must determine under this section the incapacity of—
 - (a) a claimant who was an earner at the time he or she suffered the personal injury:

- (b) a claimant who was on unpaid parental leave at the time he or she suffered the personal injury:
 - (c) a claimant who was within a payment period under the Compensation for Live Organ Donors Act 2016 at the time he or she suffered the personal injury.
- (2) The question that 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.
 - (3) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.
 - (4) The references in subsections (1) and (2) to a personal injury are references to a personal injury for which the person has cover under this Act.
 - (5) Subsection (4) is for the avoidance of doubt.

[27] Section 104 of the Act provides:

If the Corporation determines under section 103(2) that the claimant is not incapacitated for employment-

- (a) a claimant who is receiving weekly compensation for loss of earnings from employment-
 - (i) loses that entitlement immediately; and
 - (ii) cannot be subject to a determination under section 107 in respect of that incapacity:
- (b) a claimant who is not receiving weekly compensation for loss of earnings from employment is not entitled to begin receiving it.

[28] Clause 32 of Schedule 1 to the Act provides:

- (1) The Corporation is liable to pay weekly compensation for loss of earnings to a claimant who-
 - (a) has an incapacity resulting from a personal injury for which he or she has cover; and
 - (b) was an earner immediately before his or her incapacity commenced.
- (2) The claimant is entitled to weekly compensation for loss of earnings-
 - (a) on and from the day after the first week of incapacity ends; and
 - (b) for any period of incapacity, after that first week, resulting from the personal injury for which he or she has cover.

[29] Clause 52 of Schedule 1 provides:

- (1) Subclause (2) applies to a claimant who-
 - (a) first becomes entitled to weekly compensation before reaching New Zealand superannuation qualification age; and
 - (b) has been entitled to it for 24 months or longer before reaching that age.
- (2) The claimant loses entitlement to weekly compensation on reaching that age.
- (3) Subclause (4) applies to a claimant who first becomes entitled to weekly compensation-
 - (a) less than 24 months before reaching New Zealand superannuation qualification age; or
 - (b) on or after reaching New Zealand superannuation qualification age.
- (4) The claimant is entitled to weekly compensation for 24 months from the date of entitlement to the compensation.
- (5) Nothing in this clause entitles a claimant to weekly compensation if the claimant is not otherwise entitled to it under this Act.

[30] In *Stewart*,¹ Collins J stated:

Purpose of Clause 52 ...

[26] In adopting this approach Parliament has endeavoured to manage the relationship between weekly compensation entitlements and New Zealand superannuation by providing for a limited degree of overlap between the two schemes. ...

...

“Has been entitled to it for 24 months or longer”

[34] The District Court Judge held that the words “has been entitled to it for 24 months or longer” in sub-cl 52(1)(6) of Schedule 1 of the Act meant that that respondent had to have been continuously receiving weekly compensation for 24 months before reaching 65 years of age.

[35] In interpreting the composite expression “has been entitled to it for 24 months or longer” I have again applied a contextual analysis and been guided by the relevant legislative history. This analysis has led me to the conclusion that sub-cl 52(1)(6) does not require that a person have continuously received weekly compensation for 24 months or more. Accordingly, the learned District Court Judge erred on this point.

¹ *Accident Compensation Corporation v Stewart* [2012] NZHC 772.

Context

[36] When viewed in context, the words “has been entitled to it for 24 months or longer” involve taking account of a past event. In the context of sub-cl 52(1) of Schedule 1 of the Act the past event is the date on which the claimant first became entitled to weekly compensation under sub-cl 52(1)(a). This approach is consistent with sub-cl 52(3) and (6) where it is clear that the triggering of entitlements to weekly compensation is defined temporally, namely:

- (1) between 12 and 24 months of turning 65 (Scenario 2); or
- (2) within 12 months before or after turning 65 (Scenario 3).

Legislative history

[37] The legislative history supports the conclusion I have reached.

[38] Section 52(2) of the Accident Rehabilitation and Compensation Insurance Act 1992 originally provided:

“Compensation for loss of earnings calculated under sections 40 to 42 of this Act shall not cease on account of age *unless it has been paid for a total of 24 months* from the commencement of incapacity to any person who first qualified for it after attaining an age within 24 months before the national superannuation qualification age or any greater age.”

(Emphasis added)

[39] It is noted in [20(4)] above, s 52 of the 1992 Act was short-lived. The amendments enacted in 1993 did not reproduce the formulation set out in [38] of this judgment. Parliament has not referred to weekly compensation being paid for a defined total period since the 1993 Amendments were enacted. In my assessment, this strongly indicates that Parliament did not intend when enacting cl 52 of Schedule 1 of the Act, or its antecedents from 1993 onwards, that a 24 month or longer continuous payment of weekly compensation be received by a claimant before their entitlement to that weekly compensation would cease after they reached 65.

[40] For these reasons, the District Court Judge should have upheld ACC’s earlier determination that sub-cl 52(1) and (2) applied to the respondent’s circumstances.

...

Conclusion

[49] For the reasons set out above I answer the questions of law posed by the District Court in the following way:

- (1) Whether cl 52(1) means that the appellant had to be receiving weekly compensation for 24 months or longer (or continuously) before reaching 65?

Answer: “No”. The respondent had to have first become entitled to weekly compensation more than 24 months before reaching 65. ...

Discussion

[31] The issue in the appeal is whether Mr Giddy is entitled to recent weekly compensation in relation to his left knee, or whether an earlier entitlement to weekly compensation in relation to his left knee precludes him from recent weekly compensation entitlement. The Corporation is liable to pay weekly compensation for loss of earnings to a claimant who has an incapacity resulting from a personal injury for which he has cover, and was an earner at the time he suffered the personal injury and immediately before his incapacity commenced.² However, a claimant loses entitlement to weekly compensation on reaching New Zealand superannuation qualification age, if the claimant first becomes entitled to weekly compensation before reaching New Zealand superannuation qualification age and has been entitled to it for 24 months or longer before reaching that age.³

[32] Ms Taylor, for Mr Giddy, submitted prior to the hearing as follows. Mr Giddy had no entitlement to weekly compensation for 24 months or more, prior to his incapacity which followed his surgery on 17 January 2022. Mr Giddy did not receive weekly compensation on his left knee injury claim at the time of the original surgery in February 2001. Weekly compensation was paid on his right knee injury claim, and it is accepted that one cannot receive payment of weekly compensation on two concurrent claims.

[33] Ms Taylor new submissions, not raised before the appeal hearing, were as follows. Mr Giddy was not entitled to weekly compensation following his surgery in February 2001 because he did not meet the requirement of being an earner with loss of earnings immediately before his incapacity for his left knee surgery commenced. From December 2000, Mr Giddy was in receipt of weekly compensation for incapacity due to injury to his right knee. If someone is already in receipt of weekly compensation for an injury on one claim, the person suffers no loss of earnings should there be a further injury on another claim.

[34] This Court acknowledges the above submissions. The Court accepts that, administratively, Mr Giddy's weekly compensation following his bilateral knee

² Section 103(1)-(2) and clause 32(1) of Schedule 1.

surgery in February 2001 was listed under his right knee injury claim. The Court also accepts that, prior to Mr Giddy's incapacity for this surgery, he was receiving weekly compensation for incapacity due to injury to his right knee. However, the Court refers to the following considerations.

[35] First, Mr Giddy's surgery in February 2001 related to both his left knee and his right knee, for both of which he had cover. Mr Giddy was granted cover for injuries to his left knee in 1974. The Corporation approved and provided funding for knee replacement surgery relating to Mr Giddy's left knee arising out of his covered accident of 1974.

[36] Second, the Corporation's Written Guidance Transcript of 20 December 2021, recorded that Mr Giddy was an earner at the time of his original injury to his left knee. Further, as was confirmed by the treating Orthopaedic Surgeon, Mr Hardy, Mr Giddy was unable to work because of his bilateral knee replacement surgery in February 2001. The Corporation paid Mr Giddy weekly compensation, from 9 February 2001 to 13 July 2001, due to incapacity as a result of the bilateral surgery (before returning to work). The Corporation thus clearly accepted that Mr Giddy had been an earner and, as a result of his bilateral knee surgery, faced loss of earnings. This Court is therefore satisfied that, resulting from Mr Giddy's surgery, he had an incapacity relating to his covered left knee injury, was an earner at the time he suffered the personal injury and immediately before his incapacity commenced, and so was *entitled to* loss of earnings in relation to his left knee injury. Compensation cannot be paid on two concurrent claims, and so, administratively, compensation was paid under the right knee claim. This fact did not, however, extinguish Mr Giddy's *entitlement to* weekly compensation in relation to his left knee injury.

[37] Third, clause 52(1)-(2) of Schedule 1 of the Act provides that a claimant loses entitlement to weekly compensation on reaching New Zealand superannuation qualification age if the claimant has been *entitled to* weekly compensation for 24 months or longer before reaching that age. The High Court has affirmed that this clause does not require that payment of weekly compensation be *received* by a claimant for 24 months or longer before the entitlement to that weekly compensation

³ Clause 52(1)-(2) of Schedule 1.

ceases after the claimant reaches 65. Instead, the clause covers the situation where the claimant first become *entitled to* weekly compensation more than 24 months before reaching 65.⁴ The High Court has also noted that the purpose of clause 52 was to reflect Parliament's endeavour to manage the relationship between weekly compensation entitlements and New Zealand superannuation by providing for a limited degree of overlap between the two schemes.⁵

[38] Fourth, Mr Giddy reached New Zealand superannuation qualification age on 18 June 2021, that is, well beyond 24 months after he first become *entitled to* weekly compensation on 9 February 2001. Mr Giddy therefore lost entitlement to weekly compensation on reaching New Zealand superannuation qualification age. Accordingly, he was not entitled to weekly compensation from the Corporation, for the period 21 November 2021 to 17 April 2022, consequential on his incapacity due to the left knee osteoarthritis and the replacement surgery he underwent in January 2022.

Conclusion

[39] In light of the above considerations, the Court finds that Mr Giddy is not entitled to weekly compensation following recent surgery to his left knee. This is because an earlier entitlement to weekly compensation for his left knee precludes him from weekly compensation entitlement following the recent surgery. The fact that Mr Giddy did not in fact receive earlier weekly compensation for his left knee, because he could not receive weekly compensation twice at the same time, does not denigrate from his earlier *entitlement to* receive this compensation. The Corporation therefore correctly declined Mr Giddy's request for weekly compensation for his left knee, on the basis that he had exceeded the period of entitlement at the time of reaching the New Zealand Superannuation qualifying age. This Court is satisfied, in the context of Mr Giddy's case, that the Corporation's decision accords with the purpose of the Act in providing only a *limited* degree of overlap between the Act's weekly compensation entitlement and the New Zealand superannuation scheme.

⁴ *Stewart*, above n 1, at [39] and [49].

⁵ *Stewart*, at [26].

[40] The decision of the Reviewer dated 18 July 2022 is therefore upheld. This appeal is dismissed.

[41] I make no order as to costs.

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

P R Spiller
District Court Judge

Solicitors for the Respondent: Young Hunter.