

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 71

ACR 175/21

UNDER THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 149 OF
THE ACCIDENT COMPENSATION ACT
BETWEEN NESHIA HOLDAWAY
Appellant
AND ACCIDENT COMPENSATION CORPORATION
Respondent

Hearing: On the papers

Appearances: The Appellant in person
Mr L Hawes-Gandar for the Respondent

Judgment: 10 May 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Costs on appeal; Part 14 District Court Rules 2014]**

[1] This was an appeal against a decision of the respondent dated 8 May 2020, calculating the appellant's weekly compensation rate.

[2] On 13 February 2023, the Corporation revoked its 8 May 2020 decision and reassessed the appellant's weekly compensation rate at a higher level.

[3] Although the appellant claims she did receive a copy of the Corporation's decision dated 13 February 2023, she was on the same day served with a copy of the respondent's submissions which clearly explained the effect of the Corporation's new decision and that it rendered the appeal moot.

[4] Counsel for the respondent also specifically advised the appellant by telephone and email of the jurisdictional issues and urged her to consider withdrawing the appeal and applying for a review of the Corporation's new decision if she was dissatisfied with it.

[5] On the date that had been set for the hearing, namely 22 March 2023, the appellant appeared, as did Ms Becroft on behalf of the respondent.

[6] I issued a brief judgment the same day, finding that what ACC had done in recalculating the appellant's shareholder's salary for the relevant year was relevant and proper in the light of the High Court decision in *ACC v Hamilton*.¹ I said:

Given what has occurred, I must find that ACC's decision of 3 February 2023 has rendered the present appeal moot.

As the appellant has fresh review and appeal rights relating to the new decision of ACC, the appropriate course is that the present appeal, now being redundant, is struck out.

[7] The appellant, at that time, advised the Court she would be seeking costs and duly filed a memorandum dated 12 April 2023 seeking costs of \$99,000. Her rationale for this was that she had spent total hours of "around 120", to which she applied her going rate of \$550 per hour and she said:

Given the conduct of the Corporation, the appellant submits that the costs be on a full indemnity basis. An uplift of 50 per cent is to be applied ... This equates to \$99,000.

[8] In the alternative, she has also calculated costs on a 2B basis and a 3C basis as per the Schedule to the District Courts Rules. She said:

The appellant has been a lawyer for over 21 years and is self-represented.

- (i) Costs on a 2B scale are \$23,016, an uplift of 50 per cent, if applied, equates to \$34,524.
- (ii) Costs on the 3C scale are \$54,412. An uplift of 50 per cent, if applied, equates to \$81,618.

[9] She then submits that if the category scale is to be applied, then 3C is the most appropriate scale reflecting the complexity of the appellant's case and commensurate with the

¹ *Accident Compensation Corporation v Hamilton* [2019] NZHC 3109.

appellant's experience in legal matters. However, the appellant maintains that full costs be awarded, given the Corporation's conduct in this matter.

[10] I find that the appellant was put on notice by respondent's Counsel on 13 February 2023 that the Corporation had issued a new decision in the appellant's favour, which rendered the appeal moot.

[11] As someone who has had 21 years experience in the law, it should have been very clear to the appellant that, given ACC's new decision, the appeal was in fact moot.

[12] In his memorandum on costs, Mr Hawes-Gandar, on behalf of the respondent, refers to *McGuire v Secretary for Justice*.² In that case the Supreme Court confirmed what it referred to as the "primary rule" that a self-represented litigant is not entitled to costs, as they have not incurred any costs in obtaining legal representation. The Court noted two exceptions to the primary rule, where the litigant is a person who is a practising lawyer. The other exception is not relevant in this case.

[13] Mr Hawes-Gandar notes that the appellant's practising certificate was suspended on 22 December 2022 and therefore she would only be eligible to claim costs in respect of steps taken prior to that date.

[14] Mr Hawes-Gandar notes that the parties attended only one case management conference on 8 November 2022. He also notes that that conference was required due to the appellant's failure to respond to and provide updates to the Court and Counsel.

[15] He also notes that the appellant did not file any case management memoranda, but signed two joint memoranda prepared by Counsel for the respondent.

[16] He submits therefore that if the appellant is entitled to costs, it would at most be appropriate to award her costs for 0.25 days for filing and serving one memorandum in anticipation of a judicial conference.

[17] He refers to a schedule of costs provided by the appellant.

² *McGuire v Secretary for Justice* [2018] NZSC 116.

[18] Items 1-8 in that schedule relate to matters pertaining to the review and, as Mr Hawes-Gandar submits, they are clearly outside the scope of costs relating to this appeal.

[19] As to items 9-11 and 20-23 in the appellant's schedule of costs, Mr Hawes-Gandar says:

There are double-ups and in some instances the references are to steps for judicial settlement conferences, rather than case management conferences.

[20] In that he is correct.

[21] As mentioned earlier, Mr Hawes-Gandar acknowledges that the appellant signed joint memoranda prepared by counsel for the respondent and that therefore, at most, an appropriate award of costs for this would be 0.25 of a day.

[22] Items 12-18 all relate to mediation and as Mr Hawes-Gandar submits, these too are outside of the scope of the appeal.

[23] Items 23-27 were:

- Drafting submissions and synopsis to Court;
- Preparing a bundle for hearing;
- Preparing for the hearing;
- Travelling to and attendance at the hearing;
- Drafting/filing memorandum of costs.

[24] As Mr Hawes-Gandar says, these all relate to steps taken by the appellant after her practising certificate had been suspended are therefore matters for which she cannot claim costs as per the District Court scale.

[25] That being so, the case of *ACC v Carey*³ is engaged. At paragraph 91 of her judgment, Justice Grice said:

If the Judge has been assisted by the non-lawyer representative in a straightforward case, it would, as a guideline, generally be appropriate to set a daily rate set at 50% of the daily lawyer rate based on category 1.

³ *Accident Compensation Corporation v Carey* [2021] NZHC 748

[26] In this regard, she is referring to the District Court Rules.

[27] In addition, Mr Hawes-Gandar quite fairly points out that the appellant would be entitled to a time allocation of 0.2 of a day for the filing of a notice of appeal, even though she has failed to claim this.

[28] This occurred in 2021 when the appellant held a practising certificate.

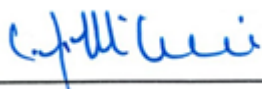
[29] Therefore, given that her appeal related to the calculation of weekly compensation, I find that for the purposes of schedule 4 of the District Court Rules, this was a category B matter.

[30] Accordingly, I find that the costs that the appellant is entitled to on this occasion is as follows:

(a) Filing notice of appeal	0.2 day (category 2 proceeding)	\$382.00
(b) Filing and serving memorandum for judicial conference	0.25 day (category 2)	\$477.50
Total		\$859.50

[31] Although Ms Holdaway came prepared to argue the appeal on 22 March 2023, her preparedness to do so was misconceived, given ACC's recalculation (in her favour) of her weekly compensation. This is particularly so, given the respondent's advice to her by telephone and email, appropriately urging her to consider withdrawing her appeal and applying for a review of the Corporation's new decision if she was not satisfied with it.

[32] Accordingly, for the above reasons, costs on this appeal of \$859.50 are awarded to the appellant.



CJ McGuire
District Court Judge