

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 159 ACR 109/22

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

Judgment: On the papers

Appearances: The Appellant is self-represented
 T Gee for the Respondent

Date of Judgment: 29 September 2023

**JUDGMENT OF JUDGE D L HENARE
[Jurisdiction]**

[1] The appellant, Marjan Hristovski resides in Macedonia.

[2] This is Mr Hristovski's fourth appeal relating to the same substantive matters as those set out in the judgments of his previous three appeals and application for leave to appeal to the High Court. All the proceedings challenged the correctness of the Corporation's decision of 27 July 2018 awarding Mr Hristovski lump sum compensation following a whole person impairment assessment (WPI) of 20%. All proceedings were dismissed.¹

¹ *Hristovski v Accident Compensation Corporation* [2022] NZACC 33; [2023] NZACC 15; and [2023] NZACC 100

[3] The issue of jurisdiction arises in the current appeal because a decision under review has not been identified. The reviewer dismissed the review application by decision dated 22 June 2022 for want of jurisdiction.

[4] This Court's Minute issued by email dated 7 July 2023 set out the position:

[1] By Minute dated 28 June 2023, the Court directed Mr Hristovski to send an email or other document to the Registry, Wellington, by 12 July 2023 stating the date of the decision of the Corporation against which he appeals.

[2] Mr Hristovski has complied with this direction noting the date of the Corporation's decision as 27 July 2018. The Court also notes this decision was in issue in Judge McGuire's judgment dated 10 March 2022 and also in issue in the judgment of Judge Spiller dismissing the leave to appeal application to the High Court dated 27 June 2023.

[3] Upon receiving the date of the decision being appealed, the Court directed that it would set further directions to the parties to file submissions which will be limited to a single issue, that is whether the Court has jurisdiction to determine the appeal.

[4] Directions are that:

- [i] Mr Hristovski will file his submissions, limited to the question of jurisdiction, on or before 11 August 2023;
- [ii] Mr Gee will file submissions, limited to the question of jurisdiction, on behalf of the Corporation on or before 15 September 2023;
- [iii] When all submissions have been filed the Court will determine the appeal on the papers.

Background

[5] The following background to the WPI Assessment is drawn from the judgment of Judge McGuire dated 2 February 2023.²

[6] In January 2018, Mr Hristovski applied for lump sum compensation due to permanent disability. The Corporation obtained an impairment assessment report from Dr Meads which concluded there was a 20% whole person impairment. On 27 July 2018, the Corporation issued a decision awarding lump sum compensation on the basis of Dr Meads' assessment of 20% whole person impairment.

² *Hristovski v Accident Compensation Corporation* [2023] NZACC 100 at [2]-[15] and [20]-[30]

[7] Mr Hristovski challenged the 20% assessment. His review application was dismissed in July 2019.

[8] In 2020, the Corporation declined to reconsider its 2018 decision, on the basis there was no evidence that the 2018 decision is wrong, and no evidence of any deterioration since the 2018 assessment.

[9] Mr Hristovski lodged a second review application, against that refusal. His review application was dismissed in November 2020. Mr Hristovski then filed a second appeal (ACR 270/20) against that refusal. In the course of the second appeal, Mr Hristovski filed further medical evidence showing that he had deteriorated since 2018. The Corporation agreed to reconsider his whole person impairment. A fresh assessment led to the conclusion that the 20% assessment should remain unchanged.

[10] On 17 February 2021, Mr Hristovski filed a third review application, identifying a decision dated 17 February 2021, relating to his impairment percentage. On 17 February 2022, the reviewer dismissed Mr Hristovski's review for lack of jurisdiction. The reviewer noted there was no Corporation decision issued in respect of the claim on 17 February 2021. The reviewer also noted the issue that he had raised have been previously dealt with in reviews in July 2019 and November 2020.

[11] On 10 March 2022, Judge McGuire delivered a judgment on Mr Hristovski's two appeals.³ His Honour noted that:

- (a) It appeared that ACR 321/19 was an appeal against the Corporation's decision of 27 July 2018 assessing a lump sum entitlement on the basis of 20% whole person impairment; and
- (b) ACR 270/20 was an appeal against the Corporation's refusal in 2020 to undertake reassessment of Mr Hristovski's whole person impairment.

[12] His Honour stated:

[28] On 23 August 2009 the appellant went to Shore Care Accident and Medical Centre in Milford, Auckland and obtained a letter of referral to a physiotherapist.

³ *Hristovski v Accident Compensation Corporation* [2022] NZACC 33.

[29] The report noted:

“Still in a lot of pain in Rt shoulder and elbow.

Prescribed codeine and paracetamol ...

O/E Rt shoulder, bruise anteriorly. Tenderness over ACJ.

Restricted movements due to pain.

Rt elbow/bruise over lateral epicondyle. Moderate swelling reduced ROM. Tenderness over lateral epicondyle.”

[30] As far as the challenge to the lump sum assessment is concerned Mr Gee refers to *Crouchman*,¹ where Judge McLean said that the courts will not interfere with or question an assessment made by a duly appointed assessor unless there is clear and compelling evidence that the assessment has been made incorrectly or that the AMA Guidelines have not been followed. This requires credible expert evidence directed at the specific aspects of the assessment which are said to be incorrect.

[31] Mr Gee submits that Dr Meads has plainly taken account of the information provided by Dr Obednikovski and concludes a 20% whole person impairment.

[32] Mr Gee submits that Dr Meads' assessment is correct as was stated by Judge McLean in *Crouchman*:

- It is not for the Court to form an opinion as to whether or not 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.
- 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.”

[13] Judge McGuire dismissed both appeals. Judge McGuire delivered his decision on 2 February 2023 dismissing the appeal for lack of jurisdiction. Judge Spiller dismissed the application for Leave to Appeal to the High Court on 27 June 2023.⁴

⁴ *Hristovski v Accident Compensation Corporation* [2023] NZACC 100

Case hearing

[14] At the case hearing of this appeal on 28 June 2023, the Court enquired of Mr Hristovski (through an interpreter) whether he had understood why it was the Court held in its recent judgments that there was a lack of jurisdiction to deal with the matters raised in each of his appeals. Mr Hristovski said he did understand the judgments in the English language. He said when he had difficulty understanding an English word, he had it translated.

[15] Mr Hristovski commented by first referring to his accident on 19 August 2009 when he visited McDonalds and slipped and fell to the floor and suffered injury to his right elbow and right shoulder. The Corporation granted cover for contusion (bruising) injuries to his right elbow area and sprain of right shoulder/upper arm.

[16] Mr Hristovski then referred to his current disabilities that prevented him from working, that the assessment previously made by the Corporation in respect to his injuries and impairment was too low, and that he needed more money to pay for medical care and to support his living in Macedonia.

Submissions of the parties

[17] Mr Hristovski sent his submissions in the English language in emails dated 17 – 19 July 2023. He forwarded further emails between 1 August 2023 and 22 August 2023.

[18] Mr Hristovski identified the Corporation's decision dated 27 July 2018 as the decision challenged in this appeal. He said he is unhappy with this decision because it does not give him the compensation he needs as an invalid for the rest of his life. He said he had to sell his house to pay for medical treatment from France and Switzerland. He attached documents from specialists which this Court observes were put in evidence in his previous appeals.

[19] Mr Gee submitted there is no jurisdiction to hear the appeal for reasons that:

- [a] an appeal can be brought only in relation to a specific decision of the Corporation;
- [b] the decision under appeal identified by Mr Hristovski, is dated 27 July 2018, and has already been upheld in the Court's judgment [2022] NZACC 33; and
- [c] since the substantive matters under appeal have already been addressed in previous appeals, issue estoppel applies.

The relevant law

[20] A claimant's right to appeal to the District Court under the Accident Compensation Act 2001 is limited to an appeal against a decision of the Corporation: Accident Compensation Act 2001 ss134(1)(a) and 149(1)(a); as ruled in *Rasmussen v ACC* which states:⁵

[7] This Court in a number of its decisions has clearly identified that the extent of its jurisdiction in appeals lodged pursuant to Section 152 of the Act, or pursuant to the comparable provisions of its predecessor and successor, can only be a jurisdiction to consider the correctness of the decision which was first made by the respondent, and it is only the scope of the primary decision which can be the subject of review and then appeal.

[21] The principles of *res judicata* and issue estoppel prevent reopening questions that have been decided by a Court with binding effect on the same parties. See *Shann v ACC*,⁶ quoting Tipping J in *Joseph Lynch Land Co v Lynch* [1995] 1 NZLR 37(CA):

[24] The principle of issue estoppel prevents reopening questions that have been decided by a Court with binding effect. A recent exposition is to be found in the judgment of the Court delivered by Tipping J in *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 40-41:

“The expression ‘res judicata’ means the matter has been adjudicated. The concept of res judicata is often applied to both cause of action estoppel and issue estoppel. Traditionally its use was confined to the former. Cause of action estoppel is different from issue estoppel which can arise where a plea of res judicata in the

⁵ *Rasmussen v ACC* [2004] NZACC 340 at [7]

⁶ *Shann v ACC* [2007] NZACC 171 at [24] per Judge Ongley.

strict sense is not open because the causes of action are not the same: see *16 Halsbury's Laws of England* (4th ed, reissue) (Estoppel) at para 977. Cause of action estoppel is more precise than issue estoppel. For there to be cause of action estoppel the cause of action sought to be estopped must be precisely the same as that upon which there has been an earlier adjudication.

Issue estoppel is concerned with the prior resolution of issues rather than causes of action. In the same paragraph of Halsbury as that referred to above, it is said that issue estoppel precludes a party from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. *Cross on Evidence* (4th NZ ed, 1989) by Mathieson discusses issue estoppel at para 12.8 on p 315. The learned author cites the judgment of Lord Denning MR in *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 2 All ER 4, 9:

‘ ... within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again.’

Discussion

[22] I accept Mr Gee’s submission that Mr Hristovski’s appeal must fail for three reasons, each of which is sufficient to determine the Court has no jurisdiction to hear it:

- [a] Mr Hristovski’s appeal is against the same decision (decision of 27 July 2018) whose correctness has already been determined by this Court. See decision [2022] NZACC 33 at [1], [64]. Accordingly, *res judicata* applies and there is no jurisdiction to hear the appeal.
- [b] The substance of Mr Hristovski’s appeal remains the same as in ACR321/19 and ACR270/20, namely that his lump sum assessment on the basis of 20% covered impairment is incorrect. That matter has already been decided: see decision [2022] NZACC 33 at [57], [60]. Issue estoppel applies. It cannot be raised again.
- [c] This appeal relitigates whether the Court has jurisdiction to rehear the substantive issue identified above. The Court has already determined that there is no such jurisdiction: [2023] NZACC 15 at [29]-[32].

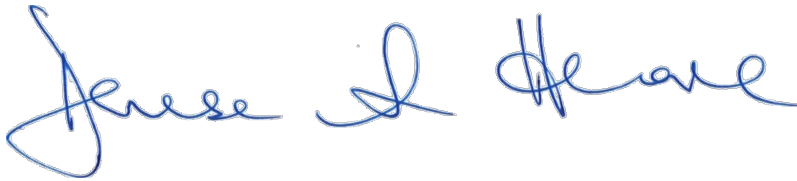
[23] Mr Hristovski's appeal must fail for lack of jurisdiction because the decision under appeal has already been determined to be correct, accordingly *res judicata* applies:

[a] the substance of Mr Hristovski's appeal has already been determined in ACR321/19 and ACR270/20, accordingly issue estoppel applies in relation to that substantive issue; and/or

[b] the question whether the Court has jurisdiction to rehear the same substantive matter has already been determined in [2023] NZACC 15. Therefore, issue estoppel applies in relation to that jurisdictional issue.

[24] Accordingly, this Court determines the appeal must fail for want of jurisdiction.

[25] The appeal is dismissed. There is no issue as to costs.



Judge D L Henare
District Court Judge

T Gee, Barrister, Lambton Chambers, Wellington for the respondent