IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 70 **ACR 52/22**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	JOSEPH JESSUP Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing:	On the papers
Appearances:	Applicant is self-represented S Bisley for the respondent
Judgment:	9 May 2023

JUDGMENT OF JUDGE D L HENARE
[Leave to Appeal to the High Court –
Section 162(1) Accident Compensation Act 2001]

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[1] This is an application for leave to appeal against a judgment of His Honour Judge P R Spiller delivered on 25 November 2022, dismissing an appeal against a review decision declining cover for occupational asthma.

Agreed facts

[2] Counsel filed an agreed statement of facts in the appeal as follows:

> …
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> 2. Mr Jessup was a safety and surface worker for the Royal New Zealand Air Force (RNZAF) for six years between 1980, when he was 17, until 1986.
>
> 3. Mr Jessup was involved in aircraft maintenance, specifically the stripping and repainting of aircraft. The paints and paint strippers used contained isocyanates.
>
> 4. Personal protective equipment was used and consisted of "off the shelf" items such as air purifying masks with charcoal cartridges, cotton or disposable overalls, rubber gloves and safety goggles.
>
> 5. The bulk of Mr Jessup's work time was spent on painting, paint removal or preparation tasks. No exposure limits were in place. When Mr Jessup was discharged from the RNZAF, he completed a medical discharge form and underwent a medical examination. In the discharge form, Mr Jessup answered "no" to questions asking whether he had suffered from any hoarseness or change of voice; persistent cough; chest pain or discomfort' or undue shortness of breath. The examining medical officer did not record any issue with asthma or breathing.
>
> 6. A colleague of Mr Jessup, Terry Austin, worked alongside him in the same facility. He was diagnosed with occupational asthma and removed from doing this work.
>
> 7. Mr Jessup was diagnosed with asthma around a year after leaving the Air Force.
>
> 8. It is accepted that Mr Jessup suffers from asthma.

9. Whether Mr Jessup suffered from shortness of breath while working for the Royal New Zealand Air Force, the timing of the onset of his asthma and whether he accurately described his medical history, the onset of his symptoms, and his condition to the various physicians who have given reports in this matter are contested facts.

District Court Judgment

[3] Judge Spiller incorporated the agreed facts into the background section of the judgment. Additionally, His Honour recorded in the background the medical evidence before him, and referred to Mr Jessup's evidence at review and statement in the appeal, together with the evidence of Mr Terry Austin who worked at the RNZAF from 3 June 1980 until 3 June 2000 as a safety and surface worker.

[4] Judge Spiller recorded the issues of fact and law in the case, having regard to the statement of agreed issues in the appeal. His Honour stated:

> The issue in this case is whether Mr Jessup has established on a balance of probabilities that that his condition is occupational asthma diagnosed as caused by isocyanate exposure. The key legal issue is what criteria trigger the operation of section 30(4) of the Act.

[5] Judge Spiller discussed the relevant statutory provisions being s30(3), clause 37 of Schedule 2, s30(4) and s 60 under the Accident Compensation Act 2001(the Act) and case law being the judgments of the Court of Appeal in *Estate of Priddle*,[1] the High Court in *Hastings*,[2] and the District Court in *Monk*.[3]

[6] His Honour held that:

> … However, it is well established in case-law that a claimant must prove, on the balance of probabilities, both requirements under section 30(3), that is, a Schedule 2 disease and workplace exposure. A mere assertion, or some evidence, that these two requirements are met, does not suffice.

[7] Judge Spiller considered whether Mr Jessup met the requirements of s 30(3), as a matter of fact. It was common ground that Mr Jessup had been exposed to isocyanates,

[1] *Estate of Priddle* v Accident Compensation Corporation (2007) 3 NZELC 98,558.
[2] *Hastings* v Accident Compensation Corporation [2019] NZHC 761.
[3] *Monk* v Accident Compensation Corporation [2021] NZACC 10.

so the issue was whether he could show on the balance of probabilities that he suffered from the relevant Schedule 2 condition: that is, "occupational asthma diagnosed as caused by isocyanates". If he could, section 30(4) would be engaged, and the Court would presume that his exposure caused the disease.

[8] The Court concluded that Mr Jessup did not suffer from occupational asthma because:

[a] His asthma did not develop until after his workplace exposure ended.[4]

[b] Medical professionals did not diagnose Mr Jessup as having asthma even as late as December 2013 and May 2014.[5]

[c] When Dr Prestage, a consultant occupational physician, saw Mr Jessup in October 2018, he concluded it was impossible to provide a definitive opinion whether Mr Jessup’s respiratory symptoms were caused by chemical exposures during his time with the RNZAF.

[d] Mr Jessup had not performed the tests for isocyanate exposure recommended by Dr Wong.

[e] Dr Monigatti's evidence was that Mr Jessup's symptoms were inconsistent with occupational asthma, because he had no symptoms “suggestive of asthma during his time in the NZRAF”.[6]

[9] In the light of these findings of fact, His Honour concluded Mr Jessup "has not proved on the balance of probabilities that he suffers from a Schedule 2 disease, being occupational asthma diagnosed as caused by isocyanates".

Relevant Law

[10] Section 162(1) of the Accident Compensation Act 2001(the Act) provides:

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4 At [36].
5 At [38].
6 At [41].

A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District court, appeal to the High Court.

[11] In *O'Neill*,[7] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
>
> (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment …;
>
> (ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;
>
> (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed …;
>
> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;
>
> (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision …;
>
> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .
>
> [25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law.

Application for Leave to Appeal

[12] Mr Jessup did not pose questions of law. He advanced two grounds for the application for leave that:

[f] The review decision was incorrect for reasons related to the Reviewer's treatment of the evidence: and

[g] Judge Spiller's judgment was incorrect because Mr Jessups' counsel did not advance evidence directed at material issues, and other largely factual

7 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

respects were not presented, and therefore needed to be properly explained, discussed and considered.

Case for the applicant

[13] Mr Jessup was represented in the District Court by counsel. The argument put by counsel was recorded by Judge Spiller:[8]

> Mr Schmidt, for Mr Jessup, submits as follows. Section 30(4) of the Act is triggered by a claim being filed for cover for a Schedule 2 disease by the claimant's GP, as occurred with Mr Jessup. In filing the claim, the GP must diagnose a Schedule 2 disease and record that the claimant was exposed to a substance listed in Schedule 2 through his or her work. The filing of the claim in this manner creates a presumption of cover. It is both illogical and pointless to assert that claimants can only enjoy the benefit of the evidential presumption provided by s 30(4) after they have proven that work caused their disease. Such an approach makes Schedule 2, the s 30(4) presumption and section 60 pointless. Mr Schmidt also points, in support of Mr Jessup's claim, to the report of Dr McBride, Occupational Medicine Specialist.

[14] Mr Jessup 's submissions in support of his application for leave are that:

(a) His counsel failed to identify the key legal issue-the diagnosis and failed to argue the correct interpretation of Dr McBride's evidence and failed to identify the Corporation's undisclosed material documents likely to affect the case and failed to address the errors in evidence.

(b) Judge Spiller should have identified, considered and commented on all the deficiencies of law and natural justice in the Review decision.

(c) There is need to clarify the legal issues and natural justice issues to ensure the Accident Compensation Act 2001 is correctly applied now and for the future.

(d) Judge Spiller was wrong for failing to consider the inconsistencies and inaccuracies in the medical evidence and failed to consider other parts of the medical evidence before him.

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[8] At [33].

(e) Judge Spiller was wrong to consider only s30(3) and 30 (4) of the Act when the claim was made under s30 of the Act.

(f) In considering the threshold of balance of probabilities, Judge Spiller failed to consider the extent of isocyanate exposure, the number of workplace exposures, the extended duration, the gradual nature of the disease sensitisation process, or long-term health in the process which are included factors likely to increase the likelihood of work-related occupational asthma.

Discussion

[15] The first ground in the leave application relating to the review decision is misdirected. The review decision is overtaken by Judge Spiller's judgment. The hearing of an appeal in the District Court is a rehearing under s155(2) of the Act. A rehearing must be, as the word implies, a hearing based on the relevant material already filed, together with any new evidence adduced at appeal. Simply, the Court is able to come to a view afresh on the available evidence before it.

[16] There is no doubt Mr Jessup disagrees with the presentation of the case submitted by counsel on his behalf at appeal. The parties filed a statement of agreed facts and noted there were contested facts on appeal. His Honour set out a comprehensive factual background as he found it to be and identified the key factual and legal issues arising which he then analysed and determined.

[17] His Honour addressed the applicable law finding correctly under s30(4) that personal injury of a type described in subsection (3) does not require an assessment of causation under s 30(1) (b)-(c) of the Act.

[18] His Honour addressed the effect of s 60 noting the Corporation may decline a claim for a work-related personal injury of a kind described in s30(3), only if the Corporation establishes that the person suffering from a personal injury of a kind in Schedule 2, or the person's personal injury has a cause other than his or her employment. His Honour took into account the relevant case law that a claimant must prove two requirements under s30(3) that is, a schedule 2 disease and workplace

exposure. There is no question of law arising from His Honour's consideration and interpretation of the relevant law, both the statutory provisions that relevantly apply and the case law he considered.

[19] The Court noted while Mr Jessup met the second requirement of workplace exposure to isocyanates, there was need to prove the first requirement, that he suffers from a Schedule 2 disease, being occupational asthma diagnosed as caused by isocyanates. It was not enough to point to the fact that Mr Jessup has asthma and he has been exposed to isocyanates.

[20] Mr Jessup argues that Judge Spiller's reasoning and conclusions on the medical reports, particularly Dr McBride, Mr Stegehuis, Dr Timming and Dr Prestage and Dr Monigatti were incorrect and therefore his findings were reached in error. It was open to His Honour to make the findings he did, and the weight he placed on it, as part of a multi-factorial assessment, was a question for him. His Honour was entitled to find on the preponderance of the available evidence that Mr Jessup had not established on a balance of probabilities that he is entitled to cover for occupational asthma. No question of law arises.

[21] Mr Jessup submitted there was a breach of natural justice in that certain material which he identified should have been disclosed by the Corporation to the Court. Mr Bisley submitted that some of that identified information was before the Court. It is the case that Mr Jessup was legally represented. Mr Jessup's counsel had the opportunity to place whatever information he determined before the Court if he wished to do so. This Court can discern no breach of natural justice.

[22] Mr Jessup submitted if the leave to appeal application is successful, he will provide the High Court with "a number of relevant peer-reviewed medical research articles put into context and properly explained by a suitable medical expert". In my opinion, this submission demonstrates the central flaw in the leave application that Mr Jessup does not wish to appeal a point of law. Rather, Mr Jessup wishes to have the opportunity to restate his case by conducting a wide-ranging re-assessment of the factual basis of the claim. This is outside the scope of s162 of the Act. No question of law arises.

[23] Finally, Mr Jessup alleges that Judge Spiller showed bias towards the Corporation by accepting unsubstantiated statements. This Court agrees with Mr Bisley that such allegation is serious and should be supported by evidence. However, there is no evidence to support this allegation. For this reason, the allegation is without foundation and is unsustainable.

Decision

[24] "The contended point of law must be quite capable of bona fide and serious argument"[9] to qualify for the granting of leave.

[25] The application for leave seeks to challenge the factual findings of Judge Spiller that Mr Jessup is not entitled to cover for occupational asthma as a work-related gradual process injury.

[26] There is no tenable basis for the exercise of any discretion to grant leave to appeal to the High Court. This Court concludes it has not been established that Judge Spiller made an error of law capable of bona fide and serious argument.

[27] No questions of law arise and the application for leave is accordingly dismissed.

[28] I make no order as to costs.

Judge D L Henare
District Court Judge

Sebastian Bisley, Barrister, Wellington, for the Respondent

9 *Impact Manufacturing*, Doogue J, HC Wellington, AP 266/00, July 2001.