IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 183 **ACR 142/22**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL TO THE HIGH COURT PURSUANT TO SECTION 162 OF THE ACT
BETWEEN	MICHAEL JONES Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Appearances: A Crabb for the Applicant
F Becroft for the Respondent

Judgment: 13 November 2023

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

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[1] Michael Jones, the applicant in this proceeding, seeks leave to appeal to the High Court on a question of law arising out of a judgment delivered by His Honour Judge PR Spiller dated 25 July 2023.[1]

[2] Judge Spiller determined Mr Jones had not established his 2017 claim for payment of backdated weekly compensation for the period from 28 May 1990 to 23 May 2008. For this reason, His Honour held the Corporation correctly declined the claim which was upheld at review.

[3] Judge Spiller set out a comprehensive factual background in his decision at [2]-[34]. This Court summarises some of that background.

The 2017 claim

[4] Judge Spiller noted cover for sinusitis was granted in May 1993 related to the 1976 accident. The 2017 claim was for entitlement to weekly compensation.

[5] Mr Jones sought retrospective medical certification of incapacity from his GP for discrete periods from 2 July 1995 to 20 September 2007. Mr Jones explained:

> Rationale: Each admission for sinusitis conservatively would have been the result of 2 weeks of incapacity prior to admission and 2 weeks post admission. Surgical admissions would require 4 weeks of recuperation.
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> The hospital notes are indicative of serious and continual poor health due to sinus disease which has been accepted by ACC as Personal Injury by Accident. Given this fact, the dates claimed are very conservative.

[6] A Medical Certificate dated 28 February 2017 was prepared by Dr Hefford, which certified Mr Jones unfit to work for a total of 280 days from 2 July 1995 over 22 years.

[7] Dr Scott, Branch Medical Advisor, and Ms Floreskova, Technical Specialist Manager noted the claim was supported by a brief summary and not by contemporaneous medical notes or reports. Notwithstanding, the Corporation agreed Mr Jones was incapacitated during five discreet periods between 16 June 1998 and 20 September 2007 and that he might (subject to satisfying all of the statutory criteria) be entitled to weekly compensation. The five periods were.

(a) 16/6/1998 - 18/8/1998
(b) 2/7/1999 - 29/7/1999
(c) 5/4/2004 - 2/5/2004
(d) 11/8/2004 - 8/9/2004
(e) 3/8/2007 - 20/9/2007

[8] Having accepted incapacity for these periods, the Corporation then considered whether Mr Jones was an earner at the relevant times. The Corporation found he was in employment only during the fifth period of subsequent incapacity beginning 3 August 2007. Abated weekly compensation was paid for the period August/September 2007. He was therefore not entitled to weekly compensation for the other four periods.

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1 *M Jones v Accident Compensation Corporation* [2023] NZACC 117.

[9] Dr Hefford completed another medical certificate dated 11 September 2017; this time certifying Mr Jones unfit to work for 6570 days from 28 May 1990 to 23 May 2008. The certificate listed in the 'complication' section: "ERC for gaps between WINZ and ACC"

[10] The Corporation's internal Weekly Compensation Panel met on 12 September 2017 and considered the Corporation was prejudiced in determining, whether there had been a loss of earning capacity due to a covered injury and what level of entitlement might be payable. The Panel recommended rejecting the claim due to prejudice but noted that it could be considered again if further financial and contemporaneous medical information were provided.

[11] The Corporation sought further information from Mr Jones but did not receive any.

The Corporation's Decision

[12] By decision dated 20 November 2017, the Corporation declined the application for weekly compensation, noting that if the requested information was provided, the Corporation might be able to reassess the claim for backdated weekly compensation.

[13] On 1 December 2017, Dr Hefford wrote to the Corporation advising he could only provide limited information about treatment for sinusitis given the scope of the claim.

[14] A review application was filed in December 2017.

The Review Process

[15] Mr Jones' then advocate, Mr Darke submitted:

(a) Mr Jones was seeking weekly compensation for the full 6000+ days, less any previously paid periods or times he was in full-time employment.

(b) He had suffered an assault in 1976 which had caused a deviated septum which stopped his sinuses from aerating properly.

(c) He was incapacitated by severe sinus problems including severe infections, as well as associated treatments such as surgery and antibiotics that caused other health issues such as gastrointestinal problems.

(d) He had received earnings-related compensation previously in relation to his pre-injury work for PrintPac.

(e) The injury affected his ability to work because:

> The ongoing malaise from constant infections, headaches, and the psychological problems associated with a chronic ongoing illness as a result of the serious assault he suffered in 1976 which essentially was a head injury which has its own issues meant that his ability to work in any capacity was severely compromised. In the workplace specifically, he could not handle interpersonal relationships in the workplace, made errors and mistakes, and was often too sick to work. Chronic illness made him irritable and depressed and this is well documented both by ACC and in medical notes. He could not consistently work effectively in any capacity. There is no evidence of [any] such preinjury issues [sic].

[16] Counsel for the Corporation wrote to Mr Darke on 18 December 2018 detailing the evidential gaps relating to the claimed periods, both in terms of medical and employment records. A timeline was provided which specified the kind of information needed to support the claim.

[17] Mr Darke subsequently obtained records from the Ministry of Social Development which, in an email dated 12 March 2019, listed the periods between 28/5/1990 - 16/5/2011 that Mr Jones was on an unemployment or sickness benefit.

[18] In an email dated 3 April 2019 Mr Jones stated that his changing careers over the years suggested a 'soldiering on' approach to work despite his injuries. He filed an affidavit dated 4 January 2020, the particulars of which are set out at paragraph [22] of Judge Spiller's decision.

[19] The parties subsequently agreed to a referral to a specialist in occupational medicine to comment on the periods of claimed incapacity. At the same time, the Corporation considered a claim for cover for mental consequences of injury.

[20] On 20 July 2021 cover was granted for phobic disorders on the 1976 claim.

[21] On 2 September 2021 Mr Jones sent an email describing his pre-injury work as a Sheet Metal Worker for Bruce Wallace Ltd:

> The tasks would have included the measuring and cutting of sheet metal such as galvanized plate to plans for the fabrication of various items. Machinery would have been used for folding the material. Some welding would have been involved and I was hospitalized for zinc poisoning while welding in a confined area. The dusty and polluted workplace would certainly not have been a good environment for someone with sinus problems. There would have been some heavy lifting involved as the sheets of metal are quite heavy.

[22] In January 2022, the parties agreed a referral to Dr Hilliard, Specialist Occupational Physician who assessed Mr Jones on 1 February 2022 and provided a comprehensive report. He concluded the only times Mr Jones would have been unable to work during the long period in question would have been during brief admissions to hospital and for a few days after discharge whilst convalescing. Certain extracts of his report were set out in full by Judge Spiller at [29] and [30].

[23] Subsequently, a review decision on 29 July 2022 dismissed the review application finding the evidence did not support incapacity for the period in question. An appeal was filed.

Judge Spiller's Decision

[24] Judge Spiller set out the tests for incapacity across the various operative Acts, and the case law outlining the relevant principles applying to backdated weekly compensation, including the High Court's decision in *Tonner*.[2]

[25] Judge Spiller then went on to identify what Mr Jones must establish to succeed in his claim:

> [44] In order to be entitled to weekly compensation, Mr Jones must show that his covered injuries prevented him from undertaking his employment. In respect to the period up to 30 June 1992, the Accident Compensation Act 1982 required Mr Jones to show that he suffered a loss of earning capacity. For the period after 1 July 1992 legislation has required Mr Jones to show that he was unable to undertake his preinjury employment due to his covered injuries.
>
> [45] Because Mr Jones' claim is for retrospective weekly compensation, the onus is on him to establish a clear picture, with strong and supporting medical evidence, of continuing incapacity over the relevant period. Retrospective medical certificates, Mr Jones' personal affirmation of incapacity, and his claim of stoicism ("soldiering on") in the face of his condition, will be treated with caution. '

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2 *Tonner v Accident Compensation Corporation* [2019] NZHC 1400.

[26] Judge Spiller referred to Mr Jones' submissions, finding the evidence before him did not support the claimed incapacity having regard to the considerations that:

(a) The evidence did not establish a clear picture, with strong and supporting medical evidence of continuing incapacity over the lengthy period in question.

(b) The Corporation had afforded time to Mr Jones to provide relevant evidence to support his claim and also provided assistance in obtaining a specialist report.

(c) Dr Hilliard's report is thorough and comprehensive and is not contradicted by any subsequent medical report.

[27] Judge Spiller determined Mr Jones had not provided convincing evidence to challenge the Corporation's findings. His Honour noted he was required to assess the claim in light of the law and the available evidence, and he concluded:

> [54] In light of these considerations, the Court finds that Mr Jones has not, on a balance of probabilities, established his claim for payment of backdated weekly compensation for the period 28 May 1990 to 23 May 2008; and that the Corporation correctly declined his claim for this payment.

The grounds of appeal

[28] Mr Crabb submits the Court's decision is wrong in law and the following grounds of appeal arise:

(a) Point of Law 1 - Governing Legislation - the District Court wrongly held that Mr Jones' claim fell to be considered under the Accident Compensation Act 2001 ("the 2001 Act") and/or did it fail to provide adequate reasons for so holding?

(b) Point of Law 2 - Burden of Proof- did the District Court err in law by applying an excessive evidential burden required for retrospective historical claims for weekly compensation?

(c) Point of Law 3 - Statutory test - did the District Court correctly assess Mr Jones' claim against the legal test found under either the 1982 or the 2001 Accident Compensation Act?

(d) Point of Law 4 - Approach on Appeal - as the appeals before the District Court are by way of rehearing, did the Court assess all the evidence before it and reach its own conclusions afresh?

(e) Point of Law 5 - Breaches of Natural Justice - did the Court breach Mr Jones' right to natural justice by adopting an improper procedure?"

Discussion

[29] Section 162 of the Accident Compensation Act 2001 provides that an applicant is entitled to appeal to the High Court on a question of law. Importantly, the question of law must be capable of bona fide and serious argument.[3] Care must also be taken not to allow issues of fact to be dressed up as questions of law.[4]

[30] The appeal concerns the 2017 claim for payment of backdated weekly compensation for the period 28 May 1990 to 23 May 2008.

[31] The background set out at length in the decision was comprehensive and covered the period of the retrospective claim. This Court observes that in his submissions, Mr Crabb did not traverse this background.

[32] I turn to consider the grounds of appeal which this Court finds do not support the leave application for reasons that follow.

Point of Law 1 - Correct Legislation

[33] Mr Crabb submits Judge Spiller did not consider the tests under relevant Acts relating to incapacity. Mr Crabb also submits there was an absence of analysis of the evidence on the one hand and the Court's reliance on the report of Dr Hilliard on the other.

[34] His Honour correctly noted this was a retrospective claim lodged in 2017 under the Accident Compensation Act 2001 for incapacity in the period from 1990 to 2008, during

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3 *Impact Manufacturing Ltd v Accident Rehabilitation& Compensation Insurance Corporation* Wellington High Court, 6/7/2001, AP 266/00, Doogue J at [4]-[9].

4 *Northland Co-operative Dairy Co Ltd v Rapana* [1999] NZCA 361.

which four Acts operated. His Honour referred to the requirements of the 1982 Act and the almost identical requirements of the 1992, the 1998 and 2001 Acts.

[35] The operation of legislation does not occur in an evidential vacuum.

[36] His Honour set out the factual background. He noted there was a brief period when abated weekly compensation was paid and a period when a prior District Court judgment dismissed a claim to weekly compensation.

[37] His Honour referred to Mr Jones' own evidence of his incapacity which sought to fill the gaps in the evidential picture, the retrospective medical certificates, and the GP opinion that only limited assistance could be provided. His Honour noted the requests from the Corporation for information of the kind sufficient to support the claim were not provided, and the parties' agreement to obtain a report from a specialist in occupational medicine. His Honour noted Dr Hilliard's conclusions. His Honour was not satisfied the evidence was sufficient to support the retrospective claim. The Court was entitled to consider the weight to be given to all the available evidence.

Point of Law 2 - Burden of Proof

[38] Mr Crabb submitted Judge Spiller misapplied the authorities from the High Court regarding the evidential burden required to support retrospective historical claims for weekly compensation. Mr Crabb submitted His Honour imposed an excessive burden which was inconsistent with the Court of Appeal's findings in *Terry*.[5]

[39] This Court accepts the submission of Ms Becroft. His Honour set out the relevant case law including the cases of *Jamieson*, *Scott*, *Bell* and *Tonner* which represent the settled and consistent body of authorities in regard to retrospective claims. Whilst the cases can be distinguished on the facts, principles apply. Judge Spiller noted the well-established principle in this jurisdiction in respect to retrospective claims to incapacity, that there must be a clear picture of incapacity for the claimed period. More than retrospective medical certification is required. The Court considers contemporaneous medical evidence assisted by retrospective assessments of medical specialists or careful specialist opinion.

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5 *Accident Compensation Corporation v Terry* [2018] NZCA 585.

[40] His Honour correctly identified Mr Jones had to establish his retrospective claim by providing a clear picture of strong and supporting medical evidence of continuing incapacity over the relevant period. Consistent with the principles in *Tonner,* retrospective medical certificates, Mr Jones' own evidence and the fact that he soldiered on are all factors to be treated with caution.

[41] Nevertheless, His Honour considered Mr Jones' own views in regard to his inability to work, and his prior work history.

[42] Judge Spiller considered the claim on its merits and circumstances on the evidence before him, and determined on that evidence, there was insufficient basis to accept the retrospective incapacity claimed.

Point of Law 3 - the Statutory Tests

[43] Mr Crabb submits His Honour failed to use the correct test for incapacity. This point revisits the first point of law. Notwithstanding, in response to the various points raised:

(a) His Honour accepted Mr Jones was claiming an incapacity throughout the period from 1990 to 2008.

(b) His Honour acknowledged there are differing tests for incapacity across the various Acts that operated over the period in question. However, consistent with the case law cited, a retrospective claim to weekly compensation does not require a focus on each of the tests for incapacity in an evidential vacuum. This Court agrees with Ms Becroft, a more general analysis starts with an enquiry of the nature of the evidence. In *Tonner,* also a case traversing various Acts and where special leave was declined, Muir J stated:

> ... I am, having regard to all evidence referred to, unable to say that Powell DCJ's factual conclusion, that Mr Tonner was not continuously incapacitated following the accident", was so seriously awry as to invite intervention by this Court. To the contrary, it was, as Christiansen DCJ held, a conclusion clearly available on the material before him. The fact that Dr Walls was driven to make what he described as an "entirely arbitrary assessment" of disability confirms that conclusion and ultimately, therefore, why the Corporation was justified in rejecting the assessment.

(c) The High Court also noted, in response to arguments for Mr Tonner around the absence of an assessment that went into the mechanics of the claimant's pre-injury employment in a detailed way:

> Whatever assessment was undertaken or which now, 22 years later, may be made, I agree with Ms Becroft that Mr Tonner's case would still face exactly the same stumbling block that it did at the point earner related claims were declined because, as the District Court found, the contemporary evidence did not adequately establish incapacity. '

[44] Mr Crabb submits Judge Spiller was wrong to rely on Dr Hilliard's evidence alone. This Court finds His Honour considered the evidence available before him. There was no sole reliance on the specialist report. What can be said is the paucity of relevant evidence required to support the retrospective claim.

Point of Law 4 - Approach on Appeal

[45] Mr Crabb submits Judge Spiller relied on one paragraph in Dr Hilliard's report regarding sheet metal work which does not provide an adequate evidential foundation for the Court's finding against the claim. It is clear from the decision that all of the evidence in the appeal, set out in detail in the background section of the judgment together with His Honour's summary of the evidence for Mr Jones, and Dr Hilliard's evidence were considered in the appeal.

Point of Law 5 - Breach of Natural Justice

[46] Mr Crabb submits there was a breach of natural justice because an adjournment was not granted to Mr Jones in circumstances where he was still seeking additional cover for mental consequences/mental injuries in relation to his claim.

[47] This ground does not amount to any error of law in the judgment.

[48] There is no breach of natural justice. His Honour recorded Mr Jones wanted the referral to specialist assessment to proceed even though he was independently seeking additional cover from the Corporation for mental consequences/mental injury.

[49] The issue in the appeal concerned a claim to entitlement to backdated weekly compensation with reference to the covered injuries. A claim to entitlements does not lie

unless there are covered injuries. Mr Jones has the right to pursue a claim for cover for any other injury and if a further covered injury is granted, then a claim can be made for entitlements.

Decision

[50] This Court finds the leave application does not contain any seriously arguable questions of law. His Honour considered the appropriate legislation, the relevant case law regarding retrospective claims, the evidence available, and the evidence required to establish an entitlement to weekly compensation.

[51] Judge Spiller determined there was insufficient evidence to support the 18 year period of weekly compensation claimed. That decision was open to the Court on the facts; therefore, no question of law arises.

[52] Accordingly, the application for leave is dismissed. There is no issue as to costs.

DL Henare
District Court Judge