

**PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE
IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE
APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE
APPELLANT**

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 177 ACR 232/22

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

Hearing:	18 September 2023
Heard at:	Wellington/Whanganui-a-Tara
Appearances:	The Appellant in person (via AVL) Ms F Becroft for the Respondent
Judgment:	30 October 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Weekly Compensation – s 36, Accident Compensation Act 2001]**

[1] At issue in this appeal is a decision by the respondent dated 12 September 2022 declining an application for weekly compensation on the basis that the appellant was not an earner at the date of injury.

Background

[2] The appellant brought an earlier appeal against the respondent and this Court made a decision in a judgment dated 27 April 2022.¹ That decision determined the appellant was entitled to cover for mental injuries suffered as a result of sexual abuse. The abuse occurred in 2014 when the appellant was working as a health professional. She resigned her position in late 2014 and left New Zealand to reside permanently in Australia in early 2015.

[3] On 22 May 2022, the Corporation confirmed cover for post traumatic stress disorder and major depressive disorder. The injury date provided in the cover confirmation letter was 8 March 2014, the accident date referred to in the original ACC claim form filed in March 2019.

[4] Following the appeal, the appellant sought various costs, including costs that related to potential entitlements under the Accident Compensation Act. She also claimed weekly compensation.

[5] The application for weekly compensation led the Corporation to reconsider the appellant's date of injury. The date on which a person is to be regarded as suffering mental injury is dealt with in s 36 of the Accident Compensation Act. Section 36(1) of the Act and requires the Corporation to identify the date that the appellant first sought treatment for her mental injury.

[6] The file was reviewed by both a psychology advisor and technical specialist and the Corporation then issued its decision on 23 May 2022, determining that the date of injury was 26 May 2015, this being the first available date at which there was confirmation that the appellant received treatment for her covered injuries. The treatment, in this case, was provided by psychologist, Ms Polymeneas.

[7] The appellant challenged that decision and subsequently sought to rely on GP notes which confirmed that she sought treatment relating to tension headaches and

¹ KC v Accident Compensation Corporation [2022] NZACC 67.

migraines in June and July 2014. The appellant suggested that these headaches were a function of her covered mental injuries.

[8] On 20 May 2022, the Corporation wrote to the appellant explaining how it arrived at the date of injury and also indicated that s 128 of the Accident Compensation Act prevented the Corporation from providing funding for rehabilitation to a claimant overseas.

[9] On 20 May 2022, the Corporation issued three decisions declining various social rehabilitation applications on the basis that the Corporation was unable to pay for rehabilitation costs incurred outside of New Zealand.

[10] On 15 June 2022, the appellant applied to review the respondent's entitlement decisions.

[11] The respondent subsequently sought internal advice from Dr Thakurdas, medical advisor, in regard to cover for migraine/tension headaches. Dr Thakurdas concluded that the symptoms were non-specific and multi-factorial rather than injury diagnoses per se.

[12] On the basis of Dr Thakurdas' advice, the Corporation issued a decision on 1 August 2022 declining additional cover for migraines and tension headaches. The decision letter read:

Following a review of the available information by our medical advisors, it has been determined that there is insufficient evidence to support for migraines and/or tension headaches for cover.

ACC is able to reconsider the request for cover of migraines and tension headaches should further information become available.

[13] The appellant applied for a review of that decision.

[14] The Corporation's decision regarding date of injury, cover and entitlements, were all upheld at review and subsequently on appeal.

[15] In respect of the present appeal, on 12 September 2022, the Corporation declined weekly compensation on the basis that the appellant was not an earner at the date of injury. The decision letter said:

In order to be eligible for weekly compensation, you must be considered an “earner” at your date of accident. To be considered an “earner” you need to be working and earning income in New Zealand. Based on the information we have, you were not working and earning income in New Zealand at the date of accident of 26/5/2015 and are therefore not eligible for weekly compensation.

[16] A review application followed and on 13 December 2022, the reviewer, Mr Edy, dismissed the review application, determining that the appellant was not an earner at the date of injury.

[17] The appellant then appealed to this Court.

Appellant’s Submissions

[18] The appellant referred to her submission entitled “Submission High Court 2” detailing her personal history with her male partner, who became sexually abusive towards her from July 2014. She resigned from her work role in February 2015 and left New Zealand.

[19] She told the Court of her efforts to deal with the abuse, including contacting the police. She said that as at the time she left New Zealand, at the end of March 2015, she was finding it very difficult to accept what had happened to her, both as a doctor and a woman.

[20] She believes that the date of her accident/injury/entitlements should be a date in 2014 when she was working full time with her health provider employer.

[21] She notes that in the Oxford Handbook of Clinical Medicine, tension headaches and/or migraines can occur at the early onset of post traumatic stress disorder, or generalised anxiety disorder, or depression/major depressive disorder. She refers to the definition of “mental injury” in s 27, which is defined as meaning:

A clinically significant behavioural, cognitive or psychological disfunction.

[22] She refers to a consultation she had with Dr Al-Beers at the East Tamaki Healthcare surgery on 22 July 2014. Her presenting complaints were migraine headaches and diarrhoea.

[23] In a further consultation on 2 August 2014, it is noted that the diarrhoea had stopped.

[24] The clinical note records:

Migraine started three months ago, it comes one/week lasts for one day, associated with nausea, prefers dark room, it is usually in the morning, wake her up from sleep.

[25] The appellant said she also received unexpected treatment in August 2014 for a mental injury, tension/stress headaches from Dr Page of Vermont Street Specialists as a result of a workplace anaesthesia referral.

[26] The appellant's referral to Dr Page was initiated by Dr Bradfield, clinical director, anaesthesia, and dated 7 August 2014. In the course of assessment of the appellant, Dr Page spoke to Dr Bradfield more than once.

[27] Dr Page's report of 10 September 2014 concludes:

DSM 5

From the information available, (the appellant) does not currently meet criteria for any DSM5 diagnosis. Although the concern from the Police may have been whether she was paranoid or had other psychotic symptoms, the story presented by (the appellant), and supported by her mother, has plausibility and must be interpreted within cultural constructs.

(The appellant's) supervisors and colleagues have noticed subtle changes in her behaviour, as well as a reduction in her level of functioning in recent months. It is not clear if this is entirely due to the stress caused by the marital problems, and (the appellant's) cultural beliefs and personality. It is possible that (the appellant) may have undisclosed symptoms and a psychotic process cannot be ruled out.

Recommendation

Although there is no apparent health condition, there are significant concerns about (the appellant's) work competence. I recommend that (the appellant) continues to work only under close supervision and that regular updates about her progress be obtained from Dr Bradfield. Further psychiatric assessment could be sought as appropriate.

[28] The appellant confirms that her performance in her chosen area of work was affected.

[29] The appellant submits that tension headaches and migraines can occur with depression and psychotic symptoms. In her case, she submits they were brought on by harmful criminal events that she was the victim of in 2014, (the subject of her earlier successful appeal).²

[30] The appellant said that prior to 2014, she had never had the “galaxy” of medical problems she experienced during that year.

[31] Produced to the Court was a copy of letter from Dr Chisholm on behalf of her employer dated 3 December 2014. The copy produced was barely decipherable. It speaks of an application by the appellant for retrospective and prospective approval of interrupted training until 19 January 2015. And reference is made to her not having being present at work “due to a combination of sick and annual leave (over 10 weeks)”.

[32] The letter supports the appellant’s application.

[33] The appellant says that prior to this, she had passed all her exams.

[34] She therefore submits that by December 2014, she was experiencing a clinically significant behavioural, cognitive or psychological disfunction as s 27 requires.

Respondent’s Submissions

[35] Ms Becroft submits that it is well established that in order to be entitled to weekly compensation, a claimant must be an earner at both the date of injury and the date of incapacity. She refers to ss 9, 100, 103 and clause 32 of Schedule 1 of the 2001 Act and the decision of *Vandy*.³

² See KC note 1 above.

³ *Accident Compensation Corporation v Vandy*, HC Wellington CIV-2010-485-1331, 25 November 2010.

[36] She submits the sole question for this appeal is to determine whether the appellant was an earner immediately before 26 May 2015.

[37] She said the factual circumstances are clear. The appellant resigned from her employment in late 2014 and left New Zealand in early 2015. She had not had any earnings in New Zealand since then and so was not an earner at the necessary time and does not qualify for weekly compensation.

[38] She also draws the Court's attention to the High Court decision in *TN*.⁴ That case involved a claimant's entitlement to earnings related compensation as a potential earner under s 105 of the Act. The appellant in that case had cover for mental injuries inflicted on her arising from sexual abuse when she was a child. Because of the operation of s 36(1), her injuries were deemed to have arisen when she first received treatment for those injuries as an adult. As the deemed date of injury was when the appellant was an adult, the Corporation determined that she was not entitled to weekly compensation as a potential earner, nor was she entitled to weekly compensation because she was not an earner at the date of injury.

[39] Ms Becroft distinguishes that case as the appellant does not fall into the category of claimants like the appellant in *TN*, namely a group of vulnerable claimants who suffer injury as a child and later make a claim for cover. The appellant in our case could never meet the definition of potential earner under the Act.

[40] Ms Becroft submits that there is no medical evidence presented by the appellant of her seeking treatment for mental injuries before 26 May 2015.

[41] She refers to Dr Page's report of 14 September 2014, in which the doctor notes that Dr Singh does not currently meet criteria for any DSM5 diagnosis.

[42] At best, at that point, Dr Page said:

It is possible that [the appellant] may have undisclosed symptoms and a psychotic process cannot be ruled out.

⁴ *TN v Accident Compensation Corporation* [2022] NZHC 1280.

[43] However, putting the appellant's consultation with Dr Page and that doctor's subsequent report at its highest, it cannot be said that the date of the appellant's consultation with Dr Page, namely 10 September 2014, was the date that the appellant first received treatment for a mental injury. Accordingly, she submits that the appellant's appeal against ACC's decision of 12 September 2022 declining her application for weekly compensation on the basis that the appellant was not an earner at the date of injury, is correct.

Appellant's Reply

[44] The appellant submits that it is clear that Dr Page thought the appellant was suffering from a mental injury and therefore she referred the appellant to Dr Bradfield.

Decision

[45] This is an appeal against ACC's decision of 12 September 2022 declining the appellant's application for weekly compensation on the basis that the appellant was not an earner at the date of injury.

[46] Suffice it to say, that prior to 2014, the appellant was a respected medical professional employed in a specialist field.

[47] As was documented in the earlier appeal⁵ and referred to again in her submissions in this case, the appellant's marital relationship broke down during the year of 2014 and she was subjected to criminal acts of abuse that gave rise to the judgment in her favour on 27 April 2022, that for the purposes of s 21 of the Accident Compensation Act, she suffered mental injury caused by criminal acts.

[48] This appeal however relates to ACC declining her application for weekly compensation on the basis that she was not an earner at the date of injury.

[49] In its decision dated 23 May 2022, ACC changed the date that it had previously recorded as her accident date, namely 8 March 2019, back to 26 May 2015.

⁵ See KC note 1 above.

[50] This follows analysis by ACC of the appellant's medical history in order to ascertain, as s 36(1) requires, the date on which the appellant first received treatment for her mental injury as that mental injury.

[51] In the course of this hearing, the appellant has referred to a number of medical consultations that she had in 2014. As well as those already referred to there was consultation in July and August 2014 for migraine. In respect of those consultations, the doctor noted that she was a bit stressed with personal issues.

[52] The appellant also refers to the consultation that she had with Dr Page, who in her report of 10 September 2014 found that from the information available, the appellant did not then meet criteria for any DSM 5 diagnosis.

[53] The furthest that Dr Page was prepared to go was to say in her report:

It is possible that [the appellant] may have undisclosed symptoms and a psychotic process cannot be ruled out.

[54] The referral to Dr Page, it seems, was arranged by her more senior colleague, Dr Bradfield, as concerns relating to her health appeared to be affecting her performance. In Dr Page's recommendation, she said:

Although there is no current apparent health condition, there are significant concerns about (her) work competence.


[55] Dr Page's report of 10 September 2014 appears to be the last consultation the appellant had before she moved to Australia in March 2015.

[56] It is clear from the evidence in this case that the appellant has not been able to point to any cogent evidence that for the purposes of s 36(1), the date on which she first received treatment for a mental injury as that mental injury, was earlier than 25 May 2015, but is to say some time after she ceased employment in New Zealand and moved to Australia.

[57] Accordingly, I am bound to conclude on the evidence, that the appellant has been unable to establish ACC's decision of 12 September 2022 is wrong. Therefore, the date of her accident, as found by ACC to have been on 26 May 2015 is correct.

[58] Accordingly, her appeal must be dismissed.

[59] Costs are reserved.



CJ McGuire
District Court Judge

Solicitors: Medico Law Limited, Grey Lynn