

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**

[2022] NZACC 207 ACR 245/19

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

Hearing: 18 October 2022
Heard at: Whangarei/Whangārei-Terenga-Parāoa

Appearances: The appellant self-represented, with his wife in support
 F Becroft for the respondent

Judgment: 14 November 2022

RESERVED JUDGMENT OF JUDGE DENESE HENARE

**[Independence Allowance Schedule 1 Part 4 Accident Insurance Act 1998; ss 48,51,52–
Accident Compensation Act 2001]**

[1] The appellant claims that his independence allowance payable for a mental injury consequent on a physical injury should be backdated to the date of his physical injuries in 2000. The position of the Corporation is that the independence allowance has been properly backdated to the date on which the claim for mental injury was lodged.

[2] The following chronology indicates the main events of claim lodgement since the appellant wrenched his back in an accident in 2000.

Date	Event
6/7/00	Accident when [the appellant] wrenched his back while operating a plough. No claim for cover sought.
29/7/08	Late claim for lumbar sprain and disc prolapse (physical injuries) said to have occurred on 6/7/00.

Date	Event
5/9/08	The Corporation declines cover for physical injuries.
30/11/10	Review decision grants cover for physical injuries.
4/7/11	5% whole person impairment assessed for physical injuries.
19/7/11	Independence Allowance declined.
8/9/11	Sensitive claim lodged in respect of childhood abuse.
26/3/12	Dr Finucane diagnoses depression, anxiety disorder, alcohol abuse, and chronic pain, advises that anxiety disorder is due to childhood abuse.
1/6/12	Cover accepted for anxiety disorder on sensitive claim.
7/9/12	Review Decision upholds decision declining independence allowance.
14/8/14	John Miller Law asks the Corporation to arrange for the appellant to see "an assessor".
18/8/14	The Corporation asks John Miller Law to clarify the nature of the intended assessment.
11/2/15	John Miller Law advises the assessment is sought to determine how to treat the appellant's chronic pain.
16/4/15	Claim lodged for mental injury consequent on physical injuries.
14/10/15	Dr Vickers diagnoses major depressive disorder and opioid dependence and mentions history of back injuries and chronic pain as a general medical condition.
16/11/15	ACC grants cover for major depressive disorder and opioid dependence on physical injury claim.
	Further Application for Independence Allowance.
13/7/16	Psychologist, Penny Louw recommends the Corporation accept cover for chronic pain also consequent on the physical injuries.
22/7/16	The Corporation grants cover for chronic pain.
6/8/16	The appellant assessed as having 39% whole person impairment in relation to the physical injuries and chronic pain.
23/8/16	The Corporation determines the appellant's entitlement to an independence allowance with payments in respect of the physical injuries and consequential chronic pain to commence from the start of the next quarter.
6/7/17	Review decision directing the Corporation to backdate the appellant's independence allowance payments to the date on which he had applied for mental injury consequent on the physical injuries.
14/9/17	Decision backdating the appellant's independence allowance payments to 16/4/15 (the date on which the claim for mental injury was lodged).

Date	Event
30/1 1/17	Decision further backdating independence allowance payments to 16/1/15, the beginning of the quarter in which the claim for mental injury was lodged.
29/6/19	Review decision upholding the Corporation's decision of 30/11/17.

Background

[3] The appellant has cover for:

- Anxiety disorder arising from a sensitive claim relating to childhood events;
- A lumbar sprain and prolapsed lumbar disc because of an accident on 6 July 2000; and
- Mental injuries consequent on the above physical injuries, including opioid drug dependence, a major depressive episode, and chronic pain.

[4] On 29 July 2008, the appellant's general practitioner lodged a claim for cover for a lumbar sprain and lumbar disc prolapse he recorded to have occurred some eight years earlier, while the appellant was operating a plough on 6 July 2000.

[5] The Corporation obtained relevant reports and contemporaneous notes which did not refer to the accident and suggested the appellant suffered from longstanding back problems prior to the 2000 accident. On 5 September 2008, the Corporation declined cover.

[6] The appellant applied for a review of the decision and obtained a new report from Mr Finch, orthopaedic surgeon. Based on the history of symptoms reported by the appellant, Mr Finch believed it was likely the 2000 accident caused a lumbar disc injury.

[7] On 30 November 2010, the Reviewer quashed the Corporation's decision and granted the appellant cover for a lumbar sprain and disc prolapse.

[8] The appellant applied for an independence allowance and the Corporation arranged for a whole person impairment (WPI) assessment which was carried out by Dr Summers on 28 June 2011. Dr Summers assessed the appellant as having a WPI of 5%.

[9] On 19 July 2011, the Corporation declined the application for an independence allowance on the basis the appellant's WPI was below the minimum threshold of 10%.

[10] The appellant applied to review the Corporation's decision. At review, the appellant's counsel submitted that Dr Summers should have considered the appellant's impairment due to chronic pain which had been suggested as a potential diagnosis in several reports. However, counsel acknowledged the appellant did not have cover for a pain disorder and did not then make claim for the pain disorder.

[11] On 7 September 2012, the Reviewer upheld the Corporation's decision declining an independence allowance.

[12] On 8 September 2011, the appellant's GP lodged a sensitive claim relating to childhood abuse.

[13] The Corporation arranged for a cover assessment to be completed by Dr Finucane, psychiatrist, on 26 March 2012. He diagnosed depression, the cause of which was multifactorial and anxiety disorder which he considered to be caused by the abuse. In June 2012, the Corporation accepted cover for anxiety disorder.

[14] In or around April 2014, John Miller Law contacted the appellant's sensitive claim case manager to assist in determining his treatment needs.

[15] The Corporation sought clarification from John Miller Law and the appellant as to the nature of the assessment being sought. On 18 August 2014 John Miller law advised that an assessment was wanted to: "see what his needs are".

[16] On 9 February 2015, John Miller commented on the purpose of the assessment:

... we think he needs an assessment of how best to treat his chronic pain - a psych appointment would be a good start.

[17] In a telephone conversation with the appellant on 13 March 2015, a case manager established he wanted the Corporation to assess cover for chronic pain as a mental injury caused by his physical injuries. The Corporation advised the claim needed to be lodged by a medical practitioner and arranged for the appellant to see his GP for this purpose.

[18] On 16 March 2015, the appellant's GP lodged a claim for chronic pain as a mental injury caused by the back injury.

[19] The Corporation arranged for an assessment to be carried out by Dr Vickers, psychiatrist. In a report dated 14 October 2015, Dr Vickers diagnosed a major depressive episode and opioid dependence. He did not identify any pain disorder. Dr Vickers considered the cause of the depression to be multifactorial, but the opioid dependency to be primarily caused by the back injury.

[20] On 16 November 2015, the Corporation granted cover for opioid drug dependence and a major depressive episode relating to the back injury claim.

[21] The Corporation subsequently sought internal advice whether the appellant's chronic pain should be covered as a mental injury. In an opinion dated 13 July 2016, Psychology advisor Ms Louw recommended the Corporation accept cover for a diagnosis of chronic pain disorder, consequent on the physical back injuries resulting from the 2000 accident.

[22] On 22 July 2016, the Corporation issued a decision accepting cover for chronic pain on the back injury claim.

[23] On 1 June 2016, the Corporation received a request for a reassessment of the appellant's entitlement to an independence allowance.

[24] A WPI assessment was undertaken by Dr Meads on 4 August 2016 who assessed the appellant as having:

- 48% WPI in relation to all his covered mental injuries with 12% (one quarter) attributable to the sensitive claim and the remaining 36% attributable to the mental injuries relating to the back injury claim;
- 5% WPI in relation to the physical injuries relating to the back injury claim; and
- A total combined physical and mental WPI in respect of the back injury claim of 39%.

[25] On 22 August 2016, Dr Collier completed a peer review of Dr Meads' assessment and confirmed his agreement with it.

[26] The Corporation issued a decision dated 23 August 2016, determining the appellant was entitled to an independence allowance as follows:

- \$218 per quarter for his sensitive claim, based on a WPI of 12%, with payments backdated to 9 September 2011, being the date on which the sensitive claim was lodged; and
- \$588.12 per quarter for the back injury claim, based on a WPI of 39%, with payments backdated to 10 October 2016, being the start of the first quarter after Dr Meads' assessment.

[27] On 10 November 2016, the appellant applied for a review of the Corporation's decision.

[28] The Reviewer, by decision dated 6 July 2017, determined Dr Meads' assessment was reliable, and the Corporation had correctly backdated the independence allowance in respect of the sensitive claim and the physical injury component of the back injury claim. However, the appellant was entitled to have the independence allowance in respect of the mental injury component of the back injury claim backdated to the date when the claim for mental injury was lodged. She directed the Corporation determine when the application for the mental injury had been lodged and issue a new decision as to the commencement date of the independence allowance payments for this component. She stated:

However, under the legislation applicable to [the appellant's] circumstances, I find that he is entitled to receive back payment on the mental injuries component of the independence allowance relating to the 2000 claim, from the date that he applied for cover for those injuries. I therefore direct ACC to establish the date [the appellant] applied for cover for those injuries, and to issue a new decision on the back payment of [the appellant's] independence allowance relating to claim number ...

[29] No appeal was lodged in respect of this review decision.

[30] On 14 September 2017, the Corporation initially issued a decision, backdating the mental injury component of the independence allowance for the 2000 claim to 16 April 2015. The Corporation then issued a revised decision, on 30 November 2017, backdating the mental injury component of the independence allowance for the back injury claim to 15 January 2015, explaining that:

The Reviewer has directed ACC to pay your arrears for claim ... back to the date that your mental injuries were accepted for cover. Your GP has lodged a claim for mental injury cover on 16 March 2015.

This means that we have backdated your entitlement of 39% to 15 January 2015, which is the relevant quarter effective for the earliest date when the mental injury claim was first lodged with ACC, which was 16 March 2015...

[31] The appellant applied for a review of this decision. In a decision dated 29 June 2019, the Reviewer noted the earliest date on which the Corporation understood the appellant was contemplating a claim for chronic pain as a mental injury (consequent upon the physical injuries) was when John Miller sent an email in February 2015 suggesting an assessment was required regarding how to treat the appellant's chronic pain. The Reviewer noted the Corporation had backdated payments to January 2015, prior to that email. He therefore dismissed the review and upheld the Corporation's decision. The current appeal arises from this review decision.

The case for the appellant

[32] The appellant informed the Court of the background and the circumstances of all his covered injuries and his interactions with the Corporation. He said he had relied on professionals and case managers giving him advice as to the proper process under the accident compensation legislation. He stated he felt much of the information he received was both confusing and misleading. He said he had relied heavily on his wife to help navigate the claims processes.

[33] The reports in evidence including from Dr Newburn detail the events and circumstances together with the consequences for the appellant's health and wellbeing, treatment and recovery. The appellant said he had confidence in Dr Newburn's treatment of him and he wished to continue this treatment.

[34] The appellant said he believed he had been wrongly diagnosed by specialists to whom he had been referred by the Corporation and let down by medical practitioners who had not lodged the claims soon enough, particularly after his accident in 2000. Dr Newburn's report of 18 May 2020 described the 2000 accident and the 2005 re-injuring event:

He had returned to New Zealand, and was working on a farm with his father-in-law, ... They were ploughing a field, using an old manual plough that was designed to be horse drawn, but was being pulled by an ATV 4-wheel drive. His father-in-law was driving the ATV. They had reached the end of the paddock, and the vehicle accelerated while turning, with the plough digging in. This was associated with significant flexion and then rotation, creating torsional forces. There was an immediate onset of severe lower back pain at that stage, without radiation. He initially attended a chiropractor with symptoms

getting worse. He subsequently went to his GP who gave him Celebrex, but failed to make an appropriate ACC claim on his behalf. He was not able to continue farming, but, as fitted his nature, he attempted to return to work. ... he thought that he could take up fishing again However, he discovered that the movement on the boat, and the associated torsional forces while trying to remain upright aggravated his problems. There was a development of sciatic nerve pain on the right, with radiation initially to his knee, then down the lateral aspect of his lower leg to his foot and under his foot. He has since also developed similar pain on the left. He was no longer able to continue with this. He did for a period try more in-shore cray ... but eventually pain interfered with this, and he was unable to continue.

There was a further re-injuring event in 2005. He had cleared two acres of pine trees at his home to make a paddock for grazing. This was associated with a substantial increase in symptoms. He noted his own "*bloody-mindedness*", describing how "*I start something and I have to finish*". He has since then experienced chronic pain.

Relevant law

[35] Pursuant to section 378(1) of the Accident Compensation Act 2001 ("the 2001 Act") the provisions of Part 4 of schedule 1 of the Accident Insurance Act 1998 ("the 1998 Act"), which provide for the payment of an independence allowance, continue to apply to personal injury suffered on or after 1 July 1999 and before 1 April 2002. This provision applies in respect of the appellant's physical and mental injuries resulting from the 2000 accident.

[36] Clause 63(b) of schedule 1 of the 1998 Act provides:

The insurer is liable to pay the independence allowance on and from the date on which the insured lodged the claim for cover for the personal injury from which the impairment results

[37] Under Section 48 of the 2001 Act a person wishing to make a claim for cover for his or her personal injury must lodge a claim with the Corporation.

[38] Section 51 provides that a claim is lodged and received on the date on which the Corporation receives the claim.

[39] Section 52 provides that a claim must be lodged in accordance with the manner specified by the Corporation, that the Corporation must specify a manner that is reasonable to expect the person to comply with, and the Corporation may impose reasonable requirements on the person, such as, for example, requiring the person to lodge a written claim.

[40] Ms Becroft referred to the relevant case law.

[41] In *Sinclair*¹ cover had been granted for physical injuries and the claimant's doctor wrote to the Corporation requesting funding for a drug commonly used as an antidepressant, noting that the claimant admitted to being depressed much of the time. The Corporation interpreted this as a suggestion the claimant was suffering from a mental injury (depression) as a result of her physical injuries and tried to arrange a psychiatric assessment. The High Court rejected the argument that the doctor's letter should be treated as a claim for cover holding that:

Claims lodged with the Corporation must specify which of the options in s 48 are claimed and must conform with the manner specified by the Corporation for the lodging of claims under s 52 of the Act. However, the Corporation must not unreasonably refuse to process a claim for want of form, provided that the claimant specifies the nature and essential features of the claim so that they can be reliably discerned, notwithstanding that a claim is lodged other than in a manner specified by the Corporation.

[Emphasis added]

[42] *Leuthard*² involved a similar situation to the present appeal. In that case the claimant had been declined an independence allowance in respect of a physical back injury due his impairment being below the minimum threshold, but then obtained cover for a chronic pain condition as a mental injury and was reassessed and found to be eligible based on his combined physical and mental injuries. This Court confirmed the claimant's independence allowance should be backdated to the date on which the claim for mental injury had been lodged.

Discussion

[43] There is no doubt after the accident of 2000, the appellant was let down by his GP who did not file a claim for the back injuries when he first presented with those injuries.

[44] The claim for cover for the back injuries caused by the 2000 accident was lodged eight years later in 2008. However, there was no contemporaneous evidence from medical practitioners about the 2000 accident. Further, when a claim for reinjury was lodged for the 2005 accident, there was no mention of the 2000 accident in the GP patient notes.

¹ *Sinclair v Accident Compensation Corporation* [2012] NZAR 313 High Court, Wellington, 12/3/2012, CIV-2011-485-1715.

² *Leuthard v Accident Compensation Corporation* [2014] NZACC 73.

[45] It took specialist evidence considered at review in 2010 to support the grant for cover for the back injuries. However, no claim for chronic pain as a mental injury because of the back injuries was lodged at that time. The evidence then shows a focus on the claim for cover for the sensitive claim.

[46] The legislation and the case law make plain that the mental injury component of an independence allowance is payable from the date on which a claim for cover is lodged. While there is no doubt the appellant has suffered back pain as a result of his back injuries, the issue is when the claim for cover for chronic pain as a mental injury was lodged.

[47] The Court has reviewed the available evidence and agrees with Ms Becroft, there are many references to the appellant suffering from chronic pain in various reports. They include:

- A report from Mr Finch dated 8 April 2010 in which he states:

... he has by definition a chronic pain situation because he has untreated pain which has not gone away. He does not have however any positive Waddell's signs and he does not have any inappropriate pain behaviour patterns on my examination today.
- A request for funding treatment from Dr Ng dated 15 September 2011, in which he referred to the following diagnosis:

... chronic lumbar somatic pain arising from lumbar spinal injury in 2000 known L4-5 and L5-S1 disc protrusions; possible lumbar facet joint source of pain exacerbated by central sensitisation/chronic pain syndrome.
- A report from Dr Finucane dated 8 November 2011, in which he states:

... it is unclear that he meets the criteria for a Complex Regional Pain Syndrome, but of course he does have chronic problematic lumbar pain which has been ascribed to several accidents as well as to degenerative disease of the lumbar spine. It is not my place to comment on whether his chronic pain is due to either degeneration to a specific accident or accidents, leaving this to the relevant accidents.

[48] While these reports mention chronic pain issues, they do not formulate a request for cover for such diagnosis as a mental injury. Significantly, they do not request cover for chronic pain as a mental injury claim. Neither do the submissions of counsel at review in 2012 in my opinion, constitute a claim for cover.

[49] The claim for cover for chronic pain as a mental injury consequent on the back injuries, was not lodged until 16 March 2015. The evidence shows the Corporation sought clarification from the appellant's lawyer in February 2015 regarding the nature of the assessment required. That lawyer replied:

... we think he needs an assessment of how best to treat his chronic pain-a psych appointment would be a good start.

[50] The Court finds this email falls short of meeting the "essential features of the claim" as required to be identified by the High Court in *Sinclair*.³ The Corporation continued to seek clarification from the appellant and his lawyer as to the nature of the psychiatric assessment being sought. The facts show that the appellant himself in March 2015 stated the assessment was to support the claim for cover for a mental injury due to his covered physical injuries.

[51] Ms Becroft submitted the Corporation backdated payments to January 2015 which predates the email because it was at this time communication with the Corporation commenced regarding the claim for cover.

[52] This Court must apply the legislation and the principle articulated by the High Court in *Sinclair* that for a claim to be valid, the terms of what is being claimed must be clear. In my view, clarity regarding the nature of the claim sought, is not present before January 2015.

[53] For these reasons, this appeal seeking backdated payments to a date earlier than January 2015 for chronic pain as a mental injury arising from the back injuries, cannot be sustained.

[54] Accordingly, the appeal cannot succeed and is dismissed.

[55] However, on the available evidence the Court finds the appellant has been let down by professionals on whose advice as to process he has relied. In consequence, he finds he has little trust in many of them.

[56] The Court acknowledges too the events in the appellant's life, compounded by the omissions in advice and not always clear information as to process have affected not only him, but also his wife and family. These consequences with the attendant emotional and financial struggles are referred to in the available evidence.

³ *Supra* at note 1.

[57] The appellant stated Dr Newburn is a professional in whom he has trust and confidence. He wishes to continue treatment with Dr Newburn. This proposal makes sense to the Court given the clear need for the appellant to receive treatment to assist healing and recovery. The appellant trusts Dr Newburn and the strategies he recommends.

[58] Accordingly, the Court directs the Corporation:

- To pay the costs of the appellant's continuing need for treatment from Dr Newburn including reimbursement of any costs already paid by the appellant to Dr Newburn and any attendant treatment;
- To pay the appellant's reasonable costs in the appeal including travel costs related to the hearing; and
- To provide case management review and advice to the appellant regarding the entitlements arising from his covered injuries and ensuring he is in receipt of all entitlements to which he is entitled as provided under the accident compensation legislation.

Suppression

[59] I consider it is necessary and appropriate to protect the privacy of the appellant. This order, made under s 160(1) of the Accident Compensation Act 2001, forbids publication of the name, address, occupation, or particulars likely to lead to the identification of the appellant. As a result, this decision shall henceforth be known as *MW v Accident Compensation Corporation*.



Judge Denese Henare
District Court Judge

Solicitor: Medico Law Limited for the respondent.