

[2] The present appeal is essentially brought on the basis that the Reviewer's decision upholding the Corporation's decision dated 23 June 2020 was wrong in fact and law, and in relation to costs not being awarded.

Background

[3] On 23 September 2009, Ms Mollet was seated at her desk and went to move out to stand up, but the chair became caught on a mat and rolled away from her and she landed heavily on the floor. She was granted cover for a contusion to her buttocks and sacrum. She suffered severe back pain and was unable to work for two or three weeks. The pain then resolved, and she was able to return to work.

[4] On 23 February 2017, Ms Mollet, while at work, was "lifting and shifting heavy weight [and] suddenly twisted back". She claimed and was granted cover for a right lumbar spine sprain. At the time, Ms Mollet was employed by accredited employer Waikato District Health Board ("Waikato DHB"). Her claim was managed by WorkAon on behalf of Waikato DHB.

[5] On 23 February 2017, Ms Mollet was treated by Ms Caroline Parry, Physiotherapist. Ms Parry referred Ms Mollet to a sports medicine physician.

[6] On 28 February 2017, Dr Zielndra Narayan, GP, certified Ms Mollet unfit for work for three days.

[7] On 25 May 2017, Dr Stuart Armstrong, Sports Medicine Physician, referred Ms Mollet for an MRI scan to investigate whether she had a "L2/3 region disc bulge". WorkAon approved funding for the scan, which was done.

[8] On 2 June 2017, Dr Peter Gendall, Radiologist, reported that the L5/S1 disc was mildly reduced in height and was desiccated. There was a broad-based posterior bulge of this disc, which was contacting the exiting S1 nerve roots without compressing them. The other discs were reported as normal. Dr Gendall also reported mild facet tropism at the L5/S1 level. There was no sign of spondylolysis or spondylolisthesis. Dr Gendall's conclusions were summarised as:

Diffuse disc bulge and annular tear at L5/S1

Mild facet joint arthropathy at the lumbosacral level

[9] On 4 July 2017, Dr Armstrong reported that the MRI scan had shown “mild disc desiccation at the L5/S1 level but was otherwise reassuringly normal”.

[10] On 16 August 2017, Ms Mollet’s claim was closed when she returned to work. The claim was subsequently transferred by WorkAon to the Corporation at the end of the accredited employer’s management period, and there was no further activity on the claim.

[11] On 21 November 2019, Ms Mollet, in the course of her work as a nurse, twisted to her left side whilst lifting putting away a trolley, and felt immediate pain in her lower back. On 24 November 2019, a claim was lodged for right lumbar sprain.

[12] On 27 November 2019, Dr Tangimoana Habib, GP, certified Ms Mollet unfit for work until 1 December 2019.

[13] On 30 November 2019, the Corporation granted Ms Mollet cover for a sprain of her lumbar spine. Ms Mollet was initially treated by Ms Maria Bentley, Physiotherapist, who subsequently referred Ms Mollet to a sports medicine physician.

[14] On 9 December 2019, the Corporation advised Ms Mollet that she qualified for weekly compensation, with effect from 2 December 2019.

[15] On 10 February 2020, Dr Armstrong reported that Ms Mollet had had “quite significant back pain” and was now troubled by “radicular symptoms down her right leg”, which had all started after the injury at work on 21 November 2019. Dr Armstrong diagnosed lumbar strain and lumbar radiculopathy. He referred her for an MRI scan.

[16] On 24 February 2020, an MRI scan was performed on Ms Mollet’s lumbar spine. Dr Gavin Davis, Radiologist, reported:

Predominantly facet disease with arthropathy at L4/5/S1. No associated thecal or foraminal stenosis is seen.

Specifically at L3/4 no disc protrusion or extrusion is seen in the sagittal images available.

[17] On 27 February 2020, Dr Armstrong reported that the scan had:

... ruled out any significant disc bulges with nerve root compression. There is some facet joint wear-and-tear especially at the L5/S1 level. I do think this might be responsible for the majority of her pain.

[18] On 3 March 2020, Dr Armstrong reported that Ms Mollet had been troubled by ongoing severe back pain.

[19] On 21 April 2020, Ms Sara Winter, Physiotherapist, noted Ms Mollet's diagnosis of right disc protrusion with nerve compression, her use of a zimmer frame at times, her weakness in the right leg and constant burning in the right lateral leg, and that she had gone back to work at the beginning of January 2020.

[20] On 24 April 2020, Dr Roshan Fernandes, GP, reported:

She has a severe lumbar sprain (Lower back muscle spasm]. This is secondary to facet joint degeneration especially at the L5/S1 level as detected on MRI scan. [Wear and tear of the bones in the spine] This is probably secondary to her morbid obesity. ...

She had a similar presentation in 2017 which lasted 4 months and episodes before that that lasted 1 week. I have no access to notes before that.

Regarding the prognosis, in her case due to her morbid obesity and the MRI scan findings of facet joint degeneration especially at the L5/S1 level, the Lumbar sprain can to be [sic] progressive. This can also be repetitive with mild triggers like bending, lifting and twisting which is required in her job as a Nurse.

[21] On 1 May 2020, Dr Benjamin Moon, Radiologist, conducted CT-guided steroid treatment on Ms Mollet.

[22] On 4 May 2020, Dr Armstrong noted that, prior to the steroid treatment, Ms Mollet's pain had improved significantly, but that she had had a flare of pain secondary to a reaction from the steroid injection.

[23] On 11 May 2020, Dr Armstrong reported that Ms Mollet's back seemed to be settling again.

[24] On 26 May 2020, Dr Armstrong reported that Ms Mollet was still troubled by significant pain and loss of function and now had back and posterior hip pain. He said that he would refer her for a SPECT CT scan of her back, to look for ongoing inflammation in her facet joints. Dr Armstrong said that, if the bone scan was negative, he would look into her hip as a possible source of her pain. Dr Armstrong stated that he had requested that Ms Mollet's hip be added to her ACC claim. Dr Armstrong certified Ms Mollet as unfit for work until 1 July 2020.

[25] On 29 May 2020, the Corporation asked Dr Armstrong to provide a READ code and side regarding his request to the Corporation to add a right hip injury to Ms Mollet's claim. The Corporation also asked Dr Armstrong whether Ms Mollet's covered lumbar sprain had resolved, and if the continued symptoms were now due to her L5/S1 facet joint pathology which had been identified by the MRI scan.

[26] On 2 June 2020, Dr Armstrong replied, by email. He provided the required READ code, and stated:

I do believe that her lumbar sprain has resolved. I am suspicious that her ongoing pain is coming from her hip.

[27] On 4 June 2020, the Corporation confirmed by email to Dr Armstrong that Ms Mollet was granted cover also for a right hip joint sprain.

[28] On 18 June 2020, following a SPECT scan done on Ms Mollet's lumbar spine, Dr Lorna Que, Nuclear Medicine Physician, stated:

The main findings are centred at the right L4/5 facet joint, uptake is of mild to moderate, with associated soft tissue swelling around the facet joints of L4/5 and L3/4 on the right. More active changes, with advanced OA and patchy moderate to marked increased uptake are noted in the SI joints bilaterally. ...

In L4/5, there is mild loss of disc height, undulation in the inferior end plate of L4 but uptake is unremarkable. There is subtle retrolisthesis of L4 on L5 with Ankylosis of L5/S1 and transverse processes of L5 and upper sacrum is noted, uptake is unremarkable. No evidence of vertebral or endplate fracture. ...

There is evidence of bilateral OA changes in the SI joints with moderate to marked increased uptake bilaterally, more so on the left, consistent with joint inflammation. The SI joint appears to be the main pain generator. ...

[29] On 23 June 2020, the Corporation suspended Ms Mallet's entitlement to weekly compensation:

After carefully assessing all the medical information available, we're unable to continue with your entitlement. We've now suspended your entitlement to weekly compensation and you'll receive your last payment on the 21st of July 2020.

We're unable to continue providing you with this support as this medical information shows that your current condition is no longer the result of your personal injury of 21/11/2019.

The medical information states that your covered injuries have resolved, and the ongoing incapacity you have is related to an injury which is not covered by ACC.

[30] On 25 June 2020, Dr Armstrong commented on the SPECT scan findings:

... Her bone scan has shown marked inflammation over the sacroiliac joints bilaterally which I do think is responsible for the pain. She also has degeneration in these joints which would pre-date the injury. The injury that she suffered on the 21st November 2019 likely caused the symptomatic inflammation.

[31] On 30 June 2020, Dr Armstrong commented further:

From my point of view [Ms Mollet] does have arthritis in her sacroiliac joints and this predates her accident. At the time of the accident she has injured her sacroiliac joints and has significant inflammation in the joints secondary to this. Once she has the cortisone injection I am hopeful this will confirm the diagnosis and settle the inflammation. This will then be the point at which we have actually treated the covered injury and ACC will likely stop entitlements for this claim.

[32] On 9 July 2020, Ms Mollet applied to review the Corporation's decision of 23 June 2020.

[33] Later in July 2020, Ms Mollet applied for review on the basis that the Corporation had failed to make a decision on cover after receiving Dr Armstrong's 27 February 2020 which confirmed that Ms Mollet had facet joint arthropathy at L5/S1. (This application was dismissed on 18 September 2020 on the basis that there was no valid claim lodged for cover for facet joint arthropathy at L5/S1).

[34] On 26 August 2020, Mr Rodney Gordon, Orthopaedic Surgeon, reported:

History of Presenting Complaint

Nikki is a 43-year-old nurse who was working as a practice manager when she injured her back on 21/11/2019. She was twisting to shift a trolley after applying a dressing to the patient.

She suffered with severe pain in her low back on the right side and subsequently had weakness of her legs particularly on the right side.

The pain was very severe. She was unable to work.

Imaging Studies

She underwent a CT-guided injection into the right L5/S1 facet joint on 1/5/2020. This gave her relief of pain for approximately 2 weeks.

She had a bone SPECT CT scan which showed increased inflammation around the right L5/S1 facet joint. There is also inflammation around both sacroiliac joints with this being worse on the left than on the right. No other abnormalities were noted.

The MRI scan that was taken in Midland Radiology on 24/2/2020 showed evidence of some darkening of the disc at L5/S1 with a central disc herniation and some inflammation and gapping of the right L5/S1 facet joint.

The disc in the remainder of the lumbar spine are [sic] normal.

On the MRI scan there was some inflammation around the right SI joint. This lady has been very heavy for a number of years and the maximum weight that she got up to was 250 kg. She presently weighs approximately 215 kg. She has started a diet and is intent on getting her weight under 200 kg so she can undergo bariatric surgery.

She does not suffer with any other health issues and does not have diabetes or heart problems. Prior to the injury she was functioning at a high level and coaching netball and also working normally as a nurse.

She has been declined by ACC for further funding of her back problem on the basis that she has degeneration of the L5/S1 disc. ...

Impression & Management

In my opinion she should be referred to the Public Hospital for consideration of bariatric surgery and this is a fairly urgent matter. Her back problem will not resolve without weight reduction. She is also already experience [sic] complications taking medication for the back problem with kidney dysfunction as a result of the use of anti-inflammatory medication.

I would encourage you to refer her to the public sector for bariatric surgery and this is a relatively urgent matter.

I also believe that ACC should be challenged on its decision to decline if [sic] ACC on the basis of degeneration of the lumbar sacral disc as I am of the

opinion that she has suffered with a disc herniation as a result of the twisting injury.

[35] On 11 November 2020, review proceedings were held in respect of the Corporation's decision of 23 June 2020, but were adjourned part-heard.

[36] On 24 March 2021, Dr Armstrong provided a report in respect of Ms Mollet's lumbar spine sprain of 23 February 2017:

Nikki has been under my care with a diagnosis of a lumbar sprain which her MRI scan showed disc desiccation and an annular tear at the L5/S1 level. She has also been under my care with regard to her sacroiliac joint inflammation from a separate injury. I have been asked by her advocate to write a letter clarifying her injuries and diagnosis.

I have seen Nikki for her claim on the 23rd February 2017 and her claim on 21 November 2019. My diagnosis from her 2017 claim was a lumbar sprain with the MRI scan showing an annular tear along with disc desiccation. My diagnosis from her 2019 claim is of sacroiliac joint inflammation with sacroiliac joint arthritis seen on MRI and CT scanning. She has an additional injury from the 23rd September 2009 claim number 100-1044-8144. She was not under my care for that claim so I am unable to comment on that claim.

I have already completed an updated ACC45 form for the previous injuries backdated to include the diagnosis of an annular tear as seen in the MRI scan dated 18th July 2017.

[37] On 23 April 2021, Ms Koloni, for Ms Mollet, lodged an application for review on the grounds that there was no decision on entitlement to weekly compensation. Ms Koloni stated that "we believed the Corporation are not satisfied with an earlier decision of 23.06.20, following further medical evidence".

[38] Also on 23 April 2021, Ms Koloni, for Ms Mollet, filed applications for review on the basis that the Corporation had not made decisions on cover for: (1) an L5/S1 lumbar injury as diagnosed by Dr Armstrong following an MRI; and (2) an L4/5 lumbar injury diagnosed by Mr Gordon following a CT scan. (These reviews were dismissed on 29 September 2021 on the basis that no claims for cover for these injuries had been lodged).

[39] On 12 July 2021, Mr Gordon reported that Ms Mollet was still experiencing quite severe back pain but had been, for the last six months, much more mobile. He said that she was still taking a lot of pain medication. He also noted that Ms Mollet

had been referred to Waikato Hospital for consideration of bariatric surgery but had been declined. He stated:

... She then tried to go privately for the same surgery but was unable to get her weight down and change her metabolism and the surgery has not gone ahead. I understand that she has been given a target weight of 200 kg prior to being considered for the surgery. ...

I have been provided with additional information regarding two other accidents that occurred [apart from that of 21 November 2019]. One accident occurred on 23 September 2009 with the ACC number being GW9092. This injury occurred when she was seated at her desk and went to move out to stand up, but the chair got caught on the mat and rolled away from her and she landed heavily on the floor. She suffered with severe back pain and was unable to work for two or three weeks. The pain then resolved, and she was able to get back to work. The recorded injury was a contusion to her buttocks and sacrum.

The second accident occurred on 23 February 2017 with the ACC claim number being QH14021. In this injury she was working as a nurse at Waikato Hospital on the bariatric ward. She described lifting and shifting a heavy patient and while she was doing this, she twisted her back as she reached to roll the patient. She suffered with serious back pain after this and was unable to work for several months.

It is therefore apparent that Nikki has suffered with her back for quite a long time and all three injuries have led to the present situation with severe degeneration of the L5/S1 disc and facet joints. She has made a considerable recovery with respect to her back and leg pain subsequent to the injury which occurred on 21/11/2019 when she twisted her back while shifting a trolley while working in a doctor's practice. In this injury she basically strained her back which had been previously injured in 2009 and 2017. These previous injuries were much more significant than the injury that occurred in 2019. These previous injuries need to be taken into serious consideration when considering her entitlement under ACC.

Subsequent to the injury on 23/2/2017 she underwent an MRI scan at River Radiology on 18/7/2017. This MRI scan revealed a diffuse disc bulge and annular tear at the L5/S1 level. The description of this injury is consistent with the mechanism of injury that occurred at that time.

[40] On 27 October 2021, review proceedings were recommenced and concluded in respect of the Corporation's decision of 23 June 2020. On 18 November 2021, the Reviewer dismissed the reviews, on the basis that:

- (a) the weight of evidence supported the Corporation's decision of 23 June 2020 that Ms Mollet was no longer entitled to receive entitlements for incapacity due to the lumbar spine sprain suffered in her 2019 accident for which she has cover; further, the weight of evidence since the

Corporation's decision also supported this decision; costs were awarded (including for appearances at two hearings) but not for costs claimed for a second case conference and "other expenses" unspecified; and

- (b) there was no merit in the review application claiming that the Corporation had failed to make a decision on weekly compensation entitlements, and, because this review was not reasonably brought, no costs were awarded.

[41] The Reviewer accepted that the review concerning the Corporation's decision of 23 June 2020 was reasonably brought, and so an award of costs was appropriate.

[42] On 17 December 2021, a Notice of Appeal was lodged against the Reviewer's decision, and, on 22 December 2021, an amended Notice of Appeal was lodged. On 1 June 2022, a further amended Notice of Appeal was lodged, based on the following grounds:

- (a) The appellant objects to the reviewer failing to take into account relevant facts and law regarding the substantive matter of cover for her accident-related injuries, in light of s 20(2)(g) – consequential injuries, and in light of ALL the medical information that had now been exposed; and the basis of the suspension of entitlements when Mrs Mollet was still receiving treatment and sought a second opinion – so the "not satisfied" test could not have been met; and the further medical evidence that had been kept secret under the ACC Insurer Liaison Unit that had now come to light, explaining the medical evidence.
- (b) The appellant objects to the costs awarded, in particular the fact there were 2 completely different hearing dates following the adjournment part-heard.

[43] On 26 May 2023, the Court heard submissions from Ms Koloni for Ms Mollet for over two-and-a-half hours. The Court was required to adjourn the matter for a further hearing, which was scheduled for 10 July 2023.

[44] On 4 July 2023, the Court, in preparation for the hearing, addressed the following questions to the Corporation, by email through the Registry to Mr McBride (copy to Ms Koloni):

The Court notes that Dr Armstrong, on 10 February 2020, diagnosed lumbar radiculopathy in addition to the earlier covered lumbar sprain; and, on 26 May

2020, asked the Corporation to add a hip injury. On 23 June 2020, the Corporation suspended Ms Mallet's entitlement to weekly compensation on the basis that her "current condition" was no longer the result of her personal injury of 21/11/2019" and her "covered injuries have resolved".

Questions:

1. Is it correct that, at the date of the Corporation's decision on 23 June 2020, Ms Mollet had cover for lumbar sprain, lumbar radiculopathy and hip injury?
2. Does the reference in the decision to "covered injuries have resolved" therefore refer to all three injuries covered?

[45] On 6 July 2023, Ms Bride reported by email to the Registry as follows:

1. There was cover for a lumbar sprain and a hip sprain attributed to the November 2019 injury event;
2. Those were taken into account (and referred to in documents at the time of suspension);
3. There was not cover for radiculopathy or other conditions referred to arising from the November 2019 injury event. In fact it has separately been determined, including on (separate) review, that there was no claim for such cover (including that the 10 February 2020 letter now referred to – BUNDLE p8 - was between treatment providers, and not to ACC);
4. There are a range of separate review decisions also determining the same issues against the Appellant, that are yet again advanced by Ms Koloni. Those include decisions in Reviews 6741717 and 7335311 and 7335312, as well as 6741699 and 7335313.

[46] Later, on 6 July 2023, Mr McBride filed a memorandum in which he stated:

1. The Court has raised questions for ACC to address, in terms of the scope of cover.
2. By this memorandum, ACC advises the Court that (for reasons separate and distinct from those raised by the Court or Appellant), it will:
 - 2.1 Revoke the 23 June 2020 decision which is currently under appeal; and
 - 2.2 Reinstate entitlements, subject to specific confirmation of both the Appellant's earnings and incapacity, by reason of the covered accident event, from the date of the suspension decision.
3. It is submitted that properly addresses and disposes of the substance of the matter before the Court.

[47] Mr McBride, in his memorandum, again addressed the matters raised by the Court. He then submitted that the subject matter of the appeal had now become

moot, and so the hearing should be vacated and the appeal (unless previously withdrawn) be dismissed.

[48] The Registry did not receive a response from Ms Koloni to Mr McBride's memorandum, and so the Court did not vacate the hearing.

[49] On Friday 7 July 2023, the Corporation sent to Ms Mollet and Ms Koloni its decision which stated:

We have revised our original decision dated 23 June 2020 after reconsidering the evidence available.

This means that we will now reinstate entitlements subject to confirmation of incapacity and earning details since suspension.

If you wish to withdraw your appeal, please advise the District Court. ...

If you've already paid someone to help you prepare for your appeal, such as a lawyer, representative or medical professional, we may be able to help with the costs you incurred. Please send your invoices or receipts to us for consideration.

[50] On Monday 10 July 2023, the Court reconvened to continue hearing the appeal.

Relevant law

[51] Section 117(1) of the Act provides:

The Corporation may suspend or cancel an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.

[52] Section 134(1)(b) of the Act provides:

- (1) A claimant may apply to the Corporation for a review of—
 - (a) any of its decisions on the claim:
 - (b) any delay in processing the claim for entitlement that the claimant believes is an unreasonable delay: ...

[53] Section 148 of the Act provides:

...

- (2) Whether or not there is a hearing, the reviewer—
- (a) must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant;
 - (b) may award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review;
 - (c) may award any other person costs and expenses, if the reviewer makes a review decision in favour of the person.
- (3) If a review application is made and the Corporation revises its decision fully or partly in favour of the applicant for review before a review is heard, whether before or after a reviewer is appointed and whether or not a review hearing has been scheduled, the Corporation must award costs and expenses on the same basis as a reviewer would under subsection (2)(a).
- (4) The award of costs and expenses under this section must be in accordance with regulations made for the purpose.

[54] In *Kacem*,¹ Justice Tipping stated in the Supreme Court:

[32] ... a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

[55] In *Sinclair*,² Justice Dobson stated:

[26] I am not satisfied that the adoption of a generous approach to what might constitute the lodging of a claim for cover can focus upon the nature of the Corporation's responses to an initiative by a claimant. Conceptually, the adequacy of what is submitted as a claim may, in some circumstances, be influenced by the nature of the Corporation's response to it. However, that does not justify an approach which uses a misconceived or inappropriate response on behalf of the Corporation to transform what is patently something other than a claim for cover under the Act into such a claim.

[56] In *Sinclair*,³ Justice Fogarty stated:

[23] ... The common law Courts do not adjudicate upon academic issues. There has to be a real consequence.

[24] ... this Court should not enter into what is effectively an invitation to issue a declaration as to the course the ACC should have taken in this case, or should take in any future similar scenario.

¹ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

² *Sinclair v Accident Compensation Corporation* [2012] NZHC 374.

³ *Sinclair v Accident Compensation Corporation* [2013] NZHC 406.

[57] In *Gregory*,⁴ Judge Beattie stated:

[12] I find that Section 134(1)(b) is a provision which is really only appropriate where there is a continuing delay and the claimant perceives that his/her claim is not being processed with all due diligence. Once the claim has been processed and a decision and payment made, then it seems to me that the purpose of Section 134(1)(b) is largely spent and the pursuance for some form of declaration is somewhat nugatory.

Discussion

Corporation's decision dated 23 June 2020

[58] The main issue in this case has been whether the Corporation's decision of 23 June 2020, suspending Ms Mollet's entitlement to weekly compensation, was correct.

[59] On 30 November 2019, Ms Mollet was granted cover for her lumbar sprain injury of 21 November 2019. On 9 December 2019, the Corporation advised Ms Mollet that she qualified for weekly compensation, with effect from 2 December 2019, for her incapacity in respect of her covered lumbar sprain. On 4 June 2020, the Corporation granted Ms Mollet cover also for a right hip joint sprain. On 23 June 2020, the Corporation suspended Ms Mollet's entitlement to weekly compensation.

[60] The Corporation stated that it suspended weekly compensation on the basis of medical information which showed that Ms Mollet's current condition was no longer the result of her personal injury of 21 November 2019. The Corporation stated that her covered injuries had resolved, and that her ongoing incapacity was related to an injury which was not covered by the Corporation. The Corporation's decision was upheld by a Reviewer on the basis that the weight of evidence supported the Corporation's decision of 23 June 2020 that Ms Mollet was no longer entitled to receive entitlements for incapacity due to the lumbar spine sprain suffered in her 2019 accident for which she had cover.

[61] At the first hearing of the current appeal on 26 May 2023, the correctness of the Corporation's decision was challenged by Ms Koloni, Ms Mollet's advocate.

⁴ *Gregory v Accident Compensation Corporation* [2005] NZHC 45.

Ms Koloni pointed out, *inter alia*, that Ms Mollet had cover, not only for her lumbar sprain, but also for her hip injury. (Ms Koloni also pointed to a diagnosis by Dr Armstrong of lumbar radiculopathy). Ms Koloni said that the Corporation's decision suspending weekly compensation, and the Reviewer's confirmation of this decision, took account only of her lumbar sprain injury, and not of her other injuries causing ongoing pain.

[62] Following the adjournment of the above hearing for lack of time, the Court addressed, to Mr McBride for the Corporation, queries which arose from Ms Koloni's submissions. On Thursday 6 July 2023, Mr McBride advised in a memorandum that the Corporation had decided to revoke its decision of 23 June 2020 and reinstate Ms Mollet's entitlements (subject to confirmation of her earnings and incapacity) by reason of the covered accident event from the date of the suspension decision. Mr McBride also confirmed that the Corporation had previously granted Ms Mollet cover for a hip sprain, though this was by way of an email and not a formal cover decision.

[63] At the reconvened hearing of this appeal on Monday 10 July 2023, Ms Koloni thanked the Corporation for its new decision, but submitted that it did not go far enough in relation to Ms Mollet's injuries. Ms Koloni submitted that there needed to be a fuller investigation of the Corporation's handling of Ms Mollet's claims for cover and entitlements.

[64] This Court finds as follows:

- (a) The Court agrees with the decision of the Corporation to revoke its suspension decision of 23 June 2020 and (in principle) reinstate Ms Mollet's entitlements from the date of the suspension decision. In terms of process, the Corporation should have conveyed its grant of cover to Ms Mollet for a right hip injury by way of a formal decision letter to Ms Mollet rather than by way of an email to a medical practitioner. In terms of substance, the Corporation's suspension decision was coloured by its reference only to cover for lumbar sprain, without reference to cover for hip injury. In its decision letter, the

Corporation incorrectly stated that “the medical information states that [Ms Mollet’s] covered injuries have resolved”. This statement is at odds with the medical evidence of Dr Armstrong, provided shortly before the Corporation’s decision, to the effect that Ms Mollet had ongoing pain from her hip. Likewise, the Reviewer’s decision was based on a finding that the weight of evidence supported the Corporation’s decision of 23 June 2020, that Ms Mollet was no longer entitled to receive entitlements for incapacity due to the lumbar spine sprain. This finding did not make any reference to Ms Mollet’s covered hip injury.

- (b) The Court further finds that the present appeal concerning the Corporation’s decision of 23 June 2020 is now moot. This appeal was against the Reviewer’s dismissal of an application for review of the Corporation’s decision suspending Ms Mollet’s entitlement to weekly compensation. The Corporation has now revoked its suspension of Ms Mollet’s entitlement to weekly compensation, and has, in principle, agreed to restore her entitlement. It is not the function of this Court to undertake a wider investigation of the Corporation’s handling of Ms Mollet’s claims for cover and entitlements.

Costs award by the Reviewer

[65] On 11 November 2020, review proceedings were held to consider a review application lodged by Ms Koloni, for Ms Mollet, in respect of the Corporation’s weekly compensation decision of 23 June 2020. The review proceedings were adjourned part-heard. On 23 April 2021, Ms Koloni lodged a second review application on the grounds that there was no decision on entitlement to weekly compensation. Ms Koloni noted that “we believe the Corporation are not satisfied with an earlier decision of 23.6.20, following further medical evidence”.

[66] At the reconvened review hearing on 27 October 2021, Ms Koloni submitted, in relation to the second review application, that the Corporation had a duty to investigate further its decision to suspend entitlements on Ms Mollet’s claim after the Corporation received new medical evidence. Ms Koloni based this review application on section 134(1)(b) of the Act, submitting that there had been an

unreasonable delay on the Corporation's part to issue a new decision on suspension of entitlements.

[67] On 18 November 2021, the Reviewer dismissed the second review application and declined to award costs for this review. The Reviewer noted that it was not disputed that, on 23 June 2020, the Corporation did make a decision on weekly compensation entitlements, and this decision was already the subject of a review well before the second review application was lodged. The Reviewer found, with reference to the decision in *Gregory*, that section 134(1)(b) was not applicable to Ms Mollet's situation, in that the Corporation had made a decision on entitlement to weekly compensation and there was no continuing delay in making the decision. On the issue of costs, the Reviewer considered that there was no reason for Ms Koloni to lodge the second review application, there was no merit in this application, it was therefore not reasonably brought, and so no costs were awarded.

[68] Ms Koloni submits as follows. Ms Mollet objects to the failure to award costs for the second review application. There were two completely different hearing dates, and therefore the first hour per hearing date is appropriate. It was the ongoing delay on the part of the Corporation that prompted Ms Koloni to lodge the second review application.

[69] This Court acknowledges the above submissions. However, the Court points to the following considerations.

[70] First, as noted above, section 148(2)(b) provides that a Reviewer *may* award an applicant costs and expenses if the Reviewer does not make a review decision in favour of the applicant, but considers that the applicant acted reasonably in applying for the review. In Ms Mollet's case, the Reviewer did not make a review decision in her favour, and considered that the review was not reasonably brought and so no costs were awarded.

[71] Second, the Reviewer's decision on costs being a discretionary one (as is evident from the statutory word "*may*"), this Court may intervene in this decision only if the Reviewer made an error of law or principle, took into account irrelevant

considerations, failed to take account a relevant consideration or made a decision that is plainly wrong.⁵ This Court finds that there is insufficient evidence that any of these criteria applies to the exercise of the Reviewer's discretion not to award costs. This Court has examined the reasons provided by the Reviewer in not awarding costs, and can find no fault with these reasons.

Conclusion

Decision

[72] In light of the above considerations, the Court finds that:

- (a) In view of the Corporation's decision to revoke its earlier suspension decision of 23 June 2020, and (in principle) restore Ms Mollet's entitlement to weekly compensation, this appeal regarding suspension of weekly compensation is dismissed.
- (b) The Reviewer's decision not to allow costs of a second review application is confirmed, and so the appeal in regard to these costs is dismissed.

Costs of the appeal

[73] In relation to the costs of this appeal, this Court finds that Ms Mollet is entitled to costs. In this regard, the Court notes that Ms Mollet's efforts to challenge the Corporation's decision of 23 June 2020 have been ongoing for the past three years. During this time, the Corporation continued to oppose Ms Mollet's challenge, through to the first hearing of this appeal in May 2023 and beyond. It was only on the last working day before the scheduled further hearing that Ms Mollet received the Corporation's decision revoking the 23 June 2020 decision. Ms Mollet is therefore entitled to costs up to and including the reconvened hearing of this appeal on 10 July 2023.

[74] The Court directs that Ms Koloni will provide a memorandum on costs by 17 July 2023, and Mr McBride will provide a memorandum in response by 24 July 2023. The Court will then make a determination on costs on the papers.

⁵ *Kacem v Bashir*, above note 1, at [32].

Final comment

[75] This Court has noted that legal proceedings regarding Ms Mollet's entitlement to weekly compensation have been ongoing for the last three years. The proceedings have involved repeated review applications and hearings and also Court hearings. As indicated above, the Corporation has fallen short in its handling of Ms Mollet's issues. This Court has serious concerns that future prolongation of legal proceedings will not be in Ms Mollet's interests or be a useful and efficient use of the Corporation's time and resources. The Court therefore recommends to the parties to convene an in-person case management conference at which the parties clarify exactly what remaining claims and/or entitlements are being sought and on what basis, and discuss an appropriate response to these claims and/or entitlements in light of medical and other evidence.



P R Spiller
District Court Judge

Solicitors for the Respondent: McBride Davenport James