

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 146 ACR 184/20

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

Hearing: 19 July 2023
Heard at: Dunedin/Otepoti

Appearances: The Appellant in person
 Mr C Light for the Respondent

Judgment: 13 September 2023

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Binding effect of review decision s 147(1)(a) Accident Compensation Act 2001]

Background

[1] On 24 December 2019, ACC wrote to Mrs Needham in respect of a claim made by her for ACC funded assistance to operate a home boiler system.

[2] The letter referred to directions made by Reviewer, Jane Wilson, in a review decision dated 15 June 2017. The reviewer had quashed ACC's decision of 19 August 2015 and directed ACC to arrange a new functional capacity evaluation. Once that had been completed, ACC was to obtain an assessment from an appropriately qualified

engineer about the costs of operating and maintaining the appellant's boiler system. ACC was then to issue a new decision about the level of support it was prepared to pay for and contribute to the management of the boiler.

[3] The letter referred to various steps taken by ACC that had not resulted in the completion of a functional capacity evaluation in accordance with the reviewer's direction. The letter concluded:

Based on the above timeline and ACC being unable to obtain the relevant information in order to make a decision as per the above, we decline your request for payments towards the cost of operating and maintaining your boiler/home heating system.

[4] ACC's position is that a valid decision could not be made without there first being compliance with the reviewer's directions.

[5] ACC's submission therefore is that there is not an issue to be determined in this appeal. Mr Light summarises ACC's position as follows:

The review decision dated 15 June 2017 remains binding on the parties and the directions made by the reviewer have to be complied with before ACC can make a new decision. The directions have not been complied with and the Court cannot therefore make a determination of the payment to Mrs Needham as for the costs of operating and maintaining the boiler/home heating system.

History

[6] Mrs Needham has cover for an infection following hip replacement surgery on 10 August 2012. The date of the treatment injury is 21 August 2014, which is the date that Mrs Needham sought treatment for the symptoms of the treatment injury.

[7] In 2015, Mrs Needham requested ACC funded assistance for the boiler system at her home. In her letter of 20 July 2015, she said she was unable to lift the 20 kilogram bags of wood pellets up to chest height to load into the hopper. She said that the costs of doing this was \$664.00 a week, which did not include the wood pellets. She said she would employ and pay a person who would do the work.

[8] On 19 August 2015, ACC advised Mrs Needham that it would not pay her \$664.00 a week. ACC would instead provide reimbursement for the work of

managing the boiler system via the home and community and support services private carer rate. This would be paid at six hours per week from 15 June 2015, which was the date Mrs Needham requested assistance, through to 1 November 2015.

[9] On 20 February 2017, Mrs Needham applied for a review of ACC's decision of 19 August 2015.

[10] As referred to above, in the review decision, the Reviewer quashed ACC's decision and made directions to be carried out before ACC made a new decision.

[11] The Reviewer in effect found against ACC and Mrs Needham, because she did not find that Mrs Needham was entitled to be paid the amount that she had claimed, and held that ACC should have obtained an independent assessment of costs of maintaining Mrs Needham's boiler system from an appropriately qualified engineer before making the decision. The reviewer accepted that there were difficulties in ACC being able to exercise its discretion because of the lack of an up to date functional capacity evaluation, for which Mrs Needham had to bear some responsibility.

[12] Mrs Needham appealed to the District Court against the review decision.

[13] In her decision Judge Walker dismissed her appeal. In her judgment, Judge Walker said:¹

As stated, Mrs Needham has made it clear that she is not prepared to undertake an assessment and accordingly no new decision can issue. As the reviewer's decision (b) and (c) both require the completion of the functional capacity evaluation, they have not been able to be triggered.

[14] Judge Walker concluded:²

The Corporation cannot be called upon to make a further decision in light of Mrs Needham's stance. However, it is clear the Corporation recognises Mrs Needham's position and a more reasonable stance by her may lead to a more favourable outcome.

¹ *Needham v Accident Compensation Corporation* [2018] NZACC 131 at [69].

² *Ibid* at [76].

[15] By letter dated 4 June 2019, ACC again attempted to progress matters in a way favourable to the appellant. The letter stated:

You agreed to participate in a functional capacity evaluation and this was due to take place on 16 May 2019. ACC has received a report from Southern Rehab which confirmed that the assessment did not take place, as you declined to sign their consent form.

Under s 133(3) of the Accident Compensation Act 2001, if both parties agree, a review decision can be varied.

To move forward, ACC suggests that we may vary Jane Wilson's review decision and proceed directly to obtaining an assessment from an appropriately qualified engineer about the costs of operating and maintaining your boiler system ...

If you agree to vary the review decision as above, please complete, sign and date the attached form and return it to me in the reply-paid envelope.

[16] In a reply on 4 July 2019, Ms Needham said:

Please clarify exactly what this will mean for me regards compensation and present-future supports for the boiler/heating system.

[17] In a reply dated 22 July 2019, ACC said it would:

Obtain an assessment from an appropriately qualified engineer about the costs of operating and maintaining Mrs Needham's boiler system.

Once ACC has completed the above, we will be able to issue a new decision regarding the level of support ACC is prepared to pay for and contribute to the management of your boiler system.

[18] There was then proposed a meeting between the appellant and ACC at the Pitt Street Medical Centre on Thursday, 5 September 2019. The appellant was prepared to meet with only an ACC representative. However, ACC wished to have both a senior ACC representative and the case manager present.

[19] The appellant's response to this on 28 August 2019 included:

Thus I must decline nor can be involved in any meeting where ACC forces me to accept multipl(e) persons from ACC to attend a one on one meeting between myself who has the authority to make binding decisions and a senior ACC representative who has the authority on behalf of ACC to make binding decisions.

[20] Next, in a letter dated 10 September 2019, ACC's client service leader, Trish Fredericksen, said:

ACC would like to suggest that we use conciliation to move forward with your claim.

[21] The appellant next wrote to ACC on 15 September 2019 requiring a number of questions to be answered before she could make a decision on ACC's request for conciliation.

[22] This was responded to by ACC on 16 October 2019, with its letter concluding:

We look forward to hearing from you regarding your agreement to participate in a conciliation meeting.

[23] Ms Needham wrote to ACC again on 7 November 2019, which included the following:

Please clarify my understanding;

- (a) ACC no longer required FCE (functional capacity evaluation) process to take place as stated by ACC Jennifer South to me?
- (b) Please confirm exactly what information and approx when ACC want it in order for ACC to make a decision on my entitlement claims.

[24] Ms Needham wrote to ACC again on 4 December 2019. Her letter included the following:

Why as at today's date, 4th December 2019, you have not had the good manners to reply to my letter of 7 November 2019 clarifying the situation.

[25] ACC replied on 6 December 2019 as follows:

In response to your questions:

- (1) **Functional Capacity Evaluation** – ACC no longer require you to take part in this assessment. However, as this was directed by the reviewer following your review hearing on 25 May 2017, we require you to sign the review variation agreement to move forward. This was posted to you on 4 June 2019 and has been enclosed again with this letter for your reference.
- (2) **Engineer Assessment** – ACC was directed by the reviewer following your review hearing on 25 May 2017 to obtain an assessment from an

appropriately qualified engineer about the costs of operating and maintaining your boiler system.

Once ACC has received information from the engineer as per above, we will be able to issue a new decision regarding the level of support we are prepared to pay for and contribute to the management of your boiler system.

For ACC to move forward to the engineer's assessment, we require you to please sign and return the review variation agreement.

Until ACC has received this signed variation, we are unable to progress your claim any further.

[26] On 24 December 2019, ACC issued a fresh decision letter regarding the appellant's boiler/home heating system. The letter said:

ACC has been trying to work with you to execute the directions of reviewer, Jane Wilson, following your review hearing decision dated 15 June 2017 (review 5116087).

ACC has been unable to obtain an assessment from an appropriately qualified engineer about the costs of operating and maintaining your boiler system. Therefore, we are unable to approve any payments towards the cost of operating and maintaining your boiler/home heating system.

How We Made This Decision

The following was noted in Jane Wilson's review decision document:

I therefore quash ACC's decision and direct ACC to arrange a new functional capacity evaluation and once that has been completed, obtain an assessment from an appropriately qualified engineer about the costs of operating and maintaining Mrs Needham's boiler system. ACC is then to issue a new decision about the level of support it is prepared to pay for and contribute to the management of the boiler.

On 16 April 2019, ACC referred you for a functional capacity evaluation under the conditions you requested. ACC received a letter from Southern Rehab dated 16 May 2019 which stated:

Mrs Needham declined to sign Southern Rehab's FCE consent form in relation to the evaluation that was to occur on this day. As a consequence, the FCE was stopped and no written documentation in regards Mrs Needham's functional ability could be provided.

On 4 June 2019, ACC wrote to you requesting your agreement to vary Jane Wilson's review decision, removing the need for you to participate in a functional capacity evaluation. To date, ACC have not received a signed review variation agreement from you.

On 22 July 2019, ACC wrote to you suggesting a face to face meeting to discuss your claim and negotiate a way forward. ACC advised that two ACC representatives need to be present at this meeting. To date, you have declined this meeting as you wish to meet with only one ACC staff member, outside the ACC Dunedin office.

On 10 September 2019, ACC suggested conciliation facilitated by Fairway Resolution Limited. To date, you have not agreed to conciliation.

Based on the above timeline and ACC being unable to obtain the relevant information in order to make a decision as per the above, we decline your request for payments towards the cost of operating and maintaining your boiler/home heating system.

[27] The appellant sought to have ACC's decision of 24 December 2019 reviewed and in a decision dated 13 July 2020, the reviewer dismissed her application.

[28] In her Review decision of 15 June 2017, the reviewer, Jane Wilson, noted that there was a dispute over whether Mrs Needham had participated in the functional capacity evaluation. She accepted that there was some form of demonstration of functional capacity but said that this was not the evaluation as required by the reviewer's directions.

[29] The reviewer continued:

ACC required not only a demonstration of Mrs Needham's abilities, but also the physiotherapists' professional opinions on Mrs Needham's functional capacities based on that demonstration and any further questions or assessment required by Ms R Wilson to form that opinion.

For the physiotherapist to ask those questions, then disclose the conclusions and assessments to ACC, Mrs Needham's consent was required. That consent was not forthcoming. I accept the affidavit evidence of Rebecca Wilson in this regard. I also consider that this is consistent with Mrs Needham's evidence to me that she did not sign any consent forms at the FCE appointment.

This left ACC in the difficult position in terms of complying with the directions contained in the review decision. Ms Wilson was clear that the FCE was the first step in the process. That was to be followed by the engineer's assessment, then a formal decision. Absent the FCE, ACC could not proceed any further.

I note the efforts ACC made to progress matter, despite the lack of FCE. I consider that ACC has acted reasonably, and has endeavoured to resolve this matter in a pragmatic manner. Absent the FCE and engineer's assessment, I am left in the same position as Ms Wilson. There is simply not enough evidence to determine what, if any, contribution ACC should make to the provision and maintenance of Mrs Needham's boiler/home heating system.

Given the lack of evidence, I do not consider that ACC's decision is unreasonable.

[30] Subsequent to the review decision, on 5 October 2020 Mr Light wrote to Mrs Needham saying he was interested in exploring with her whether the appeal could be settled without the further delay of a hearing in the District Court. He proposed a functional capacity evaluation to be carried out by Brittany Millard of Fit for Work/Proactive.

[31] In reply, on 12 November 2020, Mrs Needham said she had a video of the demonstrated functional capacity evaluation. This was a video of Mrs Needham's meeting with Rebecca Wilson, physiotherapist employed by Southern Rehab, on 16 May 2019.

[32] Mrs Needham's position was that no further functional capacity evaluation was required to fulfil her obligations under the reviewer's findings and that ACC had not fulfilled any of its obligations. She declined to attend a further functional capacity evaluation.

[33] In response to a case management conference on 1 December 2020, Mr Light again wrote to the appellant on 9 January 2023, again proposing that a functional capacity evaluation be held.

[34] He did not receive a reply to this letter.

Appellant's Submissions

[35] Mrs Needham told the Court that what happened to her in the operation in 2012 nearly killed her. She said that ACC had never ever carried out its duty of care from 2012. It had numerous people looking after her case, but half of them did not know what had happened or the seriousness of the injury.

[36] She told the Court of being labelled as a "malingerer" on one occasion.

[37] She says that at aged 82, she is "in pain up to my head".

[38] She said that her human rights had been breached and that her heart is in atrial fibrillation.

[39] She spoke of her family having to disrupt their lives to look after her and her husband.

[40] As to the functional capacity evaluation with Rebecca Wilson, physiotherapist from Southern Rehab, on 15 May 2019, she says that a video taken by an associate of hers shows that it took place. She says:

There is no way I didn't carry out the FCE ... I did all that is required.

[41] She said it was a one hour long consultation, but that Rebecca Wilson did not write on any paper during the consultation.

Respondent's Submissions

[42] Mr Light told the Court that when he was instructed in this matter three years ago, in 2020, his focus was on resolving it.

[43] He suggested an alternative person to carry out a functional capacity evaluation, however he was met with a response from the appellant to the effect that she had a full film of demonstrated FCE and that no further FCE is required to fulfil her obligations to the reviewer's findings.

[44] Mr Light referred to s 147(1)(a) of the Accident Compensation Act 2001 providing that a review decision is binding on the applicant and on ACC.

[45] Mr Light also referred to ACC's letter of instruction to Southern Rehab of 16 April 2019, which included the following:

ACC requires an objective assessment of Coral's functional ability to perform tasks such as lifting, carrying, standing, crouching, walking, bending, in order to make ongoing decisions regarding her entitlement to assistance with domestic tasks, including the management of the boiler system.

[46] Mr Light confirms that ACC has no report from Ms Wilson following her functional capacity evaluation meeting on 16 May 2019.

[47] Mr Light referred to the comments of the reviewer, Ms Cheeseman, in her review decision of 13 July 2020, where she said:

I accept that there was some form of demonstration of functional capacity given by Mrs Needham on 16 May 2019. I accept her affidavit evidence of that, even in the absence of the video recording.

However, it is also clear that this cannot be considered an FCE as required by Ms Wilson's review directions. ACC required not only a demonstration of Mrs Needham's ability, but also the physiotherapists' professional opinions on Mrs Needham's functional capacities based on that demonstration, and any further questions or assessments required by Ms Wilson to form that opinion.

For the physiotherapist to ask those questions, then disclose the conclusions and assessments to ACC, Mrs Needham's consent was required. That consent was not forthcoming. I accept the affidavit evidence of Rebecca Wilson in this regard. I also consider that this is consistent with Mrs Needham's evidence to me that she did not sign any consent forms at the FCE appointment.

That left ACC in a difficult position in terms of complying with the directions contained in the review decision. Ms Wilson was clear that the FCE was the first step in the process. That was to be followed by the engineer's assessment, then a formal decision. Absent the FCE, ACC could not proceed any further.

Decision

[48] The appellant has cover for an infection following hip replacement surgery on 10 August 2012. Following a request from Mrs Needham for ACC funded assistance in 2015 relating to the operation of a boiler system at her home, and the appellant and ACC being in dispute on the matter, a review decision on 15 June 2017 directed that ACC arrange a new functional capacity evaluation and once that had been completed, that it obtained an assessment from an appropriately qualified engineer as to the costs of operating and maintaining the boiler system.

[49] As of now, no progress has been made.

[50] In order to "break the deadlock", two possible solutions have been put forward by ACC.

[51] Under s 133(3) of the Accident Compensation Act 2001, if both parties agree, a review decision can be varied.

[52] In this regard, ACC wrote to the appellant on 4 June 2019 suggesting the following:

To move forward, ACC suggests that we vary Jane Wilson's review decision and proceed directly to obtaining an assessment from an appropriately qualified engineer about the costs of operating and maintaining your boiler system ...

[53] To have adopted this solution would have been sensible. It would have removed the need for the appellant to undergo a functional capacity evaluation and the next step would have been, in essence, an assessment of the costs of operating the appellant's boiler system and the expectation that ACC would meet an appropriate portion of those costs.

[54] That solution, proposed by ACC, was in all the circumstances of this case a very fair and pragmatic one.

[55] Regrettably, it has not been agreed to by the appellant.

[56] Instead, a further functional capacity evaluation assessment was arranged with Rebecca Wilson. The meeting with Ms Wilson for this occurred on 16 May 2019. It was filmed by a supporter of the appellant. However, it was not concluded because Mrs Needham declined to sign Southern Rehab's functional capacity evaluation assessment consent form.

[57] The impasse continued.

[58] Subsequent to this, Mr Light was instructed by ACC and attempted to resolve the ongoing impasse between the appellant and ACC by way of a functional capacity evaluation being carried out by a different assessor. This further attempt at resolving this long-standing matter has also been unsuccessful.

[59] The appellant's position appears to be that the functional capacity evaluation that she attended with Rebecca Wilson on 16 May 2019 was completed and that she has a video film of the assessment to prove it. However, there is no functional

capacity evaluation assessment report from Ms Wilson because the appellant declined to sign the consent form to enable the assessment to continue.

[60] It is ironic that by refusing to sign the consent form, the appellant brought to an end the process that would have undoubtedly resulted in her receiving entitlements from ACC to assist with the operation of her boiler system. However, that is what she has done.

[61] The appellant is almost 82 years old. She impresses with her intelligence and her resilience.

[62] She has two ways to move matters forward for herself. Either she undertakes a further functional capacity assessment with an assessor acceptable to both her and ACC, or she accepts ACC's offer contained in its decision of 4 June 2019 to agree with ACC to vary the review decision of 25 May 2017 and proceed directly to obtaining an assessment from an appropriately qualified engineer as to the costs of operating and maintaining her boiler system without first undergoing a functional capacity evaluation.


[63] In essence, the means of obtaining ACC's financial assistance in operating her boiler is in the appellant's hands.

[64] It may be helpful if the appellant were to share this decision with a suitable person at, for example, the Citizens Advice Bureau. Such might be a way of breaking the impasse that has unnecessarily stalled the resolution of this case for several years.

[65] The outcome of this appeal therefore is that the review decision dated 15 June 2017 remains binding on the parties and the directions made by the reviewer have to be complied with before ACC can make a new decision.

[66] Accordingly, the appeal is dismissed.

[67] Costs are reserved.



CJ McGuire
District Court Judge

Solicitors: Shine Lawyers NZ Limited, Christchurch