

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 142 ACR 215/22

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

Hearing: 15 March 2023

Heard at: Wellington

Appearances: D Pio, appellant in person
 B Marten and T Lyskey for respondent

Judgment: 6 September 2023

**RESERVED JUDGMENT OF JUDGE I C CARTER
(Weekly compensation, ss 100, 103, cl. 32(1)(a) and (b))**

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Introduction

[1] Mr Pio is a 61-year-old man who has worked in labour-intensive industries, including forestry, farming and in a mussel packing factory.

[2] In 2014, he developed bilateral carpal tunnel syndrome as a result of his work packing mussels. The Corporation covered the condition and funded surgery to treat the condition.

[3] During that surgery on 20 November 2015, Mr Pio unfortunately suffered a nerve injury, which the Corporation covered as a consequence of the treatment he had received for the carpal tunnel syndrome.

[4] The Corporation funded revision surgery in 2019, which was successful, and Mr Pio was cleared for work in 2020.

[5] Just over one year after being cleared for work, he claimed he was incapacitated and sought weekly compensation. In decisions dated 24 August and 24 November 2021 (“the Decisions”) the Corporation declined weekly compensation on the basis he was not an earner immediately before incapacity commenced and there is insufficient evidence of incapacity resulting from a relevant covered personal injury.

[6] Mr Pio applied for review of that decline decision. In a Review Decision dated 15 July 2022 (“the Review Decision”) the Reviewer upheld the Corporation’s decisions to decline weekly compensation on the basis there was insufficient evidence to establish incapacity and the evidence clearly established that Mr Pio was not an earner immediately before the claimed incapacity. The application for review was dismissed.

[7] This is an appeal from the Review Decision.

[8] The appeal is by way of re-hearing, which means that the District Court is required to undertake its own evaluation of the evidence and merits generally.¹ The Review Decision is considered, but the Court may come to a different conclusion.²

Scope of the Appeal

[9] The Accident Compensation Act 2001 (“the Act”) gives a claimant the right to apply for an independent review of any of the Corporation’s decisions on a claim³ with the reviewer empowered to modify or quash the Corporation’s decision, direct the Corporation to make a new decision or make the decision for the Corporation.⁴ The right of appeal to the District Court is from a review decision, including one awarding costs and expenses.⁵

¹ *Accident Compensation Corporation v Bartels* [2006] NZAR 680 at [65]; *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142 at [23]; *BL v Accident Compensation Corporation* [2023] NZACC 106.

² *Wildbore v Accident Compensation Corporation* [2009] NZCA 34, [2009] 3 NZLR 21 at [29].

³ Sections 134, 139, 140. All statutory references are to provisions of the Accident Compensation Act 2001 unless otherwise stated.

⁴ Section 145.

⁵ Section 149.

[10] The District Court’s jurisdiction in Mr Pio’s appeal is therefore confined to considering whether the Corporation’s Decisions and the subsequent Review Decision on Mr Pio’s entitlement to weekly compensation are correct as a matter of fact and law by reference to the Act as interpreted by the Courts.

[11] In his notice of appeal and attachments and written submissions filed in support of his appeal, Mr Pio has advanced numerous complaints, breaches and alleged liability including for breach of contract, negligence alleged against the Corporation and medical professionals, fraud, defamation, Consumer Guarantees Act 1993, New Zealand Bill of Rights Act 1990, complaints under the Code of Health and Disability Services Consumers’ Rights, “commercial abuse”, accident compensation levy issues relating to his claim and his previous employer, and a monetary claim for compensation and/or damages of \$500,000.00. These are set out in a lengthy and repetitive way, which is difficult to follow and understand. As Mr Pio’s injuries are covered by accident compensation, some of these claims may be subject to the statutory bar of proceedings arising directly or indirectly out of his injuries.⁶

[12] These matters are beyond the District Court’s jurisdiction created by the Decisions of the Corporation, the subsequent Review Decision and any issue of Mr Pio’s entitlement to weekly compensation. The District Court on appeal has no jurisdiction to consider them.⁷ I do not therefore address these claims in this judgment, and it will be a matter for Mr Pio as to whether to pursue them in other Courts, Tribunals or other decision makers that may have jurisdiction.

Facts

[13] The facts fall into three time periods.

2014 - 2016

[14] On 21 March 2014, Mr Pio was referred by his General Practitioner for orthopaedic review due to bilateral carpal tunnel symptoms.

⁶ Section 317. See also *Austin v Roche Products Limited* [2021] NZSC 30.

⁷ See *Capper v ACC* [2003] NZACC 236 at [31] and *Ward v ACC* [2020] NZACC 13 at [37]-[40].

[15] On 31 March 2014, Mr Rick Wilson, orthopaedic surgeon, reviewed Mr Pio, noting:

He does indeed have bilateral carpal tunnel syndrome with night-time disturbance every night and his enjoyment of life is clearly compromised by this. He is a very fit man of 50 years of age, his appearance certainly belies his years. He works in the mussel opening industry nowadays but has had other jobs historically.

[16] Mr Wilson submitted an ARTP⁸ on 1 April 2014. In that plan, he noted that packing mussels repetitively had caused bilateral carpal tunnel syndrome, requiring carpal tunnel release surgery. He expected Mr Pio would be out of work for about three to four weeks following his surgery.

[17] On 4 May 2015, over a year later, Mr Pio presented to a hospital Emergency Department complaining of left arm tingling and numbness. The triage nurse noted it had been present for two years but had gotten worse that night and Mr Pio could no longer put up with it. The Emergency Department doctor diagnosed left hand probable carpal tunnel syndrome.

[18] Mr Pio presented to his General Practitioner on 14 May 2015, who noted Mr Pio's history of longstanding carpal tunnel syndrome which had gradually been getting worse and recently flared up even more. He noted that Mr Pio was concerned it would start interfering with his job, which was now in forestry.

[19] On 7 August 2015, Mr Pio completed a client cover questionnaire. He recorded that he had been working in the mussel factory for six to seven months before noticing symptoms, and that he eventually left the job because he could not handle the pain. After a six to eight week break, he obtained a job in forestry, as he found the pain was less.

[20] On 7 September 2015, the Corporation accepted cover for bilateral carpal tunnel syndrome, with an accident date of 21 March 2014 (when he first sought treatment).

[21] On 9 September 2015, Mr Pio had an initial client interview with the Corporation. He informed the Corporation that he developed carpal tunnel gradually while working in a mussel factory. He left the factory and started a job with Pelorus Logging in Blenheim, where he was going well for approximately twelve months when symptoms returned worse than ever.

⁸ Clinical Assessment Report and Treatment Plan, requesting the Corporation to fund medical treatment.

[22] A weekly compensation transcript generated on 16 September 2015 noted that Mr Pio's date of first incapacity was considered to be 31 March 2014, with a date of subsequent incapacity being 3 August 2015 according to his medical certificate.

[23] On 30 September 2015, Mr Pio was seen by Mr Jeremy Earl, orthopaedic surgeon, who noted:

I saw this gentleman on 30 September 2015. He gives a history that he worked in a mussel factory and with using his hands so much in breaking open the mussels, he developed carpal tunnels involving both hands. He then stopped doing this work and he went on to heavy labour and he started using a chainsaw and his symptoms again reoccurred in both hands. He takes pain medication at his own discretion. He was taking Voltaren and this did improve his symptoms and by stopping work his symptoms do improve.

[24] On 20 November 2015, Mr Earl performed bilateral carpal tunnel releases, stating that "the median nerve was totally decompressed and care taken to protect the recurrent branch".

[25] At review on 9 December 2015, Mr Earl noted that Mr Pio was doing very well. He stated that Mr Pio would be unable to do heavy work for the next three weeks, but was otherwise discharged from his clinic.

[26] On 15 January 2016, Mr Pio's General Practitioner noted a vast improvement, good return of grip strength and minimal pain. He noted no neurological features were present.

[27] On 9 February 2016, Mr Pio's case manager discussed his return to work with him over the phone. She explained that the Corporation's focus was in clearing him for his pre-injury employment packing mussels, but if he wanted to return to forestry that was up to him.

[28] On 12 February 2016, Mr Pio's General Practitioner noted he was fit to return to work the next day and that Mr Pio felt "keen and ready to go".

2018 - 2020

[29] On 1 November 2018, Mr Pio was seen by a trainee General Practitioner intern. She noted that he presented with left third finger pain. He had carpal tunnel surgery more than a year previously with relief of pain in the left hand, except for that finger. The pain was described as a throbbing dull ache that woke him at night. An orthopaedic referral was arranged.

[30] On 3 January 2019, Mr Jeffrey Holman, orthopaedic surgeon, reviewed Mr Pio and requested that nerve conduction studies be carried out. On 20 March 2019, the neurology department at Wellington Hospital wrote that it was unable to accept Accident Compensation referrals due to waiting pressure for nerve conduction studies.

[31] Mr Pio was reviewed by the neurosurgery department on 2 April 2019. Dr Abussuud, registrar, noted the history including the bilateral carpal tunnel release in 2016 with “an uncomplicated postoperative course”. He noted that Mr Pio mentioned his right sided symptoms had completely resolved, but he had never had any resolution or improvement of the left-sided symptoms.

[32] On 16 May 2019, Mr Pio told his case manager his left wrist was “not right” and never had been since his carpal tunnel release. He told his General Practitioner the same thing.

[33] Nerve conduction studies were carried out on 18 June 2019. Dr Scott, neurology registrar concluded:

This is an abnormal study. There is evidence of a median neuropathy at the left wrist which is at least moderate in severity by electrodiagnostic criteria. There is no evidence on EMG of a C6 [i.e. cervical spine] radiculopathy and only some mild chronic neurogenic changes in the left triceps (C7/8). Further review with the orthopaedic surgeons is recommended to reconsider repeat surgery on the left carpal tunnel.

[34] The Corporation wrote to Mr Pio’s General Practitioner on 21 June 2019 noting that it had received an ACC18 form relating to his carpal tunnel claim, which it said was not covered by Accident Compensation due to a lack of information. It asked Dr Clayson what the root cause of the symptoms was and how the injury occurred, to which she replied it was a left median nerve neuropathy as shown by his nerve conduction studies, which had been caused during his surgery in 2015.

[35] On 23 July 2019, Dr Michael Antoniadis, occupational medicine specialist, undertook a complex medical case review on Mr Pio. Dr Antoniadis noted a current diagnosis of left carpal tunnel syndrome, with left middle finger trigger finger and minor osteoarthritis in the carpometacarpal joints of the thumbs. He noted the left carpal tunnel was the likely primary disabling syndrome and that it had a (work-related) gradual process cause. He did not see any evidence of a nerve injury caused by the surgical procedure, and instead thought the chainsaw work had caused the symptoms. Dr Antoniadis noted that the prognosis was guarded, and that it would be more likely that Mr Pio could return to a role within the mussel factory, as opposed to forestry or chainsaw work.

[36] Mr Pio was seen again by Mr Holman, orthopaedic surgeon, who submitted an ARTP. Mr Holman noted that he believed that the scarring about the palmar cutaneous branch and recurrent median nerve may be a direct result of scarring from the previous surgery and, as such, considered this was related to Mr Pio's previous carpal tunnel release. He requested funding for a carpal tunnel release revision with exploration of the palmar cutaneous nerve and an injection of the CMC joint.⁹

[37] On 5 August 2019, Mr Pio spoke with his case manager. He confirmed he had left his job "because he felt like he wasn't supported by the employer and was 'pushed to leave'". He was advised that his medical certificate was issued at a time he was a non-earner, and if he wished to apply for weekly compensation, he would need a backdated medical certificate.

[38] On 6 August 2019, Simon Bates, a Corporation technical specialist prepared a report. He noted that from his review, it seemed possible there was a new injury to the left median nerve possibly caused by chainsaw work and recommended a new WRGPI claim¹⁰ be lodged. He noted that if cover was accepted, it would be appropriate to accept incapacity from 1 April 2019, as the clinical notes suggested incapacity from that date.

[39] On 27 August 2019, the Corporation declined a treatment injury claim on the basis that it was unable to identify any injury caused by treatment.

[40] On 20 September 2019, Mr Holman carried out revision surgery. His operation note recorded:

The median nerve was identified in its proximal extent. Of interest there were two palmar cutaneous branches, one leaving radially and the other ulnarly. These were preserved and dissected distally to the level of the distal palmar crease. The nerve had good vascularity at this level but there was significant scarring about the nerve and loss of the paravasculature to the median nerve at the level of the palmar crease distal...

The thenar palmar cutaneous nerve was dissected down to the level of the distal palmar crease where it was embedded in significant scar and was found to be no longer in continuity with its distal branch. The distal branch was isolated. There were both neuromas from proximal distal ends of the nerve where it was resected. It was mobilised sufficiently for primary repair. Using a 6-0 nylon suture, a primary repair of the palmar cutaneous branch of the nerve was performed.

⁹ Carpometacarpal joint – found at the base of the thumb where it meets the hand.

¹⁰ Work-related gradual process injury claim.

[41] At review on 22 October 2019, Mr Holman noted that Mr Pio was “status post revision carpal tunnel release with palmar cutaneous branch anastomosis, i.e. neurorrhaphy”.¹¹ He noted that Mr Pio had done well and reported excellent relief of symptoms and numbness in the hand and had even seen early residual return of sensation in the palm of the hand. Mr Holman cleared Mr Pio to return to work on light duties from 22 November 2019, then full duties from 1 December 2019 once the neurorrhaphy had “quietened down”. Mr Holman released Mr Pio back to his General Practitioner. However Mr Pio did not go back to work and obtained, on 10 February and 20 March 2020, backdated medical certificates.

[42] On 12 November 2019, the Corporation declined to cover a median nerve injury on the basis that it had already declined a claim for the same injury.

[43] On 23 March 2020, the Corporation wrote to Mr Pio informing him it was unable to continue paying him weekly compensation, as his most recent medical certificate had expired.

[44] Mr Holman submitted a treatment injury claim on 16 June 2020 for “palmar cutaneous branch laceration”, caused by the left carpal tunnel release procedure on 20 November 2015. He noted in an accompanying letter dated 17 June 2020 to Mr Pio’s General Practitioner that:

The patient underwent repeat carpal tunnel release and neurorrhaphy of his palmar cutaneous branch. This has gone on to unite well. He reports the hand numbness has completely resolved. He has no further complaints and he has been itching to go back to work ever since the operation.

[45] Mr Holman noted Mr Pio had told him that he was required to complete a three month course of rehabilitation before he could return to work, when he was cleared on 1 December 2019. The three-month period was to terminate around the time of New Zealand’s first COVID lockdown, so Mr Pio reported he had not been back to work since that time either.

[46] Mr Holman reiterated in his 17 June 2020 letter that Mr Pio’s condition had been the same for the past six months, he was able to return to work without restriction and he was wanting to do so.

¹¹ Neurorrhaphy is the suturing of severed nerves.

[47] On 24 June 2020, Mr Pio's General Practitioner recorded:

Call from Tina from ACC.

Daniel keeps telling different stories to different parties. He's requesting to see specialist and physio again.

Kit has said he is fit for work.

Another treatment injury claim has been made by surgeon, awaiting notes.

I consider Daniel to be fit for work and have explained this to Tina, this is based on clinical findings and consistent report from Daniel that he feels fit for work, wants to return to work and is essentially symptom free.

[48] On 30 June 2020, the Corporation wrote another letter to Mr Pio noting that it had received a medical certificate from Dr Moore clearing him for normal work duties from 24 June 2020. It informed Mr Pio that he was no longer eligible to receive weekly compensation and asked him to contact the Corporation if his situation changed.

2021

[49] On 27 July 2021, the Corporation wrote to Mr Pio accepting cover for "injury/laceration to palmar cutaneous branch of the median nerve – left". The date of the covered injury was 21 March 2014.

[50] On 28 July 2021, Mr Pio contacted the Corporation to enquire about weekly compensation. He said he had not worked since he was cleared for work on 24 June 2020.

[51] A General Practitioner consultation note on 23 August 2021 recorded that Mr Pio was requesting backdated weekly compensation payments, but also noted:

Problem is Daniel was signed off fit for work based on the [fact] he told me he felt fit for work, separate letter from specialist Mr Holman June 2020 corroborates the same and says the same.

Even if he was signed off he would not get weekly compensation now as he has not worked since being signed off and is classed as a non-earner.

Over 1 year between being signed off and contacting ACC, myself or specialist regarding being unfit for work.

[52] On 24 August 2021, the Corporation declined Mr Pio's application for weekly compensation. The basis for that decision was that Mr Pio was not an earner at his date of certified incapacity.

[53] On 13 October 2021, Mr Holman saw Mr Pio and noted that the revision surgery had left him "quite sensitive about the surgical site". Mr Pio is recorded as reporting that this left him "unable to return to his position in the woods as a handler of a chainsaw". A medical certificate signed by Mr Holman on 20 October 2021 certified Mr Pio fit for some work from 25 June 2020 to 20 October 2021, with restrictions as to temperature and vibration.

[54] On 22 November 2021, Dr Paul Noonan, medical advisor for the Corporation, reviewed the file. He noted Mr Pio's condition had been successfully treated by the revision surgery and he had been cleared for work. He said "once such a condition has been successfully treated there is no medically plausible reason for any subsequent incapacity resulting". In respect of the median nerve injury, Dr Noonan stated that any effects of this injury would have been apparent when Mr Pio was seen by Mr Holman on 17 June 2020 and would not have deteriorated since then.

[55] On 24 November 2021, the Corporation declined the weekly compensation request again on the basis that it did not accept he was incapacitated by the covered injury at the earlier time he was certified unfit. The decision letter notes (erroneously) that he was not an earner at the deemed date of his injury (21 March 2014) but nothing turns on that.

[56] On 23 February 2022, Pete Larking, director of Neuromedtec, prepared a report noting that Mr Pio had presented with pain in both wrists along the median nerve distribution since his initial injury in March 2014, and was also suffering insomnia due to pain and high levels of stress and emotional difficulties due to ongoing loss of income. He noted that Mr Pio had responded well to neuropuncture, a type of acupuncture.

[57] On 15 March 2022, Dr Noonan prepared another comment. He stated there was no medical information indicating a change in Mr Pio's condition between 24 June 2020 and 13 October 2021, and that Mr Holman's report did not set out any clinical examination that would support incapacity. He stated that "scar sensitivity would not be expected to be to the extent that it would cause incapacitating pain, even for working with chainsaws".

[58] Mr Pio lodged applications for review of the Corporation’s August and November decisions. In a decision dated 15 July 2022, Reviewer Laura Mueller upheld the Corporation’s decisions. She found that there was no record of Mr Pio seeking treatment between 24 June 2020 and his treatments with Neuromedtec in 2022. She noted there were no records of three months’ rehabilitation that Mr Pio retrospectively told Mr Holman and his General Practitioner that he had to undergo prior to resuming work. There was no evidence of any rehabilitation programme or provider. She noted the Courts’ guidance that retrospective certification is to be treated “with the utmost caution” and that there was no credible evidence from which she could draw an inference to support the retrospective incapacity claimed by Mr Pio.

[59] On 18 October 2022, Dr James Harman, occupational medicine specialist, undertook an impairment assessment. He set out a detailed history of Mr Pio’s condition and current status and noted:

Mr Pio is not working. He has been unable to return to his forestry work due to his left hand symptoms. He now cannot use a chainsaw and he also cannot use a lawnmower at home. He is right handed. His left hand function is limited by his pain and numbness. He cannot use it for more forceful gripping tasks and he has a tendency to drop things such as cups and plates.

[60] Dr Harman assessed Mr Pio’s whole person impairment at 16%.

Appellant’s Submissions

[61] Excluding the claims that the District Court has no jurisdiction to consider on appeal, the grounds of appeal raised by Mr Pio are:

- (a) Notice of Appeal and attachments filed 16 August 2022 – The relevant injury occurred on 20 November 2015 during carpal tunnel syndrome surgery, resulting in a treatment injury. Immediately prior to this date he was employed as a forestry level 4 tree feller and skiddy.¹² Mr Pio says he was unable to return to that previous employment, as chainsaw use aggravated his injury by vibration, temperature, wrist flexibility, wrist dexterity, repetitive lifting, forceful gripping movements and very heavy physical work. He confirmed that “I am unable to use a chain saw at the

¹² A “skiddy” is a forestry worker whose primary task is cross-cutting the stems of trees into logs using chainsaws. The work is typically done on a landing, which is also called a “skid site” or “deck”.

professional level and capacity that the forestry industry demands”. The relevant covered injury is laceration to palmar cutaneous branch of the median nerve – left. The Neuromedtec Medical Report of 23 February 2022 describes symptoms reported by Mr Pio of constant pain in both wrists, often sharp, can be debilitating, worse in the left hand, worse for gripping any heavy weight, operating machinery like chainsaws which cause vibration and certain postural changes like flexion of the wrists. The diagnosis was poly neuropathy/carpal tunnel syndrome with post-surgical scarring and chronic pain. There was reduced overall pain and improved sleep following initial 12 to 16 treatments. Mr Pio’s claim relating to this injury was held in Mr Holman’s file for more than a year from 17 June 2020 until it was lodged with the Corporation on 26 May 2021. That broke the continuum of the claims process and is the explanation for the year lag in the claims process. He was incapacitated from work immediately prior to the periods for which he sought backdated certification from Mr Holman and his General Practitioner. He had not been given any Individual Rehabilitation Plan for the treatment injury laceration to palmar cutaneous branch of the median nerve – left.

- (b) Submissions filed 1 March 2023 - After the second surgery on 20 September 2019 the same symptoms persisted as recorded in the assessments of Dr Michael Antoniadis (23 July 2019) and Dr James Harman. Mr Pio has never been physically examined by Dr Paul Noonan. Dr James Harman’s impairment assessment confirms permanent impairment from 20 November 2015. The debilitating pain affects every aspect of Mr Pio’s life, with the worst stress of all being sleep deprivation. The Corporation’s position is that the relevant date of injury was 21 March 2014 when bilateral carpal tunnel syndrome was first diagnosed and was caused by Mr Pio’s working in a mussel factory. The laceration of the nerve was a treatment injury consequential on the covered injury caused by the accident on 21 March 2014. The first operation was on 20 November 2015, which was the date of the injury by laceration to the palmar cutaneous branch of the left median nerve (the treatment injury). Mr Pio’s position is that the relevant date of injury is 20 November 2015, the date the treatment injury occurred, not the earlier date of 21 March 2014. The treatment injury claim made 16 July 2021 was accepted by the Corporation after the Record of Operation performed on 20 November 2015 confirmed that it was clear the tendon had been cut during

the first operation. Mr Pio's position is that he was incapacitated as at 20 November 2015 and continuously since then for the covered injury of laceration to palmar cutaneous branch of the median nerve – left. The injury and harm happened in an operating theatre by a registered health professional on 20 November 2015.

- (c) Oral submissions at the hearing – Although Mr Pio's right hand is fixed, his left hand continues to suffer pain and he has difficulty sleeping. The Neuromedtec treatment provided some relief but since that stopped the bad symptoms have returned as before. The Corporation has got it wrong in confusing two dates. The date of accident and injury is 20 November 2015, the date of the treatment injury, when immediately prior he was working as a forestry tree feller/skiddy. Not the earlier date of 21 March 2014 when immediately prior he was working in a mussel factory. He said by way of explanation of why he had not sought any medical treatment after being cleared for work from 24 June 2020, that he had asked Dr Holman to lodge a claim, but he sat on it for a year. It was eventually lodged on 21 May 2021. Mr Pio suggested that he had been waiting for something to happen and eventually followed up with Dr Holman to inquire of progress.

Respondent's Submissions

[62] The Corporation argues that its Decisions and the Review Decision were correct.

[63] There is insufficient evidence to establish incapacity to work immediately before the claimed periods of incapacity commenced.

[64] On the evidence, Mr Pio was cleared for work in June 2020. He has not been in work and has not been an earner since that date. He was not an earner immediately prior to the claimed periods of incapacity.

[65] He is not therefore entitled to any further weekly compensation.

Issues on Appeal

[66] As agreed by the parties, the issues to be determined in this appeal are:

- (a) Is Mr Pio unable, because of his covered injury (injury/laceration to palmar cutaneous branch of the median nerve – left) to engage in employment in which he was employed when he suffered the personal injury (mussel packing)? (Section 103, cl. 32(1)(a))
- (b) Was Mr Pio an earner immediately before his incapacity commenced? (Clause 32(1)(b))

Law

[67] To be entitled to weekly compensation, Mr Pio must establish that he is unable, because of his covered personal injury, to engage in employment in which he was employed immediately before he suffered the injury and that he was an earner immediately before the start of any period of incapacity.¹³

[68] Section 67 of the Accident Compensation Act 2001 (“the Act”) states:

67 Who is entitled to entitlements

A claimant who has suffered a personal injury is entitled to one or more entitlements if he or she—

- (a) has cover for the personal injury; and
- (b) is eligible under this Act for the entitlement or entitlements in respect of the personal injury.

[69] Section 100(1)(a) confirms that a claimant who has cover and who lodges a claim for weekly compensation is entitled to receive it if incapacitated within the meaning of s 103(2) and is eligible for weekly compensation under clause 32 of Schedule 1.

[70] Determination of a claimant’s incapacity for employment in Mr Pio’s case must be done under s 103.¹⁴ Section 103(2) then states:

- (2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

¹³ Sections 67 (entitlements), 103 (incapacity) and clause 32 of Schedule 1 (weekly compensation).

¹⁴ Section 101(1).

[71] The language of clause 32 draws a clear nexus between a period of incapacity and a personal injury for which a person has cover and prescribes parameters that must be met to demonstrate entitlement. Clause 32(1)(a),(b) of Schedule 1 confirms that weekly compensation can be paid to a claimant who has an incapacity resulting from a covered personal injury and who was an earner immediately before the start of any period of incapacity. Clause 32(2)(b) of Schedule 1 prescribes a claimant's entitlement to weekly compensation "for any period of incapacity, after that first week, resulting from the personal injury for which he or she has cover."

[72] The High Court in *Accident Compensation Corporation v Vandy* held that an eligible claimant must both be incapacitated withing the meaning of section 103(2) and eligible under clause 32.¹⁵ This means that a claimant must be an earner at the time of suffering the relevant personal injury and at the time immediately before commencement of incapacity. In this case:

- (a) The requirement to be an earner at the time of injury is not in issue. There is no doubt that Mr Pio was an earner both at the time of the 2014 injury (as a mussel packer) and at the time of the 2015 treatment injury (as a tree feller and skiddy).¹⁶
- (b) A key issue is whether Mr Pio was an earner immediately before the claimed periods of incapacity after 24 June 2020.

[73] Outcomes of the requirement for a claimant to be an earner "immediately before" the start of any period of incapacity can be harsh and anomalous,¹⁷ but the Courts have consistently applied a strict lens to a claimant's entitlement to weekly compensation.

¹⁵ *Accident Compensation Corporation v Vandy* [2011] 2 NZLR 131.

¹⁶ Mr Pio's nerve injury was accepted by the Corporation, in a decision letter dated 27 July 2021, as caused by treatment for a previous injury of carpal tunnel syndrome suffered on 21 March 2014 and covered as a consequential injury of his 21 March 2014 injury. That was on the basis of section 20(2)(d), which provides cover for a "personal injury that is a consequence of treatment given to the person for another personal injury for which the person has cover". The laceration of the nerve was a consequence of treatment¹⁶ on 20 November 2015 for another covered personal injury which occurred on 21 March 2014. His employment immediately prior to 21 March 2014 was as a mussel packer. Mr Pio's employment immediately before 20 November 2015 was doing forestry work as a tree feller and skiddy

¹⁷ *Accident Compensation Corporation v Vandy* [2011] 2 NZLR 131 at [24].

[74] It is self-evident that capacity to work can be lost and regained. Regaining an identical level of capacity as before is not however required as a claimant is not incapacitated if he or she is substantially able to undertake his or her pre-injury employment.¹⁸

[75] Mr Pio's position is that the relevant employment for the purposes of assessing his incapacity for work was forestry work as a tree feller and skiddy. This was his employment at the time of the treatment injury during the surgery on 20 November 2015. Mr Pio submits that the Corporation is incorrect to assess his incapacity for work by reference to the earlier employment as a mussel packer at the time of the original injury in March 2014.

[76] The onus is on Mr Pio to satisfy the Court that the legislative criteria are met. What is required is described in one case in these terms:¹⁹

The appellant must establish, on the balance of probabilities, that his ongoing symptoms are the result of personal injury for which he has cover; he is not entitled to the benefit of any doubt; he cannot rely on possibilities; and he cannot call on the respondent to prove that it is not liable to provide cover. It is up to the appellant to prove his case.

[77] The balance of probabilities means more probable than not and higher than 50 per cent. However the courts do not engage in mathematical calculations, but rather form a general impression of the sufficiency of the law and scientific evidence and the presumptive inference which a sequence of events inspires in a person with common sense.²⁰

[78] Mr Pio is not entitled to ask the Court to speculate.²¹ A degree of precision is required. It is insufficient simply to show the existence of a personal injury by accident and a period of incapacity. An appellant must satisfy the Court that there is a causal nexus between the two.²²

[79] In order to demonstrate incapacity, contemporaneous medical evidence is generally required.

¹⁸ *Sitarz v ACC* [2016] NZACC 22 at [4], [5] and [52] (Judge MacLean). In *Sitarz*, Judge MacLean found the evidence supported that the appellant had been capable of returning to his pre-injury role, if not in terms of all work tasks, then on a substantial basis (or to the extent constituting a "plausible generic match"), such that his incapacity had not been continuous during the relevant period.

¹⁹ *Sarten v ACC* [2004] NZACC 2 at [26].

²⁰ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40 at [65].

²¹ *ACC v Ambros* [2007] NZCA 304 at [63] and [70].

²² *Johnston v ACC* [2010] NZHC 1726 and *McDonald v ARCIC* [2002] NZAR 970.

[80] The correct approach to considering a claim for retrospective incapacity, was summarised in *Jamieson v ACC*.²³ Retrospective medical certificates are viewed with caution. But the weight to be given to them depends on the whole circumstantial matrix before the Court. Retrospective certification of incapacity will be acceptable in certain circumstances. However, the onus is on the claimant to produce evidence establishing a clear picture, or strong and supporting evidence other than contemporary medical certificates, of a continuing incapacity over the period in question.

[81] It is generally more difficult to establish incapacity in a retrospective claim for weekly compensation, and especially so over significant periods. For example, in *Reid v ACC*, the Court held:²⁴

Although retrospective certification of incapacity is possible, this Court has generally upheld the proposition that contemporaneous certification will usually be required. Where retrospective certification is to be accepted, this Court has referred to the need for a “clear picture” of an incapacity which has continued throughout the period in question. Usually, it is not easy to retrospectively prove, on the balance of probabilities, that an incapacity ... has been continuous over a preceding period of several years.

Analysis

[82] I address the two issues raised by the appeal.

Is Mr Pio unable, because of his covered injury (injury/laceration to palmar cutaneous branch of the median nerve – left) to engage in employment in which he was employed when he suffered the personal injury (mussel packing)? (Section 103, cl. 32(1)(a))

[83] Mr Pio made two claims for backdated weekly compensation:

- (a) From his General Practitioner on 23 August 2021, an ACC18 form for the period 13 August 2021 to 10 November 2021, in relation to the original bilateral carpal tunnel syndrome injury in March 2014.

²³ *Jamieson v ACC* [2004] NZACC 80 at [30]-[35]; applied in *Tonner v ACC* [2018] NZACC 25 and *Tonner v ACC* [2018] NZACC 166 (leave to appeal), and approved by the High Court in *Tonner v ACC* [2019] NZHC 1400 (leave to appeal).

²⁴ *Reid v ACC* [2000] NZACC 222 at [36]. See also *Jamieson v ACC* [2004] NZACC 80; *Palmer v ACC* [2006] NZACC 26; *Johnson v ACC* [2009] NZACC 195; *Cullen v ACC* [2011] NZACC 292 and *Rayner v ACC* [2016] NZACC 176.

- (b) An ACC18 form from Mr Holman, for the period 25 June 2020 to 20 October 2021, made on the treatment injury claim of 24 June 2020, which appears not to have been sent to the Corporation until 25 May 2021. The treatment injury claim was accepted by the Corporation on 16 July 2021.

[84] The first issue on appeal is framed as if there is just one covered personal injury (carpal tunnel syndrome) diagnosed on 21 March 2014 and one immediately prior employment (mussel packing). However in this case there is a second covered personal injury (lacerated nerve) caused by a treatment injury during surgery on 20 November 2015 and Mr Pio's employment immediately prior to the treatment injury was forestry work/tree feller/skiddy. It is not in dispute that Mr Pio was an earner at the time of both injuries in 2014 and 2015. The question of incapacity under s 103(2) is to be determined in respect of either employment. I have therefore considered whether the evidence establishes incapacity to do either kind of employment.

[85] When determining the question of incapacity of an earner claimant, the question required to be answered by section 103(2) is whether the claimant is "unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury. In arriving at the answer, it is necessary to consider the assessments of medical practitioners and any other relevant evidence.

[86] The contemporaneous medical evidence relating to Mr Pio's condition in 2020 is quite clear:

- (a) Mr Holman, the orthopaedic surgeon, noted on 17 June 2020 that Mr Pio was fully able to return to work, and that he wanted to do so. In addition to this, Mr Holman noted that this had been the case for the previous six months. Mr Holman submitted an ACC18 form backdated by 16 months on 10 October 2021 but his consultation notes recorded on that date do not support Mr Pio being fully unfit for any work for the preceding 16 months during which Mr Holman had not heard from Mr Pio. Mr Holmans' reports of June 2020 and October 2021 recorded that most of the significant symptoms had resolved. The recorded remaining symptoms in October 2021 were similar to the symptoms recorded in June 2020 when Mr Pio was cleared to return to work.

- (b) Mr Pio's General Practitioner confirmed his agreement with this conclusion in a detailed consultation note on 24 June 2020.

[87] As a result, the Corporation ceased paying Mr Pio weekly compensation on 30 June 2020.

[88] There is no retrospective medical evidence from either medical practitioner that suggests Mr Pio became incapacitated again after 24 June 2020.

[89] After 24 June 2020 there is a significant gap in Mr Pio's medical history. There were no presentations for treatment throughout the rest of 2020. It was not until August 2021 (nearly fourteen months later) that Mr Pio visited his General Practitioner complaining of symptoms. It is not clear that when Mr Pio did present for treatment again, he was incapacitated. Mr Holman noted that he had sensitivity around the surgical site but does not go into any detail regarding his ability to engage in employment. He simply signed a backdated medical certificate certifying him for some duties, without any further analysis.

[90] There is no evidence of Mr Pio having sought or received any treatment for his injuries from the time he was cleared to return to work on 24 June 2020 until his treatments at Neuromedtec in February 2022. The Neuromedtec report simply records symptoms as reported by Mr Pio and notes that Mr Pio responded well to neuropuncture.

[91] None of the doctors suggest there was incapacity after 24 June 2020 to do either kind of work previously undertaken – forestry work or mussel packing. Comments made by Dr Antoniadis in his 23 July 2019 report suggest that Mr Pio's prospects of engaging in the mussel packing role were better than for returning to forestry work. This means that even if Mr Pio was unable to return to forestry (which is not at all clear on the evidence), it is not a complete answer to his entitlement to weekly compensation. It is notable that Mr Holman and Mr Pio's General Practitioner cleared Mr Pio to work from 24 June 2020 without qualification as to the nature of the work. Mr Holman's backdated medical certificate of 20 October 2021 certified that Mr Pio was "fit for some work". The evidence does not establish that Mr Pio was incapacitated by being substantially unable to undertake either of his pre-injury employed roles in forestry or mussel packing.

[92] There is no reason to doubt the correctness of the Specialist's and General Practitioner's assessments, which were not challenged by Mr Pio at the time they were given.

[93] There is no other credible evidence from which to draw an inference on incapacity as claimed by Mr Pio. Mr Pio's self-assertion that he was incapacitated is insufficient.²⁵

[94] Mr Pio's explanation that Mr Holman did not forward the ACC18 form for over a year is not disputed by the Corporation. However the absence of any seeking of medical treatment between June 2020 and 2022 is consistent with Mr Pio having capacity to work. Mr Pio waited for 14 months for some further communication from Mr Holman or the Corporation. It is implausible that he would have waited that long without seeking treatment if symptoms had reached the level of incapacitating him from work.

[95] In any event, the delay in forwarding does not affect Mr Pio's entitlement to weekly compensation under the mandatory requirements for eligibility for weekly compensation. Had the ACC18 form been forwarded to the Corporation earlier, it would have made no difference as Mr Pio would still have not been able to satisfy the earner eligibility requirement.

[96] It is not at all clear that Mr Pio became incapacitated after 24 June 2020. The available evidence considered in its entirety does not establish on the balance of probabilities a clear picture that Mr Pio was incapacitated from working in either of his pre-injury employment roles immediately before the claimed periods of incapacity.

Was Mr Pio an earner immediately before his incapacity commenced? (Clause 32(1)(b))

[97] Clause 32(1)(b) of Schedule 1 requires that immediately before becoming incapacitated, a claimant for weekly compensation must be an earner.

[98] Mr Pio was cleared for work from 24 June 2020 and did not work from then on. That is not in dispute. He could not be an earner after 24 June 2020.

[99] Even if Mr Pio had subsequently become incapacitated after 24 June 2020 by a deterioration of his injury, he could still not satisfy the requirement to be an earner immediately before commencement of incapacity.

²⁵ *Farrelly v Accident Compensation Corporation* [2013] NZACC 420 in which Judge Ongley noted that incapacity cannot be decided on the basis of the appellant's own assertion that he did not have the capacity to continue working.

[100] As Mr Pio was not an earner immediately before the claimed periods of incapacity after 24 June 2020, he does not meet the key eligibility requirement under clause 32(1)(b) of Schedule 1.²⁶

Conclusion

[101] Mr Pio was substantially able and had capacity to engage in his pre-injury employment either as a mussel packer or forestry worker/tree feller/skiddy immediately before the claimed periods of incapacity after 24 June 2020.

[102] Mr Pio was not an earner immediately before the claimed periods of incapacity after 24 June 2020, 13 August to 10 November 2021, and 25 June 2020 to 20 October 2021.

[103] Mr Pio is accordingly not entitled to weekly compensation for the periods claimed.

Result

[104] The Decisions and the Review Decision are correct in concluding that Mr Pio has no entitlement to weekly compensation.

[105] The appeal is dismissed.

Costs

[106] Although Mr Pio is unsuccessful on appeal, I make no order for costs.



I C Carter
District Court Judge

Solicitors/Representatives: Appellant in person
Izard Weston, Lawyers, Wellington, for respondent

²⁶ Schedule One, cl. 32(1)(b).