

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2023] NZACC 163      ACR 35/23**

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

Hearing:      6 October 2023

Held at:      Wellington by AVL

Appearances:    B Hinchcliff for the Appellant  
                  T Lynskey and B Marten for the Accident Compensation  
                  Corporation (“the Corporation”)

Judgment:      9 October 2023

---

**RESERVED JUDGMENT OF JUDGE P R SPILLER  
[Suspension of weekly compensation - s 117(3),  
Accident Compensation Act 2001 (“the Act”)]**

---

**Introduction**

[1]      This is an appeal from the decision of a Reviewer dated 7 February 2023. The Reviewer dismissed an application for review of the Corporation’s decision dated 16 September 2022 suspending Mr Sanders’ weekly compensation from 21 to 27 July 2022 on the basis of non-compliance.

## **Background**

[2] Mr Sanders is a 40-year-old carpenter presently living in Whitianga.

[3] On 6 April 2021, Mr Sanders injured his right biceps lifting an object at work. On 8 April 2021, an MRI found a rupture of the distal biceps brachii tendon with the biceps muscle retracted up the arm.

[4] On 9 April 2021, Mr John English, Orthopaedic Surgeon, performed a right distal biceps tendon repair surgery on Mr Sanders. Mr English advised no weight bearing through the arm for three months. On 30 June 2021, Mr Jono Devine, Physiotherapist, stated that Mr Sanders was improving with physiotherapy following his surgery.

[5] On 11 February 2022, an ACC weekly compensation payment statement confirmed weekly compensation of \$640.00 per week to Mr Sanders.

[6] In March 2022, the Corporation attempted to arrange a Stay at Work programme for Mr Sanders required for his rehabilitation. On 31 March 2022, 22 April 2022, 4 May and 31 May 2022, the Corporation issued non-compliance letters to Mr Sanders, advising that he risked losing payment of his weekly compensation.

[7] On 26 May 2022, Mr Sanders advised the Corporation that he was planning to relocate to the Coromandel Peninsula and inquired if his case needed to be handled by someone in the Waikato. He noted that any occupational therapist would have to be in the Coromandel, otherwise travel expenses to Auckland would be expected to be paid.

[8] On 30 May 2022, Mr Sanders emailed the Corporation stating that he was registering with a new doctor. He stated:

This is my new doctors, it takes up to two weeks for the registration to the new practice to be completed. Any occupational therapy will be through them.

I will be in contact with my new residential address as I have still not decided yet upon where that will be and I'm staying at temporary accommodation as well as staying at my flat in Mount Eden.

My mailing address is still the same until my lease is up but this could change whenever I want.

You will be notified.

[9] On 31 May 2022, the Corporation emailed Mr Sanders to say that it had set up a "Telehealth" initial assessment appointment with TBI Health for him. He replied: "Wrong, Everything is to be handled through my new doctor".

[10] On 2 June 2022, Mr Sanders emailed the Corporation to say: "I don't do Telehealth phone calls", and that any rehabilitation had to be face to face. On 9 and 23 June 2022, he reiterated that a meeting needed to be face to face as otherwise he would struggle understanding what was going on. He also advised that he had anxiety and became easily frustrated, and that his arm was still not right and had not been in any paid work for some time.

[11] On 5 July 2022, the Corporation emailed Mr Sanders, stating that it was willing to arrange a face-to-face appointment with him in Auckland, and would reimburse him for travel expenses. Mr Sanders replied stating that, seeing he lived in the Coromandel area, any appointment should be in this district.

[12] On 7 July 2022, the Corporation emailed Mr Sanders advising that it had arranged a medical case review for him, and attaching a letter informing the implications of non-compliance. Mr Sanders emailed the Corporation stating that he would not be going to any doctor in Hamilton on 27 July 2022, and that any time he had to leave the Coromandel Peninsula he would need travel expenses paid for in advance. Mr Sanders also queried when the travel reimbursement rate was last increased by the Corporation.

[13] On 8 July 2022, the Corporation advised Mr Sanders that, unless he attended the appointment of 27 July 2022, his weekly compensation payments might stop. Mr Sanders replied that he would not be attending the appointment as it was out of the area he lived in and because of rising fuel prices.

[14] On 11 July 2022, Corporation again advised Mr Sanders that, unless he attended the appointment of 27 July 2022, his weekly compensation payments might stop. Mr Sanders provided the same response as before.

[15] On 13 July 2022, the Corporation advised that there were no medical professionals with the appropriate qualifications who travelled to the Coromandel region, but that the Corporation offered to fund flights for him or to pay mileage to attend the appointment on 27 July 2022.

[16] On 14 July 2022, Mr Sanders sent an email to the Corporation advising that he would not be attending the appointment on 27 July 2022 as he would be doing everything through registered health care providers in his local area. He noted his mental health issues.

[17] On 14 July 2022, Ms Janette Smith, Vocational Consultant at TBI Health, emailed Mr Sanders to arrange an initial assessment appointment, for a Back-to-Work programme, in Auckland, on 21 July 2022. He replied that he was handling everything through his doctor at Mercury Bay medical centre and did not want assistance from TBI Health.

[18] On 15 July 2022, the Corporation again advised Mr Sanders that, unless he attended the appointment of 27 July 2022, his weekly compensation payments might stop.

[19] On 15 July 2022, Ms Smith of TBI Health emailed the Corporation to say that she had been unable to speak to Mr Sanders regarding the 21 July 2022 appointment, despite leaving messages and emailing him.

[20] On 15 July 2022, Ms Smith of TBI Health emailed Mr Sanders to say that she had booked an appointment for him at 10 am on 21 July 2022. He replied stating "You'll find I'm already booked in for all of the things you're talking about done here in the Coromandel Peninsula so unfortunately I will not be attending the meeting you have booked for me".

[21] On 18 July 2022, the Corporation advised Mr Sanders that, unless he attended the appointment on 21 July 2022, his weekly compensation payments might stop.

[22] On 20 July 2022 (at 11.27 am), the Corporation emailed Mr Sanders stating that it had arranged taxi transport for him to attend his scheduled appointments on 21 and 27 July 2022, and provided a purchase order number. The Corporation advised that flights were unavailable and so the Corporation had arranged alternative transport. In response, Mr Sanders said that he found it unreasonable that the Corporation was expecting him to travel by taxi when he had been told that flights could be organised. He said that at no time had taxis been discussed and he had accepted flights. He added: "I'm not sitting in a car for 6 hours travel when everything can be handled via my health care providers in the Coromandel Peninsula". Later that same day, Mr Sanders wrote:

My lawyer has told me to tell you it's unreasonable for you to expect me to travel to Auckland when there are the health care providers in the Coromandel Peninsula.

So cut my payments and we will fight it that way.

The only way I travel to Auckland is by flight which you told me you can book.

I'm, not sitting in a taxi 6+ hours return trip

No way possible.

[23] Also on 20 July 2022, Mr Sanders had email contact with the taxi company that had been booked by the Corporation. The driver advised that currently Whitianga airport was currently closed, and "it maybe open tomorrow but the airfield is waterlogged and we will be advised later today of will be open". Mr Sanders replied that he was not sitting in a taxi from Whitianga to Auckland return, and the Corporation would have to reschedule.

[24] On 21 July 2022, Ms Smith TBI Health confirmed that Mr Sanders had not attended the appointment for that day.

[25] On 22 July 2022, the Corporation suspended Mr Sanders' entitlements for failing to attend a scheduled back-to-work appointment on 21 July 2022. The decision letter stated:

We advised you on 18 July 2022 that we would stop providing entitlements on your claim if you did not attend and participate in the scheduled appointment with TBI on the 21/07/2022 and you did not give a reasonable explanation for this. You did not attend this appointment, or provide a reasonable explanation, and as such ACC is declining to provide weekly compensation payments from 21/07/2022.

[26] On 26 July 2022, the Corporation sent a further letter to Mr Sanders advising that, unless he attended the scheduled appointment on 27 July 2022, his weekly compensation payments would stop.

[27] On 26 July 2022, Mr Sanders advised the Corporation as follows:

I have doctors appointments, physiotherapist appointments, a referral to get a CT scan all in my new local area yet ACC have been hell bent on pressuring me to travel to Auckland over the last month, when I explained that ACC have not updated their refunded expenses since 2010 when fuel was \$1.77 they promised me flight from Whitianga to Auckland return to meet there needs.

I accepted, then because of adverse weather events the airport as well as many roads in and out of the Coromandel Peninsula were closed because of flooding.

Then I'm told because of the fact the airport is closed I'm expected to travel in a taxi from the Coromandel Peninsula to Auckland return go to my appointment and then hopefully make it home if it hasn't bucketed down raining which has been happening daily in my local area.

I refused this request because of these facts and I find someone expecting this from me is not reasonable.

You were notified of my change of address via the medical certificate sent to ACC on the 16/6/22 via mercury bay medical centre as well as myself emailing you these details when I asked for expenses forms that I've still not received.

The reasons for stopping weekly compensation were because of reasons outside of my control.

[28] Mr Sanders did not attend the further scheduled medical appointment on 27 July 2022.

[29] On 18 August 2022, Mr Sanders attended a scheduled medical appointment with a physiotherapist in Auckland.

[30] On 23 August 2022, Mr Sanders attended an assessment with Dr David Prestage, Occupational Physician, in Hamilton. On 28 August 2022, Dr Prestage reported on his assessment of Mr Sanders:

Mr Sanders has some minimal weakness of flexion of the right elbow. He is also relatively physically deconditioned with regard to an immediate return to work as a carpenter on a full-time basis. In addition, there is an understandable degree of caution in relation to a possible risk of re-injury. ...

Mr Sanders' current incapacity is causally related to the accident on 6 April 2021. Issues of confidence in the arm and a fear of re-injury are present but these are related to that incident. The impact of the Covid-19 lockdown is also a factor in Mr Sanders's current presentation.

[31] On 16 September 2022, the Corporation issued a new decision advising Mr Sanders as follows:

ACC will reinstate your weekly compensation from the 27/07/2022, however your weekly compensation will remain suspended between 21-27 July 2022. This decision revokes and replaces the previous decision issued on the 22/07/22.

[32] On 21 December 2022 and 10 January 2023, review proceedings were held. On 7 February 2023, the Reviewer dismissed the review, on the basis that the Corporation was correct to suspend Mr Sanders' weekly compensation for the period 21-27 July 2022, as the Corporation reasonably required Mr Sanders to attend the appointment on 21 July 2022 and communicated that and the consequence of non-compliance to Mr Sanders.

[33] On 13 February 2023, a Notice of Appeal was lodged.

## **Relevant law**

[34] Section 72 of the Accident Compensation Act 2001 ("the Act") provides:

### **72 Responsibilities of claimant who receives entitlement**

- (1) A claimant who receives any entitlement must, when reasonably required to do so by the Corporation,— ...
  - (d) undergo assessment by a registered health professional specified by the Corporation, at the Corporation's expense:
  - (e) undergo assessment, at the Corporation's expense:

- (f) co-operate with the Corporation in the development and implementation of an individual rehabilitation plan:
- (g) undergo assessment of present and likely capabilities for the purposes of rehabilitation, at the Corporation's expense:
- (h) participate in rehabilitation.

[35] In *Slight*,<sup>1</sup> Powell J stated:

[53] Section 72 sets out the responsibilities of a claimant who receives an entitlement. A claimant who receives any entitlement must, when reasonably required to do so by the Corporation, undergo assessment by a registered health professional specified by the Corporation. I accept Mr Gwilliam's submission that a precondition of s 72(1) is reasonableness on the part of the Corporation. If the requirement is unreasonable it is difficult for the Corporation to assert that a claimant must comply with it or is required to do that which the Corporation unreasonably requires.

[36] Section 117 of the Act provides:

**Corporation may suspend, cancel, or decline entitlements**

- (1) 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.
- (2) The Corporation must give the claimant written notice of the proposed suspension or cancellation within a reasonable period before the proposed starting date.
- (3) The Corporation may decline to provide any entitlement for as long as the claimant unreasonably refuses or unreasonably fails to—
  - (a) comply with any requirement of this Act relating to the claimant's claim; or
  - (b) undergo medical or surgical treatment for his or her personal injury, being treatment that the claimant is entitled to receive; or
  - (c) agree to, or comply with, an individual rehabilitation plan. ...

[37] In *Peck*,<sup>2</sup> where the Court of Appeal considered the equivalent provision of section 116 of the Accident Insurance Act 1998, McGrath J stated:

[33] Thus the power to decline to provide an entitlement, which is conditional on a person entitled acting unreasonably in the manner outlined in s 116(3), is an enforcement power given in the public interest. It is

<sup>1</sup> *Slight v Accident Compensation Corporation* [2017] NZCA 2716.

<sup>2</sup> *Accident Compensation Corporation v Peck* [2004] NZCA 324.



available where there has been a breach of duty. It is not given for punitive purposes but in order to ensure that the duties of persons entitled are observed, so that the scheme operates effectively.

[38] In *White*,<sup>3</sup> Barber DCJ stated:

[23] Reasonableness depends on all the circumstances of the case. It was put for ACC that, as a starting point, so long as ACC's requirement is not oppressive, it is reasonable for ACC to seek an accurate and contemporaneous assessment. That is probably so ...

## **Discussion**

[39] The issue in this case is whether the Corporation correctly suspended Mr Sanders' weekly compensation from 21 to 27 July 2022 on the basis of non-compliance.

[40] The Corporation submits as follows. It is plain from the communications between Mr Sanders and the Corporation that he understood the requirement to attend the appointment that had been arranged for him, as well as the consequences of not doing so. The Corporation used its best efforts to arrange transport for Mr Sanders in the circumstances that arose, and he clearly communicated that he would not comply. The decision suspending his entitlements for non-compliance was reasonable and the appeal should be dismissed.

[41] This Court acknowledges the above submissions. The Court accepts that Mr Sanders understood the requirement to attend the assessment appointment on 21 July 2022 that had been arranged for by the Corporation, as well as the consequences of not doing so. The Court also accepts that Mr Sanders had previously communicated that he would not attend the appointment. However, the Court points to the following circumstances of this case.

[42] First, the Court finds that Mr Sanders had reasonable grounds for objecting to the mode of transport to and from his assessment appointment in Auckland on 21 July 2022. The understanding of Mr Sanders and the Corporation prior to the

---

<sup>3</sup> *White v Accident Compensation Corporation* [2012] NZACC 13.

appointment was that Mr Sanders would be funded flights to and from Auckland to attend his appointment there. Shortly before midday on the day before the scheduled appointment, Mr Sanders was advised by the Corporation that, due to weather conditions, he was required to travel to and from his appointment by a paid taxi. Mr Sanders' refusal to accept this arrangement needs to be seen in light of:

- (a) the inclement weather conditions at the time: Whitianga airport was closed because its airfield was "waterlogged";
- (b) Mr Sanders' ongoing health issues arising out of his accident two years before; and
- (c) the distance involved in driving from Whitianga to Auckland and back is over 420 kilometres, with an estimated total time of around six-and-a-half hours, with the expectation that this return trip would be done in the same day.

[43] Second, the Court finds that Mr Sanders' assessment and rehabilitation process was not seriously jeopardised by his non-attendance at the scheduled assessment appointment on 21 July 2022. Mr Sanders attended medical appointments on 18 and 23 August 2022, as part of his assessment process, and the Corporation subsequently reinstated his weekly compensation payments, except for the period 21-27 July 2022.

[44] The Court concludes from the above that Mr Sanders did not unreasonably refuse or fail to attend the scheduled appointment on 21 July 2022, such that his weekly compensation for the ensuing week should remain suspended.

### **Conclusion**

[45] For the above reasons, the appeal is allowed, and the review decision dated 7 February 2023 is set aside.

[46] Mr Sanders is entitled to costs. If these cannot be agreed within one month, I shall determine the issue following the filing of memoranda.

A handwritten signature in cursive script, appearing to read 'P R Spiller', written in dark ink on a light background.

P R Spiller  
District Court Judge

Solicitors for the Respondent: Izard Weston.