

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 227

ACR 90/21

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

Hearing: 30 September 2022
Heard at: Auckland/Tāmaki Makaurau
Appearances: Mr Savage in person
Ms H Ifwersen for the respondent
Judgment: 30 November 2022

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
(Lump Sum Payment – Accident Compensation Act 1982 and 1992)**

[1] At issue in this appeal is the correctness of a decision made by the Accident Compensation Corporation on 1 March 2019 declining the appellant’s claim for an additional lump sum payment under sections 78 and 79 of the Accident Compensation Act 1982.

Background

[2] Mr Savage suffered various injuries in the 1980s, all of which were covered by ACC:

- [a] 1 July 1983: Injury to left hip;
- [b] 20 March 1985: Sprain of the right shoulder and arm;
- [c] 15 July 1986: Sprain of the right wrist;

[d] 16 July 1991: Noise induced hearing loss.

[3] Before the Accident Compensation Act 1992 came into force and repealed the 1982 Act, Mr Savage received several lump sum payments:

[a] 89398574: 1986 sprain of the right wrist: 5 per cent payment was made on 15 November 1988 - \$1,500.00;

[b] 86050168: 1985 sprain of the right shoulder and arm: 7 per cent payment was made on 11 November 1988 - \$3,000.00;

[c] 84051348: 1983 injury to left hip: 21 per cent payment was made on 28 September 1988 - \$1,785.00.

Note: payment of only 10.5 per cent was made for this accident, with the other 10.5 per cent being apportioned to another accident in Australia in 1972, which was not covered;

[d] Q2016769006: 1991 noise induced hearing: 9.2 per cent payment was made on 21 December 1993 - \$1,564.00.

[4] On 14 November 1988, the Corporation wrote to Mr Savage revoking its decision of 27 September 1988 to make a 10.5 per cent (\$1,785.00) lump sum payment for the 1983 left hip injury under section 78 of the 1982 Act. The Corporation advised that it considered his disability resulting from his hip injury was wholly attributable to his uncovered Australian accident, and therefore that he was not entitled to any compensation from the resulting disability. The Corporation advised however that it would not be seeking to recover the payment from Mr Savage.

[5] The 14 November 1998 decision noted that Mr Savage had applied to review the 27 September 1988 decision that it was now revoking, deeming Mr Savage's application for review "unacceptable" now that the relevant decision had been revoked. There is no record of Mr Savage applying to review the 14 November 1998 decision.

[6] In 2014, an application for a further lump sum payment was made under the 1982 Act.

[7] On 3 February 2014, Mr Savage requested further lump sum compensation under sections 78 and 79 of the 1982 Act. This was on the basis that he had received new medical evidence that the 1988 lump sum payment was wholly inadequate.

[8] The new medical evidence that Mr Savage referred to appears to arise in the context of a District Court Decision¹ on the appellant's entitlement to weekly compensation for his 1983 hip injury. This judgment found that historical medical evidence established that Mr Savage's 1983 hip injury was the cause of much of his physical impairment and/or pain, as opposed to the previous 1972 hip injury, which Mr Savage did not have cover for, and which was relied upon in ACC's 1988 revocation decision as the reason for deciding that Mr Savage was not entitled to any compensation for the resulting disability.

[9] On 14 April 2014, the Corporation issued a decision letter declining Mr Savage's request for a further lump sum payment, stating that:

I have considered all the information you have provided and advise that ACC declines your request for further lump sum compensation under the 1982 Act, sections 78 and 79.

This is because the 1982 Act was repealed by the 1992 Act and lump sum compensation has been replaced by independence allowance.

The date of your injury determines that if you apply for compensation now, it would be an independence allowance.

[10] Consequently, in 2015, Mr Savage applied for an independence allowance for his 1983 hip injury. On 20 November 2015, the Corporation issued a decision letter declining this application on the basis that he was not entitled to an independence allowance because his level of impairment was too low for him to be eligible for this form of entitlement.

[11] In its letter advising the appellant of its decision, ACC listed the injuries that were assessed for a combined independence allowance (for injuries before 1 July 1999):

- (a) 15/07/1986 – Sprain/strain of right wrist;
- (b) 20/03/1985 – Sprain of shoulder and upper arm – right;
- (c) 1/07/1983 – Traumatic arthropathy – hip – left;
- (d) 16/07/1991 – Noise induced hearing loss – left and right.

¹ *Savage v Accident Compensation Corporation* [2008] NZACC 184.

The assessment identified your level of impairment to be 32 per cent. However, as you have previously been paid a lump sum payment, we have to take this into account when we determine your entitlement to an independence allowance.

The calculation is as follows:

Assessed level of impairment – 32 per cent
Previous lump sum compensation impairment (for injuries before 1 July 1992) – 31 per cent
Impairment to be considered for an independence allowance – 1 per cent.

As your impairment considered for an independence allowance is less than 10 per cent (the minimum level eligible for an allowance) we must decline your application.

[12] In 2016 Mr Savage applied to review the Corporation's decision of 20 November 2015 declining his application for an independence allowance for his 1983 hip injury.

[13] By review decision issued on 11 August 2016, the reviewer, Ms Hill, modified the Corporation's decision of 20 November 2015 on the basis that the 1988 lump sum had only compensated Mr Savage for a 20.5 per cent level of impairment. Therefore, the reviewer found that Mr Savage had not yet been compensated for the remaining 10.5 per cent level of impairment (which was his 1983 left hip injury). This finding required ACC to amend its original calculations and ultimately resulted in Mr Savage being eligible for an independence allowance.

[14] In making the 2016 application to review the decision of 20 November 2015 challenging the Corporation's decision regarding an independence allowance, Mr Savage made submissions at the review hearing on the 1988 lump sum payment, which was the subject of the Corporation's 15 April 2014 decision. He submitted at the hearing that the 1988 lump sum payment was insufficient compensation for his hip injury. However, Mr Savage had not filed a review application challenging the Corporation's 15 April 2014 decision declining to make a payment of lump sum compensation.

[15] In considering Mr Savage's submissions regarding lump sum payment, Ms Hill stated in the 11 August 2016 review decision:

The first of Mr Savage's concerns that I must address is that he would like a further lump sum to be awarded under the provisions of the previous legislation because he does not believe he received adequate compensation for the 1983 hip injury in 1988. He referred to the findings of the District Court decision about the fracture in the hip now being attributed to the 1983 accident.

While I understand what Mr Savage is submitting, I simply have no jurisdiction or ability to direct ACC to consider the now defunct Act, or even look at ACC's decision of 14 November 1988.

Furthermore, as noted by (Counsel for ACC) there has been a decision issued to the effect that ACC could not award any further lump sum under the 1982 Act. As I understand it, there was no review application filed against that. My jurisdiction relates to the decision of 20 November 2015. I have no inherent jurisdiction to widen the scope of the review.

[16] On 12 February 2019, Mr Savage made a fresh request of the Corporation for an additional lump sum payment regarding the 1983 left hip injury under sections 78 and 79 of the 1982 Act.

[17] On 1 March 2019, the Corporation issued the decision stating that it could not consider his request because:

All these Acts and their corresponding entitlements have been repealed. ACC are unable to consider your request. As such, this has been declined.

[18] On the same day, 1 March 2019, Mr Savage filed an application to review the Corporation's decision.

[19] In the decision issued on 2 July 2019, the reviewer decided that he did not have jurisdiction to consider the correctness of ACC's decision of 1 March 2019. This decision was quashed by Judge Mathers in a minute dated 19 June 2020. Her Honour directed that another review hearing take place. That hearing was held on 4 March 2021.

[20] On 31 March 2021, the reviewer, Mr Thomson, issued a decision upholding ACC's decision of 1 March 2019 declining Mr Savage's claim for an additional lump sum payment under sections 78 and 79 of the 1982 Act.

[21] On 23 April 2021, Mr Savage filed a notice of appeal against the decision of the reviewer, Mr Thomson.

[22] Mr Savage produced to the court a review decision dated 4 September 1985. He read the following excerpt from it, where the reviewer said, at page 3:

I tend to accept the submissions made by Mr Savage's father, that the accident of 1 July 1983 and indeed in August 1982 were not of little consequence and I note that the medical certificates in 1984 indicated that the symptoms were aggravated by the work that Mr Savage was doing as a boner.

...

However, I have also given careful consideration to the contents of Mr Hardy's report. His report focuses on the painful symptoms associated with work activities or any other areas with excessive use of the left leg. It would appear that at the time of his examination in August 1985, these symptoms were still present to a marked degree and I understand that to be the case from Mr Savage.

[23] Mr Savage submitted that it was basically ACC's decision of 20 November 2015 that he was appealing against. That was the decision from ACC that taking into account earlier lump sum compensation, the impairment to be considered for an independence allowance was 1 per cent and less than the 10 per cent minimum level for eligibility for an independence allowance.

[24] Mr Savage acknowledges that he cannot claim a lump sum payment now, because the legislation has changed.

[25] Mr Savage told the court he was relying on section 65 of the Accident Compensation Act 2001, which allows the Corporation to revise any decision made in error, whatever the reason for the error. He also relies on section 390 of the Accident Compensation Act 2001, which provides:

Revision of Decisions Under Former Acts

Section 390(1) – The Corporation may revise any decision specified in subsection (2) if it appears to the Corporation that the decision was made in error, whatever the reason for the error.

(2) The following decisions made before the commencement of the Act:

(a) Decisions made by the Corporation (including decisions about premiums)

...

(3) In revising a decision, the Corporation must apply the Act that applied at the time when the decision being revised was made.

[26] He refers to the High Court decision in *Bartels*² where the High Court considered section 390 and said:

[31] Secondly, we see no reason to restrict the phrase "made in error" in the way suggested by Judge Ongley based on the plain words of the statute. The phrase following "made in error", "whatever the reason for the error" illustrates the broad intent of

² *Accident Compensation Corporation v Bartels* [2006] NZAR 680, CIV-2005-486-002072

Parliament. We reject Judge Ongley’s proposition that to illustrate the wider definition, the draughtsman needed to say “if it appears to the Corporation that the decision was wrong” ...

[27] Mr Savage says that in his case, what was described as a minor sprain in 1985 turned out to be a fracture by 1988.

[28] Mr Savage refers to two payments relating to the 1 July 1983 injury paid on 4 August 1983 under claim number 84051348, relating to his hip. These payments are listed in a document headed “Lump Sums / Independence Allowance Payment Report”. It shows a payment of \$1,785.00 described as “Lump Sum – Loss of Physical Function”. On the same day there is a further payment of \$500.00 described as “Lump Sum – Loss of Enjoyment of Life”.

[29] Mr Savage referred to a number of cases³ where it was acknowledged that if there was subsequent deterioration, further compensation could be awarded. In *Albert*, he notes the award was increased from \$5,000.00 to \$7,500.00. He also refers to a similar increase awarded by Judge Blackwood in *Dean*.⁴

Respondent’s Submissions

[30] Ms Ifwersen acknowledges that the appellant has cover for the 1983 injury and the exacerbation of that injury.

[31] She says, however, that the lump sum regime in the 1982 Act was repealed in the 1992 Act.

[32] She notes there was no late application by Mr Savage to review ACC’s decision. She says that Mr Savage is compensated anyway via the independence allowance under the 2001 Act.

³ *Mitchell v Accident Rehabilitation and Compensation Insurance Corporation* [1997] NZACC 220; *Herlihy v Accident Compensation Corporation* [2006] NZACC 196; *Albert v Accident Compensation Corporation* [1989] NZACAA 29.

⁴ *Dean v Accident Compensation Corporation* [1992] NZACAA 6.

[33] She says that ACC has met its statutory obligations to compensate Mr Savage for the level of whole person impairment that can be attributed to his 1983 hip injury through the independence allowance entitlement in the 2001 Act.

[34] She refers to section 377 of the 2001 Act, which provides for independence allowances for personal injuries suffered before 1 July 1999 and expressly takes into account any previous lump sum compensation payments made under the 1982 Act, by requiring the percentage of impairment for which any lump sum compensation was received under the 1972 or 1982 Acts to be deducted from any subsequent whole person impairment under the 2001 Act.

[35] In 2016, in response to the 2016 review decision issued by Ms Hill, ACC corrected the error in its 1988 payment and paid Mr Savage an independence allowance.

[36] She says the reviewer modified ACC's 2015 decline independence allowance decision on the basis that the 1988 lump sum had only compensated Mr Savage for 20.5 per cent level of impairment. Therefore, Mr Savage had not yet been compensated for the remaining 10.5 per cent level of impairment from the 1983 left hip injury.

[37] She says that accordingly, ACC amended its original calculations and ultimately paid Mr Savage an independence allowance to compensate him for the 10.5 per cent level of impairment arising from his 1983 left hip injury.

[38] She submits that the legislative intent behind section 377 of the 2001 is to directly address the impact of lump sum compensation under repealed Acts in captured cases like Mr Savage's, and provide a fair regime for entitlement for whole person impairment in cases such as this.

[39] Thus, she submits, ACC has met its legislative obligations to compensate Mr Savage for his 1983 hip injury.

[40] She says that the 2001 Act provides specifically for lump sum compensation under former Acts in section 380. However, for that provision to apply, a claimant needs to bring a valid late review application or appeal of the original decision about payment of lump sum entitlements.

[41] She refers to the reviewer, Ms Hill's, decision of 11 August 2016. In that decision, Ms Hill said:

I am satisfied that Mr Savage's impairment for all covered injuries is 32 per cent.

However, what is not correct is the amount of lump sum compensation that ACC has deducted from Mr Savage's assessed level of impairment. ACC now accept that the 10.5 per cent that was initially awarded to Mr Savage in 1988 was in fact incorrect, as it was ACC's view at the time that the entire 21 per cent that had been assessed by Mr Ayres for the hip injury was due to the non-covered Australia accident. Therefore, while ACC did not seek repayment of the amount of money which it has paid incorrectly, the fact remains that Mr Savage did not and has not received any impairment rating for the fractured hip in the 1983 accident under the 1982 Act.

Conclusion

ACC's decision is modified by amending the decision of 20 November 2015 to reflect that previous lump sum compensation is reduced from 31 per cent to 20.5 per cent, being the deduction of the 10.5 per cent which ACC originally revoked in November 1988.

Therefore, 32 per cent is deducted by 20.5 per cent, leaving a balance of 11.5 per cent. I direct ACC to provide Mr Savage with the equivalent independence allowance of an impairment of 11.5 per cent. That is payable from the date of the application.

[42] Ms Ifwersen therefore submits that the appellant has been compensated fairly and ACC has met its obligations.

[43] She acknowledges that ACC has the power under section 390 to revise any of its decisions if they are made in error.

Decision

[44] The respondent acknowledges in this case that the lump sum compensation awarded in this case in 1986 in respect of the appellant's right hip injury of 1 July 1983 was incorrectly calculated.

[45] However, this was corrected by the reviewer, Ms Hill, in her review decision dated 11 August 2016. The reviewer concluded that the appellant's impairment for all covered injuries was 32 per cent and what was not correct was the amount of lump sum compensation that ACC deducted from Mr Savage's assessed level of impairment.

[46] The reviewer modified ACC's decision of 20 November 2015 to reflect that lump sum compensation is reduced from 31 per cent to 20.5 per cent, being the deduction of

10.5 per cent, which ACC originally revoked in 1988. This, according to the reviewer, left a balance of 11.5 per cent and she directed that ACC provide Mr Savage with the equivalent independence allowance of an impairment of 11.5 per cent from the date of the application.

[47] Against this background, on 1 March 2019, ACC declined the appellant's claim for an additional lump sum payment under sections 78 and 79 of the Accident Compensation Act 1982.

[48] ACC's position is that there is no legislative basis for granting the relief sought by Mr Savage, as lump sum compensation was repealed by section 179 and Schedule 4 of the Accident Compensation Act 1992.

[49] Furthermore, it was noted on behalf of ACC that the appellant has made no late application to review the 1988 decision.

[50] In the 2001 Act, section 377 provides that persons who suffered personal injury before 1 July 1999 are entitled to be assessed for an independence allowance under Part 4 of Schedule 1 of the Accident Insurance Act 1998, irrespective of when the claim for cover for personal injury was lodged.

[51] I accept Ms Ifwersen's submission that the legislative intent behind section 377 of the 2001 Act is to directly address the impact of lump sum compensation under repealed Acts and capture cases like Mr Savage's.

[52] Parliament plainly wished to replace lump sum compensation with an independence allowance and did so when it enacted the Accident Insurance Act 1998.

[53] However, to be fair to those injured who had lodged claims for lump sum compensation before 1 October 1992, their ability, to continue with such a claim, could continue if the criteria of section 380 were met.

[54] That did not change the clear will of Parliament in the 1998 Act that an independence allowance regime would replace the lump sum compensation regime.

[55] Furthermore, as noted, Judge Powell, in *Pearson*,⁵ concluded that any determination by ACC in regard to exercising its discretion under section 390 was not a decision in terms of section 6 of the Act (and thus not amenable to review and appeal).

[56] Ultimately in this case the error that occurred in the 1988 payment to Mr Savage, as identified by the reviewer, Ms Hill, in 2016 has now been remediated by ACC by the payment of an independence allowance to Mr Savage. Accordingly, there is nothing further for this court to decide.

[57] Accordingly, the appeal is dismissed.

[58] There is no issue as to costs.



CJ McGuire
District Court Judge

Solicitors: H Ifwersen and EM Watt, Auckland for the respondent.

⁵ *Pearson v ACC* [2017] NZAC 58.