

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2024] NZACC 31

ACR 19/23

ACR 20/23

ACR 82/23

UNDER

THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF

AN APPEAL UNDER SECTION 149 OF
THE ACT

BETWEEN

SOULSBY, ANDRE
Appellant

AND

ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: 9 February 2024

Held at: Auckland District Court

Appearances: J Robinson for the Appellant
F Becroft for the Accident Compensation Corporation (“the
Corporation”)

Judgment: 19 February 2024

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for interest on weekly compensation - s 114(1),
backdated weekly compensation – s 105, cl 43, Sch 1,
alleged delay, s 134(1)(b), Accident Compensation Act 2001 (“the Act”)]**

Introduction

[1] These are appeals from the following decisions:

- (a) ACR 20/23: an appeal from the decision of a Reviewer dated 16 September 2022. The Reviewer dismissed an application for

review of the Corporation's decision dated 25 May 2022 which calculated interest owing on Mr Soulsby's backdated weekly compensation for the periods from 15 August 2019 to 30 January 2020.

- (b) ACR 19/23: an appeal from the decision of a Reviewer dated 12 January 2023. The Reviewer dismissed an application for review of the Corporation's decision dated 30 June 2022 which accepted Mr Soulsby's request for backdated incapacity for work for the period 31 January 2020 to 11 July 2021.
- (c) ACR 82/23: an appeal from the decision of a Reviewer dated 18 January 2023. The Reviewer dismissed an application for review of the refusal of the Corporation to issue a new decision as to the date of Mr Soulsby's incapacity.

Background

[2] On 6 February 2013, Mr Soulsby injured his right shoulder, upper arm and elbow/forearm while throwing wood that he had been cutting for firewood. At the time, Mr Soulsby was a self-employed electrician.

[3] On 17 June 2013, Mr Soulsby visited a physiotherapist who lodged a request for cover for a right shoulder sprain and right elbow sprain, said to have been caused by the accident on 6 February 2013. The Corporation granted cover for a sprain of the right shoulder/upper arm, and sprain of right elbow/forearm.

[4] On 17 March 2018, Mr Soulsby entered prison, where he remained until 15 August 2018.

[5] On 20 August 2018, following Mr Soulsby's release from prison, he saw his GP for ongoing issues with his right shoulder. He was then assessed by Mr Peter Poon, Orthopaedic Surgeon, and had an MRI scan on 23 November 2018. Mr Poon diagnosed Mr Soulsby with a high-grade supraspinatus tear involving 90% of its thickness. Mr Poon advised that Mr Soulsby was unable to work at that time due to the injury.

[6] On 9 October 2018, Mr Soulsby spoke to the Corporation and explained that he believed the injury he had suffered in 2013 had been exacerbated by his recent time in prison and that he sought weekly compensation on that basis.

[7] On 15 October 2018, the Corporation declined entitlement to weekly compensation on the basis that there was insufficient medical evidence to show that Mr Soulsby's symptoms and incapacity were caused by the covered injury. Mr Soulsby applied to review this decision, which resulted in the Corporation undertaking further investigation.

[8] On 14 December 2018, the Corporation received an Assessment Report and Treatment Plan from Mr Peter Poon, Orthopaedic Surgeon. Mr Poon diagnosed Mr Soulsby's right shoulder problems as being the result of a supraspinatus tear and dislocated long head of biceps tendon. He advised that he considered this injury to have been caused by the 2013 accident and requested funding for surgery to repair it.

[9] The request was reviewed by Clinical Advisor, Mr Patrick Medicott, who agreed with Mr Poon that the current problem and need for surgery was linked to the 2013 accident. On this basis, the Corporation issued a decision dated 5 February 2019, accepting cover for a rotator cuff tear and approved funding for the surgery.

[10] On 16 April 2019, Mr Soulsby's then advocate asked the Corporation to reconsider his request for weekly compensation, based on the additional cover.

[11] On 18 June 2019, as a result of this investigation, the Corporation issued a fresh decision declining entitlement to weekly compensation on the basis that Mr Soulsby was not an earner at the date of his incapacity (20 August 2018). Mr Soulsby applied to review this decision.

[12] On 16 September 2019, the Reviewer quashed the Corporation's 18 June 2019 decision and directed it seek advice from its medical advisors as to whether Mr Soulsby had suffered continuing incapacity from the period when he was an earner, then issue a new decision.

[13] The Corporation's clinical advisor, Ms Anthea Clements, reviewed Mr Soulsby's file and noted there were no contemporaneous clinical records for the period prior to 14 April 2018, that date being the last date, for the purposes of clause 43 of the Accident Compensation Act, Schedule 1, that he had ceased to be in employment.

[14] On 29 October 2019, the Corporation declined Mr Soulsby weekly compensation because it could not confirm incapacity on or prior to 14 April 2018. Mr Soulsby applied to review this decision.

[15] On 24 January 2020, Mr Poon advised that he expected Mr Soulsby to be fit to return to work in six weeks.

[16] On 31 January 2020, Dr David Ruttenberg, Occupational Physician, noted that Mr Soulsby had suffered from symptoms from his shoulder injury, over the years following the accident in 2013 and prior to his imprisonment, but that he appeared to have been able to continue his work as an electrician adequately, with modifications to work tasks as required. Dr Ruttenberg concluded:

I cannot state that he could not work during the period leading up to imprisonment, given the fact that he did actually work.

...

I would ... be of the opinion, that Mr Soulsby would quite plausibly not have been able to work, after he was released from prison in August 2018.

[17] On 17 April 2020, the Reviewer upheld the Corporation's decision declining weekly compensation. The Reviewer held that Mr Soulsby could not establish that he was incapacitated on or before the last day he was an earner; and that he was not an earner by 20 August 2018 (being the date of incapacity). Mr Soulsby lodged an appeal from that review decision.

[18] On 3 March 2021 and 6 July 2021, consultation notes from Mr Soulsby's GP suggested that Mr Soulsby had managed to return to part-time work in his pre-injury role.

[19] On 17 July 2021, Dr Anthony Burgess, Occupational Physician, reported that Mr Soulsby would have likely been at least partially incapacitated for a short period, immediately following the accident in 2013, and then, after recovering from that initial acute incapacity, his shoulder would have gradually deteriorated over time with further incapacity developing again at some point, although Dr Burgess could not say when that would have been. Dr Burgess added:

There is however normally ongoing weakness and pain with repetitive use of the tendon that has been torn and it is common for tendons to continue to tear over the following months and years. As these tendons do not repair at some point in time substantial incapacity will develop. It is difficult to put an actual timeframe in terms of this process however for manual workers I would expect a relatively substantial incapacity at some point in time...

[20] On 28 October 2021, Ms Soulsby's appeal was heard in the District Court.

[21] On 5 November 2021, the District Court found in its judgment that Mr Soulsby had become incapacitated at some point after his imprisonment, on or before 14 April 2018, within the 28-day period during which he could be deemed still to have earnings under the Act.¹ McGuire DCJ stated:

[56] What we are confronted with in this case is the fact that the appellant was able to work as an electrician earning a good income until the time he entered prison on 17 March 2018 and then was found by Dr Ruttenberg to be incapacitated from the time he was released from prison on 15 August 2018. No physically aggravating activities are identified during this period. On the contrary, the inference to be drawn is that it was his enforced inactivity during his stay in prison and the physiological effect that that had on him that resulted in the finding of incapacity by the time he left prison.

...

[60] It is a notorious fact that inactivity deconditions the body. Here I find that 28 days of enforced inactivity was long enough to render the appellant incapacitated, given his underlying serious and worsening supraspinatus tear.

[61] I therefore conclude that incapacity was present by 14 April 2018, that is, within 28 days after he ceased to be employed.

[62] Thus, his eligibility for weekly compensation in terms of cl 43 of the First Schedule to the Act is established. For these reasons therefore the appeal is allowed and ACC's decision of 29 October 2019 declining weekly compensation is reversed.

¹ *Soulsby v Accident Compensation Corporation* [2021] NZACC 169.

[22] On 24 November 2021, Mr Michael Bockett, Technical Advisor, provided advice on how to implement the Court's decision. He recommended that the Corporation take a pragmatic approach and accept that Mr Soulsby met the test for incapacity required under section 105 of the Act, without requiring further occupational and medical assessment. The Corporation proceeded to obtain the further information required to pay Mr Soulsby backdated weekly compensation.

[23] On 25 November 2021, the Corporation obtained bank account and tax details from Mr Soulsby.

[24] On 14 December 2021, the Corporation completed IRD checks for pre- and post-incapacity earnings. The Corporation then paid Mr Soulsby backdated weekly compensation for the period from 8 August 2018 (his release from prison) to 30 January 2020 (his assessment by Dr Ruttenberg). Due to additional information being required from WINZ for part of this period, payment was made in two instalments, the first on 24 December 2021 (for the period from 8 August 2019 to 30 January 2020) and the second on 27 January 2022 (for the period 8 August 2018 to 7 August 2019).

[25] On 22 February 2022, the Corporation determined that Mr Soulsby was entitled to interest on backdated weekly compensation from 25 November 2021, when it had received his bank account and tax details. Mr Soulsby filed an application for review of this decision, arguing that he should have received interest from 8 August 2018, the date from which his entitlement to weekly compensation had commenced.

[26] On 4 May 2022, the issue was considered by the Corporation's weekly compensation discussion panel. The panel discussed a number of possible dates and concluded that the Corporation had the majority of the information required to calculate and pay Mr Soulsby his weekly compensation, once the District Court's decision was issued on 5 November 2021. The Panel recommended that the Corporation take a generous approach and pay interest from that date, despite there still being some information outstanding at that point.

[27] On 28 March 2022, an occupational assessment of Mr Soulsby was completed by Mr Gary Birchfield, Occupational Assessor. Mr Birchfield identified four work types for which he thought Mr Soulsby would be suited, without some further training. These work types were General Electrician, Fire Alarm Technician, Electronic Equipment Trades Worker, and Appliance Service Person.

[28] On 19 May 2022, Dr Burgess provided a report, having conducted a medical assessment of Mr Soulsby. Dr Burgess commented on the time course of Mr Soulsby's injury, impairment and imprisonment:

I appreciate the summary provided in your email referral letter and the accompanying documentation provided. I note that I have previously reviewed documentation in relation to Andre's injury and am aware of the time course of both injury, impairment and imprisonment noted. I was not previously provided with the report from Dr Ruttenberg. Although on superficial grounds this may simply look like the period of imprisonment was the only restriction leading to a cessation in Andre's work and this date has been used as the requesting period of weekly compensation, I believe the situation is a little more complex than that. I believe that collateral evidence including subsequent surgical findings, previous reduction in work hours which Andre states he can provide accounting evidence to confirm and restriction in non-work pursuits (indoor cricket) that Andre was suffering from symptoms in his right shoulder prior to his period of incarceration and was working with some restrictions on his function. If one is to consider the effects of the rotator cuff injury as a developing condition which was initiated in 2013 but propagated with time this would fit with the gradual reduction in work and income (if confirmed) that was noted by Andre prior to his prison term. Once coming out of prison he needed surgery on the shoulder which indicates fairly clearly that this was almost certainly the case prior to going into prison as there was no indication of further trauma or work-related aggravation during this period. On the counter of this argument however would be the view that prior to imprisonment he was still maintaining some work and therefore he would not have been completely incapacitated at the time of imprisonment. I am not sure of the implications around this in terms of weekly compensation. However, this is purely just stating things from an occupational medicine perspective given his right shoulder injury and his job requirements. I note the findings of the court case with Judge McGuire accepting incapacity by way of extension. The legal issue here is not something that I am familiar with and is outside of my scope to comment.

What I can say now is that Andre is back to full time work and has no restrictions in his shoulder. He has recovered from his surgery and returned to full function a little ahead of what I predicted when I last saw him. He appears motivated and I believe he has been honest and forthcoming with all questions I raised both at this assessment and previously.

[29] Dr Burgess also reported on Mr Soulsby's medical fitness to engage in the four work types which Mr Birchfield had identified. Dr Burgess concluded that he

did not believe Mr Soulsby would have been able to sustain full-time work in the work types of General Electrician and Fire Alarm Technician until approximately September 2021 (when Mr Soulsby returned to work as a self-employed electrician full time). However, Dr Burgess advised that, from the date he had seen Mr Soulsby previously on 12 July 2021, he likely would have been able to sustain full-time work in the work types of Electronic Equipment Trades Worker and Appliance Service Person:

Electronic Equipment Trades Worker - This role appears varied with working from a bench at times but also the need for climbing and reaching above head height to access and lift down attached electronic equipment for the purpose of assessment and repair. This would include taking down wall mounted sound and visual and camera equipment and could involve accessing ceilings to repair or access electrical based faults. In terms of the period from 31 January 2020 onwards I would state that this role would also have not sustainable for a significant period but may have become sustainable prior to his current role some time before September 2021. The reason for this is that it would involve less time spent with the right arm in forward flexion however he would still have needed physical strength in the right shoulder to carry out certain aspects of this role. If asked about this at the time of my assessment in July 2021 I would have likely cleared him to do this role.

Appliance Serviceperson - This role would require the uplifting of electrical appliances such as TV's / washing machines, dishwashers, and dryers. Some of these would be of significant weight and although mitigation with a trolley would be possible there would be a need for significant right shoulder use for moving such items. As such I would consider this role to have at times more significant physical demands than General Electrician albeit for shorter periods of time as once the items are taken back to the service depot, they could be repaired at bench height. Again, this role was likely to be sustainable perhaps a few months prior to his pre-injury work role and if asked about this at the time of my assessment in July 2021 I would have likely cleared him for this role.

[30] The Corporation then obtained further physiotherapy notes for the period from November 2019 to June 2020, and GP notes for consultations between July 2020 and July 2021. These notes suggested that Mr Soulsby had returned to some part-time work by March 2021. These notes were provided to Dr Burgess along with a request for further comment.

[31] Dr Burgess advised that he thought that Mr Soulsby may well have had capacity for work prior 12 July 2021, but could not confirm whether this was the case as he considered such an opinion to be too speculative:

I believe that collateral evidence including subsequent surgical findings, previous reduction in work hours which Andre states he can provide accounting evidence to confirm and restriction in non work pursuits (Indoor cricket) that Andre was suffering from symptoms in his right shoulder prior to his incarceration and was working with some restrictions on his function. If one is to consider the effects of the rotator cuff Injury as a developing condition which as initiated in 2013, but propagated with time, this would if the gradual reduction in work and income (if confirmed) that was noted by Andre prior to his prison term. Once coming out of prison he needed surgery on his shoulder which indicates fairly clearly that this was almost certainly the case prior to going into prison as there was no indication of further trauma or work related aggravation during this period.

...

Unfortunately, I would not be in a position to offer a firm date at which I believe the roles noted as medically sustainable in my previous assessment in July 2021 would have become sustainable as it would require too much speculation without having examined Andre during that time period. Although it may well be the case that the qualification for s105 ended some time prior to my assessment in July 2021, I would not be able to tell you when that was. As such I would still have to state similarly that I can only advise at the time of my assessment what roles were likely to be sustainable.

[32] On 25 May 2022, the Corporation issued a decision determining that Mr Soulsby was entitled to interest from the date of the District Court judgment (5 November 2021). The interest owing on Mr Soulsby's backdated weekly compensation was:

- (1) \$46.27 for the period 15 August 2018 to 7 August 2019 paid by the Corporation on 24 December 2021; and
- (2) \$72.67 for the period 8 August 2019 to 30 January 2020 paid by the Corporation on 27 January 2022.

Mr Soulsby applied for a review of this decision.

[33] On 30 June 2022, the Corporation issued a decision accepting that Mr Soulsby had been incapacitated and was entitled to weekly compensation from 31 January 2020 to 11 July 2021, but declined backdated weekly compensation from 12 July 2021, on the basis that the available evidence did not establish incapacity and suggested that he had capacity for suitable work from that date onwards.

[34] On 7 August 2022, Mr Robinson, for Mr Soulsby, emailed the Corporation suggesting that Dr Burgess' report of 22 May 2022 constituted new information which had not been available to the District Court. Based on this information, Mr Robinson asked the Corporation to reconsider the date of commencement of Mr Soulsby's incapacity, and issue a new decision regarding his entitlement to weekly compensation under section 103 of the Act, based on his incapacity since early 2017.

[35] On 9 August 2022, the Corporation replied to Mr Robinson's email, and referred to McGuire DCJ's decision of 5 November 2021 stating that Mr Soulsby did not have incapacity prior to 14 April 2018. The Corporation advised that it was not in a position to act contrary to the Judge's decision, and so no new decision would be issued.

[36] On 10 August 2022, Mr Robinson requested that the Corporation reconsider Dr Burgess' report of 19 May 2022 and issue a new decision.

[37] On 10 August 2022, the Corporation declined to issue a new decision, for the following reasons:

In regards to your request for ACC to issue a fresh decision addressing backdated incapacity for work/backdated weekly compensation, it is noted that a decision has previously been issued by ACC on this point, with this being upheld by a Reviewer. More recently Judge McGuire's 5 November 2021 District Court decision has rejected the prospect of backdated incapacity for work under s 103 of the Act/backdated WC entitlement prior to imprisonment. We stress that at this time Judge McGuire was already in receipt of a medical report from Dr Burgess which was ultimately not preferred when contrasted to the contemporaneous medical documentation available and reporting of Dr Ruttenberg/ACC's Clinical Advisory Panel.

It is noted that Mr Soulsby had an opportunity to appeal Judge McGuire's decision, however the required time to do this has passed.

ACC is aware of the more recent reporting of Dr Burgess, which we consider to represent elaboration of his prior position regarding historical incapacity for work, which was ultimately not favoured by Judge McGuire in the circumstances in his 5 November 2021 decision. Given the above points ACC is of the opinion that Judge McGuire's decision remains and that we are not in a position to revise this, nor issue a fresh decision, with review rights, on the prospect of backdated weekly compensation prior to imprisonment.

[38] On 6 September 2022, review proceedings were held in respect of the Corporation's decision of 25 May 2022, concerning interest. On 16 September 2022, the Reviewer dismissed the review, on the basis that the Corporation correctly calculated interest owing to Mr Soulsby from 5 November 2021.

[39] On 28 September 2022, an application was lodged on Mr Soulsby's behalf seeking review of the Corporation's alleged unreasonable refusal to issue a fresh decision on Mr Soulsby's claim under s 103 of the Act, based on the "further and new information since the District Court hearing".

[40] On 15 December 2022, review proceedings were held in respect of the Corporation's decision of 30 June 2022 concerning further backdated weekly compensation. On 12 January 2023, the Reviewer dismissed the review, on the basis that the Corporation correctly backdated Mr Soulsby's incapacity for work for the period 31 January 2020 to 11 July 2021.

[41] On 12 January 2023, review proceedings were held in respect of Mr Soulsby's submission that there had been unreasonable refusal by the Corporation to issue a decision on Mr Soulsby's claim under s 103 of the Act. On 18 January 2023, the Reviewer dismissed the review, on the basis that the Corporation had issued a decision on Mr Soulsby's entitlement and incapacity.

[42] On 27 January 2023, Mr Soulsby lodged Notices of Appeal in respect of the Reviewer's decisions of 16 September 2022 and 12 January 2023 (ACR 20/23 and ACR 19/23).

[43] On 21 April 2023, Mr Soulsby lodged a Notice of Appeal in respect of the Reviewer's decision of 18 January 2023 (ACR 82/23).

Discussion

ACR 20/23: interest on backdated weekly compensation

[44] In this case, the Corporation granted Mr Soulsby backdated weekly compensation for the period 15 August 2018 to 30 January 2020. On 30 June 2022,

the Corporation granted this weekly compensation following the judgment of the District Court on 5 November 2021. The issue in this case is whether the Corporation, in its decision dated 25 May 2022, correctly calculated interest owing on Mr Soulsby's backdated weekly compensation.

Relevant law

[45] Section 114 of the Act provides:

- (1) The Corporation is liable to pay interest on any payment of weekly compensation to which the claimant is entitled, if the Corporation has not made the payment within 1 month after the Corporation has received all information necessary to enable the Corporation to calculate and make the payment.
- (2) The Corporation is liable to pay the interest—
 - (a) for the period from the date on which payment should have been made to the date on which it is made (the liability period); and
 - (b) at the interest rate or rates for the liability period.

[46] In *Barnett*,² Paterson J stated:

[38] The determination of what constitutes “all information necessary” must depend on the facts of each case. ... Without necessarily accepting that the list is exclusive in every case, I accept the submissions on behalf of the Corporation that in the particular case it was necessary to determine:

- (a) That there had been an incapacity due to personal injury;
- (b) The personal injury was caused by an accident;
- (c) The date of the accident;
- (d) That Mr Barnett was an earner during the relevant period; and
- (e) Mr Barnett's relevant earnings during the period.

[47] In *Kearney*,³ Chambers J of the Court of Appeal stated that “all necessary information” included “further medical or financial information”.

² *Barnett v Accident Compensation Corporation* [2002] NZHC 1305.

³ *Accident Compensation Corporation v Kearney* [2010] NZCA 327, at [30].

[48] In *Miller*,⁴ Stevens J of the Court of Appeal stated:

[40] We consider that it is unhelpful to characterise the purposes of what is now s 114 as being either solely compensatory or solely punitive. In our view, the purpose of the section is to compensate claimants for delays in processing their entitlements. At the same time, the section seeks to deter the Corporation from unnecessary delay. These twin purposes should not be seen as mutually exclusive. The focus must be upon how the section should be interpreted in its statutory context.

[41] It is now well established that interest will run from the first date on which it can be said that the Corporation holds ‘all information necessary’. The focus is not on the date of review or appeal, but rather on the date that it can be said that the Corporation is first in possession of the necessary information to make the same decision as that eventually reached on review or appeal. Hence the Corporation’s liability to pay interest on any payment of weekly compensation arises if such payment is not made within one month after the Corporation has received all the necessary information. This interpretation draws on the plain meaning of this section. ...

[44] We agree with that assessment [in *Barnett*, above].

[49] In *Young*,⁵ Henare DCJ stated:

[25] ... the Corporation had “all information necessary” when it had both the medical and financial information. The medical information required cogent information of deterioration of vocational independence, a reassessment involving both a VIOA and VIMA and the results showing Mr Young no longer had vocational independence. The required financial information to calculate weekly compensation from the date of reinstatement and/or to abate his weekly compensation (on post incapacity earnings) and/or reimburse any benefit payments to Work and Income (WINZ) under s 252 of the Act.

Discussion

[50] Mr Robinson, for Mr Soulsby, submits as follows. The pivotal fact set within s 114 of the Act is the date at which time the claim was lodged and the decision to decline entitlement was made. The purpose of this section is to reduce the financial impact on a claimant for wrong decisions made by the Corporation that deny claimants their rightful weekly compensation for more than one month. All information obtained after the decision to decline entitlement must not play any part in this section. All information necessary in this case cannot include WINZ information that would have been requested as a matter of course within one month of the time of application, if the Corporation had made the correct decision. The

⁴ *Accident Compensation Corporation v Miller* [2013] NZCA 141.

⁵ *Young v Accident Compensation Corporation* [2015] NZACC 300.

pivotal decision is that of 9 October 2018 incorrectly declining cover. Mr Soulsby is entitled to interest on late paid weekly compensation from 9 November 2018, being one month after the date of the original wrong decision, up until the date payment was made.

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

[52] First, the Corporation is liable to pay Mr Soulsby interest on the payment of weekly compensation to which he is entitled, if the Corporation has not made the payment within one month after the Corporation has received all information necessary to enable the Corporation to calculate and make the payment.⁶ “All information necessary” includes medical information (that Mr Soulsby had an incapacity due to personal injury caused by accident) and financial information (that Mr Soulsby was an earner and his earnings during the relevant period).⁷

[53] Second, the Corporation had a clear basis to find that Mr Soulsby was eligible to receive weekly compensation, including the requirement of incapacity, only on the release of McGuire DCJ’s judgment on 5 November 2021. Until that point, the eligibility of Mr Soulsby to receive weekly compensation was in genuine doubt, because there was no clear medical evidence as to the date of his incapacity. Neither of the Occupational Physicians who advised on this matter advised that the date of Mr Soulsby’s incapacity was clearly established. McGuire DCJ’s judgment was based on an inference drawn from Mr Soulsby’s enforced inactivity during his stay in prison, and the physiological effect that that had on him, that he had an incapacity by the time he left prison.

[54] Second, the Corporation had received the relevant financial information, as to Mr Soulsby’s bank account, tax details and IRD records of pre- and post-incapacity earnings, only by 14 December 2021. The Corporation therefore had grounds for adopting this date as that on which it had received all information necessary to enable the Corporation to calculate and make the payment.

⁶ Section 114(1).

⁷ *Barnett*, above note 2, at [38], *Kearney*, above note 3, and *Miller*, above note 4, at [44].

[55] The Court finds, in light of the above evidence, that the Corporation received all information, necessary to enable the Corporation to calculate and make the payment of interest, not before 5 November 2021.

ACR 19/23: further weekly compensation

[56] At issue in this appeal is a decision dated 30 June 2022, in which the Corporation approved Mr Soulsby's backdated weekly compensation from 31 January 2020 to 11 July 2021.

Relevant law

[57] Section 100(1)(c) provides that a claimant who has cover and who lodges a claim for weekly compensation is entitled to receive it if the Corporation determines that the claimant is incapacitated within the meaning of s 105(2), and if the claimant is eligible under s 224 or clause 43 of Schedule 1 for weekly compensation.

[58] Section 102 provides:

- (1) The Corporation may determine any question under section 103 or section 105 from time to time.
- (2) In determining any such question, the Corporation—
 - (a) must consider an assessment undertaken by a medical practitioner or nurse practitioner; and
 - (b) may obtain any professional, technical, specialised, or other advice from any person it considers appropriate.

[59] Section 105 of the Act provides:

- (1) The Corporation must determine under this section the incapacity of a claimant who—
 - (a) is deemed under clause 43 of Schedule 1 to continue to be an employee, a self-employed person, or a shareholder-employee, as the case may be; or
 - (b) is a potential earner; or
 - (c) has purchased the right to receive weekly compensation under section 223.

(2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in work for which he or she is suited by reason of experience, education, or training, or any combination of those things.

[60] Clause 43 of Schedule 1 of the Act provides:

Weekly earnings if employment ended before commencement of incapacity

(1) Subclause (2) applies to a claimant who, before his or her incapacity commenced, has ceased to be in employment.

(2) The claimant is deemed to continue to be in employment and have earnings from that employment for the purposes of this schedule for the longer of-

- (a) 28 days from the date he or she ceased to be in employment, if he or she -
 - (i) had been in employment within 28 days before his or her incapacity commenced; and
 - (ii) would have been an employee within the period specified in subclause (3) after the date on which his or her incapacity commenced, but for the incapacity; or (b) the period for which payments that the claimant is entitled to receive on ceasing employment and on which earner levy is payable constitute earnings under subclause (4).

[61] In *Jamieson*,⁸ Cadenhead DCJ stated:

[30] ... the following principles are discernible in cases having a factual scenario similar to the present:

- [i] It is upon the appellant to show on a balance of probability that at the date of the alleged incapacity, because of the injury for which he had cover, he was incapacitated within the terms of the statute.
- [ii] 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. ...

⁸ *Jamieson v Accident Compensation Corporation* [2004] NZACC 80. In *Tonner v Accident Compensation Corporation* [2019] NZHC 1400, at [43], Muir J affirmed that claimants with retrospective claims are required “to establish a clear picture of incapacity over the relevant period”.

Discussion

[62] Mr Robinson, for Mr Soulsby, submits as follows. Mr Soulsby's rehabilitation was based on his return to his previous role as an electrician. Mr Soulsby was never certified as being able to return to work at any time prior to his actual return in September 2021. Dr Burgess's report and subsequent communications with the Corporation do not meet the required standard to state that Mr Soulsby was able to return to his work or any other work to which he may have been suited. For the Corporation to stop weekly entitlement, it needed to prove that Mr Soulsby was able to return to work 30 hours or more per week, and it has not done so. Mr Soulsby is entitled to weekly compensation until his actual return to full time work and, as such, he is also eligible to interest on that amount to be paid late.

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

[64] First, the Corporation was required to decide on Mr Soulsby's claim for weekly compensation according to whether he was unable, because of his personal injury, to engage in work for which he was suited by reason of experience, education, or training, or any combination of those things.⁹ In so doing, the Corporation had to consider an assessment undertaken by a medical or nurse practitioner and might obtain any other professional, technical or specialist advice that it considered appropriate.¹⁰ Because Mr Soulsby's claim was for backdated weekly compensation, the onus was on him 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.¹¹

[65] Second, the Corporation, before its decision of 30 June 2022, approving Mr Soulsby's backdated weekly compensation from 31 January 2020 to 11 July 2021, had at hand the following medical evidence:

⁹ Section 105(2) of the Act.

¹⁰ Section 102.

¹¹ *Jamieson*, above note 8, at [30].

- (a) Consultation notes of 3 March 2021 and 6 July 2021, from Mr Soulsby's GP, noting that Mr Soulsby was doing part-time work with restrictions in his pre-injury role.
- (b) A report of Dr Burgess, Occupational Physician, dated 12 July 2021, following an examination of Mr Soulsby, noting that he was still partially incapacitated for his pre-injury work role of electrician, but was expected to make a complete recovery in the next three to four months.
- (c) A further report of Dr Burgess, dated 19 May 2022, having again examined Mr Soulsby, advising that, if he (Dr Burgess) had been asked at the time of a previous assessment of Mr Soulsby on 12 July 2021, he (Dr Burgess) would have likely cleared Mr Soulsby to do the work types of Electronic Equipment Trades Worker and Appliance Service Person. The Corporation then requested any GP and physiotherapy notes to be obtained and provided to Dr Burgess to obtain greater clarity as to when Mr Soulsby's incapacity ceased.
- (d) A letter of Dr Burgess, of 20 June 2022, advising (in light of additional information from a physiotherapist and GP) that it might well be the case that the above two work roles were sustainable for Mr Soulsby prior to July 2021, but that this would require too much speculation. Dr Burgess affirmed his advice as to what roles were likely to be sustainable as at the time of his assessment in July 2021.

[66] This Court notes that no contrary medical evidence has been produced by Mr Soulsby as to his incapacity after 11 July 2021, and before he commenced work in September 2021.

[67] The Court finds, in light of the above evidence, that the Corporation, in its decision dated 30 June 2022, correctly backdated Mr Soulsby's weekly compensation from 31 January 2020 to 11 July 2021.

ACR 82/23: alleged unreasonable refusal to issue a new decision

[68] At issue in this appeal is the alleged unreasonable refusal of Corporation to issue a new decision regarding the date of commencement of Mr Soulsby's incapacity.

Relevant law

[69] Section 54 provides:

The Corporation must make every decision on a claim on reasonable grounds, and in a timely manner, having regard to the requirements of this Act, the nature of the decision, and all the circumstances.

[70] Section 103 provides:

- (1) The Corporation must determine under this section the incapacity of—
 - (a) a claimant who was an earner at the time he or she suffered the personal injury:
 - (b) a claimant who was on unpaid parental leave at the time he or she suffered the personal injury:
 - (c) a claimant who was within a payment period under the Compensation for Live Organ Donors Act 2016 at the time he or she suffered the personal injury.
- (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.
- (3) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.

[71] Section 134 of the Act provides:

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

[72] In *Gregory*,¹² Judge Beattie stated:

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

[73] In *Police v Geddes*,¹³ Andrews J stated:

[57] The second relevant matter is that the Commissioner intends to call evidence that was not put before Chisholm J. The question arises as to whether this is “new” evidence, or whether it should be excluded on the grounds that it was available and could have been adduced at the hearing before Chisholm J. In *Hunter v Chief Constable of the West Midlands*, Lord Diplock discussed whether new evidence could justify an exception to the general public policy against proceedings which are collateral attacks on earlier decisions. He observed that the new evidence must be such as “entirely changes the aspect of the case”.

[74] In *Prabaharan*,¹⁴ Powell DCJ stated:

[9] To attempt to get around the review decision by issuing a further decision in reliance upon Dr Louw’s addendum is exactly the type of “collateral attack on a final decision” that the authorities are clear should not be permitted. The fact that it has arisen through a new decision in the first instance, rather than new proceedings is irrelevant. The issue has been decided and the Corporation is therefore estoppel from attempting to re-litigate the outcome through a new decision. There is no question that if the tables were turned, the Corporation would have asserted *res judicata* against a claimant seeking to revisit a decision of a Reviewer.

Discussion

[75] Mr Robinson, for Mr Soulsby, submits as follows. The Corporation was lackadaisical in its duty to follow up on the Reviewer’s concerns in the review decision dated 16 September 2019. Had Dr Burgess’ in-depth report of 19 May 2022 been available at the District Court hearing before McGuire DCJ on 28 October 2021, the outcome of the Court decision would have been different. The Court should direct that the Corporation issues a decision on section 103 eligibility with regard to the new evidence of Dr Burgess’ later report obtained by the Corporation in

¹² *Gregory v Accident Compensation Corporation* [2005] NZHC 45.

¹³ *Commissioner of Police v Geddes* [2013] NZHC 1199.

¹⁴ *Prabaharan v Accident Compensation Corporation* [2014] NZACC 185.

May 2022. Alternatively, the Court should direct that the Corporation made its decision on incapacity in error and revise that decision, granting weekly compensation from 1 April 2017 until his return to work on 15 September 2021.

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

[77] First, Mr Soulsby is seeking a fresh decision on the date of first commencement of his incapacity for work, and in particular whether this occurred prior to his imprisonment in March 2018. This Court notes that this issue was determined by McGuire DCJ, and Mr Soulsby's current argument appears almost identical to that he made in the previous appeal. In principle, therefore, issue estoppel¹⁵ applies against Mr Soulsby seeking to revisit a previous decision on the same matter.

[78] Second, the test which this Court must apply is whether Dr Burgess' second report constitutes new evidence which "entirely changes the aspect of the case", such that it raises a new and different question to that which was previously determined by the Court. In this regard, the Court refers to the following considerations:

- (a) Dr Burgess' first report of 17 July 2021 noted that it was common for tendons to continue to tear over the following months and years following an injury. Dr Burgess advised that, "at some point in time" after Mr Soulsby's injury (on 6 February 2013), substantial incapacity would develop. Dr Burgess noted that it was "difficult to put an actual timeframe in terms of the process", but, for manual workers, he "would expect a relatively substantial incapacity at some point in time".
- (b) McGuire DCJ, in his judgment of 5 November 2021, assessed when Mr Soulsby's incapacity was present, and expressly referred to Dr Burgess' assessment (above), before making a finding that

¹⁵ Issue estoppel operates to prevent an issue of fact or of law already determined being raised again later.

Mr Soulsby's enforced inactivity was long enough to render him incapacitated, and that his incapacity was present by 14 April 2018.

- (c) Dr Burgess' second report of 19 May 2022 observed that, although "on superficial grounds", it simply looked like the period of imprisonment was the only restriction leading to a cessation in Mr Soulsby's work, and this date had been used as the requesting period of weekly compensation, he (Dr Burgess) believed that "the situation is a little more complex than that". Dr Burgess referred to evidence which indicated "fairly clearly" that Mr Soulsby needed surgery on the shoulder "almost certainly" prior to going into prison. However, Dr Burgess then referred to the "counter of this argument", which would be the view that, prior to imprisonment, Mr Soulsby was still maintaining some work and therefore he would not have been completely incapacitated at the time of imprisonment. Dr Burgess noted the findings of McGuire DCJ accepting incapacity by way of extension, and Dr Burgess conceded that the legal issue here was not something that he was familiar with and was outside of his scope to comment.

[79] In light of the above facts, this Court finds that Dr Burgess' second report does not constitute new evidence which "entirely changes the aspect of the case", such that it raised a new and different question to that which was previously determined by this Court.

[80] This Court therefore concludes that the Corporation did not unreasonably refuse to issue a new decision regarding the date of commencement of Ms Soulsby's incapacity.

Conclusion

[81] In summary, this Court finds that:

- (a) the Corporation, in its decision dated 25 May 2022, correctly calculated interest owing on Mr Soulsby's backdated weekly compensation;
- (b) the Corporation, in its decision dated 30 June 2022, correctly backdated Mr Soulsby's weekly compensation from 31 January 2020 to 11 July 2021; and
- (c) the Corporation did not unreasonably refuse to issue a new decision regarding the date of commencement of Mr Soulsby's incapacity.

[82] The decisions of Reviewers dated 16 September 2022, 12 January 2023 and 18 January 2023 are therefore upheld. The respective appeals against these decisions (ACR 20/23, ACR 19/23 and ACR 82/23) are dismissed.

[83] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', with a stylized, cursive script.

P R Spiller
District Court Judge

Solicitors for the Respondent: Medico Law Limited.