

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 115 ACR 122/22

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

Hearing: 13 July 2023
Held at: Hamilton/Kirikirioa

Appearances: K Koloni for the Appellant
 B Marten for the Accident Compensation Corporation (“the
 Corporation”)

Judgment: 19 July 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for costs on review and other costs - ss 148 and 262(4), Accident
Compensation Act 2001 (“the Act”)]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 20 June 2022. The Reviewer declined jurisdiction in respect of:

- (1) an alleged unreasonable delay in issuing a decision about the funding for support person, transport and advocate costs with respect to Ms Stewart’s appointment with Dr Lamberton; and

- (2) the Corporation's decision dated 18 November 2021 declining to fund support person, transport and advocate costs with respect to Ms Stewart's appointment with Dr Lamberton as invoiced by Ms Koloni.

[2] The present appeal focusses on the following issues:

- (a) Whether the Reviewer correctly declined jurisdiction in respect of the Corporation's decision declining to reimburse Ms Stewart for her advocate's (Ms Koloni's) costs in taking Ms Stewart by car to a specialist's appointment in Tauranga on 5 May 2021, and attending that appointment as a support person.
- (b) Whether the Reviewer correctly declined to award Ms Stewart costs for bringing the review of the above Corporation decision, on the basis that the review was not reasonably brought.
- (c) Whether the Reviewer awarded Ms Stewart too small a sum in costs in relation to the review application made in relation to the Corporation's alleged unreasonable delay in deciding on the advocate's costs.

Background

[3] Ms Stewart has cover for a post-operative infection as a treatment injury following a knee replacement in June 2009. She received further surgery on the knee in July 2010 and February 2011. Following the 2011 surgery, she slipped in hospital and landed heavily on the knee, suffering ongoing problems including restricted mobility.

[4] Ms Stewart's treatment needs called for occasional appointments outside of her home region (the Waikato) to have access to specialised facilities and experts. Due to her mobility restrictions, the Corporation was involved in supporting her transport needs in connection with these appointments.

[5] On 8 June 2021, Ms Koloni informed the Corporation that Ms Stewart had her first appointment with the Auckland Regional Pain Service (TARPS) on 7 July 2021,

that Ms Stewart would require transport, and that she (Ms Koloni) sought approval to be paid as Ms Stewart's support person and the time involved to attend with her.

[6] On 10 June 2021, the Corporation explored a remote appointment with TARPS so that Mrs Stewart would not have to travel. However, on 16 June 2021, the Corporation confirmed that the TARPS appointment needed to be in person.

[7] On 16 June 2021, the Corporation offered train or bus options, or a standard travel reimbursement for Ms Koloni if she drove Mrs Stewart. The Recovery Coordinator also advised that, in regard to the request for payment as a support person and for the time to attend the appointment, there was no legal provision for the Corporation to pay Ms Koloni.

[8] On the same day, Ms Koloni replied that bus or train travel was not suitable for Mrs Stewart, and that:

If I am able to take her she'll still need a taxi to my place in Huntly, and then return to her place of residence.

I know there may not be a legal provision for ACC to pay me - but there are always discretions when it fits within the purpose of the Act - hence my question. So please advise.

What is the standard travel reimbursement please?

[9] On 21 June 2021, the Corporation responded that both the bus and the train could facilitate wheelchair users, and the Corporation could provide taxis from each terminus, but that:

Alternatively, if you will drive Gaye, ACC can fund 29c per kilometre travelled including the distance travelled from your home to pick Gaye up from her home.

ACC cannot pay for you to attend the appointment as a support person.

[10] A series of exchanges followed over the next few days on the suitability of the public transport options, while in the meantime the Corporation determined that a door-to-door taxi service would cost around \$1,300, and explored shuttle options.

[11] On 22 June 2021, Ms Koloni emailed that “[s]ince ACC don’t value my time as a support person I shall not be offering to transport Gaye at any stage in this assessment”.

[12] On 23 June 2021, Ms Koloni emailed:

The fact that you don't want to pay me as a support person through auxiliary services tells me all I need to know about the value you place on my advocacy services. But you would pay me 0.29c a kilometre to drive 1.5 hours away, pick Gaye up and drive her to Auckland, and do the reverse back - but not pay me for any time. That's insulting.

[13] In July 2021, Ms Stewart was taken to the TARPS appointment by Corporation- funded taxi.

[14] On 23 July 2021, the Corporation advised that it needed to reassess Ms Stewart’s transport funding, as the Corporation was paying \$1,300 for every appointment in Auckland and needed to explore more cost-effective options. The Corporation asked for the details of how Ms Stewart had travelled to a previous appointment to see Dr Lamberton, her Tauranga-based specialist, on 5 May 2021.

[15] On 30 July 2021, Ms Koloni advised:

The transport used for the Dr Tony Lamberton appointment on the 5th May was via my resources, and I attended with Gaye.

Please find attached my invoice as per s 262 of the Act. Please process for payment.

Gaye’s husband Doug is sometimes able to transport Gaye, but we cannot depend on him at the moment as he is unwell.

[16] Ms Koloni’s invoice for \$1,008.37, for transport and support for Ms Stewart for her appointment with Dr Lamberton on 5 May 2021, included 5.5 hours of Ms Koloni’s time at \$120/hour, and 278 kms of travel between Huntly and Pyes Pa at \$0.78/km (plus GST). The claim was expressed as being made out on the authority of s 262(4) of the Act.

[17] On 11 October 2021, the Corporation’s in-house technical advisor advised that the Corporation should not pay the above invoice.

[18] On 15 November 2021, Ms Stewart lodged a review to the effect that the Corporation had been responsible for an unreasonable delay in issuing a “Decision regarding a refund of support person and transport costs to Dr Tony Lamberton’s appointment – 28.07.2021”.

[19] On 18 November 2021, the Corporation issued a decision letter declining to pay Ms Koloni’s invoice:

We’re unable to approve your application because it is not appropriate for Kym Koloni to claim the costs she has under Section 262(4). The purpose of that section is not to help advocates additional funding outside what is prescribed by law. In this case, the client has attended an orthopaedic appointment with Mr Lamberton on 05/05/21. Kym Koloni has gone with the client as her “support person” and has seemingly driven the client in her own (Ms Koloni’s) vehicle. Support person costs are applicable only when the support person is visiting a client who is receiving in-patient rehabilitation or residential rehabilitation that the Corporation has approved and the presence of the support person is needed to help the client achieve their rehabilitation goals. While Ms Koloni has accompanied the client to her medical appointment on 05/05/21 as a “support person”, the support she was providing was more emotional support on account of the client’s partner being unavailable. Ms Koloni would not meet the definition of a “support person” for ACC purposes. Nor is the client in need of an escort on account of her injuries, such that escort costs can be claimed. Regulation 8(1) of the Accident Compensation (Ancillary Services) Regulations 2002 sets out what ACC is liable to contribute to transport costs in travelling to a place of treatment by private motor vehicle.

[20] On 19 November 2021, the Corporation wrote to Ms Stewart, attaching the above decision and advice, and offering to reimburse her for her appointment on 5 May 2021 (at the standard rate), since it was declined for her advocate/support person.

[21] On 21 December 2021, Ms Koloni, for Ms Stewart, lodged an application for review of the Corporation’s decision declining “to cover the Advocacy costs in relation to medical assessment (time, attendance, mileage) for Mrs Stewart”.

[22] On 31 March and 26 May 2022, review proceedings were held. On 20 June 2022, the Reviewer declined jurisdiction in respect of:

- (a) an alleged unreasonable delay in issuing a decision about the funding for support person, transport and advocate costs with respect to Ms Stewart’s appointments with Dr Lamberton: at the hearing, Ms Koloni advised that

the review could be withdrawn, in view of the Corporation having issued its decision of 18 November 2021, and there was therefore no longer a disputed matter before the Reviewer. The Reviewer awarded costs of \$284.53 in respect of this review.

- (b) the Corporation’s decision dated 18 November 2021 declining to fund support person, transport and advocate costs with respect to Ms Stewart’s appointments with Dr Lamberton as invoiced by Ms Koloni. The Reviewer found that the Act did not oblige the Corporation to pay these costs and the Corporation’s discretionary decision to pay was outside the Reviewer’s jurisdiction. The Reviewer did not award costs in respect of this review on the basis that Ms Stewart (via Ms Koloni) acted unreasonably in applying for this review.

[23] On 14 July 2022, a Notice of Appeal was lodged.

Relevant law

[24] Section 262 of the Accident Compensation Act 2001 (“the Act”) provides:

- (1) The functions of the Corporation are to—
 - (a) carry out the duties referred to in section 165; and
 - (b) promote measures to reduce the incidence and severity of personal injury in accordance with section 263; and
 - (ba) monitor access to the accident compensation scheme by Māori and identified population groups to identify how to improve delivery of services under this Act to injured Māori and injured persons in those population groups; and
 - (c) manage assets, liabilities, and risks in relation to the Accounts, including risk management by means of reinsurance or other means; and
 - (d) carry out such other functions as are conferred on it by this Act, or are ancillary to and consistent with those functions.
- (2) To avoid doubt, it is not a function of the Corporation or any Crown entity subsidiary of the Corporation to provide insurance, but it may provide insurance-related services in accordance with section 263 or section 265.
- (3) In carrying out its functions, the Corporation must deliver services to claimants and levy payers, as required by this Act,—

- (a) in order to minimise the overall incidence and costs to the community of personal injury, while ensuring fair rehabilitation and compensation for loss from personal injury; and
 - (b) in a manner that is cost-effective and promotes administrative efficiency.
- (4) To assist the Corporation in the effective and fair delivery of services, the Corporation may provide resources to assist those organisations providing advocacy services for ACC claimants.

[25] Section 148 of the Act provides:

...

- (2) Whether or not there is a hearing, the reviewer—
- (a) must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant:
 - (b) may award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review:
 - (c) may award any other person costs and expenses, if the reviewer makes a review decision in favour of the person.
- (3) If a review application is made and the Corporation revises its decision fully or partly in favour of the applicant for review before a review is heard, whether before or after a reviewer is appointed and whether or not a review hearing has been scheduled, the Corporation must award costs and expenses on the same basis as a reviewer would under subsection (2)(a).
- (4) The award of costs and expenses under this section must be in accordance with regulations made for the purpose.

[26] Section 68 of the Act provides:

- (1) The Corporation provides entitlements to claimants in accordance with this Act.
- (2) If any provision of this Act requires the Corporation to provide an entitlement (regardless of how that requirement is expressed), the Corporation is required to provide the entitlement only to the extent required by this Act.

[27] Clause 11 of Schedule 1 of the Act provides:

- (1) The Corporation is liable to pay or contribute to the cost of any service reasonably required by the claimant as an ancillary service related to rehabilitation, such as accommodation, escort for transport, and transport, if the service facilitates rehabilitation.

- (2) The Corporation is liable to pay or contribute to the cost of accommodation and transport of a person other than the claimant if the presence and support of the person is necessary and appropriate to assist in achieving a rehabilitation outcome for the claimant.
- (3) This clause applies subject to any regulations made under this Act.

[28] Regulation 8(1) of the Accident Compensation (Ancillary Services) Regulations 2002 provides:

- (1) The Corporation is liable to pay 29 cents per kilometre towards the cost of non-emergency transport by private motor vehicle to rehabilitation, to the extent specified in subclause (2), if—
 - (a) the claimant—
 - (i) travels more than 20 kilometres from the starting point to the nearest place for rehabilitation within 14 days after suffering personal injury; and ...

[29] Regulation 13 provides:

- (1) The Corporation is liable to contribute towards the costs of one support person who travels within New Zealand to visit the claimant if—
 - (a) ... the claimant is not under the age of 18 years and the support person would have to travel over 80 kilometres in a single trip (being in one direction) to visit the claimant; and
 - (b) the claimant that the support person is visiting is receiving in-patient rehabilitation, or residential rehabilitation, that the Corporation has approved. ...
- (4) However, the Corporation is not liable to contribute towards the cost of a support person—
 - (a) if the support person uses private motor vehicle transport and shares the transport with the claimant ...

[30] In *Kacem*,¹ Tipping J stated in the Supreme Court:

[32] ... a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

¹ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

[31] In *Beauchamp*,² Judge Spiller stated:

[26] In terms of section 148(3) of the Act, if a review application is made and the Corporation revises its decision fully or partly in favour of an applicant before a review is heard, the Corporation must award costs and expenses on the same basis as a reviewer would where he or she makes a decision fully or partly in favour of the applicant. It follows that this provision operates only where the Corporation has previously made a decision which is then revised in favour of the applicant before a review hearing. A “decision” has been defined in the High Court as “mak[ing] up one’s mind, to make a judgement, to come to a conclusion or resolution”.

[27] In Ms Beauchamp’s case, the basis on which her review applications were made was the failure to issue decisions, thus giving rise to the complaint of unreasonable delay in implementing a SRNA report issued over four months previously. The decision of the Corporation of 8 October 2020, in relation to matters arising from the SRNA report, was a new decision and not a revised one. It was only at this point that the Corporation made up its mind, made a judgement, and came to a conclusion or resolution. This Court therefore finds that the Corporation did not have jurisdiction to make the award of costs in terms of section 148(3) of the Act, and dismisses the appeal on this basis.

Discussion

Transport and advocacy costs claimed by advocate

[32] On 5 May 2021, Ms Koloni transported and accompanied Ms Stewart from Huntly to Pyes Pa, Tauranga, for an appointment with Dr Lamberton, Ms Stewart’s specialist. On 30 July 2021, Ms Koloni sent the Corporation an invoice for transport/support person costs of \$1008.37, based on the authority of section 262(4) of the Act. On 18 November 2021, the Corporation issued its decision declining to pay the invoice.

[33] Ms Koloni, for Ms Stewart, submits as follows. The advocate’s costs in attending a specialist’s appointment with Ms Stewart were to support her need for transport and advocacy services, against the background of her covered physical injuries, major depression and anxiety conditions, and her husband’s inability to drive to the appointment due to his ill health. The Reviewer incorrectly declined to award Ms Stewart these costs. Section 262(4) of the Act provides for the Corporation making a payment to an individual advocate to provide effective advocacy services, such as provided by Ms Koloni’s company (ICE Insurances Ltd).

² *Beauchamp v Accident Compensation Corporation* [2022] NZACC 140.

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

[35] First, this Court finds that section 262(4) of the Act does not compel the Corporation to make any payment to an individual advocate for his or her services. This section provides that, to assist the Corporation in the effective and fair delivery of services, the Corporation *may* provide resources to assist those *organisations* providing advocacy services for ACC claimants. As is evident from the word “may”, the provision of resources by the Corporation is discretionary rather than mandatory. Ms Koloni herself, in claiming under section 262(4), stated that “I know there may not be a legal provision for ACC to pay me - but there are always discretions when it fits within the purpose of the Act”. Further, the reference in the subsection to “organisations” indicates payment to groups of people rather than individuals or one-person operations.³

[36] Second, there is no provision in the Act and its related regulations which requires the Corporation to pay the transport and support costs claimed by Ms Koloni:

- (a) Section 68(2) provides that the Corporation is required to provide an entitlement only to the extent required by the Act. Schedule 1, clause 11(3) of the Act, states that the liability of the Corporation to contribute to the cost of an ancillary service, reasonably required in relation to rehabilitation, is subject to the applicable regulations.
- (b) The applicable regulations are the Accident Compensation (Ancillary Services) Regulations 2002. Regulation 8(1) provides that the liability of the Corporation towards transport costs extends to the payment of \$0.29 per kilometre to a claimant, towards the cost of non-emergency transport by private motor vehicle to rehabilitation. On 19 November 2021, the Corporation wrote to Ms Stewart, offering to reimburse her for her appointment on 5 May 2021 (at the standard rate), since reimbursement was declined for her advocate/support person.

³ The MP who proposed this provision referred to “advocacy groups” and “resource groups” (*New Zealand Parliamentary Debates*, vol 594 (5 and 7 September 2001)).

Review costs in respect of transport and advocacy costs' review

[37] Following the review hearing on Ms Stewart's claim for her advocate's transport and advocacy costs, the Reviewer dismissed the review, and then found that Ms Stewart, via her advocate Ms Koloni, had acted unreasonably in applying for this review. The Reviewer noted that: (1) a plain reading of section 262 of the Act did not oblige the Corporation to pay the costs claimed; (2) the Corporation had advised Ms Koloni that the Act did not allow for these costs; and (3), in any event, the Corporation offered to pay a subsidy for Ms Stewart's transport costs.

[38] Ms Koloni, for Ms Stewart, submits as follows. The Reviewer incorrectly declined to award Ms Stewart costs for bringing the review. Ms Stewart was entitled to exercise her right of review of the Corporation's decision declining the advocate's transport and advocacy costs. This review was brought reasonably, based on section 262(4) of the Act, and so qualified for the award of costs under section 148(2)(b) of the Act.

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

[40] Section 148(2)(b) provides that a Reviewer *may* award an applicant costs and expenses if the Reviewer does not make a review decision in favour of the applicant (as happened in this matter), but considers that the applicant acted reasonably in applying for the review. The Reviewer's decision on costs being a discretionary one (again, as is evident from the statutory word "may"), this Court may intervene in this decision only if the Reviewer made an error of law or principle, took into account irrelevant considerations, failed to take account a relevant consideration, or made a decision that is plainly wrong.⁴

[41] This Court finds that none of these criteria applies to the exercise of the Reviewer's discretion, for the reasons that she provided for her decision. The Court agrees with the Reviewer that a plain reading of section 262 of the Act did not oblige the Corporation to pay the costs claimed. The Court notes that, on 18 November

⁴ *Kacem v Bashir*, above note 1, at [32].

2021, the Corporation explained in a letter to Ms Stewart (who could reasonably be expected to have referred the letter to Ms Koloni) that the Act did not allow for the costs claimed. The Court further notes that, on 19 November 2021, the Corporation emailed Ms Stewart (cc Ms Koloni) offering to reimburse Ms Stewart for the return trip on 5 May 2021, since reimbursement was declined for her advocate/support person.

Review costs in respect of delay review

[42] As noted above, Ms Koloni sent the Corporation her invoice for transport/support person costs on 30 July 2021. On 15 November 2021, Ms Stewart applied for a review alleging unreasonable delay in making a decision in relation to payment of this invoice. On 18 November 2021, the Corporation issued its decision declining to pay the invoice. Nevertheless, the review application in this regard was withdrawn only at the review hearing on 31 March 2022. The Reviewer awarded, with the consent of the Corporation, costs for lodging an application and attendance at a case conference plus disbursements, totalling \$284.53.

[43] Ms Koloni, for Ms Stewart, submits as follows. The Reviewer awarded Ms Stewart too small a sum in costs in relation to the delay review application, in circumstances where the Corporation revised its decision before the review hearing. Section 148(3) of the Act provides that, if a review application is made and the Corporation revises its decision in favour of the applicant for review before a review is heard, the Corporation must award costs and expenses on the same basis as a Reviewer would under section 148(2)(a).

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

[45] First, the Court finds that there are no grounds under section 148(3) of the Act on which the Corporation was required to award costs. This section requires payment of costs and expenses if a review application is made and the Corporation *revises its decision* in favour of the applicant for review, before a review is heard. In Ms Stewart's case, no decision had been made by the Corporation on the claimed transport/support person costs at the time the review was lodged on 15 November

2021, and so no decision was revised in favour of Ms Stewart.⁵ The Corporation's decision followed three days after the review application was lodged.

[46] Second, this Court finds no grounds under section 148(2) of the Act for the Reviewer to have awarded costs in addition to those awarded for the review regarding delay. The issue of delay was resolved by the Corporation's decision three days after lodgement of the review application, and four-and-half months before the review hearing. Near the start of the hearing (as recorded in the transcript), when the Reviewer raised the issue of the review regarding delay, Ms Koloni repeatedly stated that this matter had been resolved. Ms Koloni observed that there was no live matter regarding this review, and she agreed that the application for review could be considered withdrawn. The rest of the review proceedings were devoted to other matters. In light of these realities, the Court finds that the award of costs for no more than the lodging of an application and attendance at a case conference, plus disbursements, is an appropriate one.

Conclusion

[47] This Court has no doubt that the advocacy and support services provided by Ms Koloni to Ms Stewart on 5 May 2021 were of value to her. However, this Court is bound by the Act and its accompanying regulations and can discern no legal basis for obliging the Corporation to pay for these services. Further, there is limited scope for an appeal in relation to the discretionary award of costs.

[48] In light of the above considerations, the Court finds that:

- (a) The Reviewer correctly declined jurisdiction in respect of the Corporation's decision declining to reimburse Ms Stewart for her advocate's costs in taking Ms Stewart by car to a specialist's appointment in Tauranga on 5 May 2021, and attending that appointment as a support person.

⁵ *Beauchamp*, above note 2, at [26]-[27].

- (b) The Reviewer correctly exercised her discretion to decline to award Ms Stewart costs for bringing the review of the above Corporation decision, on the basis that the review was not reasonably brought.

- (c) The Reviewer awarded Ms Stewart appropriate costs in relation to the review application made in relation to the Corporation's alleged unreasonable delay in deciding on the advocate's costs.

[49] The decision of the Reviewer dated 20 June 2022 is therefore upheld. This appeal is dismissed.

[50] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller
District Court Judge

Solicitors for the Respondent: Izard Weston Lawyers