

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2024] NZACC 007

ACR 120/22

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

Hearing:	19 June 2023
Heard at:	Christchurch / Ōtautahi
Appearances:	Mr Vine appellant appearing in person Ms F Becoft for respondent
Judgment:	15 January 2024

RESERVED JUDGMENT OF JUDGE I C CARTER
[Impairment Assessment, Accident Compensation Act 2001, Schedule 1, Part 3]

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Background

[1] Mr Vine has cover for (among other things) a fractured right femur¹ and left femur², post-traumatic arthritis in both knees, and major depressive disorder. He also has cover for a number of neck and back sprains suffered since 2003.

[2] Mr Vine's accident compensation file has a long and complex history with several previous Whole Person Impairment ("WPI") assessments for various injuries, as well as a number of challenges to various impairment rating decisions made by the Corporation.

[3] This appeal relates to a decision by the Accident Compensation Corporation made on 22 October 2021 ("the Corporation's Decision"), declining a combined independence

¹ Suffered in a motorcycle accident on 1 May 1983.

² Suffered in a motorcycle accident on 4 May 1987.

allowance on the basis that the assessed level of impairment was 6 per cent, which fell below the 10 per cent statutory threshold.

[4] The Corporation's Decision was based on a WPI assessment completed by Dr Lim on 15 September 2021 and peer review and advice by Dr Walker on 1 October 2021.

[5] Mr Vine applied for review of the Corporation's Decision. In a Reviewer's decision dated 20 June 2022 ("the Review Decision") Mr Vine's application for review was dismissed and the Corporation's Decision was maintained.

[6] Mr Vine appeals against the Review Decision and the Corporation's Decision declining a combined independence allowance.

[7] Notwithstanding the above, Mr Vine has been granted cover for new injuries and has, since April 2021, engaged in further comprehensive reassessments relating to all of his covered injuries, which will lead to a new decision on his independence allowance/lump sum entitlements. The Corporation accepts that Mr Vine can have his impairment reassessed due to his newly acquired cover, including for chondromalacia. From the Corporation's perspective, it has continued to actively attempt to arrange for further assessments of Mr Vine's physical and mental injuries (for which he has completed medical certificates) but the ongoing process has been slowed by Mr Vine's specific requirements as to who he would be willing to be assessed by.

[8] Mr Vine said in submissions that the physical assessments had been completed but not the mental assessments. He acknowledged that completion of the further assessments might resolve the current issue but he felt he had been waiting too long and decided to proceed with the current appeal.

Issue

[9] At issue is the Corporation's Decision dated 22 October 2021 declining an independence allowance on the basis that Mr Vine's WPI rating fell short of the 10 per cent statutory threshold.

Facts

Relevant Claim History

[10] It is unnecessary to go into all the details of Mr Vine's extensive claim history. I focus on summarising facts relevant only to the Corporation's Decision and the Review Decision.

[11] Indirectly relevant to this appeal is a WPI assessment completed by Dr Marshall on 15 December 2020 in accordance with the AMA⁴ and the ACC User Handbook to AMA⁴.³ This rated a large number of physical injuries dating back to 1983. His report listed the documents he reviewed, including five previous WPI Assessment Reports, several of which he had authored. Dr Marshall was thus very familiar with Mr Vine's injuries and the previous impairment ratings associated with them. Dr Marshall concluded that the combined WPI rating was 2 per cent for the injuries suffered before 1 July 1999, and 18 per cent for the more recent injuries.

[12] The Corporation made a decision dated 19 January 2021, declining an independence allowance and lump sum on the basis that, after deducting previously compensated impairment, Mr Vine's WPI fell short of the 10 per cent statutory threshold. Mr Vine sought review of the Corporation's decline decision and challenged aspects of Dr Marshall's WPI assessment report. That application for review was dismissed in a Review Decision dated 16 November 2021.

[13] On 8 March 2021, the Corporation granted cover for major depressive disorder.

[14] On 7 July 2021 the Corporation made a referral to Dr Lim, Psychiatrist, to conduct a WPI assessment in relation to Mr Vine's newly covered major depressive disorder.

[15] Dr Lim reported on 21 July 2021 and arrived at a 24 per cent impairment in relation to the left knee injury (which included the depression).

[16] Dr Walker completed a peer review of Dr Lim's impairment assessment on 4 September 2021 and made the following observations:

³ The American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition) (AMA4) and the ACC User Handbook to AMA4.

On page 8 you have written: The impairment for the left knee injury is therefore assessed at 24%. Presumably this is a typo and you meant to write: the impairment for the covered mental injury, major depressive disorder is 24%.

In relationship to apportionment as you know you apportion for noncovered factors and also to avoid rating the same impairment twice. (The handbook states: Make sure you don't rate the same condition twice.) In individuals with physical injuries the physical impairment rating includes the impairing effect of pain. Therefore, one needs to consider apportioning for the impairing effect of pain due to the covered condition as measured by the chapter 14 mental injury impairment measuring tool as well as the impairing effect of any other noncovered pain condition.

Thank you for your consideration.

[17] Dr Lim completed an amended report on 15 September 2021 which apportioned out the impairment that had previously been associated with chronic pain. The reason for this was that Mr Vine's pain fell under the physical injuries which had previously been assessed and compensated for in previous assessments. As a result, 16 per cent was apportioned out of the previously assessed total of 32 per cent. The final WPI for the covered mental injury (major depressive disorder) was assessed at 16 per cent.

[18] On 20 September 2021, Mr Vine's treating Knee Surgeon, Mr Templeton, reported that a recent MRI had shown very minor chondromalacia which he felt was related to Mr Vine's covered injuries.

[19] Dr Walker completed another peer review report dated 1 October 2021 which advised:

Dr Marshall has correctly calculated impairment in relationship to the left knee injuries. Dr Marshall points out that there appears to be two covered injuries for the same accident-related pathology in the left knee. There is cover for the left femur fracture May 1, 1983 claim and under a consequential claim, claim number 100 4248 2951: Left knee arthritis and left leg varus malalignment January 3, 2018. Dr Marshall has found 2% whole person impairment in relationship to the 1987 accident and 9% in relationship to the consequential left knee osteoarthritis.

Dr Lim has used the chapter 14 mental injury impairment measuring tool and found an estimated whole person impairment of 32%.

Having found an estimated whole person impairment of 32% Dr Lim is directed by the handbook to the AMA guides to consider apportionment. The handbook to the AMA guides states that: An impairment may be the result of multiple conditions, not all of which are covered by ACC. In this situation apportion the percentage into covered and noncovered impairment. The guides also direct the assessor to avoid making the same impairment twice.

Dr Lim in a detailed apportionment discussion has explained how he has formed the opinion that apportionment of 16% is required because of the client's ADHD and chronic pain which a rating for which has been included in the physical impairment

rating. This means that 16% is applied to the covered mental injury. ($32 - 16 = 16$) apportionment is correct.

Dr Marshall and Dr Lim have confirmed that the covered injuries are stable and have resulted in permanent impairment. The impairing effect of pain has been considered. Impairments have been combined correctly using the combined values chart.

The Corporation's Decision

[20] The Corporation made a decision dated 22 October 2021 determining that WPI associated with injuries that were:

- (a) not previously compensated; and
- (b) fell within the independence allowance period;

was 6 per cent.

[21] WPI was initially assessed at 18 per cent, but it was necessary to subtract 12 per cent from this to reflect what had been previously compensated. As the net 6 per cent was less than the 10 per cent statutory threshold, no further entitlement was payable.

[22] Also on 22 October 2021, the Corporation wrote to Mr Vine in response to a request the same day where Mr Vine had sought copies of any communication between Dr Walker and Dr Lim relating to his impairment assessment and a copy of the methods used by both doctors to calculate his impairment rating. The Corporation's letter advised that it did not hold the information requested and invited Mr Vine to instead contact Dr Lim and Dr Walker.

The Review Decision

[23] On 1 December 2021, Mr Vine applied for a review of the 22 October 2021 decision. The basis of the review was that Mr Vine believed the peer review from Dr Walker had disrupted the initial report from Dr Lim and the Corporation should have paid out entitlements based on the impairment rating reached by Dr Lim in his initial report.

[24] On 1 February 2022, the Corporation revoked its earlier cover acceptance of chondromalacia.

[25] In the course of the review against the 22 October 2021 decision, a minute dated 28 February 2022 records that there was a discussion about Dr Lim's report and there were directions for the Corporation to seek clarification from Dr Lim as to what he meant by "other personal injuries" in his report dated 21 July 2021.

[26] In a letter from Dr Lim dated 15 March 2022 he provided the following response:

I refer to your email query dated 28 February 2022 regarding Mr Vine's apportionment, specifically around that of "other physical injuries" which contributed to his pain experience and his mood, which had been apportioned out, as outlined in Page 8 of my previous report.

The covered injury related to this claim is for the left knee and this has been causing chronic pain.

Mr Vine also experiences chronic pain from other sites of the body, specifically back pain.

The chronic pain arising from the covered injury (as per claim 88600416) and that of the back pain (10009135292, whiplash injury, lumbar sprain, July 28, 2009) is therefore apportioned out, as per the ACC handbook.

Mr Vine did have other injuries including: Right shoulder fracture sustained in 1991,

84240227, right tibia/fibular fracture, right knee post-traumatic arthritis, May 1, 1983,

100 4248 2951, left knee arthritis and left leg varus malalignment, January 3, 2018.

T/6 6933 4931, whiplash injury, August 7, 2003.

T16 6933 4480, neck sprain, October 3, 2005;

100 1272 4103, neck sprain, May 19, 2010.

100 1413 6854, neck and thoracic sprain, October 14, 2010.

However, he did not report these above injuries as causing pain in general. Hence they did not form part of the apportionment.

[27] Mr Vine then completed an "amended review application" on 19 March 2022 in which he outlined the reasons why he thought that the Corporation had not properly apportioned impairment on his claim.

[28] A subsequent minute from the Reviewer dated 13 April 2022 recorded that he had not been provided with a copy of Dr Walker's peer review report dated 1 October 2021.⁴ The

⁴ A copy of this relevant document was also omitted from the Bundle of Documents filed in this appeal. A copy was annexed to the Corporation's supplementary appeal submissions dated 15 June 2023.

hearing for the review was therefore adjourned part heard, to allow for the parties to make submissions on that peer review document.

[29] The hearing resumed on 20 April 2022 however was again adjourned part-heard because the Reviewer sought submissions about why Dr Walker, rather than Dr Lim, had completed the apportionment calculation used in the Corporation's 22 October 2021 decision and why that decision only dealt with impairment assessed injuries suffered prior to 1 July 1999 and not those suffered after.

[30] The Corporation wrote to Mr Vine on 5 May 2022 in response to the questions posed by the Reviewer. The Corporation's answers were:

- Why has Dr Walker rather than Dr Lim completed the apportionment calculation that ACC's decision dated 22 October 2021 is based on?

Dr Lim is only able to undertake impairment assessment for mental injury, and Dr Marshall can only assess physical injuries.

Dr Walker does both mental and physical injuries, which is why he has undertaken the apportionment calculation as part of his peer review of the whole person impairment.

- Why are the impairment assessed injuries prior to 1 July 1999 but not the impairment assessed injuries after 1 April 2002 included in ACC's decision dated 22 October 2021?

Other injuries were not included with ACC's decision because they had not been certified or applied for as part of the reassessment. The prior ratings formed part of the overall calculations, but given that no certification of permanence or stability was received for any other injuries, they were not assessed and did not form part of ACC's decision.

Doug may be eligible for reassessment of earlier injuries. He would need to reapply via his GP.

[31] On 23 May 2022, Mr Templeton reported again in response to further questions from the Corporation about chondromalacia. Mr Templeton explained, briefly, that the chondromalacia was linked to the arthritis in Mr Vine's knee.

[32] A lump sum/independence allowance payment report generated on 25 May 2022 summarised the historic lump sum/independence allowance payments made over the years.

[33] On 8 June 2022, the Corporation wrote to Mr Vine to advise that it had received his request for an impairment assessment in relation to a variety of injuries and that this would be arranged. The letter distinguishes between the injuries which would fall under the combined independence allowance payment type and the injuries which would fall under the lump sum payment type. The letter also advised that because chondromalacia was not covered at that time, it was not able to be assessed for impairment.

[34] Also on 8 June 2022, Mr Vine wrote to the Corporation asking that his mental and physical injuries be assessed separately and specifying several assessors that he would prefer.

[35] On 15 June 2022, Mr Vine completed another review application - this time against the letter dated 8 June 2022 advising that an impairment assessment would be set up. The grounds for review were that the Corporation had notified him that chondromalacia would be omitted from the assessment process.

[36] The Review Decision dated 20 June 2022 dismissed Mr Vine's review of the 22 October 2021 decision. The Reviewer's ruling was that Dr Walker's peer review had been aimed at asking Dr Lim to reconsider his apportionment approach in line with the legislative requirements that injuries suffered before 1 July 1999 be considered separately from those suffered after. The Reviewer also found that there were no identifiable flaws in Dr Lim's final assessment of Mr Vine's WPI.

[37] On 19 July 2022, the Corporation reinstated cover for chondromalacia.

[38] Mr Vine completed a Notice of Appeal on 29 June 2022 against the Reviewer's decision upholding the Corporation's Decision declining a further independence allowance payment.

Appellant's Submissions

[39] Mr Vine does not challenge the medical opinions. However he does challenge aspects of the process followed in his case, which he argues incorrectly applied the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition) (AMA4) and

the ACC User Handbook to AMA4.⁵ Mr Vine says that the cumulative effect of multiple errors by the Corporation resulted in an incorrect decision.

[40] Mr Vine supports Dr Lim's first report which Mr Vine says apportioned things correctly and arrived at the correct WPI of 24 per cent. The higher 24 per cent assessment should have been adopted, taking the most generous and least niggardly approach as directed by *Harrild v Director of Proceedings*.⁶

[41] Dr Lim was in error and acted outside of statutory power (*ultra vires*) in effectively carrying out a second assessment because a claimant cannot be reassessed more than once a year. This is similar to the argument which Mr Vine made to the Reviewer - that Dr Walker went outside the scope of his role and should not have undertaken a peer review. There is no provision in the Act requiring a peer review.

[42] Mr Vine further submitted:

- (a) The Corporation acted in error in asking Dr Walker to apportion his injuries pre-1 July 1999 and post-1 April 2001.
- (b) Dr Lim and Dr Walker incorrectly made a deduction for two injuries - leg and back (4 per cent) - when Mr Vine was not asking for a lump sum for his back. Dr Lim reported on Mr Vine's chronic knee pain and his back pain, but because these are covered injuries, they can only be rated rather than apportioned as Dr Lim did.
- (c) A further flaw in the approach of Dr Lim and Dr Walker is that they took 12 per cent under the 1992 Act away from the 1999 lump sum. Mr Vine says the Guidelines state that there must be an assessment of every injury before going on to the next steps.

⁵ The assessment tools required to be used by regulation 4 of the Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002.

⁶ *Harrild v Director of Proceedings* [2003] 3 NZLR 289 at [19], [39], [130].

- (d) It was impermissible to assess leg injuries under the Guidelines and this was a critical error by Dr Walker and Dr Lim. The Guidelines say that you cannot apportion a covered injury and you can only apportion for non-covered injuries. Therefore 8 per cent apportionment for leg and spinal injuries should have stood. Then taking away 8 per cent from 24 per cent you get 16 per cent, which is higher than the 10 per cent statutory threshold. The end result should have been a WPI of 16 per cent.

Corporation's Submissions

[43] The Corporation submitted that Mr Vine 's entitlement to an independence allowance was correctly assessed under the AMA4 guide and Handbook and the Corporation was correct to decline further payment on the basis that the relevant impairments fell short of the 10 per cent statutory threshold.

[44] The Corporation's 22 October 2021 decision was correct at the time it was made and there is no basis to interfere with it.

Law

[45] Mr Vine 's application for an independence allowance and lump sum, and the subsequent decision issued by the Corporation, occurred while the 2001 Act was in force. The starting point is the 2001 Act.

Independence Allowances

[46] The original lump sum scheme which existed in the earliest versions of the Accident Compensation Acts was replaced by an independence allowance scheme under the Accident Rehabilitation and Compensation Act 1992 ("the 1992 Act") and subsequently, the Accident Insurance Act 1998 ("1998 Act").

[47] The ability to claim an independence allowance for injuries suffered before 1 April 2002 is preserved under the transitional provisions of the 2001 Act, namely ss 377 and 378. Section 377 provides, amongst other things:

- (2) A person who suffered personal injury before 1 July 1999 is 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 the personal injury was or is lodged, subject to the modifications set out in subsection (3).
- (3) The modifications are that-
 - (a) **any assessment or reassessment must be done on the basis of whole-person impairment for the combined effect of all injuries suffered before 1 July 1999 for which the person has cover; and**
 - (b) **the percentage of impairment for which any lump sum compensation was received** under section 119 of the Accident Compensation Act 1972 or section 78 of the Accident Compensation Act 1982, or both, **must be deducted from the percentage of combined whole-person impairment** assessed in accordance with paragraph (a); ...

[emphasis added]

[48] The provisions governing the assessment of eligibility of an independence allowance are contained in clauses 58 to 63 of Schedule 1 to the 1998 Act. The process for assessing WPI under the 1998 Act is essentially identical to the process under the 2001 Act.

Lump Sums

[49] Clause 54 of Schedule 1 to the 2001 Act states:

54 Lump sum compensation for permanent impairment

- (1) The Corporation is liable to pay the claimant lump sum compensation in accordance with this schedule, if-
 - (a) the claimant has suffered personal injury, after the commencement of this Part, for which he or she has cover; and
 - (b) the claimant-
 - (i) has survived the personal injury for not less than 28 days; and
 - (ii) is alive when assessed under clause 59; and
 - (c) **an assessment carried out under clause 59 establishes that the claimant's personal injury has resulted in a degree of whole-person impairment of 10% or more.**
- 2. To avoid doubt, there is no entitlement to lump sum compensation in respect of personal injury suffered before 1 April 2002 or in respect of any subsequent consequences of any such personal injury."

[emphasis added]

[50] Clauses 59 and 61 of Schedule 1 provide the procedure for assessing and reassessing an entitlement to lump sum compensation. A claimant's WPI must be assessed in accordance with the Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002 ("the Regulations").

[51] The Regulations provide:

4 Assessment tool for assessing eligibility for lump sum payments and independence allowance

- (1) Assessment of a person's whole-person impairment, for the purposes of determining the person's eligibility to receive lump sum compensation or an independence allowance, must be carried out by an assessor using the assessment tool prescribed by subclause (2).
- (2) The assessment tool comprises -
 - (a) The American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition); and
 - (b) The ACC User Handbook to AMA4.
- (3) The ACC User Handbook to the AMA4 prevails if there is a conflict between it and the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition).

[52] In summary:

- (a) Section 377(3)(a) provides that the WPI for injuries suffered before 1 July 1999 is distinct from the WPI for injuries suffered after 1 April 2002.
- (b) Impairment must be assessed using the AMA4 and the ACC User Handbook to the AMA4;⁷
- (c) Any prior lump sum awards must be deducted; and
- (d) The remaining WPI must be more than 10 per cent.

⁷ An assessor is required to undergo specialised training to be able to utilise the AMA4 assessment techniques and to apply the ACC User Handbook to AMA4, and the Combining Impairment Values Chart.

Relevant Cases

[53] In *Crouchman v Accident Compensation Corporation*⁸ Maclean DCJ summarised the well settled principles regarding challenges to lump sum and independence allowance decisions:

As was outlined in *W v Accident Compensation Corporation* [2014] NZACC 284 and *Robinson v Accident Compensation Corporation* [2008] NZACC 121 the principles underlying a challenge to an independence allowance assessment are well settled including:

- It is not for the Court to form an opinion as to whether or not the AMA guides have been correctly applied - this is the province of duly qualified medical practitioners. The Court must rely on the evidence of medical practitioners in this regard.
- To succeed in an appeal, it is for the appellant to establish on the balance of probabilities that the assessment was in some way flawed or incorrect. This requires credible expert evidence directed at the specific aspects of the assessment which are said to be incorrect.
- In order to upset an assessment, the Court does not necessarily have to be provided with an alternative assessment from a duly qualified expert, but it is sufficient if there is expert compelling evidence either that the AMA guides have not been correctly interpreted or that the assessor has failed to take into account all relevant factors of impairment.

[54] In *Kuru v Accident Compensation Corporation*⁹ the Corporation made a decision based on the advice of Dr Fenwicke, a qualified assessor. On appeal from that decision, Mr Kuru filed a competing impairment assessment report from Dr Kanji, also a qualified assessor, who had assessed Mr Kuru 10 months later. The Court found that its jurisdiction was confined to the correctness of Corporation's decision at the time it was made. The Court summarised the position as follows:

[16] It is not the case for this Court in an appeal situation to consider whether the appellant would now be entitled to lump sum compensation based on Dr Kanji's report, as **this Court's jurisdiction is limited to a determination of whether the respondent's decision of November 2010 was the correct decision at the time it was made.**

[17] The provisions of Clause 61 of Schedule 1 to the Act make specific provision for reassessments for entitlements to lump sum compensation, and of course the time limit is now well past the 12 month period since that first assessment, and therefore it is open to the appellant to make application for reassessment of his Whole Person Impairment. It is that provision in Clause 61 which takes specific account of the fact that a claimant's Whole Person Impairment may

⁸ *Crouchman v Accident Compensation Corporation* [2016] NZACC 29.

⁹ *Kuru v Accident Compensation Corporation* [2012] NZACC 304 at [16] to [19].

have increased since the date of the last assessment, and it is the situation that a subsequent assessment which does identify an entitlement to lump sum compensation does **take effect from the date of that further assessment**.

[18] It is therefore the situation, as I find it both as a matter of fact and law, that the respondent's decision declining the appellant's claim for lump sum compensation, was the correct decision at the time it was made, and would remain the correct decision until a claim for reassessment is lodged by the appellant and a fresh Whole Person Impairment assessment is undertaken and which was to identify a Whole Person Impairment of not less than 10%.

[19] For the foregoing reasons, therefore, this appeal is dismissed.

[emphasis added]

[55] Mr Kuru sought leave to appeal that decision, but this was declined.¹⁰

[56] Where a claimant successfully identifies a flaw in an impairment assessment, the remedy is for the claimant to be reassessed.¹¹

[57] The recent case of *Pivac v Accident Compensation Corporation*¹² is very similar to the decision at issue in this appeal:

[1] The issue in this appeal is the correctness of the respondent's decision of 17 March 2020 which advised that:

- (a) The level of impairment for a lump sum payment had been assessed at 2% that is less than the minimum of 10% required for payment.
- (b) The level of impairment for an independence allowance had been assessed at 12%. Lump sum compensation that had been paid for injuries suffered prior to 1 July 1992 in the amount of 5% had to be deducted from this amount. The balance of the impairment of 7% was less than the minimum of 10% required for an independence allowance payment.

The Court upheld the Corporation's decision in *Pivac*, confirming that it is correct to distinguish between the injuries eligible for a lump sum under the 2001 Act, and injuries eligible for an independence allowance under s 377.

¹⁰ *Kuru v Accident Compensation Corporation* [2013] NZACC 68.

¹¹ *Poihegatama v Accident Compensation Corporation* [2015] NZACC 35.

¹² *Pivac v Accident Compensation Corporation* [2021] NZACC 132.

Analysis

[58] Mr Vine has already been compensated for 12.5 per cent WPI associated with his pre-1 July 1999 injuries. To be eligible for an independence allowance, his pre-1 July 1999 injuries must therefore be assessed at a minimum of 22.5 per cent WPI. Anything less would result in an impairment below the threshold 10 per cent, once the previous awards were deducted.

[59] The Corporation last approved a lump sum for Mr Vine under the 2001 Act in a 15 June 2018 decision, based on a WPI rating of 20 per cent. To be entitled to a further lump sum, Mr Vine must be assessed as having a minimum of 30 per cent WPI for his injuries suffered after 1 April 2002. Anything less would fall below statutory threshold once the necessary deduction was made.

[60] A valid WPI rating is determined by a duly qualified assessor who has conducted an impairment assessment in line with the AMA4 and the ACC User Handbook to AMA4.

[61] As confirmed in *Kuru's* case, the correctness of the decision is determined as at the time it was made. There is no expert medical evidence or anything in Mr Vine's submissions to indicate a flaw in the way Dr Lim assessed Mr Vine under the AMA4 and the ACC User Handbook to AMA4 at the time that Dr Lim did so.

[62] Dr Lim's assessment, which is the subject of this appeal, was confined to an assessment of impairment in relation to a major depressive disorder for which Mr Vine was granted cover on 8 March 2021. Although cover was granted in 2021, the date of injury for the depression attaches to the physical injury said to have caused it – in this case a leg injury suffered on 4 May 1987. This means that the depression fell for assessment under section 377 of the 2001 Act, which preserves the independence allowance regime under the 1998 Act.

[63] Dr Lim initially rated the depression at 24 per cent, but after a peer review from Dr Walker on 4 September 2021, which raised the danger of assessing the same impairment twice (for example, the effect of physical pain and the effect of mood related issues relating to the physical pain), Dr Lim amended his report on 15 September 2021. He increased the level of apportionment, which decreased the final impairment rating, explaining as follows:

I consider Doug's injury and impairment as permanent and stable.

Apportionment is made for factors affecting Doug's diagnoses and impairments ratings that are not directly related to the injury.

Doug has a history of ADHD which is generally well maintained with medication. However, this could still affect his attention and reactivity to people from time to time. This is apportioned out.

Doug has chronic pain due to the covered injury and from his physical injuries which contribute to his pain experience and which could also affect his mood. This is apportioned out.

A rating of 16% is apportioned out for the above factors.

The impairment for the covered mental injury (major depressive disorder) is therefore assessed at 16%.

[64] On 1 October 2021, Dr Walker conducted another peer review and advice. The purpose of Dr Walker's second peer review was to consider Dr Lim's assessment alongside the earlier assessment by Dr Marshall. The reason that that was necessary is that s 377 requires the Corporation to combine the rating for all injuries suffered before 1 July 1999. Therefore, it was necessary to combine the depression rating, with the recently rated pre-1999 physical injuries.

[65] Dr Walker confirmed that both the assessments of Dr Lim and Dr Marshall (who had undertaken the most recent physical injury rating) complied with the AMA4 and the ACC User Handbook to AMA4. He was satisfied with Dr Lim's approach to apportionment. He then set out the final whole person impairment rating reconciling mental and physical injury ratings for the pre-1999 injuries. His calculation for the injuries suffered prior to 1 July 1999, relevant to the decision on appeal, was as follows:

Claim(s) No. 88604016, major depressive disorder (16%), left femur fracture, May 4, 1987 (2%) = impairments are combined using a combined value chart 16, 2 = 18%.

Claim(s) No. 84240227, right tibia/fibular fracture, right knee posttraumatic arthritis, May 1, 1983 = 0%.

Final whole person impairment for injuries prior to 1/7/99 = 18%.

[66] The Corporation in the decision that followed then deducted 12 per cent from the 18 per cent (12 per cent being the lump sum payment already paid for pre-1999 injuries) leaving Mr Vine with a WPI rating of 6 per cent, which fell below the 10 per cent statutory threshold.

[67] Dr Lim's assessment is thorough and was carefully and professionally carried out and I accept it. There is no evidence of any obvious flaw contained in it. In fairness to Mr Vine, the Corporation arranged for Dr Lim's initial assessment and amended assessment to be peer reviewed by Dr Walker, who was qualified to carry out assessments of psychiatric injury (Dr Lim) and physical injury (Dr Marshall). Following the initial peer review Dr Lim amended his initial assessment to eliminate an error in rating the same impairment twice. He apportioned the impairing effect of pain due to the covered condition and the impairing effect of any other non-covered pain condition. The peer reviewer, Dr Walker confirmed the accuracy of Dr Lim's amended report. Dr Walker recommended that Dr Lim's report be accepted. Having considered all the evidence in this case, I find no fault at all with what the Corporation did. It has approached the reassessment process in a thorough and professional way. I accept the conclusions reached.

[68] Mr Vine urged that Dr Lim's initial higher 24 per cent assessment should have been adopted. But the law is clear that the Court will not, without the assistance of expert medical evidence, substitute its own view of the application of AMA4 and the ACC User Handbook to AMA4. That is because the application of those guidelines is a matter for specially trained medical assessors.

[69] The general principle of interpretation referred to by the Court of Appeal in *Harrild v Director of Proceedings*¹³ - to take the most generous and least niggardly interpretation – cannot be sensibly applied in this very prescriptive area in the accident compensation legislation. Kos J in the Court of Appeal noted that this principle applies where more than one available interpretation exists but “if the Act is unavoidably niggardly or ungenerous, that is that”.¹⁴

[70] Dr Lim did not carry out a second a second assessment within one year. His consideration of Dr Walker's initial peer review, Dr Lim's subsequent revision of his assessment and Dr Walker's final peer review were all part of one assessment.

¹³ *Harrild v Director of Proceedings* [2003] 3 NZLR 289 at [19], [39], [130].

¹⁴ *J v ACC* [2017] NZCA 441 at [52].

[71] Peer review by another trained and experienced assessor is a useful precautionary check and a protective safeguard against error in a complex assessment process. It may just as easily work to the advantage of a claimant as disadvantage. While it is true, as Mr Vine noted, that there is no express provision in the Act requiring peer review, it is implicit that the Corporation may take such steps, including peer review, to ensure quality control and good decision making.

[72] Finally, I refer to Mr Vine's remaining submissions as to error in apportioning his injuries pre-1 July 1999 and post 1 April 2001, incorrect deduction for leg and back injuries and incorrect apportionment of certain injuries. I am not satisfied that there was any error by Dr Lim or Dr Walker in applying the AMA4 and the ACC User Handbook to AMA4, both of those Doctors being trained and experienced assessors. There is no clear and compelling evidence to indicate that the assessment was made incorrectly or that the criteria of the AMA4 and the ACC User Handbook to AMA4 guide were not followed.

[73] The Corporation has correctly followed the legislation, basing its decision on the level of impairment correctly assessed in accordance with the statutory provisions, and taking into account the modifications required by s377(3).

[74] The Corporation was correct to arrive at the final WPI rating that it did and to decline to pay any further lump sum and independence allowance.

Conclusion

[75] The Corporation's Decision dated 22 October 2021 and the Review Decision dated 20 June 2022 declining Mr Vine a lump sum and independence allowance are both correct and are maintained.

Result

[76] The appeal is dismissed.

Costs

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



I C Carter
District Court Judge

Representation: Mr D Vine, appellant in person
 Medico Law, Lawyers, Grey Lynn, Auckland