

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2023] NZACC 62                      ACR 037/21**

UNDER                                      THE ACCIDENT COMPENSATION ACT  
2001

IN THE MATTER OF                      AN APPEAL UNDER SECTION 149 OF  
THE ACT

BETWEEN                                      NICHOLAS WATTS  
Appellant

AND    ACCIDENT COMPENSATION  
CORPORATION  
Respondent

Hearing:                                      2 March 2023  
Heard at:                                      Tauranga/Tauranga Moana

Post hearing  
documents completed:                      7 March 2023

Appearances:                                      Appellant is self-represented  
Mr L Hawes-Gandar and Ms F Becroft for the respondent

Date of Judgment:                              12 April 2023

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**RESERVED JUDGMENT OF JUDGE D L HENARE  
[Weekly Compensation, s 100, Clause 3 Schedule 1  
Accident Compensation Act 2001**

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[1] This is an appeal from a review decision upholding the Corporation's decision declining the claim of the appellant, Mr Watts to weekly compensation.

[2] The Reviewer quashed a second decision of the Corporation revoking cover for post-concussion syndrome. In consequence, Mr Watts has cover for post-concussion syndrome. Since this cover issue is moot, the Court has no jurisdiction.

[3] The sole matter before the Court is the Corporation's decline decision of 6 December 2019 which stated:

ACC can only take into consideration taxable income when considering if you are an earner at the date of your accident. We acknowledge your emails advising you were an employee for MBC, however, for us to consider you as employed, your employer would need to pay you PAYE income and lodged PAYE returns with IRD. Unfortunately, there is no PAYE income showing for you from 1<sup>st</sup> April 2014 until your date of accident as confirmed by IRD.

Furthermore, you've advised us that you were paid a lump sum payment for the sale of a painting. ACC has considered if you were in self employment and received commission payments from MBC, however, IRD has confirmed that there was no self-employed income filed for you in the 2014/2015 year.

### **Background**

[4] On 18 March 2010, a company called Sorich Consultants Limited was incorporated, with Nicole Sorich as the sole director and shareholder. The company's name was changed to MBC Studios Limited (MBC) in 2014.

[5] On 28 March 2014, Mr Watts became a director of MBC, and on 3 June 2014 he resigned as a director, but remained a 50% shareholder.

[6] On 3 June 2014 Mr Watts was incarcerated.

[7] On 17 June 2014 Mr Watts suffered injuries as a result of an assault, while incarcerated.

[8] On 20 June 2014 the Corporation granted Mr Watts cover for a neck sprain and fracture of the face bones.

[9] On 5 December 2019, the Corporation issued a decision granting cover for concussion, but declining cover for post-concussion syndrome.

[10] On 6 December 2019, the Corporation issued a decision declining weekly compensation on the basis that Mr Watts was not an earner at the date of his injury.

[11] On 11 December 2019, the Corporation issued a decision informing Mr Watts he had become entitled to deemed cover for post-concussion syndrome, effective from 2 December 2019, and at the same time revoking that deemed cover.

[12] Mr Watts applied for a review of the Corporation's decisions declining weekly compensation and revoking cover for post-concussion syndrome.

[13] On 19 November 2020, the Reviewer issued a decision upholding the Corporation's decision declining weekly compensation and quashing the decision revoking cover for post-concussion syndrome.

[14] On 11 August 2021 the Corporation issued a letter purporting to decline cover for post-concussion syndrome. On 15 August 2022 the Corporation issued a further letter, clarifying the 11 August 2021 had been incorrect, and Mr Watts retained cover for post-concussion syndrome.

### **The claim for weekly compensation**

[15] On 26 September 2019, the Corporation informed Mr Watts that he was not entitled to weekly compensation because he had been in prison and therefore not working at the date of his injury. Mr Watts replied he had been an employee when he went to prison on 3 June 2014, and his employment status had not changed. He stated, "I was not fired or anything so I was effectively employed and a shareholder employee".

[16] When asked for further details, Mr Watts responded he had been employed by MBC and had a salaried position which he intended to resume upon release from prison.

[17] On 23 October 2019, Mr Watts emailed the Corporation indicating he was in prison on remand until 14 July 2014.

[18] Mr Watts was informed by the Corporation that, while his job may have been open ended, he was ineligible for weekly compensation because he needed to be

working and receiving income at the date of his injury to be considered an earner under the accident compensation legislation.

[19] On 27 November 2019, Mr Watts forwarded an email to the Corporation with the following attachments:

- [a] Excerpts from an email to a lawyer dated 7 July 2014 suggesting he had a job to go back to on his release from prison and that he had been making money from selling artwork over the last 10 months; and
- [b] Excerpts from an email from his “employer”, being his then partner and intended business partner Nicole Sorich dated 19 July 2014, referring to various plans and work that needed to be done for the company; and
- [c] Excerpts from an email from Mr Watts to Ms Sorich dated 17 July 2014, in which he referred to commission he was due on a painting he had sold, and his suggestion this should be paid to him in cash.

[20] The Corporation checked Mr Watt’s records with IRD and found there was no record of him having received any income as an employee or self-employed person, around the date of his injury.

[21] On 6 December 2019, the Corporation issued the decline decision noting also it would reconsider the decision if Mr Watts provided new information confirming he had earned taxable income in 2014.

[22] In March 2020, Mr Watts lodged review applications from the Corporation’s decisions and provided documents showing that, on 11 December 2019, he had submitted a tax return to IRD, for \$8,536.38 of PAYE income in the 2014 tax year.

[23] The Corporation subsequently re-checked Mr Watt’s earnings information with IRD and confirmed he had no earnings (PAYE or self-employed) in either the 2014 or 2015 tax years.

[24] Mr Watts and the Corporation participated in a conciliation and mediation meeting on 28 May 2020. The Corporation suggested Mr Watts provide documents such as an employment contract and payslips to establish his earner status and earnings.

[25] On 8 July 2020, Mr Watts advised that on 3 June 2014, prior to his incarceration, he had been removed as a director of MBC, had retained his 50% shareholding and had been “employed as the CEO”. Mr Watts also provided the Corporation with further documents including:

- [a] A screenshot of part of an email from Nicole Sorich to KPMG dated 12 March 2015, recording that “we would like to discuss how we are best to allocate payment made to Nicholas Watts, we would also like to do his personal tax return for the financial years ending 2013 and 2014”;
- [b] An invoice dated 4 May 2014, made out to Nicole Sorich for \$95, for web-hosting services in respect of “mbcreative studios.com”;
- [c] A CV setting out Mr Watts’ work experience from 2000 to 2011; and
- [d] Mobile phone records showing several phone calls and data usage on 3 June 2014, on a mobile telephone number registered to Nicole Sorich.

[26] On 16 July 2020, the claim was reviewed by the Corporation’s technical specialist, who noted the Companies Register showed that MBC had been removed from the register in June 2015 and there was no record of it having paid any ACC employee levies since 2011. The technical specialist advised that Mr Watts’ employment status at the date of his injury was not clear, and even if it could be established that he was a shareholder employee or self-employed at the date of his injury, he would not be entitled to weekly compensation as he had no earnings.

## **Relevant Law**

[27] Section 100 of the Accident Compensation Act 2001 sets out a number of different pathways to weekly compensation, of which the following two are relevant in this case:

[a] Section 100(1)(a) where a claimant is entitled to weekly compensation if they are incapacitated under s 103, and they are eligible under clause 32 of schedule 1; and

[b] section 100(1)(c) where a claimant is entitled to weekly compensation if they are incapacitated under s 105 and they are eligible under clause 43 of schedule 1.

[28] For a claimant to be incapacitated under s 103, they must have been an earner at the time they suffered their personal injury.

[29] A claimant is eligible under clause 43 if they have been in employment within 28 days of the commencement of their incapacity and they would have been an employee again within three months, but for their incapacity.

[30] An earner is defined in s 6 of the act as a person engaged in employment for the purposes of pecuniary gain.

[31] Where a claimant is incapacitated and eligible, they are entitled to receive weekly compensation at the rate of 80% of their weekly earnings which are calculated from the earnings they received prior to their incapacity.

## **Discussion**

[32] It is undisputed that Mr Watts was not an earner at the date of injury because he was in prison. His prison term commenced some two weeks before he suffered the assault causing injury.

[33] Mr Watts stated he went into prison on 4 June 2014 and was on remand until 14 July 2014, then returned mid-August 2014 and was released mid-December 2014.

The Court observes the available medical reports in evidence suggest a period of imprisonment from 4 June 2014 to 23 January 2015. Mr Hawes Gandar informed the Court that despite his request to Corrections for a specific release date, he had not received this information. In consequence, it appears Mr Watts' actual term of imprisonment is unclear. What is clear is that Mr Watts was in prison at the time of injury.

[34] Mr Watts claim to weekly compensation was declined on the basis the evidence did not establish he was an earner at the date of his injury on 17 June 2014. If Mr Watts was not an earner at the date of injury, the question then is whether he is deemed to have continued to be in employment and have earnings at that time, pursuant to clause 43 of the Act.

[35] I commence the analysis considering the case law cited by Mr Hawes Gandar in relation to earner status and earnings. I then turn to consider the available evidence in this case.

[36] The following principles arise from the case law:

- [a] To be an earner a claimant must be engaged in work for the purpose of pecuniary gain, at the actual date of injury. It is not sufficient that they have previously been engaged in such work or intend to be so in the future.
- [b] To be engaged in work for the purpose of pecuniary gain requires some material profit or income. Conducting limited business without any substantial profit is not enough.
- [c] There is no requirement for the Corporation to try to substantiate claims. The onus is on the claimant to establish that they are an earner, and this will be difficult to do in the absence of contemporaneous records such as tax returns; and

[d] A claimant who is an earner at the date of injury will be ineligible for weekly compensation if they were not receiving earnings.

[37] There is no doubt Mr Watts was a director of MBC prior to his incarceration. However, the evidence does not support that he received earnings or was an earner in that capacity. There is no evidence of an employment contract, payslips, tax returns or evidence of earnings from MBC in the relevant periods leading to or after the injury or PAYE evidence of earnings in 2014/2015 supporting employee status whether as CEO or not. The Court particularly enquired as to this evidence in questioning Mr Watts at hearing.

[38] Mr Watts referred the Court to the information set out earlier in the judgment including the partially redacted email showing the dates of 7 July and 13 August 2014 and also correspondence between himself and case managers of the Corporation.

[39] The Court accepts the email from Nicole Sorich, bearing the dates of 7 July 2014 and 13 August 2014, was sent on 7 July 2014 and then resent on 13 August 2014. However, the dates alone do not have relevance to the issues in the appeal.

[40] The Court questioned Mr Watts whether there was an employment contract supporting his employment and/ or evidence of his appointment as CEO of MBC or payslips or bank account. Mr Watts said he did not have an employment contract or other documents supporting his employment either from his former partner or from the lawyer engaged by his former partner. While there is correspondence between Ms Sorich and KPMG, certain of which suggest Ms Sorich asked KPMG to prepare Mr Watts' tax return, Mr Watts said he does not have this information because he did not sign the letter of engagement of KPMG. Mr Watts pointed to an extract from New Zealand Business records for MBC which confirmed his appointment and cessation dates as a director. The Court can give little weight to the fact of appointment and termination without evidence of earnings in the relevant period.

[41] At hearing, Mr Watts produced a digital audio recording. Mr Hawes Gandar subsequently filed a memorandum following the hearing, explaining the nature of the



recording. It appears the recording was sent to the Registry and counsel as an MP3 file called “Nicholas discussing wrong incapacity date and 2 dec 2019.mp3”. Mr Hawes Gandar stated the recording appears to be part of a telephone conversation between Mr Watts and an un-named Corporation staff member assigned to answer the call. The Court is informed this staff member did not have any previous involvement with or knowledge of the claim. For this reason, the Court can give little weight to this evidence having any material value to the issues for determination.

[42] Mr Hawes Gandar further explained that in the recording Mr Watts raises concerns about his claim for cover for post-concussion syndrome and the IRD document he had discovered on his claim file. The Court observes this document was produced at hearing by Mr Watts. It shows Mr Watts’ earnings in 2018 and 2019. At hearing, the Court indicated to Mr Watts this document was not relevant to the issue in the appeal because it did not relate to the relevant period in 2014 and 2015.

[43] What is to be made of the evidence before the Court?

[44] First, whilst Mr Watts’ directorship of MBC is not disputed, there is no evidence of his earnings as a director that would have been expected to have been disclosed in the returns of MBC. In fact, investigation by the technical specialist shows no returns were lodged for MBC after 2011. Even if the Court formed the view that MBC was at a stage of set up based on the email of Ms Sorich in August 2014, the company had in fact been registered for some time.

[45] Additionally, there is no evidence MBC paid any ACC employer levies.

[46] Secondly, the evidence is unclear as to Mr Watts’ employment status as at the date of the injury, that is whether he was a self-employed shareholder employee or an employee because there is no evidence of employment status, such as an employment contract.

[47] Thirdly, the IRD has no records of any earnings in 2014 and 2015 tax years. Whilst there is evidence of a screenshot of a tax return showing gross earnings of

\$8,536.38, which appears to have been submitted in 2019, this does not match the IRD records in evidence. Additionally, the screenshot does not specify the source of the earnings or the period over which they were earned. The Court can give no weight to the 2019 document because it does not relate to the relevant period in question. At hearing, the Court issued a Minute at hearing accordingly.

[48] Fourthly, Mr Watts has produced extracts of emails written by himself and his former partner, Ms Sorich sometime after the injury that suggest at best, a proposal for Mr Watts to work at MBC. Evidence of a proposal to establish a future business is quite different to actual evidence supporting earnings.

[49] Having reviewed all the available evidence, the Court finds it does not support Mr Watts' claim to have been in employment within 28 days of his injury. Accordingly, the available evidence does not answer the question posed earlier whether he is deemed to have continued to be in employment. In consequence, he does not meet the first requirement under clause 43.

[50] Even if Mr Watts had been in employment within 28 days of his injury, he would not meet the second requirement, that he would have been an employee again within three months, but for his incapacity. Mr Watts would not have been an employee again within three months since his prison term did not end until either December 2014 (Mr Watts evidence) or January 2015 (based on the available medical reports). In any event, the evidence of release date in the appeal is unclear to enable the Court to make exact determination.

[51] Even if it could be said Mr Watts was an earner at the date of injury, or eligible under the first requirement under Clause 43, the Court finds Mr Watts had no earnings at the relevant time and therefore would not be eligible to receive weekly compensation.

[52] For these reasons, the Court concludes on the available evidence that Mr Watts' appeal cannot succeed.

[53] Accordingly, the appeal is dismissed. There is no issue as to costs.

A handwritten signature in blue ink that reads "Denise Henare". The signature is written in a cursive style with a large initial 'D'.

Judge Denise Henare  
District Court Judge

Solicitors: Medico Law Limited, Auckland for the respondent.