PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT

IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 32 **ACR 41/22**

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

Hearing: 27 February 2023

Held at: Wellington by AVL

Appearances: The Appellant is self-represented
C Sinclair and S Kinsler for the Accident Compensation Corporation

Judgment: 6 March 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Impairment assessment – Part 3, Schedule 1, Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 25 February 2022. The Reviewer dismissed an application for review of the Corporation's decision dated 20 May 2021 declining the appellant's application for lump sum compensation in respect of her post-traumatic stress disorder (PTSD).

Background

[2] The appellant was born in 1972. Around 1977/78, she suffered childhood sexual abuse trauma. The appellant went to Australia in 2007. In 2014, a second sexual assault took place while there. In 2015, the appellant was diagnosed with bipolar disorder in Australia, after long-standing diagnoses of major depressive disorder and anxiety. The appellant returned to New Zealand in 2015.

[3] On 13 May 2019, the Corporation granted the appellant cover for PTSD for the episode in 1977/78. The appellant later claimed a lump sum payment for her impairment.

[4] On 16 March 2021, Dr Peter Fleischl, GP, noted that the appellant's PTSD symptoms mingled with bipolar disorder. In the last 18 months she had been receiving weekly compensation. She was managing reasonably well at present but did get overwhelming overstimulation on occasions. She had no obvious delusions and was in bright mood.

[5] On 27 April 2021, Dr John Collier, Specialist Psychiatrist and Psychotherapist, carried out an assessment after interviewing the appellant by telephone. Dr Collier assessed the appellant's whole-person impairment in respect of four categories in terms of the relevant American Medical Association Guides:

> 1. Activities of daily living
>
> She is fully independent with self-cares. She is currently doing part time work merchandising (around 15 hours a week) and is on a job seeker's benefit. Since the events of 1978 she has been able to graduate in a university degree and has worked full time in a variety of settings. She has been able to attend teacher's training college and teach, and has been able to work in a laboratory. She does not appear to have worked full time since her last breakdown in 2014. She is able to communicate effectively using social media, telephone, computer and You Tube videos. She has been able to write a book in the last seven years and paints on a regular basis. She is not in a sexual relationship. She struggles to develop and maintain a close relationship, which appears to have been a pattern through much of her life. She is able to shop. She is able to eat normally. Sleep tends to be with medication. She is getting around nine hours' sleep without interruption. She can maintain her room and is able to engage in hobbies around creativity, social media, publishing a novel and painting.
>
> She currently meets the criteria for a Class II mild impairment - *independent but in some areas functioning is not particularly effective*. She can cook and

clean, manage her household and work part time but has difficulty with relationships. I would rate her at Class II at 10%.

2. Social functioning

She is able to maintain social norms except when unwell when she becomes disinhibited and hypomanic and tends towards hypersexualized behaviour. She is able to get on with family members. She has a very restricted circle of friends and tends not to initiate social contact but is able to go out to the supermarket in the afternoon where she does her merchandising. She attends occasional social functions. She is not a member of any groups. She is cooperative and considerate, socially responsible and when well can negotiate and compromise

She meets the criteria for Class II mild impairment - *independent but in some areas functioning is not particularly effective* and I would rate her at 10 per cent.

3. Concentration / Persistence / Pace

She describes lapses of concentration and memory which are consistent with underlying anxiety, dissociation and with bipolar disorder. She is able to handle her finances. She is able to attend work on a regular basis and has been working for 12 months and 24 months in two different jobs. She is able to coordinate and pace herself to write a book over the last seven years and to complete paintings which she displays on her You Tube videos that she publishes regularly online. Formal cognitive testing was not performed.

She currently meets the criteria for a Class I '*Nil / Minimal impairment – effectively independent most of the time*' and I would rate her at the upper end at 7%, nearer to Class II where she meets the criteria for undertaking basic training and has an erratic work history.

4. Adaptation / Decompensation / Stress

She describes multiple stressors and triggers including anniversaries around loss, death and romance. She describes recurrent themes of loss, death and emotional attachment as being potent triggers for her bipolar decompensation. She does not abuse drugs or alcohol. Current medication is for rapid cycling bipolar 1 disorder and she has been on carbamazepine for the last four years. She has had one hospital admission in 2015 for two months in Australia. She has currently been discharged from Lakes DHB and has remained for the last two years in weekly psychological treatment.

Currently she meets the criteria for a Class II mild impairment – *Mild decompensation with stress such that the Claimant can still complete tasks at home and work but the standard of functioning is impaired* – and I would rate her at 10%.

Apportionment

Apportionment needs to be made for the non-covered bipolar affective disorder Type 1 (manic depression) and for the impact of social anxiety disorder. It is noted that there were several stressors in childhood and it appears that the elective mutism in her first month at school predated the sensitive claim. It is

> noted that her son has a possible diagnosis of autism spectrum and that she has been investigated for that, and there may be other underlying factors.
>
> This Assessor would consider that at least half of her impairment is due to the longstanding diagnosed bipolar 1 disorder.
>
> Final Whole Person Impairment
>
> She has a 5% whole person impairment. The condition is permanent and stable.

[6] On 20 May 2021, the Corporation declined lump sum compensation on the basis of Dr Collier's report. The appellant lodged an application for review of this decision.

[7] On 10 June 2021 and 23 June 2021, Dr Collier issued amended reports with corrections as advised by the appellant. These amendments did not alter Dr Collier's summaries or conclusions set out above.

[8] On 22 September 2021, Dr Kewa Mascelle, GP, reported that the appellant had been the target of an internet attack a week before, triggering PTSD. She took medication to sleep due to suicidal ideation. She had slurred speech and was difficult to understand. She was thinking of hanging herself, worsening over the last week, was tearful and upset. She was living in a backpackers' hostel because her parents had "kicked her out" three months before.

[9] On 12 October 2021, the appellant (at her request) underwent another assessment, via video call, with Dr Tom Levien, Consultant Psychiatrist, in support of her application for review. On 9 November 2021, Dr Levien reported in respect of each of the four categories:

> 1. Activities of daily living
>
> [The appellant] reported that she is independent with self-care. She sometimes gets a little anxious with the shared bathroom facilities but is able to manage this reasonably well. She reported that she does not tend to communicate much at all with others in real life but does communicate through social media and through Twitter. She described currently that she has had a deterioration in her mental state secondary to cyberbullying through her Twitter site. She reported that this is, in essence, people criticising the book that she has recently published. She reported that this caused her significant anxiety to the point where her mood deteriorated and she experienced suicidal ideation. She had some input through the Acute Mental Health Services approximately a week

ago with some increase in p.r.n. medication. She reported that her mental state is now settled.

She tends to travel by walking. She does have a car but reported that when her mental state deteriorates, she does not drive as she feels that this would be dangerous. There is no public transport in her town to utilise.

She reports a belief that she has not had any healthy intimate relationships through her life and avoids intimate relationships currently as this is a significant trigger for her PTSD.

She does her own shopping but tends to do this at times when the supermarket is quiet. She tries to undertake the shopping quickly and only gets what she needs for the next few days. She goes through self-checkout.

She sleeps reasonably well nine hours at night, which she feels is due to the medication she is taking. She eats regularly and reasonably well. At times, she struggles to maintain her residence because of the small size but undertakes this reasonably regularly.

She has interests in creative pastimes including writing books and painting. However, she reported that she undertakes this only very occasionally, and in fact, finds it quite tiring. She reported that her most recent book has taken her approximately seven years to write. The last time she painted was two months ago. …

[The appellant] is independent, but in some areas, functioning is not particularly effective.

Impairment levels are compatible with some but not all useful functioning.

She meets all of criteria for class 2, mild impairment – 10% to 35%. She meets a significant number of the criteria for class 3, moderate impairment.

She is therefore in the higher range of class 2, mild impairment.

Impairment rating – 30%.

2. Social functioning

[The appellant] reported that she has difficulties interacting with others. She avoids interacting with other people in the hostel because her hostel is "full of drama." She reported that there was fighting between different residents and she generally spends most of her time isolated in her room. She does try to go for a walk once a day and undertakes her work when she can.

[The appellant] reported that she has two or three friends in real life but catches up with them very rarely. She reported that she will have social contact with others in real life approximately two to three times a year. She does interact with others online including through social media. She very rarely instigates social contact herself.

She reports that she does not go to social functions and she does not belong to any groups. She sees herself as cooperative and considerate. She does not have any social responsibility for others.

She finds negotiating for her own needs difficult and will often become irritable. This was particularly so when interacting with her parents at home.

She is independent, but in some areas, functioning is not particularly effective.

Impairment levels are compatible with some but not all useful functioning.

She meets all of criteria for class 2, mild impairment – 10% to 35%. She meets a significant number of the criteria for class 3, moderate impairment.

She is therefore in the higher range of class 2, mild impairment.

Impairment rating - 33 per cent, in the higher end of class 2.

3. Concentration, persistence and pace

[The appellant] reports that she often takes an extremely long time to complete tasks but generally finishes them in the end. Completing tasks can be affected by a change in her mood or an increase in anxiety. She reported that she is not very organised with planning activities. She reported that she finds it very hard to get ready for work and often will take a long-time getting showered and dressed. She said that sometimes this can be due to anxiety and distraction. She reported that she has to think through all options before making a decision and weighs up things logically. Her judgment of others is impaired secondary to seeing others as somewhat of a threat.

She looks after her own bank account but has put all her regular bills as automatic payments as she reported that she often forgets to pay the bills.

She reported ongoing subjective issues with concentration particularly if she is having to concentrate for long periods of time. …

The appellant is independent, but in some areas, functioning is not particularly effective.

Impairment levels are compatible with some but not all useful functioning.

She meets all of criteria for class 2, mild impairment – 10% to 35%. She meets a moderate number of the criteria for class 3, moderate impairment.

She is therefore in the midrange of class 2, mild impairment.

Impairment rating – 22%.

4. Adaption/decompensation

[The appellant] reported her biggest source of stress is the "stress of her daily life." She reported that financial issues cause her stress. She becomes very stressed with any conflict with others and is stressed in interactions with authority figures.

If particularly stressed, she reports that she would generally first become quiet and shutdown and dissociate. She tends to internalise her stress. She reported that she will generally isolate herself more.

> [The appellant] reported that extreme stress can trigger episodes of bipolar disorder. Severe stress usually triggers mania followed by a crash into depression. She reported the previous manic episodes have lasted for two to three months, but currently, stress can trigger hypomania for two to three days. The appellant nowadays is much more adept in managing her hypomanic episodes herself. She will generally take p.r.n. medication.
>
> [The appellant] reports that she tries to utilise mindfulness, walks and listening to music to help with stress.
>
> [The appellant] continues to see a psychologist weekly and has intermittent contact with the Acute Mental Health team as required. Her latest contact with the Mental Health team was a week prior to this assessment. There was no history of abuse of alcohol or illicit substances. She does have suicidal ideation at times when stressed. …
>
> [The appellant] mildly decompensates with stress such that her standard of functioning is impaired.
>
> She meets all of the criteria for class 2, mild impairment.
>
> She meets a significant number of criteria for class 3, moderate impairment.
>
> She is therefore at the higher range of class 2, mild impairment.
>
> Impairment rating – 30%.
>
> Estimated WPI 32%
>
> There are clearly some non-covered psychological factors contributing to [the appellant]'s impairment. She has other diagnoses of bipolar affective disorder type I and mild social anxiety. At the time of this assessment, her bipolar disorder was reasonably well-controlled but it clearly contributes to impairment at times, particularly when she is stressed, when hypomanic symptoms are triggered and a full-blown manic episode follows, followed by a depressive episode. Bipolar disorder particularly impacts on her concentration, persistence and pace particularly through its effect on concentration. Stress, levels adaptation and decompensation is impacted on by her BPAD causing significant impairment.
>
> The mild social anxiety disorder nowadays likely contributes little in the way of impairment outside of her covered post-traumatic stress disorder.
>
> It is my opinion that both her post-traumatic stress disorder and bipolar disorder contribute equal amounts of impairment, as per Dr Collier's assessment.
>
> The difference in ratings between this assessment and Dr Colliers relies on the accuracy of [the appellant']s self report, and is clear in the impairment assessment categories. The appellant' reported her perception that there were inaccuracies in Dr Collier's report.

[10] Dr Levien concluded that the appellant's impairment was 16 per cent. He noted that her PTSD had become chronic and there had been a diminishing amount

of improvement with psychological input, and that this condition was permanent and stable.

[11] The Corporation referred the assessments of Dr Collier and Dr Levien to Dr John Vickers, Psychiatrist, for peer review. On 20 October 2022, Dr Vickers reported as follows:

> Dr Collier's report 27/04/2021:
>
> I agree with Dr Collier's ratings for activities of daily living at 10%, social functioning at 10%, concentration, persistence and pace at 7% and adaptation decompensation at 10%. I agree with Dr Collier's views that the appellant functions well in many spheres of life in that she has a degree, has been a teacher, was working when assessed and has published a book and online videos of her experiences and art work. I agree with his WPI of 10% and apportionment of 5% for bipolar and social anxiety disorders leading to a final WPI of 5%.
>
> Dr Levien's report 12/10/2021:
>
> At the time of this assessment her circumstances had changed and she was living in a hostel. Her mental state had declined as a consequence of others criticising her book online. She had had input from the acute Mental Health Services for mood deterioration. Bipolar disorder is characterised by variable mood states and it would not be unexpected for a relapse of this condition to affect impairment ratings.
>
> My view is that Dr Levien's rating for activities of daily living at 30% is too high given the description of her functioning in this category as she would have to fulfil most of the criteria in the moderate category for this rating which is not the case here. In social functioning there is decline in functioning as a consequence of having moved to live in a hostel but again I consider the rating of 33% to be too high to qualify for a rating in the upper mild impairment category for the same reasoning as in the ADL category.
>
> The handbook describes how range-finding should be applied (p.9). The most applicable method in assessing 'mental and behavioural' impairment (where functioning cannot be based on quantitative criteria) is that if the criteria for the range 'X' are ALL satisfied, and the criteria for the range above are MOSTLY satisfied, then choose a percentage towards the top of the range 'X'. It follows that if the criteria for the range above are not or only partially satisfied, then choose a percentage in the lower or mid-range of 'X'.
>
> The 22% rating in concentration, persistence and pace could be explained by the recent decompensation in her mental state. The 30% rating in adaptation decompensation is reasonable in the circumstances of her having had mood deterioration and very recent involvement with the acute mental health team.
>
> Given that I see some of Dr Levien's ratings as being unrealistically high I do not support his 32% WPI rating. I do not accept his reasoning of apportioning half for the non-covered conditions of bipolar and social anxiety disorders. Dr

> Collier's view was that half of her 10% impairment was due to these conditions but it does not necessarily follow that apportionment should always be half. The increase in WPI rating between the two assessments has in large part been due to a relapse of bipolar depression with suicidal ideation and not due to a worsening of PTSD. Therefore it could be argued that the rating for PTSD is still 5% and the excess apportioned for on the basis of bipolar disorder.
>
> In summary therefore the assessments were done six months apart and the latter in changed social circumstances and soon after a relapse of bipolar depression, so it is not unexpected that the ratings have changed. Important considerations are that claimants can present differently to individual assessors as has possibly been the case here, and assessors can see cases differently. All considered my view is that Dr Collier's report is the more accurate of the two.

[12] On 4 February 2022, review proceedings were held. On 25 February 2022, the Reviewer dismissed the review, on the basis that the Corporation was correct to decline the appellant's application for a lump sum payment of compensation for her impairment. The Reviewer found insufficient basis to conclude that Dr Collier's assessment was flawed.

[13] On 15 March 2022, a Notice of Appeal was lodged.

Relevant law

[14] Clause 54 of Schedule 1 of the Act provides:

> **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.

[15] The provisions governing the assessment of lump sum compensation are found at clauses 58 to 61 of Schedule 1. The assessment must be undertaken by an

assessor (clause 58(1)). The assessor must assess the claimant in accordance with regulations made under the Act (clause 59(3)(a)). The Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002, regulation 4, provides:

> **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) [AMA4]; and
>
> (b) the ACC User Handbook to AMA4.
>
> (3) The ACC User Handbook to AMA4 prevails if there is a conflict between it and the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition).

[16] In *Robinson*,[1] Judge Beattie stated:

> [23] The jurisprudence in the field of Lump Sum/Independence Allowance assessments is now well settled, and it is the case that the assessments upon which the respondent based its decision to provide for Lump Sum, must be shown by clear and cogent evidence to be flawed in the way in which the AMA Guides have been interpreted or where it is shown that all aspects of injury were not considered. The mere expression of an alternative opinion is not sufficient.

[17] In *Gilbert*,[2] Judge Beattie stated:

> [5] … the assessment made by Dr Bracken is to be regarded as being the measure of impairment of the covered personal injuries as at the day of that assessment. The fact that there may have been a deterioration in the appellant's medical condition since that assessment does not affect the validity of that assessment.

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1 *Robinson v Accident Compensation Corporation* [2008] NZACC 121.

2 *Gilbert v Accident Compensation Corporation* [2009] NZACC 166.

[18] In *Crouchman*,[3] Judge MacLean stated:

> [28] As was outlined in *W v Accident Compensation Corporation* [2004] 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.

[19] In *Williams*,[4] Judge Powell stated:

> [9] The case law is well settled that to succeed in appeal of this type it is for the appellant to establish on the balance of probabilities that the assessment was in some way flawed or incorrect. Generally this will require credible expert evidence directed at the specific aspects of the assessment which are said to be incorrect although it does not require a full alternative assessment, and an assessment can also be flawed or incorrect in the event that there has been an error of law or it is otherwise flawed on its face.

Discussion

[20] The issue in this case is whether the impairment assessment by Dr Collier, on which the Corporation based its decision to decline the appellant's application for a lump sum payment of compensation for her impairment, was incorrect. The assessment of the appellant's whole-person impairment, for the purposes of determining her eligibility to receive lump sum compensation, must be carried out by an assessor using the American Medical Association Guides to the Evaluation of

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3 *Crouchman v Accident Compensation Corporation* [2016] NZACC 29. The judgment reflects the approach earlier taken in *Anderson v Accident Rehabilitation and Compensation Insurance Corporation* [1999] NZACC 286, and *King v Accident Compensation Corporation* [2004] NZACC 4, at [13].

4 *Williams v Accident Compensation Corporation* [2018] NZACC 13.

Permanent Impairment (Fourth Edition) (AMA4).[5] The appellant must show, by clear, cogent and compelling expert evidence, that Dr Collier's assessment was flawed in the way in which the AMA Guides were interpreted or because all aspects of the appellant's injury were not considered.[6] The mere expression of an alternative opinion by Dr Levien is not sufficient.[7] The assessment made by Dr Collier is to be regarded as being the measure of impairment of the appellant's condition as at the day of that assessment, and the fact that there may have been a deterioration in her medical condition since that assessment does not affect its validity.[8]

[21] The appellant submits as follows. There were errors and deficiencies in Dr Collier's report, and his one-hour telephone interview for the assessment was not adequate. Further, he did not properly consider her relevant medical records. No context was given to how difficult it is for her to complete tasks. She medically withdrew from university twice and was on a sickness benefit before she worked in laboratories. She did not teach for long as she did not cope with stress and cannot work full-time. Therefore, Dr Collier must have assessed her incorrectly in at least one category. The "outdated" AMA4 was used as part of the assessment. Apportionment should not have been made for any impact of bipolar disorder, as there is "uncertainty" and dispute about her diagnosis. Articles in medical journals support her view that Dr Collier's assessment was incorrect.

[22] This Court acknowledges the appellant's submissions. However, the Court points to the following considerations.

[23] First, the appellant has not produced expert evidence that Dr Collier's assessment was flawed in the way in which the AMA Guides were interpreted or because all aspects of her injury were not considered. Dr Levien's alternative opinion did not find flaws in Dr Collier's report; rather, Dr Levien observed that the difference in ratings between the two assessments relied on the accuracy of the appellant's self report. Neither the appellant's own assessment nor general medical

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5 Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002, regulation 4.

6 *Crouchman*, above note 3, at [28].

7 *Robinson*, above note 1, [23].

8 *Gilbert*, above note 2, at [5].

journal articles can substitute for compelling medical evidence directed specifically at the assessment by Dr Collier

[24] Second, Dr Vickers, Psychiatrist, in peer reviewing the assessments of Dr Collier and Dr Levien, agreed with the assessments of Dr Collier and found his report to be the more accurate of the two.

[25] Third, there is clear evidence that there was a deterioration in the appellant's medical condition between the time of Dr Collier's report (April 2021) and the time of Dr Levien's report (November 2021), a fact that does not affect the validity of Dr Collier's report when it was done. The Court notes the contrasting medical reports of Dr Fleischl in March 2021, and Dr Mascelle in September 2021. As pointed out by Dr Vickers, the assessments of Dr Collier and Dr Levien were done six months apart, and the later assessment was done in changed social circumstances and soon after a relapse of bipolar depression, and so it was not unexpected that the ratings changed.

[26] Fourth, Dr Collier's use of the AMA4 Guides is required by the applicable regulations, and he had no discretion not to apply these Guides.

[27] Fifth, all three experts who assessed the appellant agreed that there should be an apportionment for bipolar disorder in the assessment of the appellant's impairment rating. Dr Levien stated that both the appellant's post-traumatic stress disorder and her bipolar disorder contributed equal amounts of impairment, as per Dr Collier's assessment. Dr Vickers observed that it could be argued that the rating for PTSD was still 5% and the excess apportioned for on the basis of bipolar disorder.

Conclusion

[28] In light of the above considerations, the Court finds that the appellant has not established that the impairment assessment, on which the Corporation based its decision to decline her application for a lump sum payment of compensation for her impairment, was incorrect. The decision of the Reviewer dated 25 February 2022 is therefore upheld. This appeal is dismissed.

[29] I make no order as to costs.

P R Spiller
District Court Judge