

**IN THE DISTRICT COURT
AT WELLINGTON**

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

**[2022] NZACC 229 ACR 248/18,
ACR 248/18-1, 2, 3 & 4**

UNDER THE ACCIDENT COMPENSATION ACT 2001

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

BETWEEN ALAN LANGDON
 Appellant

AND ACCIDENT COMPENSATION CORPORATION
 Respondent

Hearing: 27 September 2022
Heard at: Auckland/Tāmaki Makaurau

Appearances: Mr P Schmidt as Amicus Curiae
 Ms B Woodhouse for the appellant
 Mr H Evans for the respondent

Judgment: 1 December 2022

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Earnings-related compensation]**

Administrative Background

[1] These appeals date back four years. They have been the subject of a number of telephone conferences. For a time since 2018, Mr Langdon resided in Australia and communication with him proved challenging.

[2] In order to advance matters, the respondent agreed to pay for the appellant's representation. Mr Schmidt agreed to becoming involved and at a telephone conference on 13 February 2020, agreed to act as Amicus.

[3] The court acknowledges the work put in by Mr Schmidt in that role.

[4] More recently, Ms Woodhouse has agreed to act for Mr Langdon.

[5] At a telephone conference held on 5 August 2022 with Mr Evans, Mr Schmidt, Ms Woodhouse and Mr Langdon, it was agreed to set aside hearing time, commencing 26 September 2022 to work through the issues of the various appeals, with the goal of dealing with all of Mr Langdon's appeals.

[6] I am indebted to Counsel for the time and effort they have put in and at the hearing on 27 September 2022, Counsel, Mr Schmidt, Mr Evans and Ms Woodhouse, helpfully informed the court that the most appropriate way forward was for Counsel to file an agreed statement of issues, facts and law for the purpose of bringing these appeals to a resolution.

[7] That document was filed on 10 October 2022 and is now set out in full.

Agreed Statement of Issues

[1] The parties agree that there are two substantive issues at appeal which fall under ACR 248/18. The two issues are the correct rate of earnings-related compensation (ERC) with respect to the accident occurring on 18 August 1984 and the correct rate of ERC with respect to the accident occurring on 2 February 1990.

[2] Jurisdiction to determine entitlement to ERC with respect to the accident on 18 August 1984 arises from review decision 5344102, in which the reviewer declined Mr Langdon's application for ERC. ACC subsequently determined that Mr Langdon was entitled to ERC from this accident and issued a decision dated 18 January 2022, granting ERC in the amount of \$79,181.89, less reimbursement to WINZ.

[3] Because the period of ERC with respect to the August 1984 accident has now been determined, it is the quantum of relevant earnings that is the focus of the appeal.

[4] At the hearing, Counsel for Mr Langdon sought leave to amend the notice of appeal to cover two separate periods of incapacity. The first period of incapacity begins on 18 August 1984 and lasted around five months. The second period of incapacity runs from 18 August 1985 until 31 December 1989. The Corporation and Amicus supported the leave application which was granted by the court.

[5] Accordingly, the determination of relevant earnings arising from the 1984 accident with respect to the two periods of incapacity is at appeal. As noted above, relevant earnings with respect to the February 1990 accident will also be determined by this appeal.

ERC with Respect to the 1984 Accident

[6] Mr Langdon was injured in a motorcycle crash on 18 August 1984. The injuries suffered in this crash were serious. Mr Langdon suffered a subchondral fracture of the lower end of the left femur. He also suffered a colles fracture of the right wrist and a fracture of the scaphoid in his left wrist. He sustained lacerations over the front of his left knee. A report from orthopaedic surgeon, Ian Brown, dated 26 April 1993, discusses the ongoing problem caused by these injuries. This report was authored after the 1990 motor vehicle accident. The report advises that Mr Langdon had ongoing occasional discomfort in the left and right wrist that varied with the weather. Overall, he had recovered reasonably well, but would likely struggle with heavy work. With respect to his left knee and the femoral fracture, he had achieved a good recovery, with discomfort if he did a lot of walking or running.

[7] Although Mr Langdon made a good recovery from the 1984 accident, forestry is heavy work, which involves walking on uneven terrain and the use of hand tools. Given Mr Langdon's difficulty in walking on uneven terrain and occasional wrist problems with jarring movements, it is unlikely that he would be able to sustain forestry work. Indeed, the file indicates that his employer did not believe he was up to this work when he returned to work, and this was the primary reason why his employment ended. Accordingly, it is accepted that Mr Langdon has an entitlement to ERC from 16 August 1985 through to 31 December 1989.

[8] After the first period of incapacity, Mr Langdon temporarily returned to forestry work, but this proved unsustainable. As a result, he had two periods of incapacity and weekly compensation was calculated on two separate occasions. The start date of the first period of incapacity is 18 August 1984. An ACC employee earnings certificate (C3) was received by ACC on 30 August 1984 (ERC bundle, page 19). It records Mr Langdon's average earnings in the four weeks prior to incapacity as being \$313.44. His long term weekly compensation assessment was based on eight weeks of earnings covering the period from 21 June 1984 through to 18 August 1984 in the sum of \$2,580.11. Using an eight week divisor, ACC

determined his long term relevant earnings as \$322.51. Weekly compensation was paid at that rate until Mr Langdon returned to work.

[9] Mr Langdon suffered a further period of incapacity from 16 August 1985 onwards. ACC has used this date for the assessment of ERC. ACC determined that Mr Langdon's relevant earnings at that time were \$351.70. That figure is based on employee earnings certificate (C3) dated 22 August 1985 from New Zealand Forest Products Limited. That certificate details that Mr Langdon's short term weekly earnings in the four weeks prior to incapacity averaged \$351.70. His long term earnings have been calculated at \$302.76. That calculation was based on \$15,743.32 of earnings obtained from 11 August 1984 to 10 August 1985. ACC chose to use the higher short term period for the assessment of ERC, ie. \$351.70.

[10] The parties agree it makes sense to use the higher short term earnings, rather than the long term earnings, because it is likely that Mr Langdon's ability to work was hampered by his injury. In terms of the Accident Compensation Act 1982, the goal is to fairly assess the loss of income at the date of injury, or at the date of incapacity. On our facts, where we have a later period of incapacity, the applicable section is section 53(9) of the 1982 Act, which grants ACC a discretion to determine relevant earnings that fairly and reasonably represents the person's normal weekly earnings at the commencement of the period of incapacity. The section allows ACC to consider all relevant factors that may influence that outcome. The parties agree that applying that test results in relevant earnings in the amount of \$351.70.

[11] ACC did not consider the value of allowances when determining Mr Langdon's relevant earnings, because at the time it was thought that non-taxable allowances were not part of a person's relevant earnings. Subsequently, the High Court in the decision of *Lewis*,¹ determined that ACC must consider taxable and non-taxable allowances when determining relevant earnings under the 1982 Act.

[12] Mr Langdon believed that he received allowances in the form of clothing and a meal allowance. As part of the pre-hearing conciliation process, ACC obtained copies of the 1985 and 1986 New Zealand Forestry Workers' Awards. Allowances are provided for under clause 16 of the April 1985 Award. The parties agree that because the clothing allowance was by

¹ *Accident Rehabilitation & Compensation Insurance Corporation v Lewis* (1994) 16 NZTC 11,234 High Court, Auckland, 13/4/1994, HC149/93, Barker J.

way of reimbursement, no extra pay is available for that. Mr Langdon's relevant earnings should, however, be increased by reference to the meal allowance, as this was a benefit that came from the employment and was lost due to being unable to continue with forestry work. The allowance was \$3.80 a day and can be rounded up to \$20.00 a week.

[13] Accordingly, the parties agree that Mr Langdon's relevant earnings can be fairly set at \$371.70, with allowances included. That amount should be used for the assessment of ERC from 16 August 1985 through to 31 December 1989.

[14] The parties agree that ACC should also adjust the relevant earnings with respect to the first period of incapacity starting on 18 August 1984 from \$322.51 to \$342.51 to include the \$20.00 meal allowance.

[15] With respect to forestry work, Mr Langdon's view was that he may be entitled to have his ERC assessed under section 63 of the 1982 Act as an "improver". He believes that, but for the motorcycle accident, he would have continued to undergo further training as a forestry worker and be able to obtain a higher income. Assuming that is true, his earnings under section 63(5) would be \$190.00 or such other amount as from to time may be prescribed in orders in Council. That amount can be increased by up to 50 per cent in some cases pursuant to section 63(5) of the Act. Increasing the \$190.00 by 50 per cent equals \$275.00. The parties observe that this amount is well short of the \$371.70 figure obtained by applying section 53 of the Act. As Mr Langdon is entitled to the higher of the two amounts pursuant to section 63(5) of the Act, the amount of \$371.70 should be used.

[16] Mr Langdon queried whether his ERC could be assessed using section 62(1)(a) of the 1982 Act. Section 62 allowed ACC to reassess ERC in cases where it accepted that a person would likely "improve" before the age of 20. This meant likely to finish an apprenticeship or qualification. In Mr Langdon's case, this would mean improving in his forestry work. For section 62 to apply, ACC would have needed to conduct an assessment on the request of Mr Langdon at the relevant time. ACC would have used the Forestry Workers' Award to assess whether he was an "improver". Such an assessment did not take place, which makes section 62 inapplicable. In addition, Mr Langdon's section 53 earnings of \$371.70 are well above the award rates for senior forestry workers. Page 9 of the 1985 Forestry Workers' Award, for example, records that the rate of pay of a leading hand is \$243.06 a week.

[17] For the reasons set out above, the parties ask that the appeal be allowed and that Mr Langdon's relevant earnings for the purpose of calculating ERC with respect to the second period of incapacity from the 1984 accident be set at \$371.70.

ERC with Respect to the 1990 Accident

[18] With respect to the February 1990 motor vehicle accident, the Appeal Authority, in *Langdon*,² determined that Mr Langdon was being paid the equivalent wages of a certified deck hand at the time of his accident, with a relevant earnings figure of \$420.00 being accepted by both parties.

[19] The Authority went on to set out its view of the value of allowances without making a formal determination on this issue. The Authority recommended that allowances be set at \$100.00. Following the appeal, in a decision dated 28 July 2015, ACC set the value of allowances of \$54.72, being \$14.52 for a clothing allowance and \$40.00 for accommodation and food. Whether this is correct is an issue at appeal.

[20] In the ERC bundle are copies of the 1989, 1990 and 1991 New Zealand Seamen's Maritime Industry (Seagoing) Awards. These Maritime Awards are applicable to sailors working on commercial vessels, rather than fishing vessels per se, but provide a useful guide about the value of allowances for all persons working at sea. The Awards allow for the valuation of accommodation and food on daily rates.

[21] On page 19 of the 1991 Award are rates for meals and accommodation. The purpose of the Award rates is to determine a reasonable amount to reimburse sailors who must pay for meals and accommodation when this is not available onboard. The total value for meals and accommodation is \$128.77 a day. The Awards for other years details similar amounts. On a weekly basis, the total amount would be much more than was recommended by the Appeal Authority.

[22] On the other hand, is the Appeal Authority's decision of *PS*,³ dated 27 August 2007. In that decision, which involved the assessment of lodging as part of the appellant's employment

² *Langdon v Accident Compensation Corporation* [2014] NZACA 9.

³ *PS v Accident Compensation Corporation* [2007] NZACA 6

circa 1988, the Authority accepted a value of \$90.00 a week as being a fair estimate. The appellant is seeking to value lodging at \$135.00 a week.

[23] The parties agree that the best that can be achieved would be a reasonable estimate of the value of food and accommodation and agreed that the Appeal Authority's estimate of \$100.00 a week (supported by Counsel for Mr Langdon at the time) is reasonable.

[24] Mr Langdon appealed the Appeal Authority's decision to the High Court with respect to other allowances, namely:

- [a] Training and associated costs.
- [b] Use of a company vehicle.
- [c] Motorcycle storage.
- [d] Laundry expenses.

[25] The parties agree that not every benefit or perk provided by an employer must be valued and form part of a person's relevant earnings. Training costs, for example, would not normally be part of the assessment of relevant earnings because the cost of training is not added to an employee's pay; rather, the employer pays both for training or reimburses the cost of training. Similarly, it is not necessary to value benefits that are a favour or a convenience. Here, for example, storage of a motorbike is more in the nature of a convenience. Some benefits cross over with others or are in a grey area. Here, for example, the provision of laundry services is normally part of board or accommodation. The parties agree that training costs, motorcycle storage and laundry services should not affect the calculation of relevant earnings.

[26] ACC accepts that Mr Langdon had use of a motor vehicle as part of his employment in the family fishing business. The parties agree that use of a company vehicle is an allowance that should be valued and note that this allowance received specific recognition in the High Court decision of *Lewis*.⁴ The parties obtained copies of two recent reports prepared by the accounting firm, Deloitte's, for the purpose of valuing the free use of a motor vehicle for 1982 Act remuneration purposes. The two reports considered a 1989 Toyota Hiace van valued at \$29,750.00, which was assessed as having an annual value of \$10,657.00 for remuneration

purposes, a 1989 Ford Telstar valued at \$30,000.00, which was assessed as having an annual value of \$10,746.00 for remuneration purposes. Based on this evidence, the parties agree that a fair value for remuneration purposes of the utility vehicle at issue in this appeal is \$10,000.00 per annum.

[27] On this basis, free use of a company vehicle would add a further \$190.00 a week to Mr Langdon's relevant earnings (\$10,000 divided by 52 weeks). As a result, Mr Langdon's relevant earnings would be \$420.00 a week, plus \$100.00 for other allowances, plus \$192.00 for the use of a motor vehicle, which added up to a total of \$712.00 a week in relevant earnings. This is a significant increase in relevant earnings that considers both the actual earnings and allowances. Overall, it represents an annual income of around \$35,000.00, which, based on all the evidence, is a fair assessment of loss of earnings for a young skipper on a family fishing boat, given the uncertainties that arise out of Mr Langdon being unable to take up that position because of the 1990 accident.

[28] For the reasons set out above, the parties ask that the appeal be allowed and Mr Langdon's ERC with respect to the 1990 accident be based on relevant earnings of \$712.00 a week.

ACR 248/18 – 1, 2, 3 and 4 – Agreed Position on these Appeals

[29] ACR 248/18-1 relates to a consolidated review decision dated 20 December 2018. This review incorporated several review applications that were heard together. The reviews involved are:

- Reviews 5851090, 5851093 and 5851586, in which Mr Langdon asserts that ACC decided to make payments to persons other than himself.
- Review 5878585, in which Mr Langdon asserted that ACC has not made payments in accordance with the legislation.
- Review 5817093, in which Mr Langdon asserts that a decision of ACC in 2009 was null and void.

⁴ Supra.

- Review 5867088, in which Mr Langdon sought to review ACC's email of 2 June 2017 about payment.
- Review 5867089, in which Mr Langdon sought to review ACC's email of 13 April 2018 about ACC no longer issuing payments by cheque.
- Review 5879086, in which Mr Langdon asserted a failure by ACC to include previous assessments of whole person impairment in a lump sum assessment.
- Review 5865101, in which Mr Langdon asserted there had been an unreasonable delay in supplying file information.

[30] ACR 248/18-2 is an appeal from review number 5818592, which concerned a decision dated 18 May 2009 where ACC suspended Mr Langdon's entitlements on the basis that he had not contacted ACC when requested to do so.

[31] ACR 248/18-3 is an appeal from review number 5823610, which is about whether ACC breached its obligations under the Code of Claimants' Rights. The review considered whether there were extenuating circumstances to file the review. The appellant withdrew this proceeding prior to the hearing, by way of a notice of discontinuance filed on 22 September 2022.

[32] ACR 248/18-4 is an appeal from review number 6009090 concerning whether the Accident Compensation Corporation was correct in its decision of 30 May 2018 to decline to accept Mr Langdon's late application on the grounds that there were no extenuating circumstances. The appellant withdrew this proceeding prior to the hearing by way of a notice of discontinuance filed on 16 September 2022.

[33] In summary, the issues of concern to Mr Langdon appear to be that:

- ACC made payments into a bank account in the name of his wife, resulting in him not receiving the weekly compensation.
- He may not have received lump sum correctly and wishes to have all his covered injuries properly assessed.

- ACC has withheld information that he needs to advocate effectively.
- That there has been an unreasonable delay in making decisions with respect to his entitlement to ERC.
- That his weekly compensation was wrongly suspended at some point.

[34] These reviews and the resulting appeals involved jurisdictional challenges that were likely unsustainable. The parties accept, however, that the appeals raise issues that may have merit. The parties discussed the best way to resolve these appeals at conciliation, and up to and at the hearing. As noted above, ACR 248/18-3 and ACR 248/18-4 were discontinued by the appellant prior to the hearing. A consensus was reached at the hearing that ACR 248/18-1 and ACR 248/18-2 should also be withdrawn. That position was confirmed by Counsel for Mr Langdon at the hearing. The rationale for this is set out below, along with the agreed actions ACC will take, with a view to resolving these substantive issues:

- [a] To address Mr Langdon's concern that he may have received incomplete lump sum compensation, ACC has agreed to carry out a fresh assessment. That assessment will consider all Mr Langdon's injuries chronologically and record what impairment percentage attaches to each injury. The report will record what lump sums have been paid previously for each injury. If Mr Langdon is entitled to any additional lump sum compensation or independence allowance, that can be paid. If Mr Langdon believes this assessment is wrong, he will be able to review the resulting decision.
- [b] With respect to any historic suspension(s) of weekly compensation, ACC has agreed to backpay weekly compensation over the whole period, now that Mr Langdon's entitlement to ERC has been reassessed. Because ACC has offered to backpay weekly compensation over the whole period, any prior suspensions of weekly compensation are moot.
- [c] With respect to the assertion that ACC has failed to provide Mr Langdon with information, ACC has agreed to provide fresh copies of any files. If Mr Langdon believes that file information is missing, he has an obligation to identify what may be missing.

[d] With respect to the assertion that ACC has paid weekly compensation into the wrong bank account, Mr Langdon needs to provide proof of this and identify the payments and dates involved. When that occurs, ACC agrees to investigate and issue a decision.

[e] With respect to Mr Langdon's concern about delays in providing entitlements in a timely fashion, the remedy would be to direct ACC to provide these entitlements. The entitlements of concern were the correct rates of ERC arising from the 1984 and 1990 injuries and the correct payment of lump sum compensation. The issue of the correct rates of ERC with respect to the 1984 and 1990 accidents is resolved by this decision. As noted above, ACC has offered Mr Langdon a reassessment of lump sum compensation. Accordingly, these issues are not moot.

Decision

[35] For the reasons set out above, the parties agree that appeal ACR 248/18 regarding the calculation of relevant earnings for the purposes of determining ERC in respect of the 1984 and 1994 accidents should be allowed on the basis that:

- Relevant earnings under the 1984 claim with respect to the first period of incapacity should be \$342.51.
- Relevant earnings under the 1984 claim with respect to the second period of incapacity should be \$371.70.
- Relevant earnings under the 1990 claim should be \$712.00.

[36] With respect to the remaining appeals, no decision is required, because these have been withdrawn. ACC is directed to carry out the steps set out at paragraph 34 as soon as is practicable.

DATED 10 October 2022

Beatrix Woodhouse
Counsel for the Appellant

DATED 10 October 2022

Hamish Evans
Counsel for the Respondent

Decision of the Court

[37] I am indebted to Counsel, Ms Woodhouse, Mr Evans and Mr Schmidt, for the work that they have done to resolve these long outstanding matters. For the reasons set out in the above agreed statement of issues, facts and law, prepared jointly by Counsel, I formally rule that appeal ACR 248/18 is allowed and Mr Langdon's relevant earnings for the purpose of calculating ERC with respect to the second period of incapacity from the 1984 accident be set at \$371.70 per week for the reasons set out in Counsels' agreed statement dated 10 October 2022 set out above.

[38] Appeal ACR 248/18 is also allowed in respect of the appellant's claim for earning related compensation in respect of the accident occurring on 2 February 1990.

[39] For the reasons set out in Counsels' agreed statement of 10 October 2022, the appellant's relevant earnings for the purposes of calculating earnings related compensation in respect of the 1990 accident are \$712.00 per week.

[40] Pursuant to paragraph 34 of the same agreement between Counsel of 10 October 2022 (set out above) appeals ACR 248/18-3 and ACR 248/18-4 were discontinued by the appellant prior to the hearing.

[41] Accordingly, therefore, Appeals ACR 248/18-3 and ACR 248/18-4 are dismissed.

[42] Counsel record in the same paragraph that a consensus was reached at the hearing on 27 September 2022 that appeals ACR 248/18-1 and ACR 248/18-2 should also be withdrawn.

[43] Accordingly, therefore, appeals ACR 248/18-1 and ACR 248/18-2 are dismissed.

[44] I record my thanks to all Counsel involved for their hard work and focus to bring these long outstanding to a conclusion. It is fervently hoped that the hard work and initiative taken by Counsel in this case will result in the remaining matters at large to be investigated and resolved as soon as practicable, so that all outstanding matters between the appellant and ACC can be finalised.

[45] Should there be any issue as to costs, Counsel have leave to file memoranda in respect thereof.



CJ McGuire
District Court Judge

Solicitors: Schmidt and Peart Law, Ellerslie
Beatrix Woodhouse, Barrister, Wellington
Young Hunter, Solicitors, Christchurch