IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION
WELLINGTON REGISTRY

M. 390/83

[redacted]

1275

IN THE MATTER of the Accident Compensation Act, 1982

a n d

IN THE MATTER of an intended Appeal pursuant to Section 110

BETWEEN BASIL LLEWELLYN WATKIN

INTENDED APPELLANT

A N D THE ACCIDENT COMPENSATION CORPORATION

INTENDED RESPONDENT

Judgment: 1 OCT 1984

Hearing: 26, 27 June 1984

Counsel: H. Fulton for Intended Appellant
B. S. Paki for Intended Repondent

JUDGMENT OF CASEY J.

On 5th February 1976 Mr Watkin found himself unable to continue his duties as an Air Traffic Controller at Auckland Airport because of pain in his neck and he consulted his medical practitioner, Dr Edmonds of Takapuna. He issued a First Medical Certificate under the Accident Compensation Act on 5th March, describing the incident as "recurrence of pain resulting in inability to carry out normal duties" and attributing it to a whiplash injury to the neck sustained on 5th October 1973 when his car was hit from behind while it was stationary. As this happened before the Act came into force on 1st April 1974, the Commission (as it then was) did

not accept the claim and Mr Watkin applied for a review which was heard on 14th December 1976. The Hearing Officer had the benefit of a further report supplied to the Commission by Dr Edmonds on 1st June 1976 in response to its enquiry of 17th May, in which he accepted that there was no specific incident relating to the accident occurring on 5th February 1976. However he considered that the continuous movements of his head and neck over a period of time carrying out his duties as an Air Traffic Controller constituted a series of minor accidents to the neck, the accumulation of which reached their peak on that date and caused him to stop work. He thought the original accident in 1973 might well have made him more liable to injury but this did not negate the fact that the work-load created a series of injuries to his neck. He thought Mr Watkin was an honest and conscientious person who was not in any way attempting to falsify the facts.

It was clearly on the basis of this report that the Hearing Officer (Mr A.C. Lynch) reached his decision on 16th February 1977 in Mr Watkin's favour, noting, however, that the medical evidence was scanty and in particular did not indicate the precise nature of the injury he suffered. He commented that reference to an orthopaedic surgeon would have put the matter beyond doubt. The file was referred to the Commission for calculation and payment of appropriate compensation. In the meantime Mr Watkin had been continuously off work and in June 1976 he failed his annual medical examination. On 13th September 1976 Mr Lamb, an orthopaedic surgeon, reported on him to the Civil Aviation Department, stating that he had been asked to see Mr Watkin by Dr Edmonds for that purpose. He described his earlier history in the Royal Air Force (where he attained the rank of Squadron Leader on his retirement in 1957) and mentioned an earlier injury to his cervical spine resulting in a grafting operation before he could be returned to full flying duties. He was then engaged as an Air traffic Controller in New Zealand and suffered the whiplash injury in the car,

which was the subject of a claim for damages and as a result he was seen by a number of orthopaedic surgeons and it had not been settled at the time of Mr Lamb's report. He noted that Mr Watkin admitted to a mild degree of neck pain prior to that incident and I gather from other reports that he qualified for a War Pension of 30% in respect of the injury in the RAF. Mr Lamb was firmly of the view that the combination of his injuries rendered him unfit for Air Traffic Control work with its sustained and intense concentration. He has never returned to it nor, so far as I am aware, to any other form of employment.

After discussions with Dr Edmonds Mr Watkin decided to seek further examination by the RAF authorities in England and he arranged this in conjunction with travelling to attend a meeting of the International Federation of Air Traffic Controllers. He advised the Accident Compensation Commission of his intentions, receiving no response, and left New Zealand on 10th April 1977, returning in July 1978. His request for assistance for the medical referral was declined in July 1977 on the basis that there was no reason for seeking such attention overseas. He received no payment of weekly earnings-related compensation nor any advice about it until, in response to his solicitor's request, the Commission wrote on 2nd February 1978 setting out its calculation of the amount due to 9th April 1977 and intimating it was not prepared to pay compensation while he was overseas as he could not be rehabilitated back into the New Zealand work force. With the letter came a cheque for $7,523. He applied for a review of this decision and was advised on 17th March 1978 that the Commission considered it should stand, and his application was being referred for the appropriate procedures. It then required him to be examined by an orthopaedic surgeon and the late Mr Parke saw him on 3rd August, reporting to the Commission on the 23rd. After a lengthy review of the history and findings on examination he concluded that Mr Watkin had not suffered any personal injury by accident resulting from his employment as an Air Traffic

Controller, nor had that occupation produced the condition then present in his cervical spine. He regarded it as due primarily to the injury caused in his service career followed by the stiffening of the three lower cervical joints, and to the increasing strain thereby placed on the remainder, with aggravation likely to have occurred as the result of the whiplash injury. As a result, the Commission wrote to Mr Watkin and his solicitor on 25th September stating that in the light of Mr Parke's report and the medical history "it is quite clear that your present incapacity is not the result of personal injury by accident occurring on or after April 1, 1974." They added that no further payments of compensation or medical expenses would be made and advised that the letter was notice of a decision under the Act, drawing attention to the review procedures under the then s.153. Mr Watkin applied for a review of that decision and a copy of Mr Parke's report was sent to his solicitors in October 1978. He is very critical of it.

Mr Q.A. Mines was appointed a Hearing Officer on 2nd March 1979 in respect of the decision contained in the Commission's letter to which I have just referred, and the date for his review was fixed for 12th April 1979. Mr Watkin said he and his solicitor expected it would be concerned primarily with the failure of the Commission to pay weekly earnings-related compensation, together with the proper amount of compensation payable, and its failure to give an assessment of disability, these being the issues arising out of the earlier application for review made as a result of the Commission's assessment of the amount due and its refusal to pay beyond the time he left New Zealand. However, Mr Mines telephoned Mr Watkin's then solicitor (Mr G. Ryan) on 10th April 1979 and told him he thought a further orthopaedic report should be obtained in his client's interest in view of the unequivocal conclusion reached by Mr Parke. This suggestion was unresolved by the time the hearing started on 12th April and there was a long preliminary discussion in which Mr Watkin played a full

part. Mr Ryan disputed the accuracy of Mr Mines' memorandum of his phone conversation; both he and his client emphasised that the hearing was concerned with quantum only and insisted that the Commission could not re-open the question of liability already determined by Mr Lynch. There was criticism of Mr Parke's report and after a lengthy session running into some 50 pages of transcript, in which Mr Mines attempted to explain his own independent position, he concluded it by ordering another orthopaedic report. Eventually, after considering the names of different specialists, he decided to appoint a medical committee in terms of the former s.154(6) and the hearing adjourned on that basis. Later that day Mr Mines wrote detailing the arrangements. He said:-

> "I have emphasised that the committee or specialist is to be asked one primary question - what weight should attach to the conclusions arrived at by Mr Parke in his report. In effect, are Mr Parke's conclusions valid and justified. The committee or specialist should be specifically asked to advise upon the duration of incapacity which could be brought home to the events on 5 February 1976. An advice will be sought as to the point at which the Commission could properly conclude that those events were no longer incriminated, if indeed incapacity due to those events has now expired."

He also added that Mr Watkin must feel free to make whatever comments he considered appropriate to the committee or specialist and that all information of any relevance whatsoever would be provided to it, including reports previously prepared by other orthopaedic surgeons on previous occasions. Messrs Nicholson and Farr were duly appointed and presented their joint report on 29th January 1980. It is a lengthy document but for present purposes I could refer to two comments - the first to the effect that the activities on 5th February 1976 would be quite consistent with him having a temporary aggravation or flare up of his neck problems "but it is difficult to see how this could result in a permanent aggravation of the degree apparently present

now." The other was that he could not now be usefully employed but in their opinion this could not be held attributable to the events of 5th February 1976 alone and the aggravation of the pre-existing condition as a result of them was equivalent to no more than 5% of total incapacity.

The hearing resumed on 24th March 1980 before Mr Mines with Mr Ryan again taking the initial point that the issue was really one of quantum, in view of the conclusion in the earlier hearing that there had been an accident, Mr Mines accepted that he had no authority to reverse the finding of his predecessor, so that the central question for him to decide was quantum and duration - the period for which earnings-related compensation should run. He asked whether there was agreement on that and both Mr Watkin and his solicitor accepted this view. Then followed a lengthy discussion of Mr Parke's report in the light of other orthopaedic opinion and of his own health and other problems at the time which caused Mr Watkin to lose confidence in him. The transcript of this hearing runs into 71 pages and I think virtually every aspect of Mr Watkin's concern was covered, with him taking a most active part in the discussions and demonstrating a thorough grasp of the matters at issue. At the conclusion Mr Mines asked whether he had the opportunity to air his various grievances; Mr Ryan replied he thought they had and Mr Watkin added "you have been very patient actually."

On 3rd April 1980 Mr Mines gave his decision confirming the Commission's decision to cease earning-related compensation and payment for medical expenses as from 9th April 1977. He also recommended further consideration of the quantum of compensation due to Mr Watkin for the preceding period and dealt with travelling expenses. Mr Fulton informed me those two matters are no longer in issue. Mr Watkin appealed to the Accident Compensation Appeal Authority and on 16th February 1981 His Honour Judge Blair upheld the decision and dismissed the appeal. He also

rejected an application for leave to appeal to this Court; I do not have a copy of that decision but Mr Fulton informed me that he considered there was no question of law involved. On 22nd August 1983, over two and a half years later, Mr Watkin filed notice of application to this Court under s.111 of the 1982 Act for an order extending the time within which he might give notice of appeal. The limit under subsection (4) is 28 days. It was supported by a lengthy affidavit from him and a supplementary affidavit from Dr Edmonds, while the Commission filed an affidavit in reply with copies of further orthopaedic reports. By consent the application was dealt with as one for leave to appeal as well. It may be granted by this Court on a question of law, or if in its opinion the question involved is one which by reason of its general or public importance or for any other reason ought to be submitted for decision.

It is quite clear that no question of law is involved. There was adequate evidence before the Hearing Officer enabling him to reach the conclusion that by 9th April 1977 the events of 5th February 1976 were not the cause of Mr Watkin's continuing incapacity. I might add that this view is confirmed by the report from Mr Kirker, who examined Mr Watkin on behalf of the insurer in connection with the damages claim for his whiplash injury. That report was not available to Mr Mines but was supplied to the committee. The clear inference from it is that Mr Watkin was claiming that he had to stop work because of the car accident, and I have already noted that the First Medical Certificate supplied to the Commission cited it as the cause of his disability on 5th February 1976. Having been informed that the claim was settled, I asked whether he had been compensated for loss of earnings and received a memorandum from Mr Fulton of 11th July which, with respect, I find curiously uninformative having regard to the meticulous grasp of detail which Mr Watkin had previously shown in every aspect of his claim against the Commission. Apparently he had recently suffered a heart attack making communication

difficult. All that Mr Fulton could tell me was that some allowance was made for future loss of earnings but it was well short of complete compensation or indemnity for loss of his employment. I mention these matters in passing without drawing any conclusions about the claim. My concern on this aspect of the application is to determine whether there is an arguable question of law, on the basis that there was no sufficient evidence on which the Hearing Officer and the Appeal Authority could make their findings. There was ample; its evaluation, and the conclusions they came to (which were open to them) are not reviewable in the absence of any demonstrable error of law.

I therefore turn to the other grounds available under s.110. While the amount involved may be substantial (I was told it was about $38,000) I can see no questions of general or public importance involved. Mr Fulton submitted that the case fell within the "any other reason" qualification, relying on the approach taken by Chilwell J. in Thomson v. A.C.C. (1982) NZACR 419, and claimed that the deficiencies in the enquiry and hearing procedures, taken in conjunction with the somewhat unusual background of this claim, led to the conclusion it had been dealt with in an unsatisfactory manner giving rise to serious misgivings about the justice of the result. Mr Fulton's first point was the Hearing Officer's failure to deal with the first application for review of the Commission's decision to cease weekly payments because Mr Watkin had gone overseas. He said there was no attempt to answer his allegation that absence from New Zealand on that ground did not provide a basis for termination. But this point was raised and discussed at considerable length before Mr Mines and it is quite clear from the transcript that whatever the strength of Mr Watkin's case there (and it apears to be unanswerable), it had been overtaken by the second decision of 25th September 1978 following Mr Parke's report. When the hearing resumed on 24th March 1980 page four of the transcript makes it abundantly clear that the issues were quantum and duration of

earnings-related compensation. The Appeal Authority dealt at some length with the Commission's ability to make such a decision under the former s.151(1D) and with respect I adopt his reasoning. No claimant can expect to receive compensation in perpetuity under an original decision made in error or affected by fresh evidence. Mr Mines did not attempt to revise Mr Lynch's decision; he confined himself to the cause of Mr Watkin's continuing disability after 9th April 1977. In this context causation becomes very much an exercise of practical judgment in the light of the relevant evidence, and I refer to Lord Wright's comments in Smith, Hogg and Co. Ltd. v. Black Sea and Baltic General Insurance Co Ltd. (1940) AC 997, 1003:-

> "There is always a combination of co-operating causes, out of which the law employing its empirical or common sense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case."

I think this is precisely what the Hearing Officer did and I see nothing to criticise in his approach.

Mr Fulton's next point was that Mr Parke's medical examination had been requested by the Hearing Officer. After hearing Mr Paki on this point I am quite satisfied that the reference in the transcript on which he relied is quite equivocal. All the indications are that it was ordered by an officer of the Commission. This is confirmed by the fact that Mr Mines was not appointed until well after the date of Mr Parke's examination. There is no justification for the suggestion that Mr Mines was not acting independently; indeed I share the view of the Appeal Authority who described it as something of a model of a fair and careful review and in allowing a full discussion.

Mr Fulton then challenged the validity of Mr Parke's report and submitted that in all the circumstances it should have been ignored. Undoubtedly he had health

problems at the time and died shortly after. Mr Watkin described his physical infirmities and problems under which he appeared to be operating. However, when one comes to look at that document it impresses as a detailed and thorough description of Mr Watkin's history and the results of his examination. There is nothing about the way he has expressed his findings in the latter part to cast any doubt upon his continuing professional ability. He voiced a more forthright conclusion than that contained in some of the other reports, but the findings and opinions are not so inconsistent as to raise questions about his competence; indeed, the differences are of a type commonly encountered among practitioners in this field. It was quite in order for Mr Mines to have regard to Mr Parke's views along with the other material before him. Moreover, I see nothing to criticise in his view that more weight could be attached to it as a specialist report than to the opinions of Mr Watkin's general practitioner. This would represent the view held by most people of the added authority of professional qualifications.

Mr Fulton also criticised the terms of the letter Mr Mines sent to the medical committee as indicating that he was going to use Mr Parke's report unless they indicated it was not valid for him to do so. With respect I think that is putting a strained interpretation on a perfectly understandable and very fair decision to obtain and give proper consideration to further specialist opinion which might benefit Mr Watkin. He submitted that some medical evidence should have been given orally, having regard to the opposing contentions, but conceded there was no such request made to the Hearing Officer. It is impossible to read the lengthy transcript gaining the impression that Mr Mines put all the material he had before Mr Watkin and his solicitor and listened patiently to everything they had to say including some very lengthy factual statements. He has a wide discretion about the sort of evidence he should receive. The Appeal Authority dealt at some length with the

proceedings and found nothing which could be said to contravene the Act or constitute a breach of natural justice. Nor do I think there is anything in the point that the terms of reference to the medical committee were not in fact the terms Mr Mines undertook to Messrs Watkin and Ryan to place before it. Their report was ample to cover the matters calling for decision and the Appellant was supplied with a copy before the resumed hearing.

It was further submitted that neither he nor Mr Ryan understood the nature of some of the committee's findings, and the latter apparently did not come to grips with two of them in particular. The first was his failure to understand the conclusion that the aggravation of the pre-existing condition as a result of the activities of 5th February 1976 amounted to no more than five percent of total incapacity. Mr Ryan thought this was a misprint for 50% and that the committee meant to add two earlier findings in different orthopaedic reports of 20% and 30% respectively. I am satisfied Mr Mines understood this point perfectly and he quoted their comment in his decision. The second misunderstanding related to a suggestion of neurasthenia made by the committee in discussing the aggravation of the symptoms, which they said would ordinarily be expected to be only temporary. Mr Mines went into this at some length with Mr Watkin and Mr Ryan, expressing the view that there was a conflict of views between that report and Mr Parke's findings. He concluded that on the evidence before him no such compensatable condition existed. He gave an adequate explanation of the nature of neurasthenia, offering them the opportunity of an adjournment to seek further specialist advice on that aspect, although he felt reservations about its usefulness having regard to the time which had elapsed since the episodes. After a break during which Mr Ryan and Mr Watkin conferred, he was advised that his decision should be confined to orthopaedic aspects. Although it was perfectly clear that Mr Ryan had no idea what neurasthenia meant when it was first put to him by Mr Mines, the

transcript shows that he grasped its significance after it was explained to him, and the decision he and his client reached at the end of the discussion was adequately informed. Mr Mines was entitled to form the views he expressed about the significance of that comment on the material before him. I might add that one of Mr Kirker's reports (not before Mr Mines) noted a psychological overlay or some degree or neurasthenia aggravating the general organic disability, but he was clearly relating this to the earlier car accident.

Mr Fulton's final point was the failure to disclose available information to the Appellant at the review hearing as required by s.154(6) of the 1972 Act - the provision is the same in s.102(6) of the current Act. He maintained that the Hearing Officer should have disclosed all the medical evidence he received, and referred especially to segments of a copy report supplied to Mr Watkin which seem to have originated with the RAF Medical Authority following his examination there. He found them largely incomprehensible and so did I, but it is now clear that this was a compilation of comments made by Mr Harman Smith in a form supplied to him by the United Kingdom Authorities, and based on an orthopaedic examination he had made of Mr Watkin. It then formed the basis of a full medical report made for his U.K. war pension and Mr Watkin said that after a lot of trouble he finally obtained a copy of that document and annexed it to his affidavit. He says this accounted substantially for the reason for the two and a half years delay in making this application. He claimed he had never seen it before and that a significant passage had been omitted from the disjointed segments originally supplied to him. However, on the copy (Ex. "N" to the affidavit) this passage does appear, consisting of a comment that the incident of 5th February 1976 precipitated his retirement and he would have been able to work to the age of 65 ordinarily. I must therefore accept that it was part of the material before the Hearing Officer. But it seems from Mr Paki's analysis of the

transcript that the original report (Ex. "O" to the affidavit) was also before him and was shown to Mr Ryan at least during the course of the hearing. On page 21 of the transcript he made a lengthy comment on what he was shown, identifying it as the Department of Health and Social Security War Pensions OB/M3/61626 which is the exact heading of Exhibit "O"; the truncated Exhibit "N" contains no such references. Moreover, following an adjournment for that purpose, he said Mr Watkin had been through the reports and took issue with some serious inaccuracies. There are several pages of discussion dealing with them in which Mr Watkin played a full part.

From his earlier comments at page 19 the reports in question appear to have come into Mr Mines' hands from the medical committee and he was unsure whether Mr Watkin had seen them before; the latter confirmed that he had not. I see nothing in this exchange to indicate any evasion by Mr Mines of an obligation to disclose this material and on learning that Mr Watkin had not seen it previously he quite fairly gave him the opportunity to consider and take advice on it if he wished to. Mr Fulton also submitted that he should have been supplied with the orthopaedic reports of previous examinations which the committee obtained from Messrs Harman Smith and Kirker, no doubt pursuant to the proposal accepted by Messrs Watkin and Ryan that they could have access to all relevant information. The Respondent did not receive copies of these two specialists' reports and it was not until after this application was made that they were obtained and produced as an exhibit Mr Ashraf's affidavit. I cannot see how the Commission could be expected to supply such material, which it did not have in its control or possession, as part of the obligation under s.154(6).

It will be evident from the foregoing conclusions that I share the Appeal Authority's view that Mr Watkin received a fair hearing and there was nothing amounting to a contravention of the Act or a breach of natural justice in

the way his claim was handled. My study of the transcripts and of the material before me does not leave me with that sense of serious misgiving about the result which prompted Chilwell J. to allow the appeal in Thomson's case. I cannot say that the conclusions reached by the Hearing Officer and the Appeal Authority were unreasonable or wrong. The application must be dismissed, and if necessary I will hear Counsel on the question of costs, which are reserved.

M.C. Casey J.

Solicitors:

Wilson Henry Martin & Co., Auckland, for Intended Appellant
Accident Compensation Corporation, Wellington, for Intended Respondent