

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2008-404-8482

UNDER the Injury Prevention, Rehabilitation, and
Compensation Act 2001

IN THE MATTER OF an application for special leave to appeal to
the High Court pursuant to s 162 of the Act

BETWEEN CHRISTOPHER O'NEILL
Intended Applicant/Appellant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: 25 June 2009

Appearances: Applicant/Appellant in Person
D Tuiqereqere for Respondent
A Lewis for Professor Windsor

Judgment: 29 June 2009 at 4:00 pm

JUDGMENT OF ASHER J

*This judgment was delivered by me on 29 June 2009 at 4:00 pm
pursuant to Rule 11.5 of the High Court Rules*

.....
Registrar/Deputy Registrar

.....
Date

Solicitors:

CJ O'Neill, 62 Kimberhall Ave, Mt Roskill, Auckland
MJ Mercier, PO Box 242, Wellington

Copy:

D Tuiqereqere, Barrister, PO BOX 16-204, Sandringham, Auckland

[1] Christopher Joseph O'Neill seeks leave to appeal the decision of Judge Barber on an appeal of a review decision under the Injury Prevention, Rehabilitation and Compensation Act 2001 ("the Act"). Judge Barber heard the appeal on 6 October 2006, and dismissed it by a judgment on 27 October 2006.

[2] Mr O'Neill sought leave to appeal Judge Barber's decision in the District Court. That application was heard by Judge Cadenhead on 23 June 2008. Leave to appeal was refused. The Judge concluded that Judge Barber had in a straightforward way applied the clear medical evidence to the provisions of the legislation.

[3] This application is brought under s 162 of the Act. It reads as follows:

162 Appeal to High Court on question of law

- (1) A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with the leave of the District Court, appeal to the High Court.
- (2) The leave of the District Court must be sought within 21 days after the District Court's decision.
- (3) If the District Court refuses to grant leave, the High Court may grant special leave to appeal.
- (4) The special leave of the High Court must be sought within 21 days after the District Court refused leave.
- (5) The High Court Rules and sections 74 to 78 of the District Courts Act 1947, with all necessary modifications, apply to an appeal under this section as if it were an appeal under section 72 of that Act.]

[4] The appeal is, therefore, only on a question of law. Under s 162(3) if the District Court refuses to grant leave, the High Court may do so.

[5] Mr O'Neill's submissions were very general and it was difficult to refine them to precise points. They can be summarised as follows:

- a) At the hearing before Judge Barber, only the applicant and the Corporation were entitled to be present under s 142 of the Act. In fact representatives of a doctor involved in the allegations, Professor

Windsor, and the Auckland District Health Board were present and gave submissions contrary to Mr O'Neill's interests.

- b) Mr O'Neill was entitled to a "deemed decision" and Judge Barber failed to recognise this.
- c) All the medical evidence supported Mr O'Neill's position, and Judge Barber's decision was clearly wrong.

First point

[6] Mr O'Neill's first argument became refined during submissions. Section 142 of the Act provides:

142 Persons entitled to be present and heard at hearing

The following persons are entitled to be present at the hearing, with a representative if they wish, and to be heard at it, either personally or by a representative:

- (a) on every review, the applicant and the Corporation:
- (b) Repealed.
- (c) Repealed.
- (d) if the review relates to a decision to accept or decline cover for a work-related personal injury,—
 - (i) the claimant; and
 - (ii) the claimant's employer; and
 - (iii) in the case of a claim for cover for personal injury under section 30, any employer whose name the reviewer receives from the claimant or from the claimant's employer or from the Corporation so that notice can be given under section 141(3), if the name is that of any other employer of the claimant or any former employer of the claimant.

[7] Originally sub-sections (b) and (c), permitted affected registered health professionals or organisations to be present. Those sub-sections were repealed on 1 July 2005, prior to the review hearing before Judge Barber. At that hearing on 6 October 2006 it was assumed that those provisions still applied. However, given the fact that they were repealed, they may not have applied.

[8] Mr Tuiqereqere, for the Corporation, after discussion, accepted that there was a point of law that was reasonably arguable on this issue. This appears to me to be a concession that is correct. Leave to appeal will be granted on this point.

The deemed decision

[9] It was very difficult to understand Mr O'Neill's submission on this point. In so far as he appears to rely on a deemed review decision, that was not something that was before Judge Barber, or that he determined. He was unable to point to any specific error of Judge Barber in this regard. I am not satisfied that there is any point of law that arises under this head.

Evidence of medical misadventure

[10] Reading Judge Barber's decision, there appears to be a sound factual basis for his decision. Certainly there is nothing on any of the material before the Court to indicate that there was overwhelming evidence that was supportive of Mr O'Neill's position. In the end the point that Mr O'Neill seeks to argue is at best a matter of fact. Leave to appeal is declined on this point.

Conclusion

[11] I conclude, therefore, that leave to appeal should be granted, but only in respect of the representation issue. I have discussed the appropriate way of drafting the point with counsel. I will divide it into two questions.

[12] Mr O'Neill has invited me to stay aspects of Judge Barber's decision. However, there is no indication that he is suffering any prejudice in the meantime, and I decline to make any stay orders.

Result

[13] Leave to appeal will be granted in relation to the following point of law:

- a) Did s 142 of the Injury Prevention, Rehabilitation and Compensation Act 2001 permit counsel for Professor Windsor and the Auckland District Health Board to be present and make submissions at the review hearing?

- b) If not, what are the consequences of this, and, in particular, should the appeal be allowed and the review decision modified or quashed? If so, what indications of effect should be given under s 161(2) of the Act?

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Asher J