IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-002592

BETWEEN	BRENT WILLIAM MATTHEWS Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 30 April 2009

Counsel: I S Young-Gough for appellant
A D Barnett for respondent

Judgment: 21 May 2009 at 10am

In accordance with r 11.5 I direct the Registrar to endorse this judgment with a delivery time of 10am on the 22nd day of May 2009.

RESERVED JUDGMENT OF MACKENZIE J

Introduction

[1] This is an appeal, by leave, from a decision of Judge Ongley in the District Court at Wellington on 1 February 2005, dismissing an appeal by the appellant from a "decision" of the Corporation. The issue is whether or not there was a decision of the Corporation which carried a right of appeal.

Background

[2] The appellant suffered two injuries for which he had cover: a left knee injury suffered in 1983 and a neck injury suffered in 1987. He suffered chronic pain which led to an incapacity for work, and weekly compensation was paid until it was suspended on 14 September 1999 on the grounds that a causal association between the covered injuries and the appellant's incapacity was no longer established. The suspension decision was upheld on appeal. In a judgment delivered on 23 November 2000 Judge Beattie said:

> As noted at the beginning of my decision, the onus is on the appellant to establish that he has a continuing entitlement and that his present condition is causally connected to or is as a consequence of the personal injuries for which he was granted cover. In the final analysis I find, on the medical evidence and the reasoning given by the various witnesses in that regard, that that onus has not been discharged.

[3] Leave to appeal to this Court against that decision was refused on 1 September 2004.

[4] Shortly after that decision, on 5 December 2000, the appellant lodged a claim for cover for an injury which was described by his general practitioner as "(R) knee degeneration as a result of a chronic antalgic gait secondary to a (L) knee injury". The Corporation failed to consider that time within the statutory time limits so it became the subject of a deemed decision. By letter dated 20 April 2001, the Corporation revoked the deemed decision, on the basis that the injury to the right knee did not meet the criteria for cover as a separate claim. However, the Corporation left open, for further consideration, the question whether the right knee degeneration was a consequence of the left knee injury, for which there was cover. There was further consideration of the medical evidence by a consultant in orthopaedic and accident surgery, who formed the view that "the claim that the right knee degeneration is causally related to the problems in the left knee directly related to injury is highly unlikely in this case". The Corporation, by letter dated 20 June 2001, declined the claim on that basis. A review of that decision was dismissed, on the grounds that the application involved the same issue as that covered by the earlier

appeal decision delivered on 23 November 2000, and that the doctrine of *res judicata* applied. An appeal to the District Court against the reviews of both the April and June decisions was dismissed by a judgment delivered on 2 October 2002. Judge Middleton held that it was clear from Judge Beattie's findings in the earlier appeal that the issue whether pain in the right knee as a result of the appellant's antalgic gait was a possible consequence of the 1983 accident which caused the left knee injury was an issue considered in the earlier appeal. He also held that the medical evidence did not establish a later identifiable injury to the right knee.

[5] Following that decision, on 2 December 2002, the appellant's solicitor wrote to the Corporation claiming reinstatement of his weekly compensation from the date of the letter together with rehabilitation. This claim raised the contention that the chronic pain syndrome was a mental, rather than physical, consequence of the earlier injuries. It was based on a report from Dr Davis, a psychiatrist, dated 11 March 2002. The claim letter said: "The report from Dr Davis confirmed that Mr Matthews is currently suffering the mental consequences of the injuries at issue. This aspect was not addressed in the decision to suspend entitlements and subsequent proceedings." The Corporation issued a decision on that request for reinstatement of weekly compensation by letter dated 9 December 2002. It considered that there was nothing in the other medical reports provided that offered new evidence that had not already been presented to both the review process or at appeal. It addressed the report from Dr Davis in these terms:

> In respect of the report from Dr Davis, which has not already been considered by the review process or the Court, ACC finds nothing in this report that would alter the decision already made by the Court. There is no evidence in the report that Mr Matthews' is suffering the mental consequences of injury. The District Court decision of 23 November 2002 [*sic*, should be 2000] dismissed the appeal on the basis that Mr Matthews was suffering from a chronic pain syndrome that had no injury related basis. Mr Davis states on several occasions that Mr Matthews' condition, is in part a result of his relationship with ACC over the last three years and in part as a result of chronic pain syndrome.
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> Therefore, ACC's original decision of 14 September 1999 to suspend entitlements, upheld at both review and appeal, stands.
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> This letter is not a new decision, but a further confirmation of the original decision and therefore does not carry with it new review rights.

[6] The appellant appealed against that decision. That was heard on 22 November 2004, and a reserved judgment dismissing the appeal was delivered on 1 February 2005 by Judge Ongley. Leave to appeal against that decision was granted by the District Court on 7 November 2008.

The judgment appealed against

[7] The question on the appeal to the District Court was stated by Judge Ongley in his decision of 1 February 2005 in these terms:

> [1] The question to be decided in this appeal is whether a letter from the Corporation amounted to a decision open to review. The letter stated that cover would not be granted on grounds that had already been the subject of a decision relating to the same claimant.

After considering the various matters raised in detail he said:

> [25] Whether there is a new issue between the parties requires some judgment of fact and degree. The question now introduced of mental consequences of injury, is on its face so similar to, or dependent upon, a chronic pain syndrome that has been fully considered and excluded from cover, that it is impossible to see the emergence of a different issue between the parties. There has been no medical information presented to suggest that there is a new issue in the sense of alleged consequences from the physical injury itself that are different consequences from the chronic pain syndrome, or are not themselves caused by the chronic pain syndrome.
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> [26] I find that the appellant has not been able to demonstrate that the 9 December letter contains another decision that was not fully within the scope of the September 1999 decision.

[8] In granting leave to appeal to this Court, Judge Beattie noted that the issue on the appeal was whether the letter from the Corporation dated 9 December 2002 amounted to a decision within the meaning of s 6 of the Act. He said:

> [8] Whilst the applicant and respondent have identified their respective positions insofar as the subject letter is concerned, nevertheless I find that it cannot alter the fact, that the question of whether that letter does or does not constitute a fresh decision which is capable of review, is primarily a question of law and requires regard to be had to the definition "decision" in Section 6 of the Act and the circumstances in which that letter was written and what it was intended to achieve. Those matters, I find, are factual matters, but

> which impact on the question of law as to whether or not the subject letter is a reviewable decision.

[9] The present appeal was filed as a consequence of that grant of leave, and the issue for determination is whether Judge Ongley was correct to find that the letter of 9 December 2002 did not contain a reviewable decision.

The grounds of appeal

[10] The appellant submits that the Judge erred in fact and in law in relation to the following matters:

(a) In stating that the respondent's letter of 9 December 2002 contained comments and statements that do not amount to a new decision;

(b) In stating that the letter clearly intends to convey that further mental problems are connected to the appellant's chronic pain syndrome only and cannot take that further because the chronic pain syndrome itself is not causally connected to a covered injury;

(c) Taking into account the statement in the letter that it is not a new decision;

(d) Apparently finding that there is no medical information presented in the psychiatrist's report confirming a mental injury as a consequence of the physical injury to suggest that there is a new issue in the sense of the alleged consequences of the chronic pain syndrome; and

(e) Finding that the appellant had not been able to demonstrate that the letter contains another decision not fully within the scope of the earlier decision to suspend entitlements.

The legal principles to be applied

[11] This is an appeal on a question of law. The question of law is whether or not the letter of 9 December 2002 was a decision capable of review. Under s 134 of the Act, a right of review, and consequently of further appeal, arises in respect of any of the Corporation's decisions on a claim. What is a decision is defined in these terms:

> Decision or Corporations decision includes all or any of the following decisions by the Corporation:
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> (a) a decision whether or not a claimant has cover:
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> (b) a decision about the classification of the personal injury a claimant has suffered (for example, a work-related personal injury or a motor vehicle injury):
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> (c) a decision whether or not the Corporation will provide any entitlements to a claimant:
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> (d) a decision about which entitlements the Corporation will provide to a claimant:
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> (e) a decision about the level of any entitlements to be provided:
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> (f) a decision relating to the levy payable by a particular levy payer:
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> (g) a decision made under the Code about a claimant's complaint

[12] The claim on which a decision was sought by the letter of 2 December 2002 was a claim pursuant to s 48(c) for a specified entitlement. The specific entitlements sought were weekly compensation and rehabilitation, as provided for in s 69. The decision sought thus fell within paragraphs (c) or (d) of that definition.

[13] The essence of the question on this appeal is whether the Corporation was, as a matter of law, entitled to, and did, refuse to make a decision on the grounds that the matter had already been decided.

[14] The question whether a letter declining to review previous decisions itself comprised a reviewable decision was considered at length by Judge Ongley in *Langley v Accident Compensation Corporation* (District Court Wellington Decision No 119/2005 12 April 2005 Judge Ongley). His decision was approved in this Court

by Gendall J in *Waenga v Accident Compensation Corporation* [2006] NZAR 396 in these terms:

> [23] Questions as to whether a letter advising a claimant of rights, entitlements and otherwise, amounts to a "decision" in respect of an application or claim, as being opposed merely to the provision of information, has been the subject of a significant number of District Court decisions and which I need not recite. The short point is that observed by Judge D A Ongley in *Langley v Accident Compensation Corporation* (District Court, Wellington Decision No 119/2005, AI 663/03, 12 April 2005, Judge Ongley) at para [37]:
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> > … that confirmation of a prior decision does not constitute a new decision. To hold otherwise is to cut across statutory time bars and provide a new avenue of reopening old claims. The ratio of the judgments preventing such a course is that a decision on statutory entitlements is subject to review and appeal, or revocation by the Corporation. Otherwise it remains effective and is not revived or replaced by advice that the Corporation confirms it and does not decide to revoke it … There is no avenue for avoiding time limits on grounds of apparent or manifest injustice. That can only be achieved by statutory amendment of the time barriers for review or appeal.

[15] In his decision in this case, Judge Ongley referred in *M v ACC* (Decision No 319/2003 8 December 2003 Judge Cadenhead), which dealt with the situation where the previous decision does not deal with precisely the same question between the parties. Counsel for the appellant relies upon that decision and draws attention to the following passages:

> [22] The fundamentals of a decision are that a particular issue is decided, and that issue is conclusive subject to the right of a review within the three month period of time. This, as it were, is a statutory form of issue estoppel. Guidance can be had from considering how the law concerning issue estoppel is developed. Issue estoppel is concerned with the prior resolution of issues and precludes a party from contending the contrary or any precise point which, has once been distinctly put in issue and been determined against the other party.
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> …
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> [27] It is clear from the authorities that if there is ambiguity or uncertainty as to what was decided by the previous decision, then a party is not precluded from raising that issue. It is upon the party alleging the previous decision, or concluded issue, to provide that what is subsequently raised falls within the parameters of the earlier decision or issue.

[16] Those decisions, and several other District Court decisions, form part of a quite extensive case law on the broad issue of when a previous decision may be reopened. It will not be helpful for me to attempt to summarise that case law, or to state any general proposition on that broad issue. It is preferable that I confine my conclusions to stating the test which is to be applied having regard to the specific situation in this case. I consider that the test to be applied in this case is whether the claim of 2 December 2002 raised some new matter which required the Corporation to address some new and different question from that which it had earlier addressed, and did not simply seek to rely on different evidence or information to achieve a different answer to the same question as had been earlier addressed.

Discussion

[17] In considering whether the letter of 2 December required a new decision or not, it is necessary to set out the facts in a little more detail, so as to understand clearly the basis on which the appellant contends that Dr Davis' evidence added a new issue which needed to be the subject of a new decision. The two injuries, and the medical evidence as to the consequences of those injuries, were described in the decision of 23 November 2000. On 10 June 1983, the appellant suffered an injury to his left knee when he was driving a truck and depressed the clutch with his left foot and felt a popping sensation in his left knee in the process. On 7 October 1987, again when driving a truck, he drove over a judder bar, with the impact causing him to hit his head on the roof of the cab. Following surgery to remove the medial semilunar cartilage he regained a full range of knee movement and was able to return to work. He continued to experience pain behind the kneecap. He was working at the time he suffered the second injury in 1987. X-rays following that second injury showed no bone or disc injury but the appellant suffered severe cervical pain from then onwards.

[18] The appellant was certified as unfit for work in about 1987 and weekly compensation was paid until the Corporation made its decision to suspend payment in September 1999. That decision followed a reference to Dr Turner, a specialist in occupational medicine, in May 1999. He reported that in his opinion the most

appropriate diagnosis was chronic pain syndrome, and that there were sufficient criteria present to diagnose chronic fibromyalgia. He described fibromyalgia in these terms:

> Fibromyalgia which is a form of the chronic pain syndrome is a common pain disorder of diffuse soreness, stiffness, reduced pain threshold, non-restorative disturbed sleep, fatigue and psychological disturbance. There is no particular cause for fibromyalgia indeed it is thought to arise from many causes through neuro-endocrine dysfunction.

As to whether that condition was causally connected to the injuries, or either of them, Dr Turner said that the injury in mid 1983 was a biologically implausible cause for a diffuse pain syndrome involving not only the left but the right knee and for that matter the neck, shoulders and upper limbs as well. He noted the report of an orthopaedic surgeon to the effect that clinical examination was completely normal, and expressed the opinion that the problem was one of pain not anatomical derangement. This conformed with Dr Turner's own findings of the clinical manifestation of fibromyalgia pain syndrome which is one of pain and soft tissue tenderness in the absence of soft tissue damage. Dr Turner expressed his conclusion in these terms:

> In conclusion since his condition is not a function of ongoing injury but rather arises through lack of strength and endurance in the muscles together with his ontoward [*sic*] cognitive perceptions, there is no injury based medical reasons why he should not return to vocational employment. Clearly however in order to do this he would have to be prepared to tolerate pain and be willing to remain active despite the symptoms.

[19] Additional medical evidence relevant to the decision to suspend payment in September 1999 was adduced at the hearing of the 2000 appeal. The Judge considered all of the medical evidence, and found Dr Turner's view more convincing in saying that muscle wasting is not a sign of injury but rather a sign of disuse or under use. The Judge said:

> In the final analysis I find that I prefer the explanations and reasoning of Dr Turner in this particular case, particularly as his reasoning takes account of the fact that the appellant has severe pain problems with both knees, and of course the right knee was not the subject of any notified injury. Furthermore, the diffuse pain in the shoulders and upper body, again unassociated with any injury site, give added impetus to his conclusion of a fibromyalgia condition whose origins are unrelated to any discrete or underlying injury process. Certainly insofar as the neck is concerned, even Mr Krause is "*less definite*".

[20] The essence of the appellant's contention that Dr Davis' evidence raised a new matter on which a new decision was required is that it is contended that the earlier 1999 decision, upheld in the 2000 appeal, dealt only with the issue of whether the chronic pain syndrome or fibromyalgia from which the appellant was suffering was a physical consequence of either the 1983 or the 1987 injury. Counsel submits that Dr Davis' evidence raises a new point, namely whether the chronic pain syndrome is a mental consequence of either of those injuries. Cover for the 1983 and the 1987 injury was under the Accident Compensation Act 1982, where the relevant definition of personal injury by accident included: "the physical and mental consequences of any such injury or of the accident".

[21] An entitlement to weekly compensation depends, under s 100, on the claimant's incapacity for employment. The Corporation must determine, under s 103, whether the appellant is unable, ***because of his personal injury*** to engage in employment. The decision to suspend payment in 1999 had been made because "it appears that Mr Matthews' current symptoms can no longer be attributed to [the injuries for which he has cover] but arise as a result of other factors". That was a decision that the appellant's inability to engage in work was not "because of his personal injury". The decision requested in the letter of 2 December 2002 was similarly a decision as to whether the appellant's inability to engage in work was because of his personal injury. The condition from which the inability to work arose was exactly the same in 2002 as it had been in 1999. It was chronic pain syndrome or fibromyalgia. That condition had been held not to be causally connected to the injury, in the 1999 decision. The 2002 claim required a finding that that same condition was causally connected to that same injury.

[22] The issue in 1999 was whether the chronic pain syndrome or fibromyalgia was a consequence of the knee and head injuries in 1983 and 1987. Mr Young-Gough for the appellant submits that what was in issue was whether the chronic pain disorder was a physical consequence, whereas the evidence of Dr Davis raises the possibility that it may be a mental consequence. I do not consider that that is a sufficient basis for distinction to require the revisiting of the earlier decision. The same issue arises, namely whether the pain which the appellant suffers is a consequence of the injury. All of the possible causes of a chronic pain disorder were

in issue then. Dr Turner, in the passage quoted at paragraph [18] above referred specifically to the appellant's condition arising from his "untoward cognitive perceptions". Dr Davis expresses the opinion that the pain disorder is a psychological or psychiatric disorder. However, the question is not what is the nature of the disorder (namely whether it is physical or mental), rather it is what is the cause of the disorder. There is no basis upon which this Court could find that ACC was wrong in law to reach the conclusion that the report contained no new evidence on this crucial issue of the cause, rather than the nature, of the disorder.

[23] The report of Dr Davis, which is now relied upon, is directed towards the very same question which was the subject of consideration when the decision was made in 1999. It did not raise matters which required, as a matter of law, a further decision on a matter not the subject of the earlier decision. The assessment of whether, as a matter of fact, the report raised matters which might justify a reconsideration of its earlier decision involved an issue of fact which it was for the Corporation to decide. Its assessment on that issue is not open to examination on this appeal, which is confined to questions of law.

[24] Counsel for the appellant relies upon the decision in *Hogenes v Accident Compensation Corporation* (Decision No 249/2007 13 November 2007 Judge Ongley). In that case the appellant had suffered head and neck injuries in 1985. He did not obtain cover in respect of that injury until 2001. He applied in 2003 for weekly compensation but was declined. Subsequently evidence emerged that the head injuries had led to traumatic brain injury. That consequence had not been known when the 2003 decision was made. Judge Ongley held that some aspects of the present claim overlapped with matters considered in the appeal related to the earlier decision but that the possibility of incapacity from traumatic brain injury had not been considered on that occasion. He accordingly held that the decision of the Corporation in 2006 purporting to confirm the earlier 2003 decision was a new decision. That is different from the situation here. For the reasons I have given the possible new point here was the nature of the disorder, not a possible new consequence of the injury.

[25] For these reasons, the Commission's finding that there is no evidence in the report that Mr Matthews is suffering the mental consequences of injury is not one which is open to challenge on this appeal.

[26] That discussion deals with all of the matters raised as grounds of appeal as set out in paragraph [10] above, though not in precisely the form expressed. One further matter was raised in argument, namely the ability of ACC to revise an earlier decision which was made in error. As ACC contends that its earlier decision was not made in error, it is unnecessary to address this aspect further. I accordingly do not need to address Mr Barnett's submission that the power to revise an earlier decision made in error does not extend to a decision which has been upheld on appeal. Nor need I address the further submission that the provisions in s 116 of the 1982 Act relating to suspension of payments may permit their resumption. Clearly, a decision by ACC that resumption was appropriate would be required before any such power could be exercised. That is not the case here.

Result

[27] The appeal is dismissed. Costs are reserved. Memoranda may be submitted.

"A D MacKenzie J"

Solicitors: I S Yough-Gough, Masterton for appellant
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