IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-2692
[2013] NZHC 188

UNDER	the Accident Compensation Act 2011
IN THE MATTER OF	an appeal pursuant to s 149 of the Act
BETWEEN	MAREE HOWARD Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 11 February 2013

Counsel: Mr J Howard (with leave to present argument for Mrs Howard)
Mrs M Howard in person
P McBride for Respondent

Judgment: 15 February 2013

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 11.30am on the 15th February 2013.

JUDGMENT OF WILLIAMS J

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[1] The appellant, Maree Howard, has suffered two spinal injuries – both covered under the Accident Compensation Act 2001 (the Act). She was referred by her case manager at Care Advantage to an occupational medicine specialist for assessment for the purpose of facilitating Mrs Howard's social or vocational rehabilitation. The appellant objected to being assessed on three grounds:

(a) the assessor had not been provided with all relevant information for the purpose of conducting the assessment;

(b) the assessor was not qualified to perform the assessment; and

(c) Mrs Howard did not wish to risk a further bout of pain or injury being brought on by the physical examination required to complete the assessment.

[2] A fourth issue arose during the course of the prosecution of Mrs Howard's appeal. This related to an irregularity in the review hearing and it was dealt with in the judgment, the subject of this application for special leave. I also address that issue below in this judgment.

[3] In any event, in light of Mrs Howard's objection, Dr Kenny, the occupational medicine specialist, decided not to proceed with the assessment.

[4] Care Advantage, the organisation managing the file on behalf of NZ Post, then suspended Mrs Howard's entitlements under s 117(3) of the Act. That subsection provides:

> The Corporation may decline to provide any entitlement for as long as the claimant unreasonably refuses or unreasonably fails to–
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> (a) comply with any requirement of this Act relating to the claimant's claim; or
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> (b) undergo medical or surgical treatment for his or her personal injury, being treatment that the claimant is entitled to receive; or
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> (c) agree to, or comply with, an individual rehabilitation plan.

[5] Care Advantage (and now ACC) takes the view that the objections raised by Mrs Howard amounted to an unreasonable refusal or failure to permit an examination and assessment in accordance with that subsection and that this justified the suspension. Mrs Howard then applied to review that decision under s 134. The decision was affirmed on review. Mrs Howard then appealed to the District Court under s 149. His Honour Judge Ongley dismissed the appeal. Mrs Howard then applied to the District Court for leave to appeal to this court. His Honour Judge Joyce QC declined leave to appeal. Mrs Howard now applies to this court for special leave to appeal.

The judgment

[6] Judge Ongley, in a careful decision, addressed each of the four grounds advanced by the appellant.

[7] On the question of insufficient information available to Dr Kenny at the time of the proposed examination, Judge Ongley:

(a) impliedly accepted Dr Kenny's indication that it was common for assessors to obtain further relevant information in respect of the patient *after* the examination phase of the assessment; and

(b) found that Mr Howard, who for all purposes spoke for Mrs Howard, was very experienced in dealing with ACC and could have put any relevant document before Dr Kenny prior to the examination if he so chose.

[8] On the question of Dr Kenny's qualifications, the Judge rejected the applicant's contention that the occupational assessment could only be completed after obtaining an orthopaedic surgeon's assessment of the patient's condition. While the Judge accepted that it would have been reasonable to get an orthopaedic surgeon's view prior to Dr Kenny's assessment, it was also reasonable to proceed straight to an occupational needs assessment and to leave the question of whether an orthopaedic surgeon's examination was necessary until later in the process of rehabilitation. Ultimately, the Judge found, the choice was for ACC to make. Neither option was mandatory in principle. Both were reasonably available.

[9] In any event, Judge Ongley found on the facts that Dr Kenny was well qualified as a musculo-skeletal pain specialist, to carry out the necessary examination and assessment of Mrs Howard's rehabilitative needs.

[10] On the question of the risk of pain that the examination might represent to Mrs Howard, the Judge acknowledged that Mrs Howard had prior negative experience with physical examinations causing pain, but Dr Kenny's expertise was

in musculo-skeletal pain – the very issue causing Mrs Howard concern. In any event, Mrs Howard did not, it appears, discuss her fears with Dr Kenney. Nor was there any discussion of what the limits of any physical examination might be, or whether there would be a physical examination at all.

[11] Finally, on the point of irregularity in the review process, the Judge acknowledged that the initial review hearing had been adjourned part-heard and then recommenced before a different reviewer. The Judge accepted that a matter could be adjourned part-heard in terms of s 146 of the Act but noted in any event that the second hearing in fact involved a full reassessment of all aspects of the case so there was no risk whatever that the break in proceedings could have caused Mrs Howard any substantive injustice. The Judge concluded:[1]

> It is well to note that the reviewer, Mrs K Taylor, delivered a very thorough and carefully reasoned decision in which I could find nothing to disagree with.

[12] The second point made was that an appeal by way of rehearing required a full reassessment of the evidence with the appeal court reaching its own conclusions on that evidence in any event.

[13] With the appeal dismissed, the matter came before Judge Joyce QC on an application for leave to appeal.[2] Mrs Howard posed 15 questions of law for his Honour's consideration. They were described by the learned Judge as:[3]

> … a mix of references to matters it was suggested ought to have been, but supposedly were not, taken into account by the court; non-legal points such as what notice Mrs Howard was entitled to take of her GP's advice; references to over-arching provisions of the Act such as s 3 and s 54; reference to estoppel by representation the pertinence of which in the context of a statutory regime is difficult to fathom; whether a note on the doctor's form "please advice (sic) the specialist if you do not wish to proceed with the consultation for any reason" could make it reasonable (in the particular statutory context) to decline to proceed; whether the Judge was entitled to give more weight to one set of witnesses as opposed to another; putting in question the Judge's fact finding in respect of what happened at the doctor's rooms; matters relating to the review process, and so on.

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1 *Howard v ACC* [2010] NZACC 218 at [32].
2 *Howard v ACC* [2012] NZACC 388.
3 At [37].

[14] The Judge took the view that almost all questions came down to issues of fact and, applying the test in *Edwards v Bairstow*[4] (confirmed in New Zealand in *Bryson v Three Foot Six*[5]), concluded that it had not been shown that the judgment was:

(a) made despite the absence of evidence to support it;

(b) inconsistent with or contradictory of the evidence when it is viewed as a whole; or

(c) contradictory of the true and only reasonable conclusion on the evidence.

[15] It falls to me now to consider Mrs Howard's application for special leave to appeal. It is important to note that under s 162(1), appeals to this court can only be brought on a question of law. Thus, any questions posed for consideration by this court must, in whole or in part, be questions of law.

Special leave principles

[16] The principles applicable to an application for special leave are well understood. They are captured in the Court of Appeal judgment in *Waller v Hilder*.[6] The proposed appeal must:[7]

(a) raise some question of law or fact capable of bona fide and serious argument; and

(b) involve some interest, public or private, which is of sufficient importance to outweigh the cost and delay of a further appeal.

[17] In the end, as always, the guiding principle must be the requirements of justice, though this time in light of the fact that the applicant has already had the benefit of a full merits appeal by way of rehearing.

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4 *Edwards v Bairstow* [1995] 3 All ER 48,57.
5 *Bryson v Three Foot Six* [2005] NZSC 34.
6 *Waller v Hilder* [1998] 1 NZLR 412 (CA).
7 At 413.

The questions

[18] As Judge Joyce QC indicated, the questions posed in this appeal are indeed wide ranging and, in the end, misconceived. They are directed at factual questions, questions of weighting of relevant considerations, or irrelevant questions of law. That is questions, the answers to which would make no difference to the outcome in the appeal. In light however, of the lengthy and thoughtful submissions provided by Mr Howard on behalf of Mrs Howard, I feel it is beholden on me to properly consider each question posed.

Question 1: Did His Honour err in not quashing the respondent's decision and give effect to the will of Parliament as expressed in cl 8(3) and (4) of Schedule 1 and s 76(4) and directing the respondent to take immediate action and implement the terms of the appellant's agreed Individual Rehabilitation Plan (IRP) pursuant to His Honour's power in s 161(2) of the Act?

[19] This question asks whether ACC should have adopted a different enforcement pathway pursuant to cl 8 of Schedule 1 to the Act – in relation to individual rehabilitation plans. It does not seem that this was argued in the appeal before Judge Ongley, and it does not now raise an arguable relevant question of law. The fact is s 117(3) was used to suspend payments, and it is the meaning of that subsection that is in question.

Question 2: In the appellant's known medical circumstances did His Honour err in finding the respondent acted reasonably in requiring the appellant to attend for assessment by occupational physician Dr Kenny over the objective medical judgment and treatment claims lodged by the appellant's GP for a like-kind assessor such as orthopaedic surgeon Mr Cowley?

[20] This question raises only issues of fact and weighting of competing considerations. No question of law arises.

Question 3: In pursuing her health and treatment rehabilitation goals to the maximum extent practicable pursuant to the provisions in the Act, is the appellant entitled to rely on the medical judgment and certifications of her GPs particularly when the respondent had advised the appellant in writing that she has an obligation to follow the advice of her treatment providers?

[21] This question does not raise a relevant question of law. Whether Mrs Howard should be entitled to rely on the opinion of her GP is beside the point. On the other hand, it must be for ACC to choose which specialist assessor to use in the circumstances of any specific client.

Question 4: Was His Honour bound to support the s 3 Purpose, the s 6 Definitions of Rehabilitation and Individual Rehabilitation Plan, ss 54 and 70 of the Act?

[22] The sections referred to are all of general import. It is far from established that His Honour did not apply them. The question is therefore unhelpful.

Question 5: Did His Honour err in not mentioning or giving reasons why the issue of ***estoppel by representation*** *raised in submissions and also raised orally at the appeal hearing, relating to the Care Advantage promise in its 9 April 2010 email to arrange a treatment assessment with orthopaedic surgeon Mr Cowley at the same time it was arranging an appointment with an occupational assessor? His Honour has not dealt with this issue in his decision. The Care Advantage email promise is in the appellant's bundle at document 9.*

[23] The representation here appears to be that a referral would be made to an orthopaedic surgeon. The relevant excerpt from the 9 April 2010 email is as follows:

> From this conversation with Mr Howard, I will be arranging a new appointment with Dr Monigatti, and an appointment with Mr Cowley, for Maree. This will be completed as soon as possible and Mrs Howard will be advised of the dates for the appointments in writing and will receive a copy of the referral letters as soon as they are ready.

[24] Apart from the difficulty in public law of enforcing a substantive legitimate expectation[8] there is a more fundamental problem here. Even if the indication from

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[8] Substantive legitimate expectation remains contentious as a review ground. For acceptance of substantive legitimate expectations see *New Zealand Association for Migration and investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [145], [147] per Randerson J and *Lalli v Attorney-General* [2009] NZAR 720 (HC) at [29] per Asher J. For hostility to substantive legitimate expectations see *Air New Zealand v Wellington International Airport Ltd* [2009]

Care Advantage in that email was not overtaken by events, there is no representation made as to when, or in what order, such referrals would be made. This point is reflected in Judge Ongley's March judgment[9] in which he refers to Care Advantage's subsequent letter of 23 July 2010. In that July 2010 letter, Care Advantage advised that the possibility of an appointment with Mr Cowley would be reviewed once Dr Kenny's assessment had been completed. It follows that no estoppel or legitimate expectation can arise on the facts in any event.

Question 6: Did His Honour err in not giving reasons why the evidence in the ACC policy document regarding making referrals to appropriate providers with the skills/competencies relevant to the client's particular needs and was not dealt with? (Documents 41-44) which, in the circumstances, was an orthopaedic specialist. The appellant relies on that policy as important to the s 72(1) "when reasonably required" test.

[25] Having reviewed the material at pages 41 to 44 of the applicant's bundle, I can see nothing that is inconsistent with the option chosen by ACC, given that it had been decided that advice was required from an occupational medical specialist. The pages to which Mrs Howard referred cannot reasonably be read as allowing the client, as a matter of policy, a choice of both which specialist and what kind of specialist. The relevant policy advisory simply provided:

> If a client has genuine and reasonable concerns with the provider they've been referred to, we will:
>
> - offer them a choice of two alternative providers (if there are two available), and
>
> - give them FIVE days to select which provider they wish to see.

[26] No question of law arises.

NZAR 138 (HC) at [52], [62] per Wild J and *GXL Royalties Ltd v Minister of Energy* [2010] NZCA 185, [2010] NZAR 518 at [45] per Glazebrook J.

9 *Howard v ACC* [2012] NZACC 73 at [32].

Questions 7: Does s 117(3)(a) operate so as to make it unreasonable for a claimant to refuse to undergo a demanding physical examination and treatment particularly when she feared harm, if it fell (sic), would be substantial given that she had been injured previously by one of the respondent's selected assessors in similar circumstances.

[27] This question focuses on the way in which Mrs Howard's pain concerns were dealt with. As the reviewer noted, the problem in this case was that discussions over that matter never took place at the time. Neither Mrs nor Mr Howard asked what the nature of the examination would be, whether it would be physical and, if so, how physical? Dr Kenny was never asked how Mrs Howard's concerns about pain might be addressed. Mrs Howard simply advised that they objected to the examination. Once again, this question fails on the facts.

Question 8: Does s 117(3) operate so as to allow all entitlements to be declined?

[28] This does not raise a question capable of bona fide argument.

Question 9: In finding that it was reasonable for the respondent to seek opinion from an occupational physician at first instance, did His Honour err in the s 72 context – when reasonably required – by giving primacy and affording undue weight to the opinions of Care Advantage employees over the medical judgment and claims of the appellant's two treating GPs?

[29] Again, this question raises issues of the relative weight given to different competing considerations. Questions of weight are quintessentially for the first instance decider, and do not raise questions of law.

Question 10: Did His Honour err in failing to give reasons for preferring the opinion of Care Advantage over the medical judgment of the appellant's GPs and also concluding at [40] that it was the "appellant's insistence" on assessment by Mr Cowley when factually it arose from the treatment claims of two GPS?

[30] Judge Ongley did not prefer Care Advantage's medical judgment over that of two GPs. He simply held that both the option involving Mr Cowley and that involving Dr Kenny were reasonable. It was therefore open to Care Advantage to

choose the option that it did. The underlying premise of the question is accordingly not made out.

Question 11: If His Honour had given all the medical evidence and the appellant's circumstances appropriate weight, would that have affected the outcome of his deliberations?

[31] This is classically a question that goes to the facts. Challenge to the weighting given by the decider to relevant considerations does not raise any question of law.

Question 12: Did His Honour err in his decision when only reciting part of Dr Kenny's email letter to Care Advantage dated 7 November 2010 at [19] and failing to take into account, or give reasons why the total of the evidence was rejected, and not taking into account and referring to the complete contextual statement of Dr Kenny's 7 November 2010 email to Care Advantage which states:

> *Because of John and Maree's concerns above, I have therefore not undertaken a clinical assessment of Maree's condition, and its relationship to injury and to her work, and am not able to provide answers to the questions raised in your referral letter,* ***other than on the basis of the medical information already provided.*** (emphasis by applicant)

[32] This question suggests that the Judge, by failing to include full reference to the email of 7 November 2010, had fatally failed to consider relevant evidence when assessing the appeal. I do not see how this could be so. The portion underlined simply records that without an examination, the medical information provided was the only available basis upon which to make the assessment required of him.

[33] Dr Kenny therefore declined to arrange for any further assessment. That really was the whole reason for the suspension of payments. I do not see how the Judge could be said to have ignored this.

Question 13: Did His Honour err in his decision and the evidence before him when stating "The evidence does not show that the assessment was terminated by Dr Kenny independently of a refusal by the appellant" when [8] of Dr Kenny's 7 March 2011 affidavit (with reference to [7]) independently of the appellant states: "This reinforced my view that proceeding with the consultation would be unwise until Mr Howard was clear as to my role in regard to the further assessment of Mrs Howard's health problems …"

[34] This question goes to the Judge's assessment of the evidence and so raises questions of fact. Of course, if the Judge's conclusion in that respect had no evidential support at all, that could raise potential questions of law.[10] But the District Court judgments, the review and background documents all make it clear that there was ample evidence upon which the Judge could reach the conclusion he did.

Question 14: Does s 117(3) operate so as to allow the above circumstances to constitute the appellant's unreasonable refusal or failure to participate when the NZ Bill of Rights Act 1990 provides: Everyone has the right to refuse any medical treatment.

[35] This question does not address the appeal. Mrs Howard was entitled to refuse medical treatment – presuming as I do, that Dr Kenny's proposed assessment amounted to treatment. The assessment was not mandatory. Rather, the position was simply that, by so refusing, Mrs Howard risked her ACC payments being suspended.

Question 15: With reference to [29] to [33] of His honour's decision and to s 133(5), upon an appeal against a review decision (s 149) is the District Court entitled to scrutinise the practices and procedures adopted by a first instance reviewer and pronounce judgment so as to ensure the reviewer has properly complied with ss 140, 141 and 144 of the Act and that those sections have been correctly interpreted and applied by a reviewer?

[36] This question appears to ask whether the Judge was right in the way he addressed the procedural irregularity in the review. The question, if properly framed, probably does raise a question of law – was for instance, the Judge wrong in concluding that s 146 – the three month deeming provision – did not apply to these facts?

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[10] See earlier discussion in respect of *Edwards v Bairstow* above n4 at [14] of this judgment.

[37] That said, I do not think that question is capable of bona fide and serious argument in terms of *Waller v Hilder* in this case. The initial review hearing was set down within the three month timeframe. The delay due to the failure to complete the hearing on the day fixed, was according to the reviewer, caused by the lengthy submissions Mr Howard produced on behalf of Mrs Howard. Contribution to delay disqualifies the applicant from the benefit of the section.[11] Even if that is wrong, the question is narrow and involves no wider interest sufficiently important to outweigh the cost and delay involved in a further appeal by special leave.

[38] The point is that even if the Judge was ultimately found to be wrong on the review procedure, it is still the case that the merits were reconsidered in full both in the second review hearing and in the District Court appeal. Mrs Howard pointed to no irregularity on review that caused some aspect of argument or evidence not to be put before the reviewer or Judge Ongley in the appeal. Whatever irregularity may have occurred on review was clearly overtaken by two full merits considerations of Mrs Howard's case.

Further questions posed in argument

[39] In the course of oral argument, Mr Howard attempted to recast questions 9 to 15 in order to better meet the legal question standard. He then added two further questions. These reworks and additions did not achieve his objective. Some questions were too general to be useful. For example, "Whether or not Judge Ongley wrongly approached his appellant task (sic) in the case?" Others (most in fact) were repetitive of earlier posed questions – for example, "Does the opinion of the respondent … always trump the medical judgment of Mrs Howard's GP?" And so on.

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[11] See s 146(1)(b).

Conclusion

[40] In the end, Mrs Howard is really seeking a second (in fact a third) full merits review. That cannot be achieved within the narrow ambit of an appeal on a question of law.

[41] The application for special leave must fail accordingly.

Williams J