IN THE DISTRICT COURT
HELD AT CHRISTCHURCH

Decision No. 104/2004

AI 278/03

UNDER	The Injury Prevention, Rehabilitation, and Compensation Act 2001
AND	
IN THE MATTER	of an appeal pursuant to section 149 of the Act
BETWEEN	**JOHN KEVIN WINDLE**
	Appellant
AND	**ACCIDENT COMPENSATION CORPORATION**
	Respondent

HEARING at CHRISTCHURCH on 4 December 2003

DATE OF THIS DECISION: 19 April 2004

APPEARANCES/COUNSEL:

Ms K Stringleman for appellant
Mr C J Hlavac for respondent

DECISION OF JUDGE P F BARBER

[1] This is an appeal from a 28 April 2003 decision of Reviewer W L Shirley dismissing the appellant's application for a review disputing his level of entitlement to weekly compensation as calculated by the Corporation.

Background

[2] The appellant is a 53 year old sheep scanner/meat inspector, who on 30 May 2002, slipped on tiles at his home and fell heavily on his right shoulder. He was subsequently diagnosed as suffering from a right rotator cuff injury.

[3] On 9 August 2002, the appellant lodged a claim for cover with the respondent Corporation. That application was accepted.

[4] On 18 October 2002 the appellant's GP, Dr Swan, provided a medical certificate (ACC18) stating that the appellant had incapacity for work and indicating that

the appellant would be unable to resume specified duties at work for 42 days from 18 October 2002.

[5] It appears that the appellant was able to return to work on 28 November 2002.

[6] For the past six years, the appellant has been regularly employed by ASURE New Zealand Ltd as a meat inspector at the Alliance Group's Mataura plant. He has been employed each year on a full time basis to work during the processing season which runs from early/mid November to the end of May/early June of each year. ASURE have stated that, had he been fit, the appellant would have been offered work for the 2002/2003 season for a period of 30 weeks from 13 November 2002.

[7] During the *"off"* season, the appellant is self-employed operating a small business in a 50% partnership with his wife. He has been so self-employed since 1 July 2000, and up to six people (including the appellant and his wife) undertake work for that small business which provides various services to farmers such as collecting the skins of dead animals.

[8] During the 2002 year, the appellant ceased work at ASURE in early June, and then continued to work in a self-employed capacity until the date of incapacity on 18 October 2002.

[9] During his period of incapacity, the appellant's self-employed business continued to operate and earn an income.

[10] The respondent subsequently carried out an assessment of the appellant's entitlement to weekly compensation for the period 18 October 2002 to 28 November 2002 on the basis that, immediately prior to the date of his incapacity, he was self-employed. The assessment was based solely on the appellant's self-employed earnings, under Clauses 37 and 38 of Schedule 1 of the 2001 Act, which amounted to $25,487 for the financial year ending 31 March 2002. Accordingly, his weekly compensation was assessed at $392.10 per week, i.e. 80% of the weekly rate of $490.13 in terms of annual earnings of $25,487.

[11] Inland Revenue Department records showed further earnings of $34,223 as an employee with ASURE. However, those earnings were not taken into account by the respondent in assessing the appellant's entitlements to weekly compensation.

[12] The appellant was advised of the Corporation's assessment on 4 November 2002.

[13] On 11 December 2002, the appellant lodged an application for review which was heard on 13 March 2003 and 4 April 2003. In a written decision dated 28 April 2003, the review officer dismissed the appellant's application for review and upheld the respondent's decision.

[14] It is helpful to set out as follows the reasoning of the Reviewer, namely:

> *"The Corporation have calculated Mr Windle's entitlement to weekly compensation based solely on his self-employed earnings.*

It is clear that he was also an employee from 11 November 2001 through to 6 June 2002.

Although his injury occurred on 30 May 2002, he did not have incapacity until 18 October 2002, some four and a half months after he ceased his employee work for the year.

Ms Stringleman in her submissions said that even although Mr Windle had earnings as an employee which were earned in the twelve months prior to his incapacity, he did not qualify to have those earnings assessed because he was not regarded by the legislation as having been in permanent employment immediately before his incapacity commenced.

She believed that the provisions of section 41 of the Act should apply, but this I believe only applies if Mr Windle had been in employment prior to the incapacity. It is clear that he was not in employment as an employee at that time.

It seems inequitable that there can be earnings from two sources during the financial year ended 31 March 2002, and that only one can be considered.

I am satisfied however that the Corporation have correctly assessed the entitlement to weekly compensation following incapacity following injury, using self-employed earnings only.

Mr Windle was not an employee immediately before the incapacity occurred and therefore those earnings cannot be considered.

The application for review must therefore be dismissed."

The Statute

[15] Essentially weekly compensation is assessed in accordance with the provisions of Part 2 of Schedule 1 of the Injury Prevention, Rehabilitation and Compensation Act 2001 ("the Act") and the clauses relevant to this appeal are:

Clauses 33 and 34 - employee in permanent employment
Clauses 35 and 36 - employee not in permanent employment
Clauses 37 and 38 - self-employed claimant
Clause 41 - aggregation of calculation for multiple employment situations

[16] I accept that these provisions largely mirror those contained in clauses 8 and 9 (re 33 and 34), 10 and 11 (re clauses 35 and 36), 14 and 15 (re clauses 37 and 38) and 17 (clause 41) of Schedule 1 of the 1998 Act so that cases decided under those provisions of the 1998 Act are relevant to the present issues.

Reasons for Decision

[17] I am most appreciative of the comprehensive submissions from each advocate but I am satisfied that the reasoning and decision of the Reviewer is correct.

[18] Clauses 33, 35 and 37 make it clear that it is a claimant's occupation status immediately prior to the date on which his or her incapacity commenced, which is relevant for the purpose of assessing calculation of weekly compensation.

[19] Clauses 33 and 34 apply where, immediately before the date of incapacity, a claimant was in permanent employment and receiving earnings as an employee from that permanent employment. *"Permanent employment"* is defined in clause 33(3) as where, in the opinion of the respondent Corporation, a claimant would have continued to receive earnings from that employment for a continuous period of more than 12 months after the date upon which his or her incapacity commenced, if he or she had not suffered a personal injury.

[20] The appellant does not meet the requirements to be categorised as a permanent employee in terms of clause 33(3). Although he is a permanent employee in the eyes of his employer, he receives earnings only during the processing season which is approximately 30 weeks from November to June each year. However, in terms of section 33 he would not have received earnings for a continuous period of more than twelve months after the date on which his incapacity commenced.

[21] Although he had earnings as an employee which were earned in the twelve months prior to his incapacity, the appellant does not qualify to have these earnings assessed, because he is not regarded by the legislation as having been in permanent employment immediately before his incapacity commenced.

[22] Clauses 35 and 36 apply where, immediately before the date on which his or her incapacity commenced, a claimant was an earner, but not in permanent employment.

[23] Clause 35(2) states that if, in the opinion of the respondent Corporation, a claimant would not have continued to receive earnings from his employment for a continuous period of more than twelve months after the date of commencement of incapacity (if he had not suffered the personal injury), the employment is not permanent employment. Therefore, the appellant's employment situation is regarded by the legislation as *"not permanent employment."* As the appellant's incapacity commenced during the off-season at the meat plant, he did not have earnings as an employee (from employment that was not permanent employment) immediately before his incapacity commenced. The respondent correctly determined that his employment earnings from ASURE could not be included in the assessment of his weekly compensation pursuant to clause 35.

[24] The appellant does not fall within the ambit of either clauses 33 and 34, or 35 and 36.

[25] Clauses 37 and 38 apply to a claimant who had earnings as a self employed person immediately before his or her incapacity commenced. Those clauses 37 and 38 apply to the appellant. Immediately before the date on which the appellant's incapacity commenced, he was a self-employed person. His earnings as a self-employed person for the previous tax year were $25,487.

[26] It is submitted for the appellant that clause 41 could be applied to his situation. Clause 41 reads:

41 Aggregation of calculations for multiple employment situations

(1) If a claimant would have more than 1 amount of weekly earnings from different employment situations because of the operation of any of clauses 34, 36, 38, or 39, the claimant's weekly earnings are calculated by doing the relevant calculations under those clauses separately and then aggregating the results.

(2) However, a claimant's weekly earnings calculated under clause 34 or clause 36 must not be aggregated with the claimant's weekly earnings under clause 39, if the claimant's weekly earnings under clause 9 are his or her earnings under clause 34 or clause 36.

[27] Clause 41 is intended to apply to the situation where, immediately prior to the date of his or her incapacity, a claimant is in receipt of more than one amount of weekly earnings from different employment situations. Clause 41 sets out the way in which such multiple employment situations are to be considered when assessing a claimant's entitlement to weekly compensation. That is not the situation here. Immediately prior to the date of his incapacity, the appellant was only in one employment situation, being that of a self-employed person. Accordingly, clause 41 does not apply. It needs to be amended to provide in clause 41(1) that there is to be aggregation of all employment earnings in the year prior to incapacity.

[28] Having ascertained that the appellant falls within clauses 37 and 38, the question is whether the respondent has correctly applied those clauses in calculating the appellant's entitlement to weekly compensation.

[29] Pursuant to clause 37(3), because the appellant's income tax return for the year ended 31 March 2003 was not available, his income tax return for the year ended 31 March 2002 is to be used. As indicated earlier, the appellant's self-employed earnings for the financial year ending 31 March 2002 amounted to $25,487.

[30] Turning then to the application of clause 38, in assessing the appellant's entitlement to weekly compensation for each of the four weeks after the first week of incapacity, the respondent has adopted the formula set out at clause 38(2) by dividing the appellant's $25,487 earnings as a self-employed person in the relevant year by the number of weeks in that year (52) to reach a weekly compensation figure of $392.10 per week (i.e. 80% of the weekly rate of $490.13). I consider that this is the appropriate calculation to be used as it is greater than the amount of minimum weekly earnings set out at clause 38(3).

[31] In determining the appellant's relevant rate of weekly compensation after the first four weeks of incapacity, the respondent has continued to use the same figure as that calculated for the first four weeks pursuant to clause 38(4)(b). This is the appropriate method of calculation on the basis that the relevant year (the year ended 31 March 2002) was not the first year during which the appellant received earnings as a self-employed person.

[32] Accordingly, the Corporation has correctly calculated the appellant's entitlement to weekly compensation.

[33] The position in which the appellant finds himself is not novel. The same situation arose in both Beatty (340/00) and Carr (131/00). In those cases Judge Beattie noted the differences between provisions of the 1992 and 1998 Acts in that the 1992 Act contained provisions more "*benevolent"* to persons in the claimant's position of having income from two separate employment statuses in the preceding financial year. His Honour noted in Beatty (at page 8) that:

> *"The appellant has every reason to feel he has been hard-done-by but the provisions of the Act are clear and it is not the function of this Court to import into those clear provisions any ameliorating implied terms or conditions when the meaning of the relevant clauses are clear and plain.*
>
> *The lesson to be learned is that persons who oscillate between the status of self-employed and employee in the course of their work require income protection insurance if they are to be fully compensated during any incapacity."*

[34] That approach seems correct to me. The respondent Corporation and this Court are required to apply the legislation, irrespective of whether this would appear to create a situation of *"unfairness"*. Where the legislation is clear, as it is here, there is simply no basis for asserting that it should be interpreted in any other way.

[35] With reference to Judge Beattie's comments regarding the prudence of income protection insurance, I understand that, as a self-employed person, the appellant is able under section 208 of the Act to purchase additional weekly compensation cover. On 13 August 2002 subsequent to the date of his accident (but before the date of incapacity), the appellant did obtain a Cover Plus Extra policy. However, because this post-dated his accident, it cannot be used for weekly compensation purposes in relation to this claim.

[36] I agree with Ms Stringleman that the appellant has been severely disadvantaged by the assessment of weekly earnings for the six week period he was unfit for work, and that the assessment is inequitable.

[37] During the full twelve month period immediately preceding his period of incapacity, the appellant was an earner with earnings from his employment with ASURE and earnings from his self-employment making up his total income from this period.

[38] The appellant has had the same earnings situation for the last six years. In respect of each of those years he has paid quite substantial ACC levies on his total income comprising his earnings as an employee and his earnings from self employment.

[39] Despite this, when the respondent assessed weekly earnings in respect of the appellant's period of incapacity, the calculation was based only on his self-employed income for the year ending 31 March 2002:

$25,487.00 ÷ 52 = $490.13 (only 80% is paid weekly compensation)

[40] Had the appellant's total earnings for the twelve months ended 31 March 2002 been used as the basis of the calculation the result would have been considerably different:

$60,070.00 ÷ 52 = $1155.19

[41] A weekly compensation assessment in respect of an earner who has earnings from self employment only for the twelve month period prior to incapacity, or in respect of an earner who has earnings as an employee only for the twelve month period prior to incapacity would in both cases be based on the full twelve month period. The appellant has been treated differently because his earnings are derived from two different sources, and earnings over seven months of his relevant working year have been ignored.

[42] The respondent correctly applied the provisions of clauses 37 and 38 to the calculation of the appellant weekly compensation. In terms of clause 37(1), he had earnings as a self-employed person *"immediately"* before his incapacity commenced, and the respondent Corporation assessed his weekly earnings in accordance with clause 38, by determining his earnings as a self-employed person in the relevant year (2002), and dividing those earnings by 52.

[43] Whereas subclause 36(3)(c), which covers non-permanent employees, allows this divisor of 52 to be reduced if the person had earnings as a self-employed person for a period during the twelve month qualifying period, there is no directly comparative provision in respect of self-employed persons. Clause 38(4) does provide for the divisor of 52 to be reduced, but only for a person in the first year of self employment. Obviously, this provision does not apply to the appellant.

[44] Clearly the legislation does not provide specifically for the appellant's earnings/employment situation. I accept that by only applying clauses 37 and 38 an artificial and anomalous result is achieved in respect of his weekly compensation. But for the fact that his earnings are derived from two sources, he is no different to a full-time employee or a full-time self-employed person, but the result of the assessment is a significantly lower result compared with either a full time employee or a full time self-employed person with the same level of earnings. There seems to be a gap or lacuna in the legislation so that the appellant's earning situation is not covered adequately.

[45] In last financial year preceding his incapacity, the appellant's average weekly earnings from both employment and self-employment were $1155.19. The assessment based on self-employed earnings only, gives an average weekly earnings figure of $490.13 as the base for compensation of 80%. This illustrates that this man who has been fully employed for the last twelve years has not been compensated fairly and properly in line with the income from the overall employment which he has lost because of his injury.

[46] The appellant is not a person in transition from one type of employment to another, but has derived earnings from both the same employment and the same self-employment for the twelve years prior to his injury and subsequent incapacity.

[47] It seems unjust to only assess the appellant's weekly compensation on the basis of his self-employment earnings only. It seems most unlikely that it was the intention of the Legislature to so confine the assessment of the appellant's earnings where all premiums and levies have been paid on both lots of income.

[48] I realise that the final submission for the appellant is that this matter could be resolved simply by following the provisions of s.41 which allow for the aggregation of earnings from different employment situations. However, as explained above, the legislation does not permit this.

[49] I understand that there are a number of other meat inspectors in a similar predicament to that of the appellant. I can only record that I find this situation to be quite unfair to the appellant and that seems to be the view of both counsel in this case. However, this Court must comply with the legislation referred to above and does not have a discretion to go behind the precise wording of that legislation. I am bound by it as were the respondent and the Review Officer. As I have indicated above, and with specific reference to clause 41(1), it may well be that Parliament needs to address the said lacuna or gap in the legislation to enable a fair calculation of relevant earnings (for compensation purposes) for people who in the course of any year rely on a mix of employment income and self-employed income.

[50] For the reasons outlined above, this appeal is hereby dismissed.

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Judge P F Barber
District Court Judge
WELLINGTON