Proposed amendments to the Accident Compensation (Review Costs and Appeals) Regulations 2002

Submission to MBIE from Schmidt and Peart Law

4 April 2022

SCHMIDT & PEART LAW
Office/Courier: Suite B, 1 Robert Street, Ellerslie, Auckland 1051
Post: PO Box 11682, Ellerslie, Auckland 1542
Telephone: 09 636 6010
E**mail**: admin@schmidtpeart.co.nz

Introduction

1. At Schmidt and Peart Law, we practice extensively in accident compensation law and regularly appear at review hearings on behalf of claimants, unions, and employers. We have significant experience in the District Court, High Court, and Court of Appeal on ACC matters. We currently have over 100 active ACC cases.

2. We have been provided with a copy of the New Zealand Law Society ACC Committee's submissions on the proposed amendments to the review costs regulations. We support those submissions. Those submissions provide comprehensive answers to the questions posed by MBIE.

3. In our submission we have not followed the question-and-answer format provided by MBIE. The reason for this is that we believed it important to provide evidence on the amount of work involved in preparing for complex reviews.

4. Our view is that whatever the final format of the different cost categories, there should be a category for complex reviews where the standard for an award of costs is "reasonable costs".

5. What amounts to a complex review and what costs are reasonable should be determined by the reviewer, considering the complexity of the matter, the need for specialist representation and the actual costs incurred by the applicant

The purpose of the review process

6. The review hearing is the primary hearing for accident compensation

disputes. This is the hearing where claims for cover and entitlements (e.g., lump sum, weekly compensation, attendant care, treatment, and rehabilitation) must be canvassed in full.

The variety and complexity of matters at review

7. Review hearings involve a broad range of matters from simple through to very complex. A major difficulty with the existing rigid cost structure is that a reviewer is limited to awarding the same amount of costs regardless of complexity. Set out below are some examples of District Court appeals that came out of review hearings. These illustrate the complexity of matters that go to review:

- "Gradual process injury" (solvent neurotoxicity) – in *ACC v Scoullar* [2005] NZACC 366 the District Court considered the case of a spray painter who suffered numerous physiological and psychiatric symptoms linked to his work. There was conflicting evidence provided by two leading specialists, and the claim was opposed by the employer. The District Court approved the approach of the reviewer, who had considered all the medical records, heard evidence from the claimant and decided that the legal threshold for cover had been met.

- "Informed consent to treatment" – in *Tooley v ACC* [2003] NZACC 216 the Court held that on an issue of informed consent, it was necessary for the reviewer to see and hear the conflicting evidence of the medical team. The Judge doubted this could be achieved by teleconference. The matter was referred back to review for a full hearing, including witnesses and further medical reports.

- "Medical misadventure/treatment injury" – *Blair v ACC* [2004] NZACC 162 was an appeal upholding a review where a finding of medical error had been made against a surgeon in respect of a cancer-related procedure. The review involved the claimant's widow, her representative, two doctors and their representatives, and ACC and its representative. Three parties gave evidence and were cross-examined. Expert evidence was provided by three independent specialists in written form.

- "Vocational independence" – In *Ofa v ACC* [2013] NZACC 291 the Court considered a decision where ACC asserted the appellant could do eight different jobs for 30 hours or more per week. There were difficult questions about the nature and timing of rehabilitation, the appellant's literacy in English, his transferable occupational skills, and his medical capacity to do the jobs. Competing specialist evidence was required on all points. The appellant also had to obtain separate literacy and numeracy testing via adult literacy providers and give testimonial evidence on all of this. The review involved extensive evidence covering a multitude of different bases.

8. In reviews involving historical attendant care, the reviewer will need to assess what level of care an injured person required, what periods of time the care was required, and who provided this care. Examples of cases that moved through the review and appeal process are *Estate of Simpson v ACC* [2007] NZCA 247 and *Campbell & Handley v ACC* [2004] NZCA 39.

9. With respect to historic weekly compensation reviews, the reviewer will need to consider a person's pre-accident employment, their level of earnings, the relevance of post-accident earnings and the issue of

incapacity. Often there will be different periods of incapacity and different occupations over many years. Establishing causation and incapacity for work often requires multiple reports from different specialists.

10. If cover is established for historic serious injury, years of support will be in issue. This could involve weekly compensation, attendant care, lump sum compensation and cover for additional injuries, including mental injury. Accordingly, many hundred thousand dollars of past and future entitlements can be in issue in these reviews.

11. Many seriously injured claimants will not be able to afford treatment if they cannot establish that their condition was caused by injury. Spinal surgery, for example, costs tens of thousands of dollars. Entitlement to surgery is a common issue in review hearings.

12. Another significant entitlement dealt with at review is social rehabilitation. Social rehabilitation can include attendant care, modification to housing, childcare, home help, aids and appliances, and various forms of therapy, such as speech therapy.

13. Similarly, entitlement to vocational rehabilitation, which enables claimants to retrain for a new job following injury, is the subject of review hearings. The entitlement to vocational rehabilitation is a complex assessment that requires several statutory tests be satisfied. A claimant who challenges a decision to decline retraining would find it extremely difficult to succeed at review without the assistance of a lawyer. By way of example, see *Jenns v ACC* [1998] NZACC 259.

14. As the examples illustrate, complex reviews can involve very significant sums of money, difficult issues, testimonial, and expert evidence. The proposed costs categories do not reflect the complexity or work involved

in these hearings. As the examples illustrate, some of these hearings are at the most complex end of civil litigation, and that needs to be recognised in the review costs regime.

The importance of proper procedure at review

15. Although the review hearing is informal with respect to procedure it is a substantive hearing that must comply with the rules of natural justice. A lawyer representing a claimant is obliged to prepare for the hearing to a professional standard. Although the reviewer's role is inquisitorial, the reality is that reviewers do not have time to conduct investigations into complex claims and will rely on the applicant's lawyer to perform this role. In *Wikeepa v ARCIC* [1998] NZAR 402, the Court said (at pp 405-406):

> The whole concept of the review procedure is to revisit the issue which is the bone of contention as raised by the claimant and look at it afresh having regard to any new evidence or information which might be pertinent to the particular issue that needs to be determined. I find that the review procedure is more than simply casting an eye over the first instance decision of the Corporation to see whether the particular officer who made the decision got it right.
>
> The review procedure allows for representation by the interested parties, the making of submissions and the giving of evidence and the whole issue which is the subject of the review hearing is alive and the Review Officer who conducts that hearing has the power to substitute his own decision for that which had earlier been made.

16. The natural justice standard mandated in the Act is important. In *Berkahn v ACC* [2006] NZACC 232, Judge Ongley said that a reviewer should be assiduous in ensuring the claimant had an opportunity to present all his evidence and argument, and to respond to evidence produced by the opposing party.

17. The District Court has emphasised the importance of the review as the primary hearing and, as such, the place where issues of credibility should

be resolved. In the decision of *McKinney v ACC* [2006] NZACC 167, the District Court set aside the review decision because it did not address credibility issues that were at the heart of the issue. The reviewer was directed to set aside a reasonable amount of time to hear testimonial evidence and allow for cross-examination of witnesses.

18. In 2020 our firm was involved in a birth injury case at review where three experts gave testimony in person and at least five others had given evidence on the papers. The parents gave oral evidence at the hearing. The hearing lasted seven hours.

19. The essential nature of the review process, particularly in complex cases, has been the subject of judicial comment by the High Court and Court of Appeal. For example, the Court of Appeal in *ACC v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 emphasised (at [64]) that:

> The inquisitorial approach should generally mean that, to the extent this is practical, all aspects of the claim (including causation) have been investigated by the Corporation before matters reach the courts. If that occurs, the situation in *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 (HC) would be avoided. In that case, the medical evidence at the review stages had not been directed to the legal test of causation. As a consequence, a rehearing was ordered in the District Court.

20. In *Wildbore v ACC* (High Court Wellington, 22 November 2007, Clifford J) the High Court discussed the role of the reviewer at paragraph 23 in these terms:

> [23] …. The roles of the Reviewer and the Court are distinct. The function of the Reviewer is to review the decision of ACC in its entirety, by setting aside ACC's decision and making the decision afresh. It is given the statutory power to examine anew all the relevant information, including any new information that might be produced, and to come to its own decision.
>
> [24] The District Court, on the other hand, is exercising its function as an appellate Court. It is to consider the appeal by way of rehearing, according to the provisions of the District Courts Act. It is well

> established that on such an appeal the Court is to give due weight to the opinion of the maker of the decision under appeal.

21. The superior courts rely on the review process to establish the relevant facts and legal issues. The limitations set by the proposed review costs regulations are, with respect to complex cases, at odds with these decisions. The costs regulations should align with these judicial determinations about what complex reviews involve.

Work involved in taking a case to review

22. In view of the complex issues of fact and law that can arise and the requirement to follow natural justice, a good deal of work is involved for lawyers representing claimants. Set out below is an outline of what is required.

23. Many complex claims files are large and date back many years. This is particularly true of claimants who suffered serious injuries from childhood and claimants who have suffered from multiple injuries due to serious accidents, such as a car crash. In these cases, the evidence will encompass several hundred pages. Such evidence is not indexed. The only way to review the material is to read it. Although an experienced solicitor can do this efficiently, 5 to 10 plus hours of work can be required to extract and collate relevant evidence. That work is essential if a claimant is to be properly represented at review.

24. Because the review hearing is the primary hearing at which witness evidence should be presented, it is necessary to draft statements of evidence for all person's giving evidence – the applicant, family members and eyewitnesses (such as work colleagues). Some witnesses will also need to be prepared for cross-examination.

25. Any expert evidence must be obtained before the hearing. This involves reading the existing specialist reports, instructing a specialist, drafting and a formal letter of instruction and sometimes clarifying the evidence with the expert. An instruction letter sets out the background, the medical evidence, explains the relevant statutory criteria, and sets out the questions to be answered by the specialist. In most cases a bundle of documents is also provided to the report writer.

26. Preparation for the review will require drafting written submissions. This involves setting out the issue, the factual background, the testamentary evidence, the medical evidence, the relevant statutory provisions, case law and the argument. Written submissions for complex cases are often 20 to 30 pages long and can take15 to 20 hours to draft. Issues of statutory interpretation can be crucial to success or failure at review. Accordingly, a lawyer representing a claimant needs to review the relevant sections and the case law when drafting submissions.

Submissions on review costs for complex reviews

27. The difficulty with the proposed review costs regime is that although the proposal recognises that there are complex cases, it does not make sufficient allowance for the work involved in complex cases. The proposal does not reflect the reality or importance of complex hearings in terms of their impact on claimants. A complex review will often be the most important civil dispute a New Zealander will be involve in.

28. It isn't sensible or fair to cap costs when it comes to complex reviews. Rather, what costs are appropriate needs to be determined by reference to the individual case. Awarding costs on this basis for complex reviews (reasonable costs) was the practice under the Accident Compensation Acts of 1972 and 1982 and this worked well for more than 20 years.

29. It is worthwhile recalling that complex review hearings often take place after a separate conciliation or mediation process. There will have been an earlier opportunity to resolve the issue that went to a hearing. The award of reasonable costs for complex reviews is fair because ACC has made an incorrect decision that required a hearing to remedy. In addition, because ACC enjoys a statutory monopoly with respect to providing cover, there is little accountability for getting decisions wrong *except* the costs regime.

30. Finally, we observe that the Corporation is usually represented by counsel at complex reviews and their work is fully funded by the ACC system. ACC would object to the amount it pays its lawyers being capped. The policy document does not discuss this issue, but there is an obvious unfairness where, with respect to complex claims, one side is fully funded (whether successful or not) but claimants must pay most of their own legal costs, even if they are successful.

31. The review costs proposal states that complex reviews take around 12 hours to prepare. This is an accurate average for most reviews but not for complex reviews. Complex reviews often take around 15 to 30 hours of work. The most complex reviews, such as birth injury cases, can involve 40 to 60 or more hours of work over several months, often 6 months to two years.

32. The cost proposal states that the standard hourly rate for counsel is around $200 an hour. With respect, that is not correct. The standard hourly rate for counsel acting on complex reviews is around $400 to $500 an hour. It is submitted that the hourly rate upon which complex reviews should be based should be $400 an hour.

33. The review costs proposal with respect to specialist costs should be similarly adjusted for complex cases. With respect to birth injury cases, both sides will often produce two or three reports and the cost involved would be in excess of $4,000.

34. We note that this proposal by MBIE follows on from Miriam Dean's recommendations in 2016 (nearly seven years ago) and refer to her concerns raised then. We also note that Judge Trapski commented on the costs available at review and appeal as part of his *Report of the Inquiry into the Procedures of the Accident Compensation Corporation* (1994). The section on "Costs of Review or Appeal" from the Trapski Report is included as an appendix to this submission. The issues raised by Judge Trapski in 1994 with respect to costs reflect those raised here and have remained unaddressed for 26 years. That does not reflect well on New Zealand and is evidence of a significant departure from the principles of the Woodhouse scheme.

35. The present costs system makes it difficult for claimants to access representation, particularly so in complex matters. The number of lawyers practicing in this area of the law has greatly diminished. The quantity and quality of representation will continue to diminish if steps aren't taken to remedy the problem.

36. Awarding reasonable costs for complex matters, where the reviewer determines that this was necessary, is a realistic and affordable solution to the present costs regime, which is manifestly unfair, out of step with reality, and inconsistent with the Woodhouse principles upon which the scheme is founded.

37. In summary, our submission is that a separate cost category should be in place for complex reviews. What amounts to a complex review and what

costs are reasonable should be determined by the reviewer, considering the complexity of the matter, the need for specialist representation and the actual costs incurred by the applicant.

Dated 4 April 2022

……

Philip Schmidt & Hamish Peart
Partners, Schmidt and Peart Law

Appendix: Extract from Judge Trapski's *Report of the Inquiry into the Procedures of the Accident Compensation Corporation* (1994), pp.101-04

Costs of Review or Appeal

I can however report that a number of the claimants suffered because they were forced to pursue their rights of review or appeal. It cost them to obtain a valid decision in the face of an incorrect decision after the doctor's examination and report. Others suffered detriment because they decided for various reasons not to pursue their rights of review or appeal; they suffered because the decisions they were given did not accord with their rights under the statute.

In the case of the first group, those who pursued their rights and obtained relief, their actions were not without suffering or loss. Because of the delays involved in effecting a correction they all unnecessarily suffered a loss of time, effort, security and peace of mind inherent in any review or appeal process. But these people also suffered a financial loss in not being able to recoup the cost of having to take that step. The most visible of these costs was the fees paid to a third party to assist them in processing their review or appeal. The claimants received a contribution to those costs but that in no way covered the actual cost in which they became involved.

In most cases the contribution received from the Corporation was between $150.00 and $250.00 but the cost to the claimant was many times that amount. In one case a claimant paid an advocate $4,478.25 to correct a decision on review and received a contribution of $175.00. In another case a claimant paid a solicitor $1,210.00 to get her compensation payments reinstated and received a contribution of $250.00, leaving her to face a deficit of $960.00 from her meager savings. Another woman paid her solicitor $1,219.85 and received a contribution of $250.00. These cases are typical of those I saw. In none of the cases I saw could it be said that the bill rendered by a solicitor was anything but reasonable. They compared more than favourably with the fees charged by "compensation advocates", usually legally trained but non-practising solicitors whose work was confined solely to this jurisdiction. Their fees were always far in excess of those charged by solicitors.

All this raises a point of principle; one that has been argued on many occasions. Should a claimant suffer any financial loss in taking a decision on review where the original decision was wrong; where it was the Corporation which drove the process which resulted in that wrong decision; where the process which resulted in that wrong decision was driven in a wrong direction and often for the wrong reasons; where the resulting decision was entirely the fault of the Corporation It is often claimed that in these circumstances the Corporation or the party who initiated the error should bear the entire cost of correcting that error.

As a matter of logic it is difficult to fault that line of thinking but it suffices to say that traditionally that view has not found favour with the courts in this jurisdiction or in any other jurisdiction of a similar nature. The defaulting party is generally

required only to make a contribution to the successful party's costs, and successful party is always left dissatisfied with the result. The usual comment is – the little man can never win against the big corporation, especially where a monopoly is involved.

Personally I have real sympathy for that view, especially in those cases where compensation payments are involved over a long period of time and where the claimant is of necessity and compulsorily losing 20% of their income in any case, even when they win. But rarely if ever is such a plea successful.

That aside, I am of the view that the Corporation is unduly niggardly in the scale of contribution it makes on review. In the very early stages of its existence the Corporation declined to make any contribution towards a claimant's legal costs. It took the view that the review system was simple, one which did not require the involvement of the legal profession, and it declined to make any contribution to a claimant's legal costs on review. It soon retreated from that position and agreed to make contributions towards legal costs but these were minimal, even parsimonious.

There is a great deal of legal involvement in these matters and if the Corporation is unable to get it right the first time, it ought in the main bear the cost of the consequences. If that was the case it may encourage the Corporation to require claims officers to obtain greater legal input at the stage of initial decision-making instead of proceeding to make perverse or inadequate decisions without legal input.