

Review No.:

Claim No.:

Application for Review

by

Mr Chapman

A Decision made under the Accident Compensation Act 2001
("the Act")

Held at	Penrose.
Date of hearing	8 August 2011. Concluded 6 October 2011.
Reviewer	M H Donovan
Present	Neither Mr Chapman (applicant) nor his advocate, Mr McMillan attended the hearing. Mr Joe Cowans representing ACC, Mr Adam Sandford observing.
Issue	Whether ACC's decision dated 18 January 2011 declining housing modifications was correct.

Decision

I **quash** ACC's decision.

Costs	Representation costs: \$166.94.
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Follow-up action	As set out on pages 1-2 of this Decision.
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DECISION

(Made under Part 5 of the Act)

Issue

Whether ACC's decision dated 18 January 2011 declining housing modifications was correct. The housing modifications which had been sought and declined were for the windows in Mr Chapman's kitchen to be lowered to allow him to see out from his wheelchair.

Outcome

I **quash** ACC's decision and as provided for in section 145(4)(a) I substitute my decision finding that Mr Chapman is entitled to have ACC provide housing modifications to meet Mr Chapman's injury-related needs in observing the rear-section and carport at his house, as well as his injury-related security needs. Mr Chapman is therefore successful in this review.

I find that ACC has wrongly failed to exercise its discretion to provide Mr Chapman with further housing modifications, despite his being assessed as having injury-based needs for this modification. I therefore direct ACC to action those recommendations as follows:

- Commence a trial of a convex mirror placed to allow overview of the rear section/carport;
- At the same time, secure comparative quotes for the modification (enlargement) of the existing window and the installation of a fixed pane window to be used in the event that the mirror trial does not, in fact meet Mr Chapman's needs;

- Fit security spy-holes to the front and rear door of Mr Chapman's house.

In addition, I further direct that ACC arrange for a security audit to be undertaken for Mr Chapman's property, including the rear section and carport, to ensure Mr Chapman's security needs due to his injury-limitations are being fully addressed.

Background

Mr Chapman's covered claim

Mr Chapman has cover for an incomplete T5 spinal cord injury as a result of a motorcycle accident in June 1974. As a result of his injuries from the accident Mr Chapman has lost sensation and functional mobility below the level of his injury (essentially from below the level of his lower chest) and is confined to a (self- propelling) wheelchair.

Mr Chapman is reported to be independent in all his self-cares. He does however require assistance with heavy domestic tasks, and also requires assistance with meal preparation and other tasks he would usually perform when he requires periods of bed rest. He has ACC-funded support for these tasks. He has a modified vehicle to use for driving in the community (also ACC-funded).

Mr Chapman lives in a Housing New Zealand (HNZ) property in an area where he has a strong social and family network. ACC has previously funded appropriate modifications to this house to enable Mr Chapman to live there independently. These modifications involved improving access to and from the house, within the house, changes to the bathroom to enable Mr Chapman to access the shower and toilet facilities independently, alterations to the height of kitchen benches, sink and cooker to allow Mr Chapman to use these independently.

What led to this review?

On 3 November 2010 Mr Chapman was assessed in relation to a request for further housing modifications. The assessment was conducted by Gill Crosby, an occupational therapist from FAST. The issue for assessment was Mr Chapman's request for further modifications in his kitchen to enable him to see out of the windows in his kitchen.

The main kitchen windows were not accessible to Mr Chapman, being above his head height and therefore only affording him a view of the upper half of the rear fence of his section. Another window, to the side, allowed some limited view of part of the carport where Mr Chapman's car was stored.

The assessor noted that Mr Chapman's reasons for seeking a modification were:

1. security: Mr Chapman was unable to observe anyone trespassing on the rear of his property, and was unable to adequately observe the area where his car was parked;
2. social interaction: because he was unable to see out his kitchen windows he was unable to see friends and children in the garden unless he went outside to do so.

The assessor made the following recommendations to address these interests:

1. installation of a parabolic mirror to allow an overview of the rear of the section and the carport. This would need to be properly trialled to be sure that it did meet the need identified by Mr Chapman;
2. lowering the height of the existing rear windows by increasing their size (i.e. increasing the existing size of the current functioning windows);
3. installation of an additional (non-opening) window to allow an overview of the rear of the property and the carport;
4. installation of spy-holes in the front and rear house doors

Ms Crosby noted that it was Mr Chapman's preference to have option

3. She recommended that a comparative quote be obtained to determine the best option between options 2 and 3.

ACC's decision

ACC referred the assessment report, and its recommendations, to the Manager, Housing and Vehicle Modifications. It addressed the request as arising solely on the basis of security needs. ACC concluded that no action should be undertaken in respect of this request because “security is a common social need but not an injury related need and therefore there can be no entitlement.”

On 13 January 2011 ACC wrote to Mr Chapman declining his request for housing modification, for the reasons noted above.

Mr Chapman disagreed with that decision and brought the present review.

The review hearing

I opened the hearing on 8 August 2011. ACC attended and presented its submissions. Neither Mr Chapman nor his advocate, Mr McMillan attended. Mr McMillan advised that his written submissions were to be forwarded but due to technical difficulties he was unable to print them on the day of the hearing.

I therefore adjourned the hearing and provided the parties with a timetable for exchange of written submissions. The parties provided submissions as directed and I concluded the hearing on 6 October 2011.

The law applying to this issue

Under section 81 ACC is liable to provide social rehabilitation for certain matters, known as “key aspects”. Amongst these is housing modifications. The matters to be considered in the provision of any of these key aspects are set out at section 81(3) and (4) and section 84, as follows:

Section 81(3) The Corporation is liable to provide a key aspect of social rehabilitation to a claimant—

- (a) if the conditions in subsection (4) are met; but
- (b) not earlier than a date determined in accordance with section 83.

...

(4) The conditions are—

- (a) a claimant is assessed or reassessed under section 84 as needing the key aspect; and
- (b) the provision of the key aspect is in accordance with the Corporation's assessment of it under whichever of clauses 13 to 22 of Schedule 1 are relevant; and
- (c) the Corporation considers that the key aspect—
 - (i) is required as a direct consequence of the personal injury for which the claimant has cover; and
 - (ii) is for the purpose set out in section 79; and
 - (iii) is necessary and appropriate, and of the quality required, for that purpose; and
 - (iv) is of a type normally provided by a rehabilitation provider;

Section 84 Assessment and reassessment of need for social rehabilitation

(1) An assessment under this section assesses a claimant's need for social rehabilitation and identifies the specific social rehabilitation that the claimant needs.

(2) The Corporation may—

- (a) do assessments and reassessments, itself, by using appropriately qualified assessors employed by the Corporation; or
- (b) appoint and pay as many appropriately qualified assessors as it considers necessary to do assessments and reassessments; or
- (c) both.

Sub-section 81(4) sets out the matters that ACC must have regard to in any assessment of need, such as the claimant's level of independence before and after the personal injury, the likely rehabilitation outcomes, any alternatives and options, the claimant's geographical location, and other matters relative to the claimant.

Clause 18 of the 1st Schedule to the Act sets out matters ACC must consider in determining an application (whether or not to provide or contribute to the cost of this key aspect) for home modifications:

- The rehabilitation outcome;
- The claimant's difficulties in accessing, enjoying 'reasonable freedom of movement' and living independently without the proposed modifications;
- How long the claimant is likely to live in their home, and how long s/he is likely to suffer from the difficulties discussed above;
- The cost and benefit to the claimant of the proposed modifications;
- Whether the owner (if not the claimant) agrees to the modifications being done; and
- The likely cost of reasonable alternative living arrangements.

Relevant case law

In **Waldie (183/98)** Judge Beattie noted that the Court would only intervene in the exercise of discretion if one of the following three failures had occurred:

1. Where discretion is exercised on a wrong principle or if ACC has ignored or misapplied a principle laid down in the statute.
2. Where the decision-maker took account of wrong considerations.
3. Where the decision is quite plainly wrong.

That approach has been followed in the case of **Waaka** (101/03). In that case, the court identified the main principle applicable to the exercise of discretion as follows:

As a matter of law, although this Court is hearing this appeal by way of rehearing, nevertheless it is an appeal against the exercise of a discretion and the clear principle of law pertaining to such appeals is that **such a discretion should not be interfered with unless it can be demonstrated that that discretion has been exercised on a wrong principle.** I find that it would require the appellant to demonstrate that the respondent had not complied with its statutory obligations when considering the appellant's application for attendant care or that having viewed the matter as a whole the Court could not accept that the decision was proper and fair.

In the court's view, due weight must be given to an assessor's report once they have visited the claimant and provided their professional opinion. In the case of **Woods** (320/03), the court commented:

The Court is only concerned with a capsule of time [covered by the period of time covered by the assessment report]. I have considered the assessment of [the appellant] and found it to be thorough and based on sound reasoning. As with other assessments which various other provisions of the Act require to be made by professionals, it should be the case that **such an assessment should not be disregarded unless there are clear and cogent reasons demonstrated for doing so.**

Analysis

In considering the provision of social rehabilitation, the overriding consideration is that set out in section 79, namely to "assist in restoring a claimant's independence to the maximum extent possible." While ACC may adopt policies and processes in the provision of social rehabilitation, and assessments conducted for the

purpose of determining needs, those processes cannot supercede the requirement in section 79.

Any assessment conducted by ACC must also direct itself to that requirement, and may not diverge, from that purpose. Section 81(4) and clause 18 provide the only framework that is to be considered in achieving that purpose.

In this case I find that ACC's decision declining to make any provision for Mr Chapman's request to be able to see the rear of his section is wrong and cannot be maintained.

I find that ACC was plainly wrong to decline to make any provision for Mr Chapman's need to see out into his rear section. Mr Chapman is clearly prevented from doing this activity by his injury. The injury-based need for him to mobilize in a wheelchair means he is below window-height in relation to the rear windows/rear section at all times when in the kitchen. The assessor has offered a range of options, yet ACC has not acted on any of them.

The reasons for ACC's decision to take no steps appears to rest on its view that one of the reasons identified by the assessor, the need to maintain security of the rear of the property through observation, was not an injury-related need because non-injured members of the community would have a similar need.

Such an analysis entirely ignores the fact that Mr Chapman has no capacity to even casually observe the rear of the section, as other members of the public can routinely do. Yet he is, due to the nature and extent of his covered injury, in a more vulnerable position in terms of his personal and domestic security when compared to the general public. I find that because of those injury limitations Mr Chapman is, in fact, in a lesser position as compared to the wider public. The provision of social rehabilitation is intended to address that deficit. Consequently, by disregarding that injury-related impact on his entitlement to security I find that ACC has failed to take a relevant consideration into account when declining to exercise its discretion to provide any housing modifications.

Further, I find ACC has wrongly confined its assessment of Ms Crosby's recommendations to only an issue of security. It is clear from the assessment report that a second basis was identified. This was Mr Crosby's interest in being able to fully engage with his family and social network when they visited him in his home.

Simply put, the report noted that Mr Chapman's ability to engage in this way when in his own home was not being maximised the greatest extent practicable (as required by section 79) because he was only able to enjoy his rear section, and any activities being performed there (whether positive or negative in nature) by going outside. That limitation was due to the combination of his being in a wheelchair and the height of the present windows looking over the rear section.

The assessor, Ms Crosby, proposed a number of options to meet that identified need. And, contrary to ACC's decision, Mr Chapman's preferred option was not to have the existing windows modified (by enlarging or lowering them) but rather to have a fixed pane window placed into the rear of the kitchen wall, so that both the carport and the rear section could be seen. The recommendation was for ACC to do a comparative costing of this option with the possible modification of the existing windows, to identify the most cost-effective option. But, as well, ACC was recommended to trial a convex mirror (which the assessor was uncertain would address Mr Chapman's identified needs).

I find that ACC has incorrectly failed to exercise its discretion to provide an key aspect of social rehabilitation to Mr Chapman. Applying the court's approach in Waldie and Waaka (above) I am able to set ACC's decision aside. I must now consider whether I am able to excise that discretion myself.

I find that I am, as I am able to rely on the Housing Modifications assessment report recommendations.

Conclusion

For the reasons set out above I quash ACC's decision and substitute my own decision.

Costs

I consider this review was reasonably brought. Therefore I award costs as follows, pursuant to the Injury Prevention, Rehabilitation and Compensation (Review Costs & Appeals) Regulations 2002 (as Amended on 1 October 2010):

Preparation and lodging of application for review:	\$116.94
Disbursements (photocopying, paper, ink)	\$50.00
Total	\$166.94



M H Donovan
Reviewer

Date: 2 November 2011

Appeal Rights

All parties have the right of appeal to the District Court. For further particulars, please see the accompanying letter.