

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

[2021] NZACC 12

ACR 178/18

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	EVAN MUDGWAY Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 24 September 2020
Held at: Napier/Ahuriri

Appearances: Ms Williams for the appellant
Ms Feltham for the respondent

Judgment: 12 January 2021

**RESERVED JUDGMENT OF JUDGE DENESE HENARE
[Claim for Cover for Personal Injury – sections 20 and 48 of the Accident
Compensation Act 2001]**

[1] The appellant, Evan Mudgway challenges the Corporation’s decision dated 18 May 2017 declining cover for an ulnar injury following an accident on 10 August 2016. The Corporation’s decision was upheld at review.

[2] Ms Williams and Ms Feltham filed an agreed statement of facts and issues on appeal, including a statement of the position of the parties, which are reproduced here.

Agreed Facts

[3] On 10 August 2016, Mr Mudgway sustained an injury while returning a heavy dumbbell to the rack at a gym.

[4] On 23 September 2016, Mr Mudgway's physiotherapist lodged a claim with ACC on his behalf for a "sprain tendon wrist or hand." The Injury Claim Form described the accident as "lifting heavy weights and twisted hand".

[5] On 23 September 2016, Mr Mudgway had an ultrasound of his right forearm, wrist and hand. The ultrasound was normal.

[6] On 27 September 2016, ACC granted cover for a right wrist sprain.

[7] On 2 December 2016 Mr Mudgway was assessed by Dr Oliver Jensen, plastic surgery registrar. He diagnosed, "right forearm ulnar nerve distribution motor weakness to FCU, FDS, FDP and thenar groups" and organised an urgent MRI scan.

[8] On 8 December 2016, Mr Mudgway had an MRI of his brachial plexus. The radiologist reported that no cause could be identified for Mr Mudgway's ulnar nerve symptoms.

[9] On 22 December 2016, Mr Mudgway requested cover for a right sided ulnar nerve injury.

[10] On 23 December 2016, Dr Gerard Walker, occupational medicine specialist, carried out a file review at the request of ACC. He noted that "the nature of the accident has not been well articulated" and there "is seemingly a mismatch between the apparently minor nature of the accident and the advanced nature of the neurological problem". He suggested that a specific diagnosis might be attainable by a more expert medical assessment, such as by a neurologist or neurosurgeon and that electromyography (EMG) studies should be sought.

[11] On 7 February 2017 Mr Mudgway applied for weekly compensation.

[12] Mr Mudgway was referred to Dr James Cleland, who examined Mr Mudgway and conducted electrodiagnostic studies. In a letter dated 24 February 2017, Dr Cleland stated that Mr Mudgway had no problem affecting his wrist, but the clinical features were consistent with a right C8 radiculopathy. He noted that this was "possibly due to rupture of perineural cyst at C8 nerve root and compression/demyelination". He said that the described accident of 10 August 2016 was likely to have caused Mr Mudgway's current condition.

[13] Mr Mudgway's file was then reviewed by ACC branch medical advisor, Dr Tony Haycock. On 30 March 2017, he advised that further investigation was required to obtain a definitive injury diagnosis.

[14] On 11 April 2017 ACC received further comment from Dr Cleland stating that he had reviewed the MRI scan and that the diagnosis remains that of right C8 radiculopathy,

[15] Possibly due to rupture of perineural cyst at C8 `nerve root and compression/demyelination. He said the dysfunction did not relate to other multifactorial problems with the cause considered to be compression of the C8 nerve root as a result of heavy lifting

[16] ACC obtained further advice from Dr Haycock, ACC branch medical advisor. On 28 April 2017, he advised that as Dr Cleland had stated there was no problem affecting Mr Mudgway's wrist that ACC ought to consider revocation of cover for the wrist injury. He also stated that there was no convincing medical evidence to attribute Mr Mudgway's disability to trauma of the neck and there was no reason to extend cover to include the neck.

[17] On 18 May 2017, ACC declined cover for a right ulnar nerve injury, on the basis that the medical information did not link that injury with the 10 August 2016 accident.

[18] On 22 May 2017, ACC issued a further decision declining Mr Mudgway weekly compensation.

[19] On 23 May 2017, Mr Mudgway filed an application for review.

[20] The review hearing was held in Hastings on 13 December 2017.

[21] In his decision dated 5 January 2018, the reviewer noted that in order to obtain cover, the evidence must establish that Mr Mudgway sustained a discrete physical injury caused by the accident event. He accepted that Dr Cleland was best placed to comment on the injury in this case because it is his area of expertise. However, the reviewer did not consider that Dr Cleland had identified a discrete physical injury. Although Dr Cleland had stated that the lifting event caused a compression of the nerve, causing Mr Mudgway's symptoms, he had not identified what physical damage was caused to the nerve. The reviewer concluded that the symptoms arising from the compression of the nerve were not, in themselves, sufficient evidence of personal injury. None of the other medical professionals had identified a new physical injury and the ultrasound and MRI did not identify any cause for Mr Mudgway's ulnar nerve symptoms. Accordingly, ACC were correct to decline cover for the additional injury.

Relevant statutory provisions

[22] Pursuant to s 48 of the Act, a claimant who wishes to claim under the Act must lodge a claim with the Corporation for:

- [a] Cover for his or her personal injury; or
- [b] Cover, and a specified entitlement, for his or her personal injury; or
- [c] A specified entitlement for his or her personal injury, once the corporation has accepted the person has cover for the personal injury.

[23] When a claim for cover under s 48, is lodged, the Corporation must decide whether or not to grant cover. If it accepts cover, the Corporation must provide information about the entitlements to which it considers the claimant may be entitled and facilitate the claimant's access to those entitlements;¹

¹ Section 50(1)(b).

[24] Pursuant to s 20(1) of the Act, a person will have cover for a personal injury if:

- [a] He or she suffers the personal injury in New Zealand on or after 1 April 2002; and
- [b] The personal injury is any of the kinds of injuries described in s 26(1)(a) or (b) or (c) or (e); and
- [c] The personal injury is described in any of the paragraphs in s 20(2).

[25] One of the types of personal injury described in s 20(2) is "personal injury caused by an accident to the person".

[26] "Personal injury" is defined in s 26 of the Act. Personal injury includes physical injuries suffered by a person, such as a strain or a sprain.² Physical injuries are those which have some appreciable and not wholly transitory impact on the person but which are not necessarily long-lasting or ones that cause serious bodily harm.³ A physical injury must involve physical damage or hurt, that is bodily harm or damage.⁴

[27] Accident is defined in s 25 of the Act. Pursuant to s 25(3), the fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.

Submissions of the parties

[28] Ms Williams submitted Mr Mudgway's position is that he sustained an injury in the 10 August 2016 accident. The initial diagnosis was a sprain or possible ulnar nerve injury, but Dr Cleland has now diagnosed root nerve damage of the C8 and stated that was caused by the accident. More weight should be put on Dr Cleland's report, because he is a specialist in the area and he actually examined Mr Mudgway. Even if an initial diagnosis is incorrect, it does not mean a claimant does not have

² Accident Compensation Act 2001, s 26(1)(b).

³ *Allenby v H* [2012] 3 NZLR 425 (SC) at [56].

⁴ *Teen v Accident Rehabilitation and Compensation Insurance Corporation and Telecom NZ Limited* DC Wellington 244/2002, 9 September 2002 at [13], upheld in *Teen v Accident Rehabilitation and Compensation Insurance Corporation and Telecom NZ Limited* HC Wellington CIV 2003-485-1478, 11 November 2003 at [35].

cover for their injury. Mr Mudgway clearly sustained a personal injury and therefore, the Corporation must cover it.

[29] Ms Feltham submitted the Corporation's position is that a claimant applies for cover for the personal injury they have suffered, not for the accident itself. Here, the personal injury initially said to be suffered in the 10 August 2016 accident, and for which cover was sought and granted, was a wrist sprain.

[30] The current claim is for cover for a right ulnar nerve injury, caused by the same accident. However, as Mr Mudgway does not have that physical injury, the decision to decline the claim for cover was correct. Ms Feltham submitted Mr Mudgway has now been diagnosed with a C8 nerve root injury, which is a distinct, specific injury. The appropriate course would be for Mr Mudgway to lodge a new claim for cover for that injury.

The issue

[31] Ms Williams and Ms Feltham agree the central issue on appeal is whether the Corporation's decision of 18 May 2017 to decline Mr Mudgway cover for an ulnar nerve injury is correct.

Discussion

[32] It is apparent the Reviewer reached a decision on a different basis to that on which the Corporation declined the claim for cover. The Reviewer dismissed the review application on the basis Mr Cleland had not identified a discrete physical injury.

[33] Ms Feltham submitted that nerve compression, such as C8 radiculopathy may be sufficient to constitute a physical injury and therefore is a personal injury provided the other definitional criteria are met. Ms Feltham submitted the relevant case law indicates that physical injury does not necessarily need some form of permanent physical damage to the body, only some form of bodily harm that has an

appreciable and not wholly transitory impact.⁵ It is the case the Corporation has accepted that injuries that involve some form of nerve compression have been covered, such as carpal tunnel syndrome.

[34] In any event as Ms Feltham submitted, this is not the reason why the Corporation declined cover. The Corporation declined cover because Mr Mudgway sought cover for a physical injury being ulnar nerve injury.

[35] Dr Parsotam, GP filed an injury claim for ulnar nerve injury on 22 December 2016, which was unsupported by the medical evidence. The covered injury was a sprain of tendon wrist or hand (right). However, Mr Cleland concluded there was no injury to the ulnar nerve or the wrist.

[36] A review of the evidence shows that in his patient note dated 5 October 2016, Dr Parsotam queried whether an ulnar nerve injury had been sustained in the accident on 10 August 2016. He referred Mr Mudgway to the plastic surgery department at Waikato Hospital where Mr Mudgway consulted Mr Jensen, Plastic Surgery Registrar.

[37] In his report of 2 December 2016 Mr Jensen was unsure whether an injury to the ulnar nerve had been sustained. For this reason, he organised an urgent MRI scan. The medical certificate dated 2 December 2016 from Mr Jensen noted:

Right arm/hand motor weakness **cause to be determined.**

[Emphasis added]

[38] An MRI scan of the right upper extremity was reported on 19 December 2016 with the radiologist noting “no cause was identified for the patient’s ulnar nerve symptoms”. Notwithstanding the radiological findings reporting no signal changes seen in the ulnar nerve and no adjacent soft tissue lesions leading to the radiologist’s conclusion, Dr Parsotam provided his clinical opinion of weakness and wasting of the ulnar aspect, but queried causation. On this basis, with causation unclear, Dr Parsotam filed the injury claim for cover for ulnar injury.

⁵ The cited cases (supra).

[39] Dr Walker queried whether the accident was causative of the ulnar nerve injury and suggested that a specific diagnosis be obtained by a more expert medical assessor, for example, a Neurologist or Neurosurgeon and also noted that electrodiagnostic studies (EMG) may also be required to clarify the diagnosis.

[40] Mr Cleland's report is overwhelmingly clear that the accident of 10 August 2016 caused right C8 radiculopathy. The medical opinion of Mr Cleland is clear there is no injury to the ulnar nerve or the wrist, for which cover had previously been approved. The Court observes that Mr Cleland's report was copied to Dr Parsotam.

[41] Ms Williams submitted this diagnosis should have received cover. Ms Williams also acknowledged that a claim for cover for C8 radiculopathy had not been filed.

[42] I accept Ms Feltham's submission while it is possible to add to or change a diagnosis this is not the same as changing the physical injury that is said to have been suffered. Changing a diagnosis is contingent on there being a diagnosed original injury that is linked to the new injury diagnosis.

[43] In this case, Mr Mudgway's claim for cover for ulnar nerve injury was declined because he had not been diagnosed as suffering from that physical injury. At best, the evidence shows a clinical impression only from a GP. However, this is unsustainable in light of the radiological evidence provided at the time the claim for ulnar injury was filed. Moreover, the specialist opinion from the Neurologist, Mr Cleland is preferred.

[44] For these reasons, the claim for an ulnar injury cannot succeed.

[45] The injury for which Mr Mudgway now contends that he has, is a specific injury that requires a distinct claim for cover so that the claim can be properly investigated in the usual way.

[46] The Court is satisfied that the evidence before the Court does not support the claim for cover for an ulnar nerve injury. The medical evidence is clear that Mr Mudgway does not have such a physical injury.

Decision

[47] Accordingly, the Corporation's decision dated 18 May 2017 to decline cover for an ulnar nerve injury (right) is correct.

[48] The appeal is dismissed.

[49] There is no issue as to costs.

A handwritten signature in blue ink, reading "Denese Henare". The signature is written in a cursive, flowing style.

Judge Denese Henare
District Court Judge

Solicitors: Luke Cunningham Clere, Wellington for the respondent