

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 121

ACR 86/21

UNDER

THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF

AN APPEAL UNDER SECTION 149 OF
THE ACT

BETWEEN

PHOEBE HEYHOE
Appellant

AND

ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: 27 May 2022

Heard at: Wellington/Te Whanganui-a-Tara

Appearances: Mr P Schmidt for the Appellant
Ms F Becroft for the Respondent

Judgment: 27 June 2022

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Causation; Personal injury s 26; Personal injury caused by accident s 20
Accident Compensation Act 2001]

[1] At issue is a decision of the Accident Compensation Corporation dated 11 December 2020, declining surgery funding and cover for an annular tear at L5/S1 in the appellant's lumbar bone.

[2] The appellant's position is that the surgery is needed to repair post traumatic degenerative change caused an L5/S1 disc injury suffered on 7 December 2018. The Corporation submits that the available evidence does not establish a causal link between the appellant's need for surgery and injury suffered in the accidents of 7 December 2018 and 24 February 2020. In particular, the annular tear is not as a

result of an accident but rather is part and partial of a pre-existing degenerative condition.

Background

[3] On 13 December 2018, a claim for cover was lodged by the appellant's physiotherapist for injury suffered on 7 December 2018 with the accident description being:

I was lifting a reformer and I felt a sudden pain in my lower back.

[4] The claim was accepted by ACC on 18 December 2018 and physiotherapy was funded.

[5] X-rays were taken on 19 December 2018. The findings in respect of the lumbosacral spine whereas follows:

Bone density is normal. There is no evidence of fracture, dislocation or osseous destruction. All intervertebral disc heights and facet joints are within normal limits. No soft tissue abnormalities are noted.

[6] A further ACC injury claim form was lodged on 24 February 2020 for a lumbar sprain with the description of injury being:

I was moving my reformers, bending forward ad(sic) pick it up,
Description twisted and an instant pain in my back ...

[7] On 4 March 2020, cover was accepted by ACC for this claim.

[8] The appellant's spine was X-rayed on 4 March 2020 with the findings:

There is slight curvature of the lumbar spine convex to the right and striking the lordosis with no spondylolisthesis. No fracture or focal bone lesion is identified. No pars defects are seen. Mild disc height loss is present at L5-S1 and disc height is maintained at the other lumbar levels.

[9] On 14 April 2020, the appellant had a telephone consultation with Orthopaedic Surgeon, Michael Barnes, who in his report of the same date, noted:

She is a Pilates instructor who injured her lower back at work on 24 February 2020, lifting machinery to move it.

She has had persisting, moderately severe lower back pain at the base of the spine and the sacral region ...

...

She has had episodes of lower back pain in the past but not as severe, although lasting up to three or four months. This has not occurred for four years. These episodes occurred mostly when she was a professional dancer.

[10] The appellant proceeded to an MRI scan. This was completed on 17 April 2020 and the report noted:

Findings: At L5/S1, there is a moderate loss of disc height with slight retrolisthesis of L5 and moderate oedematous end plate changes. A shallow midline disc protusion is present with a posterior annular tear. There is no canal or foraminal stenosis. No nerve root compression. The larger lumbar discs are normal.

[11] On 21 March 2020, Mr Barnes reported again following a telephone consultation. He said:

She has been symptomatic for two months. The most likely outcome still is that the pain will settle. If that is not occurring within six months, she should perhaps consider the option of surgery.

[12] The appellant was referred to Orthopaedic Surgeon, Mr Insull, for a second opinion. He reported on 10 June 2020:

Phoebe is a very pleasant and otherwise healthy 30 year old lady who injured her back in December 2018. When squatting, lifting and pushing up a piece of exercise equipment in her role as a Pilates instructor, she had a new onset of pain at the lumbosacral junction, she has never before experienced this other than minor aches and pains. This has persisted and has been problematic for her since that time.

Her pain has been worse since a similar lifting mechanism provoked exacerbation of pain on the 24th of February 2020. She has intermittent right lower limb paraesthesia if she sits for too long, otherwise her pain is centred at the lumbosacral junction.

...

I think it is relatively plausible that an original accident event injuring the L5/S1 disc in December 2018 will have undergone post traumatic gradual process changes represented by the MRI imaging identified in April 2020. However, without preinjury MRI scan, it is obviously impossible to say this with certainty.

[13] On 22 June 2020, Mr Barnes met the appellant in person for the first time. The appellant advised him that her symptoms actually preceded the injury of 24 February 2020 by one year:

There was a previous ACC claim for which she received chiropractic treatment without subjective benefit.

[14] A further MRI was carried out on 30 June 2020 which reported:

Findings: **Comparison 17/4/20. Alignment is stable, with mild retrolisthesis at L5/S1. Moderately advanced spondylolisthesis at L5/S1 is not progressed.

[15] On that same date, Mr Barnes reported:

The MR scan shows no neurocompressive lesion to explain the lower extremity symptoms.

...

Phoebe has relative indications for L5/S1 anterior lumbar interbody fusion. She is opposed to the concept of fusion and would prefer a disc replacement. An application to ACC could be made on the basis that the lifting injury in December 2018 which initiated the pain may have caused the imaging findings.

[16] Mr Barnes reported again on 7 September 2020 saying:

Phoebe came into see me today and is of mind to proceed to L5/S1 Baguera disc replacement.

The recent claim is dated 24 February 2020. An X-ray taken on 4 March 2020 shows moderately severe to severe loss of disc height at L5/S1. Obviously, this would not have been caused by an injury the previous week. On the ACC website, the only other injury we can find is 2015. It cannot be stated with any certainty that this injury caused the degenerate L5/S1 disc.

Therefore, I see no prospect whatsoever that ACC would fund surgical treatment for her condition, which is degenerative.

[17] On 22 September 2020, Mr Barnes reported again noting that the appellant had found another ACC claim from December 2018. He advised:

She showed me an X-ray report from a Chiropractic X-ray which is not signed but which describes normal disc height through the lumbar spine.

It is possible this injury caused damage to the L5/S1 disc which then progressively lost height and caused her current problem.

[18] On 7 October 2020, an assessment report and treatment plan was filed seeking funding for lumbar disc replacement surgery. In it, Mr Barnes stated:

This patient has a degenerate L5/S1 disc. She believes this was caused by lifting her Pilates table on 7 December 2018. The only imaging available at that time is a report from a chiropractic X-ray which is not signed but describing normal disc height throughout the lumbar spine.

The next available imaging is the X-ray of 4 March 2020 which is on the Auckland Radiology Website. This shows moderately severe to severe loss of disc height at L5/S1.

Would you please consider funding disc replacement surgery at L5/S1 on the basis that the lumbosacral disc was injured while lifting on 7 December 2018 which led to progressive loss of disc.

[19] The surgery request was looked at by Mr Hunter, Orthopaedic Surgeon and Principal Clinic advisor to the Corporation on 28 October 2020. He advised that annular tears are more correctly termed annular fissures, and are part of the age-related degenerative change in the intervertebral disc. He did not consider that fissures were caused by a single injury event and also indicated they do not generally act as pain generators. He did not think that there was a link between the need for surgery and an injury suffered in an accident.

[20] On 29 October 2020, ACC issued its decision to decline surgery funding.

[21] On 23 November 2020, the appellant was referred to Dr Segar, Spinal and Scoliosis Surgeon, for a second opinion. He described the appellant's pain as increasing over time since the accident. He noted that the appellant's age (30) and that she had L5/S1 disc pathology on the background of an otherwise normal spine. He concluded:

... It is on the balance of probabilities very unlikely that this is a degenerative process especially given the rest of the spine is pristine. It is likely that this is related to the injury she had in 2018, causing an acute disc injury resulting in the disc to desiccate and for the disc to become painful over the insuring two years.

[22] On 11 December 2020, the Corporation issued a further decision noting that it had reconsidered all the information available and again declining cover and surgery funding.

[23] On 15 February 2021, ACC asked a radiologist, Dr Omar to review the 19 December 2018 X-ray. He reported as follows:

...

Minor lumbar curvature convex to the left with no listhesis.
There was a minor degree of L5/S1 disc space narrowing consistent with spondylolisthesis.
The posterior elements are unremarkable.
Vertebral heights are preserved and there is no focal bony lesion seen.

In Summary, minor spondylitic change at the L5/S1 level.

[24] On 1 March 2021, Mr Hunter provided some further comments following the review. He responded to the question:

The date of accident was 07/12/18 and the above X-rays taken 12 days after this. Could this spondylolisthesis have developed in that time? Please explain your reasoning.

No.

Disc narrowing from disc dehydration and loss of hydro static pressure in the disc would take several months or years to show on X-rays or MRI.

Appellant's submission

[25] Mr Schmidt referred to the sworn evidence the appellant gave at the hearing relating to her accident of 7 December 2018:

I did not lift the reformer the way I usually do. I was tired and did not bend my knees. I lifted the reformer with my spine bent over. I felt a severe sharp pain in my lower back when I lifted the reformer off the ground. I dropped the reformer and collapse to the floor. I lay there for a while not moving because the pain was so severe. After a few minutes, I carefully got to my feet and made my way back home.

Over the next few days, this pain was still acute. The muscles in my lower back began to spasm. Sitting, bending forward, lifting, coughing, sneezing and even rolling over in bed were very difficult and would trigger back spasm.

With treatment (physiotherapy and chiropractic), the pain began to feel less severe over the following three months but did not go away ...

My pain level at this stage was around 7 out of 10. The benefit I obtained from Westmere Physiotherapy and Kindred Chiropractic plateaued and so I decided to treat myself with Pilates instead. I would regularly try to release the muscles in my butt and lower back but felt relief for only an hour or so before the muscles were tightened up again ...

I continue to struggle for the next year and half. Standing at work, bending over to assist clients, lifting my washing basket, and similar activities, were difficult and caused pain in my lower back, muscles spasm, sciatica down my right leg, tingling and numbness.

The pain gradually got worse to the point that I was finishing work in tears ... I did not think I could continue in my job and that is when I finally saw an osteopath ... in February 2020. She referred me to get X-rays...

Looking back, I regret not getting help much sooner but I honestly thought that with exercise and patience I could work my way through this injury.

[26] Mr Schmidt submits that that evidence is consistent with an injury to the L5/S1 disc. And that it is not consistent with a back sprain nor a finding of mild spondylosis.

[27] Mr Schmidt refers to an article regarding intervertebral disc ageing by Professor Adams, Professor of Biomechanics at Bristol University,¹ to the effect that injuries to the annulus fibrosus or vertebral end plate can cause human intervertebral discs to degenerate.

[28] He submits that as a principal, the heavier the load and the more unfavourable stance of the person, the more the risk of annular tear.

[29] He submits that there is ample evidence that the appellant “soldiered on” as many people do after the accident of 7 December 2018.

[30] He refers to the fact that in the X-ray of 19 December 2018, read on 15 February 2021, Dr Omar, found evidence of minor spondylolistic change at L5/S1 level.

[31] He refers to the MRI scan of 17 April 2020 and that there is degeneration only at the site of the injury.

[32] He reminds the Court that biomechanically this was a substantial weight lifted by the appellant who was herself positioned poorly.

¹ Mechanical influences in disc degeneration and prolapse: medico-legal relevance; Bone and Joint; Volume 3; Issue 2; April 2014.

[33] He submits that the symptoms that followed the 7 December 2018 lifting incident are consistent with a disc injury. He says the opinions of Mr Barnes and Mr Segar are consistent with the peer reviewed literature, the mechanism of injury and the post injury clinical history. He submits that the competing view that mild spondylolisthesis explains deterioration in the L5/S1 disc is at odds with the testimonial evidence and the specialist evidence of those who have reviewed the relevant scans and examined the appellant first-hand.

Respondent's submission

[34] Ms Becroft acknowledges that the primary issue in this case is causation.

[35] She compares the report of chiropractic radiologist, Mr Bassano relating to the X-ray of the appellant's spine dated the same date, with that of Dr Omar, dated 15 February 2021.

[36] She submits that Mr Bassano is describing an essentially normal lumbosacral spine, whereas Dr Omar does not. Dr Omar states:

There is a minor degree of L5/S1 disc space narrowing consistent with spondylolisthesis.

[37] Whereas Mr Bassano under the heading "Lumbosacral spine and pelvis" said:

All intervertebral disc heights and facet joint spaces are within normal limits.

[38] Accordingly, she says that Dr Omar's review should be preferred.

[39] She notes that neither saw any traumatic injury.

[40] Next, Ms Becroft refers to the clinical opinion of Mr Peter Hunter, the Orthopaedic Surgery Principle Clinical Advisor to ACC, who says in his report of 28 October 2020:

Annular "tears" are more correctly termed annular fissures and are part of the age related so called degenerative change in the intervertebral disc.

Such fissures are not caused by a single injury event, they do not generally act as pain generators and would be found on MRI in 20% of people in this age group.

...

While this disc pathology become symptomatic from time to time, it is not caused by any single event of injury.

A causal link with any ACC covered injury for ACC to fund the planned lumbar disc replacement surgery cannot be established on the information provided.

[41] Mr Hunter says further in his clinical comment of 8 December 2020 that:

Dr Segar's observation that a single injury event can cause disc dehydration would not be generally accepted.

Disc dehydration intersection is due to disc collagen change and is part of the normal aging process and found on MRI and some 30% of people in this age group.

...What is not always clear is why such underlying gradual process changes sometimes become symptomatic after simple strain injuries.

[42] Ms Becroft next refers to a review of the X-ray taken on 19 December 2018 with focus on any pathology revealed at L5/S1.

[43] Dr Omar, with reference to the x-ray taken on 19 December 2018, says in his report of 15/2/2021:

There is a minor degree of L5/S1 disc space narrowing consistent with spondylolisthesis.

[44] Ms Becroft notes that we have the advantage of radiological evidence at the time.

[45] She refers to orthopaedic surgeon Mr Barnes' reports and she submits that Mr Barnes frames his application on the appellant's own beliefs and not his own. She notes that on being shown the chiropractic X-ray report of 19 December 2018, Mr Barnes says in his report of 22 September 2020 that:

It is possible this injury caused damage to the L5/S1 disc which then progressively lost height and caused her current problem.

[46] Ms Becroft next refers the appellant's post-accident presentation which she says is not wholly consistent with disc injury.

[47] Turning to the article of Professor Adams, she notes that it is especially the discs at L4-S1 that become degenerated. She also notes that Professor Adams says that:

Many such herniations are injuries but few are traumatic.

[48] Ms Becroft submits that there is evidence of prior degeneration and that this could not have occurred within the 12 days between the 7 December 2018 and 19 December 2018 when the X-ray was taken.

Appellant's submissions in reply

[49] Mr Schmidt again refers to Professor Adams' article noting that excessive mechanical loading can cause human discs to herniate even if they appear "normal" for their age. Furthermore, the author says:

Experts should not claim that any herniated disc must have been degenerated before it herniated, unless there is independent evidence of the spine degeneration. (Insisting that it must have been degenerated because herniated is a circular argument.)

[50] He notes Mr Hunter is silent on the mechanisms of injury.

[51] It is acknowledged that the accident event on 7 December 2018 involved a 30 to 40 kg event. And that this is very traditional mechanism of disc injury.

[52] He notes that someone with the appellant's pain at the time should have been sent for an MRI but this did not happen for 18 months.

[53] He also says that the theory of degeneration does not explain the severe pain the appellant experienced.

Decision

[54] The ultimate issue in this case is whether the appellant's pathology at L5/S1 requiring surgery was wholly or substantially caused by her accident event on 7 December 2018 or whether it was degenerative. At the time of her accident, the appellant was a fit, 28 year old. In the accident claim form, she describes what happened as "I was lifting a reformer and I felt a sudden pain in my lower back".

[55] She says in her evidence:

- I lifted the reformer with my spine bent over. I felt a severe, sharp pain in my lower back when I lifted the reformer off the ground. I dropped the reformer and collapsed to the floor. I laid there for a while not moving because the pain was so severe. After a few minutes, I carefully got back to my feet and made my way home.

Over the next few days, this pain was still acute. The muscles in my lower back and buttocks began to spasm. Sitting, bending forward, lifting, coughing, sneezing and even rolling over in bed were very difficult and would trigger back spasm.

[56] The appellant took chiropractic and physiotherapy treatment.

[57] So far as they can be deciphered, the physiotherapy notes of 13 December 2018 record:

Pain in the lower back... very tender... was lifting a reformer at for posture.

[58] The clinical notes showed that she continued with this treatment for excess of a month and in her own evidence she said she continued to struggle for the next year and half:

Standing at work, bending over to assist clients, lifting my washing basket, and similar activities, were difficult and caused pain in my lower back, muscle spasm, sciatica down my right leg, tingling and numbness.

The pain gradually got worse to the point where I was finishing work in tears.

...I regret not getting help much sooner but I honestly thought that with exercise and patience I could walk my way through this injury.

[59] An X-ray was taken on 19 December 2018. Mr Bassano, noted that in the lumbosacral spine and pelvis “all intervertebral disc heights and facet joint spaces are within normal limits”.

[60] Dr Omar, who reviewed this X-ray on 15 February 2021 said:

There is a minor degree of L5/S1 disc space narrowing consistent with spondylolisthesis.

[61] Mr Hunter said in his clinical opinion of 1 March 2021:

Disc narrowing from disc dehydration and loss of hydrostatic pressure in the disc would take several months or years to show on X-rays or MRI.

[62] Dr Segar, in his report of 23 November 2020, says:

Ms Heyhoe is a 30 year old woman who has L5-S1 disc pathology on the background of otherwise normal spine. She is very young. It is on the balance of probabilities very unlikely that this is a degenerative process especially given the rest of the spine is pristine. It is likely that this is related to the injury she had in 2018, causing an acute disc injury resulting in the disc to desiccate for the disc to become painful over the ensuing two years.

[63] Mr Hunter, in a clinical opinion of 1 March 2021, said that roughly 20% of people in their 20s have some changes on MRI which could be described as spondylitic, which rises to 90% at 90.

[64] The article by Professor Adams, Professor of Biomechanics at Bristol University in “Mechanical Influences in Disc Degeneration and Prolapse”, has been referred to by both counsel. Under the heading “What has been established beyond reasonable doubt?”, Professor Adams says:

Injuries to the annulus fibrosus or vertebral body end plate can cause human intervertebral discs to degenerate.

- Excessive mechanical loading can cause human discs to herniate, even if they appear “normal” for their age. Middle aged discs at lower lumbar levels are most vulnerable.
- Many of such herniations are injuries, but few are traumatic.
- Most degenerative changes in surgically removed disc herniations are consistent with them occurring after herniation.
- Experts should not claim that any herniated disc must have been degenerated before it herniated, unless there is independent evidence of this prior degeneration (insisting that it must have been degenerated because it herniated is a circular argument).

[65] It must be accepted that in the those of the appellant’s age “natural” disc degeneration may occur in approximately 20% of the population.

[66] It should also be remembered that there is a limit to what X-rays may show, namely bone spurs on vertebral bodies of the spine, thickening of facet joints and

narrowing of intervertebral disc spaces. In this case it appears that the only indication of a problem at L5/S1 was the narrowing of intervertebral disc space at L5/S1, which the chiropractic radiologist had opined was within normal limits.

[67] Given his particular expertise, Dr Omar's opinion of minor spondylitic changed L5/S1 should arguably be preferred over that of Mr Bassano.

[68] However, what ultimately tips the balance in favour of the appellant in this case, is her own evidence as to the trauma she experienced on the date of the accident and following as well as the supporting contemporary notes of a significant injury that she underwent treatment for, for some five weeks immediately following the accident and that caused her to finally see an osteopath in February 2020.

[69] Accordingly, I find that on the balance of probabilities the appellant has proved that her need for surgery at the L5/S1 level was caused by her accident and injury on 7 December 2018.

[70] Accordingly, the appeal is allowed. Counsel have leave to file memoranda in respect to costs should the need arise.



Judge C J McGuire
District Court Judge

Solicitors: Schmidt and Peart Law, Auckland;
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