IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 133 ACR 144/20

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

Hearing: 8 July 2022
Held at: New Plymouth/Ngāmotu

Appearances: The Appellant is self-represented
J Sumner for the respondent

Judgment: 13 July 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for personal injury, whether jurisdiction to consider Corporation's decision - s 6, Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 25 June 2020. The Reviewer dismissed an application for review of the Corporation's decision dated 4 June 2019 approving cover for a mild traumatic brain injury.

Background

[2] Mr Thomson was born in 1962. On 30 October 2009, Mr Thomson, whilst driving a tractor, was hit at speed by an oncoming car. He was catapulted around the

inside of the cab of the tractor before being thrown out the back window, making contact with the tractor's mowing attachment.

[3] Later, on 30 October 2009, a CT scan was taken. Dr Maren Krueger, Radiologist, reported:

> Findings: CT head hand and facial bones without intravenous contrast. There is a comminuted fracture of the right zygomatic arch with two depressed fracture fragments by approximately 6 mm. No foreign body is identified in this region. Mild bilateral basal ganglia calcification, otherwise the brain parenchyma is normal with no evidence of intracranial haemorrhage. A small extracranial soft tissue swelling with small locules of air are noted in the left parietal region as well as slightly increased density consistent with haematoma. However, there is no underlying cranial vault fracture. The paranasal sinuses are mainly patent, there is only mild mucosal sinus disease of the maxillary antra.

[4] A claim for cover was lodged on behalf of Mr Thomson, and the Corporation provided Mr Thomson cover for various injuries.

[5] On 9 April 2011, Mr Thomson was assessed for three hours by Dr Janet Leathem, Neuropsychologist, for the purpose of determining his cognitive functioning. Dr Leathem, having read the notes and reports provided, including the CT scan report taken on 30 October 2009, and having assessed Mr Thomson, noted:

> Mr Thomson's account of the accident has been well documented previously. He said that he has no recollection of the accident itself, his last memory being of coming around a corner on his tractor just seconds before the collision. He was able to walk away from the accident, but thinks that he was knocked out for a period afterwards but has been told he was conscious when other people arrived and the ambulance was called. His first memory is of being in the ambulance. His Glasgow Coma Scale score when the ambulance arrived was 14/15 (he was slightly confused), and 30 minutes later on arrival in hospital was 15/15.

[6] Dr Leathem reported that Mr Thomson's level of cognitive functioning was within the average range for all domains, except for short-term memory and learning of non- meaningful material. Dr Leathem noted that Mr Thomson's information-processing speed was reduced when numbers/letters and symbols were involved. In relation to the ongoing effects of the accident, Dr Leathem noted:

> Mr. Thomson sustained a head injury in a tractor/car accident 18 months ago. His injuries (fractured right zygomatic arch with no intracranial bleeding and extracranial soft tissue haematoma) and Glasgow Coma Scale score at the time

> of the accident and on admission suggests that any brain injury was likely to have been in the very mild range.
>
> Mr. Thomson's CT scan immediately post injury also suggested mild bilateral basal ganglia calcification. This condition is usually of long standing and is associated with a number of symptoms, including depression, memory difficulty and speech disturbance.

[7] On 26 May 2011, Mr Thomson was examined and assessed by Dr Peter Wright, Neurologist. Dr Wright noted:

> I have been provided a number of records pertaining to this accident, the emergency department records suggest that he had little recollection beyond driving a tractor round a corner, he is aware that he struck a car, was thrown out the back window of the tractor, hit several parts of the tractor including the mudguard on the way down causing damage and had a facial fracture, grazes and black areas over his left shoulder and upper arm region, knee pain, a scalp laceration towards the back of the head on the left, right ear laceration and a right elbow laceration.

[8] Dr Wright provided answers to questions posed by the Corporation:

> ***1. Can you identify the cause of the client's presenting symptoms and incapacity, if any?***
>
> There is a left upper and middle trunk neuropathy, traumatic in nature, documented on the EMG and nerve conduction studies. It is causing neuropathic pain and subtle sensory disturbance without weakness, the use of the left upper limb is severely impaired. On the assumption that all orthopaedic causes for this pain on certain movements have been excluded, the pain can then be fully attributed to the brachial neuropathy. In addition verbal memory has been identified as reduced, the patient has identified this mild cognitive loss and this may represent traumatic brain injury. Other features of traumatic brain injury including persistent headaches in the early phase of illness, have largely settled. Please ensure that orthopaedic causes for his movement-associated pain have been fully excluded. The rationale for this is that neuropathic pain is not usually absent at complete rest, and exacerbated by specific movements, but not by others as was seen around the shoulder in this case.
>
> ***2. Can you identify the extent to which the client is functionally incapacitated?***
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> The left upper limb is essentially unusable for most tasks due to limiting pain with movement, he is left handed. Any tasks which can be done on his feet or using exclusively the right upper limb should be unaffected. The level of incapacity associated with a traumatic brain injury is mild.

[9] On 30 May 2011, Dr Peta Levin, Branch Medical Advisor, advised:

> I have reviewed Dr Leatham's neuropsych report as requested. The client sustained a mild TBI and the results of testing suggest his level of cognitive

> functioning is essentially within estimated pre-injury capabilities aside from possible mildly reduced auditory-verbal learning ability. (Medical imaging also revealed (non-injury related) mild bilateral basal ganglia calcification that may also be contributing to his current experience of memory problems.) I support Dr Leatham's suggestion re: this client's rehabilitation needs and recommend a limited no of sessions (max 5) with an OT in order to provide client with basic info on managing sx following a mild TBI and coaching in compensatory strategies to address reported memory difficulties.

[10] On 19 March 2013, the Corporation advised Mr Thomson that the management of his claim had been transferred to the ACC Remote Claims Unit.

[11] On 31 August 2015, the Corporation provided Mr Thomson cover for the additional injury of fibromatosis.

[12] On 4 June 2019, the Corporation provided cover for a mild traumatic brain injury. On 8 August 2019, Mr Thomson lodged an application for review of this decision.

[13] On 27 August 2019, Dr Leathem again saw and reported on Mr Thomson's likely treatment and rehabilitation needs, in light of the newly granted cover for a mild traumatic brain injury:

> Mr. Thomson sustained a head injury in a tractor/car accident now almost 10 years ago… Glasgow Coma Scale score at the time of the accident and on admission suggested that any brain injury was likely to have been in the very mild range. A CT scan immediately post injury also suggested mild bilateral basal ganglia calcification a condition usually of a long standing associated with a number of symptoms, including depression, memory difficulty and speech disturbance. Thus, in my report of 8 years ago, it was noted that other factors could be contributing to his memory difficulty e.g., the calcified lesions and that information processing speed could be reduced to a pre-existing slight reading difficulty. Now almost 10 years later any neuropsychological sequalae from a possible mild traumatic brain injury sustained in the accident would be expected to have resolved.

[14] On 24 January 2020, Dr Tim Stevenson (using a pseudonym), Branch Medical Advisor, advised:

> Duration of post traumatic amnesia less the 24 hours and 13-15 GCS would be at the low end of the mild range as highlighted by Janet Leathem …
>
> So, in regards the client, he had an estimated GCS 15/15 and a post traumatic amnesia time of no more than an hour. He clearly falls into the mild category of traumatic brain injury.

[15] On 29 May 2020, review proceedings were held. On 25 June 2020, the Reviewer dismissed the review, on the basis that all of the evidence pointed to a mild traumatic brain injury, and no other opinion has been provided that challenged this evidence.

[16] On 22 July 2020, a Notice of Appeal was lodged, on the basis that the Reviewer's decision was in breach of the Bill of Rights Act 1990, section 27(1), by the Corporation's use of a pseudonym for a doctor's report which the Corporation and the Reviewer relied upon.

Relevant law

[17] Section 6 of the Accident Compensation Act 2001 ("the Act') provides:

> "decision"" or "Corporation's decision"" includes all or any of the following decisions by the Corporation:
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> (a) a decision whether or not a claimant has cover:
>
> (b) a decision about the classification of the personal injury a claimant has suffered (for example, a work-related personal injury or a motor vehicle injury): …

[18] In *Wilson*,[1] Judge Ongley stated:

> [21] The Court is not qualified to draw any independent medical conclusions. The question for the Court concerns the weight to be given to medical professional opinions for or against the appellant's claim. That enquiry may be guided by the persuasive reasoning of a particular opinion, the skill and experience of the practitioner, the recital of authoritative sources, the first hand examination of the patient or observation of the development and progress of symptoms, and possibly by a level of agreement between a number of practitioners.

[19] In *Tuffery*,[2] Judge Beattie stated:

> [45] The Court is on record as holding that the mere fact of a temporal connection is insufficient to establish causation, and that sound medical reasoning with the necessary clinical pathology is required in order to establish the necessary causative link to the necessary degree of probability …

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1 *Wilson v Accident Compensation Corporation* [2009] NZACC 189.
2 *Tuffery v Accident Compensation Corporation* [2005] NZACC 293.

[20] In *Stewart*,[3] Judge Barber stated:

> [28] As the issue of causation is essentially a medical question, it must be determined with reference to medical evidence. Evidence provided by the appellant as to her symptoms and experience is, of course, useful and is required by the medical experts in order for them to make the appropriate determination. However, in itself, evidence by the appellant cannot establish the required causal link because the appellant is not medically qualified to determine the issue of causation.

[21] Section 27(1) of the New Zealand Bill of Rights Act 1990 ("BORA") provides:

> Right to justice
>
> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[22] In *Chief Executive of the Ministry of Social Development v L*,[4] Collins J considered that the undisclosed practice of the Ministry's Benefit Review Committee (a statutory administrative decision-making committee) of using fictitious names and signatures was unlawful:

> [10] The answer to the first question posed by the Authority is that it was correct to conclude the Committees required express legislative authority in order to lawfully use fictitious names and signatures when they issued the six decisions in question. This is because the use of fictitious names and signatures by the Committees prevented Ms L from challenging the appointment of Committee members on the grounds of bias or being otherwise ineligible to consider her application. This in turn breached her right to natural justice affirmed by s 27(1) of the New Zealand Bill of Rights Act 1990 (the NZBORA).

Discussion

[23] The issue in this case is whether the Corporation was correct to grant Mr Thomson cover for a *mild* traumatic brain injury. Mr Thomson submits that he should be granted cover for a *moderate* brain injury. He notes that mild traumatic brain is determined by a loss of consciousness of anything less than 15 minutes (according to the Glasgow Coma scale), and he was unconscious for around 90 minutes after the accident. Mr Thomson disputes the report of Dr Leathem, which

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3 *Stewart v Accident Compensation Corporation* [2003] NZACC 109.

4 *Chief Executive of the Ministry of Social Development v L* [2018] NZHC 2528, [2019] 2 NZLR 135, (2018) 11 HRNZ 521.

did not definitely suggest mild injury and did not take account of the length of unconsciousness. Dr Levin's report was based on the Leathem report. Mr Thomson refers to Dr Wright's report that Mr Thomson might have traumatic brain injury, and notes that Dr Wright referred to the level of incapacity and not the level of brain injury. Mr Thomson also submits that Dr Stevenson's report should not be used as it was made under a pseudonym and also did not take account of the length of unconsciousness.

Preliminary matters

[24] Before considering Mr Thomson's submissions, this Court addresses two submissions made by the Corporation.

[25] First, the Corporation submits that the categorisation of Mr Thomson's injury as mild is not a "decision" in accordance with section 6 of the Act, and so not subject to review and subsequent appeal. However, this Court finds that the Corporation's categorisation of Mr Thomson's injury as mild is a decision about the classification of the personal injury that he, as a claimant, has suffered, and so is included in the definition of decision in terms of section 6(b) of the Act.

[26] Second, the Corporation submits that the Court has no jurisdiction to enquire into the Corporation's practice of assigning pseudonyms to its staff in the course of exercising its statutory functions under the Act, or the Crown Entities Act 2004. However, this Court notes that, in terms of section 27(1) of the New Zealand Bill of Rights Act 1990, Mr Thomson has the right to the observance of the principles of natural justice by the Corporation, as a public authority which has the power to make a determination in respect of his rights or interests protected or recognised by law. The Corporation's branch medical adviser who provided an opinion on 24 January 2020 used, not his actual name, but a pseudonym (Dr Tim Stevenson). It is at least arguable that the use of a fictitious name by the branch adviser has prevented Mr Thomson from challenging the advice of the branch medical adviser on the grounds of bias or being otherwise ineligible to consider his claim. In the interests of natural justice being seen to be done, this Court therefore puts the advice of the branch adviser to one side.

Substantive matters

[27] The Court now addresses the submissions of Mr Thomson as to the substance of the appeal, and notes the following considerations.

[28] First, this Court finds that the medical opinion of Dr Leathem, Neuropsychologist, is entitled to considerable weight. Her professional opinion was formed after an in-depth examination of Mr Thomson and after having read the notes and reports provided, including the CT scan report taken on the day of Mr Thomson's accident. Dr Leathem concluded that any brain injury that Mr Thomson suffered was likely to have been in the very mild range.

[29] Second, this Court finds that the medical opinion of Dr Wright, Neurologist, is also entitled to considerable weight. His professional opinion was formed after an examination of Mr Thomson and after having read the records provided. Dr Wright concluded that the level of Mr Thomson's incapacity associated with a traumatic brain injury was mild, a finding which is in line with Dr Leathem's conclusion as to the extent of Mr Thomson's brain injury.

[30] Third, the determination as to what cover Mr Thomson has for his injury must be determined with reference to medical evidence,[5] and Mr Thomson has not produced any evidence from a medical expert in his favour. While the views of Mr Thomson as to his medical condition are acknowledged, they cannot in themselves establish his medical condition because he is not medically qualified to do so.[6] Further, Mr Thomson's views as to the impact of his accident are hampered by the fact that, according to Dr Leathem and Dr Wright, he has little or no recollection of the accident and its aftermath.

Conclusion

[31] In light of the above considerations, the Court finds that the Corporation's decision to grant Mr Thomson cover for a *mild* traumatic brain injury was correct.

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5 See n1 *Wilson*, at [21].
6 See n3 *Stewart*, at [28].

The decision of the Reviewer dated 25 June 2020 is therefore upheld. This appeal is dismissed.

[32] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors: Ford Sumner for the Respondent.