PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT

IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 134 ACR 126/20

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

Hearing: 4 July 2022
Held at: Rotorua/Rotorua Nui A Kahumatamomoe

Appearances: K Penrose for the Appellant
S Churstain for the Accident Compensation Corporation

Judgment: 14 July 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Revocation of original decisions - s 65, Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 14 May 2020. The Reviewer dismissed an application for review of the Corporation's decision dated 6 September 2019, revoking cover for the mental injury of pain disorder and revoking deemed cover for a spinal cord injury.

Background

[2] The appellant was born in December 1979. She worked on a farm. In July 2006, she was knocked by a heifer, and, in November 2007, she came off a farm bike and injured her neck.

[3] On 8 February 2008, the appellant was assaulted by her then partner and taken to hospital. On 9 February 2008, an injury claim form was lodged for several physical injuries caused by the assault.

[4] On 9 February 2008, Anne Fitzwater, Rural Nurse Specialist, stated:

> Today tearful and upset. Head not KO'd no obvious bruising or swelling, orientated and speaking clearly, neck, non tender over cervical spine, pain R) side on flexion and rotation. Non tender over thoracic and lumbar spine, tender over R) lower ribs, not painful to take a deep breath, no obvious bruising on trunk, L) arm bruising on upper and lower arms, R) arm tender over lower humerus and upper end of ulna, full ROM although stiff and painful, no swelling or deformity, wrist and fingers OK, good circulation and movement …

[5] Also, on 9 February 2008, notes from the hospital recorded:

> Partner assault.
>
> Sustained various minor injuries: contusions/bruising to legs, arms, head, neck.
>
> No concern for major injury. Admitted for social input and help.
>
> Self discharged next morning. No clinical concerns at time from nursing staff.
>
> Advised to seek women's refuge and social worker held.

[6] Later, on 9 February 2008, an x-ray of the appellant's chest, thoracic spine and left elbow/humerus was completed. The report noted:

> The chest appears clear with no rib fractures shown. No thoracic vertebral fractures have been seen. The left humerus and elbow appear normal.

[7] On 14 February 2008, the Corporation accepted cover for a right-sided upper limb contusion, sprain of the medial collateral ligament (knee), hip/thigh contusion and a neck sprain.

[8] On 28 February 2008, the appellant's physiotherapist, Ms Laura Richards, noted that the appellant had neck and back pain after a farm bike accident that had been aggravated by the earlier assault.

[9] On 16 April 2008, Ms Richards noted the appellant's severe constant neck, thoracic, lumbar pain and soft tissue contusion to her left arm. The Corporation granted cover for the lumbar sprain diagnosed by Ms Richards.

[10] From 16 July 2008, GP notes referred to the appellant's ongoing lower back pain and lower limb numbness and tingling.

[11] On 28 July 2008, the Corporation advised that it had agreed to commence the payment of weekly compensation, and that it had arranged for a medical case review.

[12] On 13 August 2008, Mr Gavin Farr, Orthopaedic Surgeon, reported that the appellant complained of stiffness and pain in the whole of her back, and mainly the lower back; and said that the appellant demonstrated restricted movement of the lumbar spine. He diagnosed a chronic pain syndrome and anxiety, but advised that there was no known pathology to explain her ongoing back and left elbow pain. He noted that the substantial cause of the current symptoms to her neck was the event of 2007, aggravated by the event of 2008; and, in terms of the rest of the spine, there was the event of 2008. Mr Farr acknowledged that the injury of February 2008 had been to her neck and the rest of her spine but advised that the pathology was not known.

[13] On 26 August 2008, an MRI was performed on the appellant. Dr Guy Mason, Radiologist, reported no abnormal pathology, stating "unremarkable imaging of the whole spine, with no cause for spinal pain or right leg numbness identified".

[14] Due to persisting concerns about the neurological function of the appellant's right leg, she was referred to a neurologist. On 2 June 2009, Dr Andrew Chancellor, Neurologist, agreed with Mr Farr that the best description of the appellant's presentation was a pain syndrome "without specific cause, other than post-traumatic".

[15] In 2009, the appellant attempted to reconcile with her ex-partner but was assaulted a second time. This resulted in contusions to and around her hips. For some time after the assault, her ex-partner made threats against her and her now husband, and on multiple occasions arrived unannounced at her property. As a result of these events, she developed symptoms consistent with post-traumatic stress disorder ("PTSD"), depression and agoraphobia.

[16] On 23 July 2009, Mr Albert Ruiterkamp, Physiotherapist, identified the appellant's lower lumbar spine as showing a lot of bruising and restriction due to soft tissue injury sustained during the February 2008 assault.

[17] On 15 March 2010, the Corporation received a medical certificate with the diagnosis of "spinal cord injury", said to be linked to the appellant's 2008 assault.

[18] On 24 March 2010, Dr Andrew Wilkinson, Consultant Psychiatrist, diagnosed the appellant with post-traumatic stress disorder ("PTSD") caused by the 2008 assault.

[19] On 1 April 2010, based on Dr Wilkinson's report, the Corporation granted cover for PTSD as a mental injury suffered as a result of the appellant's covered physical injuries from the 2008 assault.

[20] On 30 May 2011, Mr Mark Franken, Osteopath, noted that the appellant had a history of low back pain dating, back to an assault that occurred on 8 February 2008, but was not keen on spinal surgery.

[21] On 5 July 2011, the appellant was assessed by Dr Ian Wallbridge, Musculoskeletal Pain Physician. On 11 July 2011, Dr Wallbridge identified continued and marked tenderness in the appellant's pelvis, difficulty standing on her right leg, and decreased motion in her right S1 joint. Dr Wallbridge diagnosed right sacroiliac joint pain and possible radicular pain and radiculopathy at S1. He arranged a further MRI, which he reported was "normal".

[22] On 29 January 2013, Dr Katrina Allison, Clinical Psychologist, provided an assessment report. Dr Allison advised that the appellant had experienced ongoing pain since her assault, which had now become chronic in nature. Dr Allison diagnosed an Axis 1 pain disorder.

[23] On 22 August 2012, the appellant's GP completed medical certificates with the principal diagnosis described as "spinal cord injuries" linked to the 2008 assault.

[24] On 18 March 2013, Dr Morton Mair, the Corporation's Branch Medical Adviser, recommended that the Corporation accept cover for a pain disorder. On 26 `March 2013, the Corporation accepted cover for "mental injury - pain disorder".

[25] On 15 April 2014, the appellant's GP completed medical certificates with the principal diagnosis being described as "Spinal Cord Injuries" linked to the 2008 assault.

[26] On 8 January 2015, Dr Darren Malone, Psychiatrist, assessed the appellant. Dr Malone noted references in some reports to the appellant having mental health issues, including chronic pain, prior to the 2008 assault, even though she denied any psychiatric history prior to the assault. Dr Malone listed inconsistencies in the appellant's evidence and assessed that these gave rise to symptom validity concerns. Dr Malone recommended that the Corporation arrange neuropsychological testing and obtain notes from the appellant's GP and hospital. Dr Malone concluded that, "due to the inconsistent account and concerns about symptom validity", he was not able to make a psychiatric diagnosis.

[27] From 26 January 2016 to 7 November 2017, the Corporation received nine more ACC18 medical certificates from the appellant's GP noting "Spinal Cord Injury". However, no requests for treatment for a spinal cord injury were noted.

[28] On 19 October 2016, another MRI of the appellant's lumbar spine was performed. Dr Claudia Schueller-Weidekamm, Radiologist, compared the findings with the 2011 MRI and reported:

> Unchanged to previous MRI examination, there is a mild desiccation at L4/L5 with unchanged mild posterior disc bulge but no involvement of the nerve roots. Slightly increased hypertrophy of the ligamentum flavum and mild joint arthrosis L4/L5, but no joint effusion.

[29] On 21 December 2016, the Corporation wrote to Ranolf Medical Centre, the location of the appellant's then GP, requesting:

(1) Medical notes relating to the appellant's pre-injury difficulties associated with mental health issues/disorders including mood disorders and/or substance abuse for the five years prior to the injury, being from February 2003;

(2) All medical and clinical notes pertaining to the appellant's 2008 assault from February 2008 to the date of the request;

(3) Specialist reports and correspondence (where applicable); and

(4) X-ray and MRI scan results.

[30] On 26 January 2017, the appellant was seen by Dr John Petrie, Consultant in Rheumatology and Rehabilitation. Dr Petrie made a diagnosis of complex regional pain syndrome of the right leg following the 2008 assault, and noted "recent onset of significant back, buttock, and leg stiffness with features consistent with inflammatory disease". Dr Petrie stated:

> [The appellant] has had problems with her back and right leg since an assault from a previous relationship partner gave rise to what sounds like a regional pain syndrome involving her right leg… More recent symptoms however have included widespread stiffness of her spine and buttocks, with symptoms also occurring in her left wrist and forearm. These were investigated with further MR scans towards the end of last year, the MR scans themselves demonstrating patent neural foramina, no change in what are really age appropriate disc changes at L4/5, but evidence of bone marrow oedema and erosive changes in both sacroiliac joints.

[31] On 28 February 2017, the appellant applied for a lump sum/independence allowance.

[32] On 9 March 2017, the Corporation received the GP records it had requested from the appellant's GP, Dr Susanna Papenfus, at Ranolf Medical Centre. Included

in the medical reports was Dr Wallbridge's diagnosis of chronic somatic lumber spinal pain and central sensitization.

[33] On 27 April 2017, the Corporation obtained comment from Dr Helen Gemmell, Branch Medical Adviser, who noted that she could not find any evidence on file to support a spinal injury.

[34] On 16 May 2017, Dr Gemmell commented:

> It is of additional note that the ACC 18s cite 'spinal cord injury' to be the diagnosis for which the client has cover - I can find no evidence in any file to support any spinal injury has ever occurred to this client. There is not even any supported peripheral nerve injury with no radicular symptoms and a normal whole spine initial MRI. The client has moved around geographically a great deal, it is not unusual for a new GP to fill out an ACC form before prior notes are to hand then never correct the initial diagnosis entered - this could be a possible explanation for this apparent repeated error through the file. This client has no cover for any spinal cord injury on any claim.

[35] On 21 June 2017, the Corporation received further comment from Dr Gemmell. She advised that she had received recent clinical notes from the appellant's GP and Dr Wallbridge, indicating that low back pain was the predominant cause of the appellant's recent incapacity. Dr Gemmell noted that Dr Petrie made reference to "complex regional pain syndrome". Dr Gemmell assessed that Dr Petrie was basing his comments purely on self-reporting from the appellant, and that he did not have the full clinical information to hand. Dr Gemmell considered that the clinical notes also indicated that the cause of the appellant's pain was an underlying medical condition.

[36] On 25 July 2017, the Corporation wrote to the appellant's GP, advising that the Corporation had received the medical certificates noting a diagnosis of "spinal cord injury", but that there was nothing on the file to support any significant injury beyond soft tissue sprains occurring. The Corporation advised that it would no longer accept medical certificates with this diagnosis.

[37] On 1 August 2017, Christine Vorster, Clinical Psychologist and Psychology Advisor, provided advice:

> I note that Dr Malone did not feel comfortable making a diagnosis without further investigation, collaborative information and psychometric testing. Dr Malone listed 16 points of validity concerns. At the time Dr Malone requested a comprehensive psychological assessment including a MMPI-2 and collateral information from her family members. I note that [the appellant] was not interested in seeing a pain specialist.

[38] In 2018, the Corporation advised that it had failed to action a claim for additional cover for a lumbar disc prolapse with radiculopathy, and that the appellant had deemed cover for such injury from 25 March 2008.

[39] On 25 May 2018, the Corporation revoked deemed cover as there was no evidence that the 2008 assault caused a disc prolapse.

[40] On 14 November 2018, Dr Susan Shaw, Neuropsychologist, assessed the appellant. Dr Shaw concluded that the results of the appellant's psychological testing were not valid and that it was strongly likely that the appellant had mental health problems prior to the assault in 2008.

[41] On 24 April 2019, Dr Malone reported again. He advised that the additional information received since his 2015 report made clear that the appellant had a pre-2008 pattern of chronic depressive symptoms and chronic pain. Dr Malone assessed that there was evidence of compelling inconsistency, which pointed more to the appellant malingering than to her having a mental injury (pain disorder). Dr Malone assessed that the significant inconsistencies and serious concerns about symptom validity and impairment prevented the making of an Axis 1 psychiatric diagnosis.

[42] On 6 May 2019, Ms Clarkson, Psychology Advisor, noted that it was unclear how somatic symptom disorder had been added to the claim, as it was not supported by any of the mental injury assessments completed by Dr Wilkinson or Dr Malone.

[43] On 6 May 2019, Dr C Paterson, Branch Medical Adviser, stated:

> Is there deemed cover for spinal cord injury? Revoke? Although ACC 18s have noted a diagnosis of spinal cord injury, Dr Gemmell has made it clear that there is no evidence for this. I have not identified any clinical information to support a diagnosis of spinal cord injury.

[44] On 22 June 2019, Dr Allison stated:

> At the time of seeing [the appellant] I was
>
> > a) unaware of her extensive pre-injury history of depression, anxiety, ongoing fatigue and issues with insomnia. Nor was I aware that [the appellant] had previously attended counselling as noted in the GP notes dated 17/08/05 or that she had possibly been depressed since her adolescence.
> >
> > b) It appears that [the appellant] had an extensive ACC history beginning in 1991 and again I was unaware of the number of claims or that she had received ACC related compensation prior to her injury in 2008.
> >
> > c) I was unaware of the conflicting information between the Grey Base Hospital discharge summary notes (10/02/08) and [the appellant's] presentation some ten weeks later to her GP. The hospital notes state: "there are no concerns for major injury, she was admitted for social input and help." She presented to her GP on the 22/04/08 and stated that as a result of the assault, she sustained an injury to her lumbar spine, cervical spine and fractures to her right foot. …
>
> Had I known in 2012 of her previous extensive psychological and pain history and the inconsistencies that arose between presentations to various medical professions, then on balance of probability, I would not have given an Axis 1 diagnosis.

[45] On 28 August 2019, Ms Clarkson reviewed the evidence and commented:

> Persistent Somatoform Pain Disorder
>
> There is now medical evidence and specialist opinions (Dr Malone Psychiatrist, Katrina Allison Clinical Psychologist) that there is an alternative explanation for [the appellant's] symptomatology and incapacity from the time of her index accident, and this mental injury cover was considered and approved based on inaccurate and unreliable information.

[46] On 6 September 2019, the Corporation revoked cover for mental injury - pain disorder. The Corporation stated that it had made an error in accepting cover for this condition in 2013 as it relied on incomplete information. The revocation decision also stated that:

> The Corporation is declining cover for a pain related mental injury. This includes 'Mental Injury – Pain Disorder' and for the avoidance of doubt we are also unable to cover the mental injuries conditions of 'Persistent Somatoform Pain Disorder' and 'Chronic Pain Associated with Significant Psychological Dysfunction.

[47] Also, on 6 September 2019, the Corporation issued a decision, revoking deemed cover for spinal cord injury:

> ACC has now looked carefully at all the information now available and has decided that spinal cord injury cannot be accepted. This is because this diagnosis was not correct and the medical evidence, namely the MRI of 26/08/2008, supports that a spinal injury did not occur due to the accident of 08/02/2008.
>
> As a result, ACC has now declined your claim for cover for Spinal Cord Injury. This means that ACC is not able to help with treatment costs or other support for this injury from today

[48] On 16 April 2020, review proceedings were held. On 14 May 2020, the Reviewer dismissed the review. This decision was made on the basis that the Corporation was justified in revoking its decisions, as it had erred in originally accepting cover for the mental injury of pain disorder, and the appellant should not have deemed cover for a spinal cord injury.

[49] On 25 May 2020, Thomas Armingeat, Consultant Rheumatologist, saw the appellant and provided comment. Mr Armingeat diagnosed non-radiographic axial spondyloarthropathy, and low back pain, disc protrusion and right leg pain with complex regional pain syndrome following trauma and assault in 2008 by her former partner.

[50] On 16 June 2020, a Notice of Appeal was lodged.

[51] On 5 May 2021, a psychology service completion report was completed by Philippa Van Der Wal, Psychologist, of Habit Health. The report noted:

> In 2008 the appellant sustained multiple soft tissue injuries and two fractured toes, following an assault from her partner at the time. The appellant was taken to Greymouth Hospital where she was admitted, however later self-discharged and stayed with a friend. She reported that the injuries took several months to heal. It is stated that she developed a chronic pain disorder in her lower back and right leg. …
>
> The appellant participated in a psychological assessment interview on 5 May 2021. The assessment indicated presenting problems of PTSD and secondary symptoms of agoraphobia. The appellant also reported depressive symptoms…

Relevant law

[52] Section 20(2)(a) of the Act provides that a person has cover for a personal injury which is caused by an accident. Section 26(2) states that "personal injury" does not include personal injury caused wholly or substantially by a gradual process, disease, or infection (unless it is personal injury of a kind specifically described in section 20(2)(e) to (h)). Section 25(1)(a)(i) provides that "accident" means a specific event or a series of events, other than a gradual process, that involves the application of a force (including gravity), or resistance, external to the human body. Section 25(3) notes that 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.

[53] In *Johnston*,[1] France J stated:

> [11] It is common ground that, but for the accident, there is no reason to consider that Mr Johnston's underlying disc degeneration would have manifested itself. Or at least not for many years.
>
> [12] However, in a passage that has been cited and applied on numerous occasions, Panckhurst J in *McDonald v ARCIC* held:
>
>> "If medical evidence establishes there are pre-existing degenerative changes which are brought to light or which become symptomatic as a consequence of an event which constitutes an accident, it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered. The fact that it is the event of an accident which renders symptomatic that which previously was asymptomatic does not alter that basic principle. The accident did not cause the degenerative changes, it just caused the effects of those changes to become apparent ..."
>
> [13] It is this passage which has governed the outcome of this case to date. Although properly other authorities have been referred to, the reality is that the preceding decision makers have concluded that Mr Johnston's incapacity through back pain is due to his pre-existing degeneration and not to any injury caused by the accident.
>
> [14] … I consider it important to note the careful wording in the McDonald passage. The issue is not whether an accident caused the incapacity. The issue is whether the accident caused a physical injury that is presently causing or contributing to the incapacity.

[54] In *Ambros*,[2] the Court of Appeal envisaged the Court taking, if necessary, a robust and generous view of the evidence as to causation:

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1 *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

2 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

> [65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved. They proceed on their general impression of the sufficiency of the lay and scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person of common sense …
>
> [67] The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the Court to draw robust inferences of causation in some cases of uncertainty -- see para [32] above. However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture … Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witness evidence …

[55] Section 65 of the Act provides:

> (1) If the Corporation considers it made a decision in error, it may revise the decision at any time, whatever the reason for the error.
>
> (2) The Corporation may revise a decision deemed by section 58 to have been made in respect of any claim for cover, but may not recover from the claimant any payments made by it, in respect of the claim, before the date of the revision unless the claimant has made statements or provided information to the Corporation that are, in the opinion of the Corporation, intentionally misleading.
>
> (3) A revision may—
>
> (a) amend the original decision; or
>
> (b) revoke the original decision and substitute a new decision.

[56] In *Bartels*,[3] Gendall and Ronald Young JJ stated, in relation to the Injury Prevention, Rehabilitation, and Compensation Act 2001, section 390 (equivalent to section 65(1) above):

> [28] … the process under s 390 requires the Corporation to examine the earlier decision. It is after all, in the words of s 390, for the Corporation to establish "that the decision was made in error". We are satisfied, however, that it is entitled to do so using material not available to it at the time of the original decision but which has become available since. We stress, however, that material must clearly establish that the original decision was made "in error" before it can invoke s 390. …
>
> [31] ... We are satisfied that all Parliament meant was that the Corporation can today, with the factual and other material it now has, look back at the decision

[3] *Accident Compensation Corporation v Bartels* [2006] NZAR 680.

> previously made and decide if it was "made in error". A simple example will illustrate the position. A claim is made for a broken arm. An x-ray is inspected which confirms the break and thus cover accepted. Later it is discovered that either the x-ray has been misread or someone else's x-ray has been read and that the x-ray of the claimant reveals no break. This is "new evidence" and would be highly relevant to a decision under s 390 to revoke the original decision as made "in error". …
>
> [33] Finally, we agree with the Corporation's submissions … that where decisions previously made are clearly made in error that those decisions should not be left to advantage or disadvantage either claimants or the Corporation. This is a publicly funded insurance scheme for those who suffer personal injury by accident. Those who suffer personal injury by accident should have cover under the Act and those who do not should not get cover when none is due.

[57] The Court has, on several occasions, accepted that the Corporation was entitled to revisit and revoke an earlier decision that it had made.[4]

[58] In *Atapattu-Weerasinghe*,[5] Williams J held:

> [22] … it seems clear that s 65(1) and (2) cover two different situations. The first, where a decision has been made and is now felt to be erroneous; the second, where no decision has been made, cover is deemed to be granted, and the Corporation wishes to revisit that. *Bartels* does not speak to the second situation.
>
> [23] … The reverse onus, as provided for in *Bartels*, only makes sense because an actual error has been identified by the Corporation in the earlier decision. It seems entirely fair that, in that situation, the Corporation should be required to justify the change. But in the absence of such error, reversal of the onus makes no particular sense. …

Discussion

[59] The issues in this case are whether the Corporation correctly revoked:

(1) deemed cover for a spinal cord injury, and

(2) cover for a mental injury (pain disorder).

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4 *Stowers v Accident Compensation Corporation* DC Christchurch 167/2009, 5 October 2009; *Paku v Accident Compensation Corporation* [2017] NZACC 143; *Crosswell v Accident Compensation Corporation* [2019] NZACC 37; *Garing v Accident Compensation Corporation* [2019] NZACC 63; and *Herbst v Accident Compensation Corporation* [2020] NZACC 109.

5 *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142, followed in *Singh v Accident Compensation Corporation* [2019] NZACC 102, at [112].

Revocation of deemed cover for a spinal cord injury

[60] On 10 March 2010, the Corporation received an ACC medical certificate with a diagnosis of spinal cord injury arising out of the assault on her on 8 February 2008. Because the Corporation failed to process that claim in time, the appellant was (as at 15 May 2010) deemed to have cover for a spinal cord injury. The Corporation later received further medical information about the appellant's physical injuries, and, on 6 September 2019, it revoked deemed cover for a spinal cord injury. This Court notes that the Corporation is entitled to revoke its deemed decision in favour of the appellant, and that the onus of proof rests with her to establish that she is entitled to cover.[6] In the appellant's case, in order to obtain cover for a spinal cord injury, she is required to establish that she sustained this injury, and that it was caused by the assault on her on 8 February 2008.

[61] The appellant's counsel submits that the Corporation was wrong to revoke deemed cover for her spinal cord injury. The appellant relies on:

- the notes of Mr Farr (Orthopaedic Surgeon), dated 20 August 2008, that a primary cause of the injury to the appellant's spine was the assault in 2008;

- the letter of Mr Ruiterkamp (Physiotherapist), dated July 2009, which identified the appellant's lower lumbar spine as showing a lot of bruising and restriction due to soft tissue injury sustained during the assault;

- the letter of Mr Franken (Osteopath), dated May 2011, that spinal surgery was offered to the appellant as a form of treatment for her back pain;

- the 2016 MRI, showing the appellant as having an unchanged mild disc desiccation and disc bulge; and

6 Section 65(2) of the Act and *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142, at [22]-[23].

- the letter of Dr Wallbridge (Musculoskeletal Pain Physician), dated March 2017, providing a diagnosis of chronic somatic lumbar spinal pain and central sensitisation.

[62] This Court acknowledges the above evidence submitted by the appellant. However, the Court notes the absence of diagnosis in the above evidence of a spinal cord injury caused by the 2008 assault. Further, the Court notes the following considerations.

[63] First, the medical notes and reports from the day after the assault on 8 February 2008 contain no mention of spinal cord injury. The Court refers to the notes of the Rural Nurse Specialist who attended the appellant, the notes taken at the hospital to which she was referred, and the report of the x-ray of her thoracic spine taken the same day.

[64] Second, the above opinion of Mr Farr was qualified by his assessment that, while the injury of February 2008 had been to the appellant's neck and the rest of her spine, there was no known pathology to explain her ongoing back pain.

[65] Third, on 26 August 2008, Dr Mason, Radiologist, reported that an MRI performed on the appellant showed no abnormal pathology, with unremarkable imaging of the whole spine and with no cause for spinal pain or right leg numbness identified.

[66] Fourth, on 2 June 2009, Dr Chancellor, Neurologist, affirmed that the best description of the appellant's presentation was a pain syndrome without specific cause, other than post-traumatic.

[67] Fifth, on 19 October 2016, Dr Schueller-Weidekamm, Radiologist, reported that a further MRI of the appellant's lumbar spine revealed that the spine was unchanged compared to the previous MRI examination.

[68] Sixth, on 27 April 2017, Dr Gemmell, Branch Medical Adviser, noted that she could not find any evidence on file to support a spinal injury or any supported peripheral nerve injury.

[69] In light of the above evidence, this Court finds that the appellant has not established that she sustained a spinal cord injury as a result of the assault on her on 8 February 2008.

Revocation of cover for mental injury (pain disorder)

[70] On 29 January 2013, Dr Allison, Clinical Psychologist, advised that the appellant had experienced ongoing pain since her assault on 8 February 2008, and Dr Allison diagnosed an Axis 1 pain disorder. On 26 March 2013, in light of Dr Allison's report, the Corporation accepted cover for "mental injury - pain disorder". The Corporation later received further evidence and reports regarding the appellant's pre-2008 mental health. In light of the further information, on 6 September 2019, the Corporation revoked cover for "mental injury - pain disorder", advising that it had made an error in accepting cover for this condition in 2013 as it had relied on incomplete information. This Court notes that the Corporation is entitled to revoke its decision, and substitute a new decision, if it considers that it made the original decision in error.[7] The onus is on the Corporation to justify the change in the original decision as having been clearly wrong.[8]

[71] The appellant submits that the Corporation has not established that its decision to grant cover for mental injury - pain disorder, as being caused by the 2008 assault, was made in error. The appellant notes the lack of diagnosis for chronic pain prior to or other than that which arose from the 2008 assault, and further relies on:

- the letter from Ms Richards (Physiotherapist), dated 16 April 2008, noting that the appellant presented with severe constant neck, thoracic, lumbar pain and soft tissue contusion;

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7 Section 65(1) and (3) of the Act.
8 See n3 *Bartels*, at [28] and [33].

- the letter of Dr Franken, dated 30 May 2011, that the appellant presented with a history of low back pain radiating into the right sacroiliac joint dating back to the 8 February 2008 assault;

- the clinical examination notes of Dr Wallbridge (Musculoskeletal Pain Physician), dated 11 July 2011, which identified continued and marked tenderness in the appellant's pelvis, difficulty standing on her right leg, and decreased motion in her right S1 joint;

- the MRI scan, dated 19 October 2016, which found new subchondral small erosions with subchondral bone marrow edema at the inferior portion of the sacroiliac joints sacral-sided on the right and iliac-sided on the left, which might be associated with chronic/acute sacroiliitis;

- the diagnosis of Dr Petrie (Consultant in Rheumatology and Rehabilitation), dated 26 January 2017, that the appellant had complex regional pain syndrome of the right leg following the 2008 assault, with recent onset of significant back, buttock and leg stiffness with features consistent with inflammatory disease; and

- The diagnosis of Dr Armingeat, Consultant Rheumatologist, dated 25 May 2020, that the appellant had non-radiographic axial spondyloarthropathy, and low back pain, disc protrusion and right leg pain with complex regional pain syndrome following trauma and assault in 2008.

[72] This Court acknowledges the above evidence submitted on behalf of the appellant. However, the Court notes the absence of diagnosis by a psychologist in the above evidence of mental injury - pain disorder caused by the 2008 assault. Further, the Court notes the following considerations.

[73] First, there is the assessment of the appellant in person on 8 January 2015, by Dr Malone, Psychiatrist. Dr Malone noted references in some reports to the appellant having had mental health issues, including chronic pain, prior to the 2008 assault, even though she denied any psychiatric history prior to the assault.

Dr Malone concluded that, due to the inconsistent account and resultant concerns about symptom validity, he was not able to make a psychiatric diagnosis. This Court notes the objections raised by the appellant to Dr Malone's evidence, centring on the appellant's privacy concerns. However, this Court also notes that Dr Malone's report is based on his assessment of records of the appellant's psychological condition as well as his own in-person psychiatric assessment of the appellant. The appellant has not demonstrated whether, and if so in what way, Dr Malone's report is inaccurate. In any event, the Court is (as per section 156(1) of the Act) entitled to hear any evidence that it thinks fit. This Court concludes that Dr Malone's assessment report is entitled to some weight.

[74] Second, there is the assessment of the appellant in person on 14 November 2018, by Dr Shaw, Neuropsychologist. Dr Shaw concluded that the results of the appellant's previous psychological testing were not valid and that it was very likely that she had mental health problems prior to the assault in 2008. This Court notes the objections raised by the appellant to Dr Shaw's evidence, centring on the appellant's privacy concerns and complaint against Dr Shaw. However, the Court notes that Dr Shaw's report is based on her assessment of notes of the appellant's psychological condition as well as Dr Shaw's own in-person neuropsychologist assessment of the appellant. The appellant has not demonstrated that Dr Shaw's report is inaccurate. In any event, the Court is (as noted above) entitled to hear any evidence that it thinks fit. This Court concludes that Dr Shaw's report is entitled to some weight.

[75] Third, there is the further report of 24 April 2019, by Dr Malone, Psychiatrist. Dr Malone advised that the additional information received since his 2015 report made clear that the appellant had a pre-2008 pattern of chronic depressive symptoms and chronic pain. Dr Malone assessed that the significant inconsistencies and serious concerns about symptom validity and impairment prevented the making of an Axis 1 psychiatric diagnosis. For the reasons noted above, this Court finds that Dr Malone's further report is also entitled to some weight.

[76] Fourth, there is the report of 22 June 2019, by Dr Allison, Clinical Psychologist, whose diagnosis of Axis 1 pain disorder of the appellant (in January

2013) had led to the Corporation's decision of 26 March 2013 to accept cover for mental injury - pain disorder. Dr Allison noted in her June 2019 report that, when she made her previous diagnosis, she was unaware of the appellant's extensive pre-injury history of depression, anxiety, ongoing fatigue and issues with insomnia, and of the records of conflicting information having been given by the appellant. Dr Allison concluded that, had she known at the time of her previous report of the appellant's previous extensive psychological and pain history, and the inconsistencies that arose between presentations to various medical professions, then, on balance of probabilities, she (Dr Allison) would not have given an Axis 1 diagnosis. This Court notes the objections raised by the appellant to Dr Allison's evidence, centring on the appellant's privacy concerns. However, the Court notes that the appellant has not demonstrated that Dr Allison's June 2019 report is inaccurate. The Court finds that Dr Allison's revised assessment is of significant weight.

[77] Overall, the Court finds that the Corporation had sufficient medical evidence to justify the revocation of its original decision on the basis that it was clearly wrong.

Conclusion

[78] In light of the above considerations, the Court finds that the Corporation correctly revoked deemed cover for a spinal cord injury. The appellant has not established that she sustained a spinal cord injury as a result of the assault on her in February 2008. The Court finds further that the Corporation has established that it correctly revoked cover for mental injury - pain disorder on the basis that the decision to grant cover was made in error.

[79] The decision of the Reviewer dated 14 May 2020 is therefore upheld. This appeal is dismissed.

[80] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors: Ford Sumner for the Respondent.