

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 139 ACR 154/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	MARK RAWSON Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
	ANDERSON AND O'LEARY LIMITED Second Respondent

Hearing: 29 June 2022

Heard at: Auckland/Tāmaki Makaurau

Appearances: Mr B R Hinchcliff for the appellant
Ms L Hawes-Gandar and Ms F Becroft for the first respondent
Mr P Nant on behalf of the second respondent

Judgment: 20 July 2022

**RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Personal injury, s 20, Accident Compensation Act 2001]**

[1] At issue on this appeal is whether the decision of the Accident Compensation Corporation dated 12 November 2020 accepting the appellant's claim as a work-related personal injury at Anderson and O'Leary Limited is correct.

[2] The position of the appellant is that he meets the requirements for a work-related personal injury under the Accident Compensation Act 2001.

[3] In this case, Mr Hawes-Gandar on behalf of the first respondent advises that the Corporation abides the decision of the Court, a decision that comes down to the factual question of whether or not an accident causing injury to the appellant's wrist occurred.

Background

[4] In this case, the accident causing injury is said to have occurred on 21 November 2019. At that time the appellant was a mill hand worker for Anderson and O'Leary Limited.

[5] On 11 January 2020, the appellant consulted Dr Marquis who noted:

Before Christmas was unloading timber – had his right wrist jarred between the timber, pain in the ulnar(?) side of the right wrist.

OE (on examination):

Right hand and wrist – pain in the ulnar (ulnar?) region. Able to F/E/laterally rotate his hands.

I; right hand wrist sprain

Wrist splint

Pain medication

[6] An ACC injury claim form was completed by Dr Marquis on 11 January 2020. The accident date is shown as 21 November 2019 at Anderson and O'Leary, Whenuapai.

[7] The accident description is as follows:

While unloading timber accidentally got his right hand and wrist jammed between the timber. Pain on certain movements. Paid work. Impact with a sharp object.

[8] The coding diagnosis was "sprain wrist ligament".

[9] By letter of 14 January 2022, ACC accepted the appellant's claim.

[10] A nurse clinic note from 22 June 2020 says:

Phone call to PT re visit to white cross with sore R hand and wrist.

Pain in ulcer (ulnar) region still the same as JAN, PT now also experiencing pain in R thumb, PT describes it as feeling like pinched nerve with pain shooting up his thumb.

PT unable to come to RMC during day as he cannot get time off work – afraid he will lose his job if he does take time off.

PT can come in Fri afternoon, advised PT Dr SM is duty doctor so he will be able to see his usual doctor...

[11] The appellant saw Dr Marquis on Friday 26 June 2020. The doctor's note says:

ACC review.

Seeing hands on X-ray was nad.

Didn't come in for a review due to the lockdown.

Plan: review if no improvement with hands on.

[12] On 30 July 2020, the appellant was seen by Dr Mutu-Grigg, Wrist Specialist.

[13] In his report, Dr Mutu-Grigg says:

Thank you for referring Mark who is a 61-year-old right-hand-dominant gentleman who works in a sawmill. He was carrying a very large 6m piece of timber, walking with it with another gentleman at the other end when they hit something and his wrist was forced into an ulnar deviating position and developed pain of the ulnar aspect of his wrist. He noted that he told his superiors about this straight away and they were on-site shortly thereafter for a different purpose, but they neglected to complete an incident form, as they were supposed to, and he has had some minor issues because of that since. He is now complaining of pain of the ulnar aspect of his wrist, particularly with supination.

...

He is exquisitely tender under the ulnar fovea and TFC grind testing is positive.

X-ray is performed under the TRG system, did not show any significant anomalies and a fairly neutral variance, perhaps 1mm positive.

At sounds so he has a TFCC (Triangular Fibro Cartilage Complex) tear. I have organised an MRI scan to be performed at TRG.

[14] The appellant underwent an MRI scan of his right wrist on 31 July 2020. Under the heading "Conclusion" was this:

1 As clinically suspected, there is a 3mm communicating tear defect in the TFCC central articular disc and small volar ganglion cyst.

- 2 Tiny dorsal scapholunate ligament interstitial tear with an associated 10mm x 3mm multilobulated ganglion cyst. Mild thickening and scarring and the volar scapholunate ligament.
- 3 Mild osteoarthritis and synovitis within the pisotriquetral joint. The articular cartilage throughout the wrist is otherwise maintained.

[15] After the MRI scan, on 14 August 2020, Dr Mutu-Grigg called the appellant for a follow-up. Dr Mutu-Grigg was of the belief that the first line would be a steroid injection into that region.

[16] On 20 August 2020, the appellant completed an ACC 121 form for a work-related injury. In that document he listed three persons who witnessed the accident, Lee Tevaga, Tasi Inu and Mani Karena. The date and time of the injury are not shown. However, the appellant has ticked yes that he reported the injury to his employer within 15 minutes but that it was not in writing.

[17] On 25 August 2020, the appellant was interviewed by Mr Nant, General Manager and Pat Courtney, Supervisor.

[18] In the interview, the appellant began by saying that the injury was not on 21 November 2019. Then there was the following questions and answers:

- Q: When was it?
- A: I can't answer. I can't give the exact date.
- Q: How was it reported?
- A: Aaron and Kumar came down to check a packet 15mins after the incident. I said I took the timber off the table and Lee did not lift it high enough off the table lug. My wrist twisted and jarred my RH wrist.
- Q: What did Aaron or Kumar say to you?
- A: "We'll see how it goes." Aaron said. I said, "Ok, fair enough. My pain barrier is pretty high, and I put up with shit."
- Q: Were you aware of any report being written?
- A: No. There were photos taken by somebody.
- ...

[19] The interviewers made further enquiries and recommenced the interview with the appellant on 27 August 2020 at 8 am. In the meantime, it appears that Mr de Jonge, the previous mill manager, was spoken to and could not recall the incident, as described, happening.

[20] When told this, the appellant said:

That surprises me. Bloody disappointing to be honest. I don't know what to say. Don't know why Aaron and Kumar cannot recall it. It could have been two or three months before Aaron left when the incident happened.

Mr Nant: Aaron left on 5 November 2019.

Mr Rawson: It may have happened after the peg machine incident on 23 October 19 because there is no way I could have set a production record on that day with a sore wrist.

[21] The witness Mani Karena made a statement dated 27 October 2020. He said:

...He and other workmate was carrying a piece of timber one on each end when the timber they were carrying hit a lug at end of the table twisting or jolting Mark's hand causing pain in Mark's wrist area. I just heard about the incident, I don't witness it...

[22] Lee Tevaga made a statement on 19 October 2020. He said:

Mark and I worked together one day back in 2019, we worked picking or taking off timbers from the E-Grader machine. We picked off a 2 by 8 timber from the machine. Mark picked up his end of the timber with one hand (right) and as we walked to the pile, Mark accidentally twisted his wrist. At the time Mark thought it was better after a while but that is not the case now. I know this incident caused Mark an ongoing health issue with his hand.

[23] The witness Tasi Inu made this brief statement which is date stamped 27 October 2020:

As I was leading the E-Grader table, I saw that Lee and Mark were carrying a piece of 90 x 45 I believe, as they were about to land the piece onto the packet it got caught onto the lug cause the piece wasn't lifted high enough. I don't remember Mark seeking first aid straight away but I do remember our supervisor and production manager at the time came down to the E-Grader to take photos of the incident.

[24] On 22 October 2020, Mr Mutu-Grigg noted in a report:

The steroid injection worked well for a few weeks but then his pain came back. He is complaining of pain over the ulnar aspect of his wrist. Particularly when he is loading.

We have failed non-operative management and I have thus recommended surgery.

...

[25] In a further statement date stamped 27 October 2020, the appellant repeated the mechanism of the accident and said:

I reported this to my supervisor Kumar and Aaron, the production manager about 15 minutes after the incident. Aaron took photos of what happened. Aaron said, we'll see how it goes. I said, ok, fair enough.

I would like to point out the reason that the date is hard to remember is because I was switching between the E-Grader (grading department) and the boron treatment plant at that time.

My pain barrier is quite high and put with a lot before sorting my problems out and don't like to let my workmates down.

[26] Next, on the basis of an opinion by Dr Fong, ACC's principal clinical advisor, orthopaedic surgery, that the appellant's presentation was an age-related change and that these conditions could be symptomatically aggravated by the claimed accident but not caused by it, ACC on 29 January 2021 wrote declining to pay for surgery to treat the appellant's TFCC tear.

[27] In a letter dated 11 February 2021, Mr Mutu-Grigg said:

It must be noted that Mr Raymond Fong is incompetent in dealing with TFCC injuries. Mark's TFCC tear is shown on the MRI as a hole in the central disc. This is classified under the palmar classification is a palmar IA, which by definition is traumatic. I have been through this classification system with Mr Fong a number of times but he continues to make same mistakes again and again.

[28] On 4 May 2021, Mr Nant affirmed an affidavit dealing with his investigation process in which he discovered "the misleading reporting of an alleged incident that allegedly occurred on 21 November 2019".

[29] Mr Nant notes that the appellant says the incident occurred on 21 November 2019 and was reported to his manager Aaron de Jonge. Mr Nant says:

Aaron left Pinepac on 5 November 2019 and after my telephone interview with him last month, he cannot recall the incident being reported or investigated at this or any other time.

[30] Mr Nant points out that the timber involved was 250 by 50 whereas the record shows that this dimension of timber was not run on 21 November 2019.

[31] Mr Nant notes that there is no record in Jobsafe of the wrist injury occurring and that Aaron de Jonge had a reputation for reporting all incidents, big or small within Jobsafe.

[32] Mr Nant also says:

When asked why he didn't seek medical treatment from our company doctor, he said he was unaware of this requirement. This message was/is communicated regularly at toolbox meetings.

[33] Mr Nant also says:

It would be helpful if we could obtain both Mark and the witness statements referred to, the 12/11/20 letter, so that we can compare these to our investigation and interview notes. To date this is not been provided.

[34] Mr Mutu-Grigg provided a further report on 1 July 2021 in which he said:

It is my understanding that he was carrying a six-meter-long piece of very heavy wood. His wrist was in the expected position when carrying something like this of being fully supinated neutral flexion/extension and slightly ulnar deviated. They were moving it at walking speed and he was using quite significant force to hold it. They then bumped into something and suddenly stopped moving and all the force who was using to carry and move the item was transferred into his wrist which was instantly maximally ulnarly deviated. This caused his ulnar and his lunate to hit together causing a tear of his TFCC.

Appellant's submissions

[35] Mr Hinchcliff traversed the background of this case acknowledging that there is some vagueness with the date, he refers to the decision of *Anderson*¹ where Judge Beattie said:

I find and rule that it is not necessary that an active trauma which is found to be the probable cause to be able to be identified, or even pinpointed by date ...

[36] He also refers a similar comment of Judge Joyce in *Murphy*.² What is important is that there was an accident and there was a personal injury.

¹ *Anderson v Accident Compensation Corporation* [2006] NZACC 63 at [19].

² *Murphy v Accident Compensation Corporation* [2013] NZACC 398 at [46].

[37] Mr Hinchcliff submits that the description of the accident is relatively consistent with the appellant working at an E-grade table and his wrist being twisted and jarred.

[38] He therefore submits that ACC's original decision in granting cover was correct and that there should be judgment in favour of the appellant.

[39] Mr Hinchcliff says that if the respondent's position is accepted, it means that all eye-witnesses' statements relating to this "accident" are false.

Second Respondent's Submissions

[40] Mr Nant told the Court he was in attendance today to reinforce his company's position. He spoke of the safety culture of his company and the seriousness with which it treated all accidents. He said:

We do our utmost to make our systems safe for those on site.

[41] He said that the company had gone to some trouble to investigate this matter and although the accident was alleged to have occurred in November 2019, the company was not told until July 2020.

[42] He said that the appellant had reported a minor "scratch" which was caught by the company's system.

[43] He says that the company stands by the evidence submitted and requests that the reviewer's decision stands.

[44] He told the Court how straight forward the system for reporting of an accident is, which can be done by smart phone to an online cloud system. Once the system is activated, a photograph is demanded and uploaded to cloud storage. He again emphasised the safety culture of his company. He also pointed out that as a reflection of how the company valued its employees, in the appellant's case, after an operation on 5 August 2019, he was able to "rehabilitate" at the boron plant for two weeks.

Decision

[45] From all that I have heard and read relating to this appeal, it is clear to me that the second respondent Anderson and O’Leary Limited places high priority on having a safe culture that is reflected in ongoing instruction to employees that they must record and report accidents and the company has made the process of reporting accidents accessible to all by providing for it to occur using smart phones which, in the course of report by that means, request a photograph.

[46] The second respondent is to be applauded for its commitment in this regard to keep its employees safe.

[47] However, the question that this Court has to answer in this case is whether the accident as described by the appellant occurred and if it did, whether it caused the injury the TFCC tear to his right wrist that now requires surgical remediation.

[48] Next, it needs to be said that in terms of the appellant’s actions or inactions, he has done little to assist his position. So much so the fundamental issue arises as to whether there was any accident causing injury at his place of work as he claims.

[49] In his affirmation of 4 May 2021 which was made after a conscientious investigation headed by him in August 2020 into the alleged workplace accident, Mr Nant points out a number of inconsistencies. Amongst the inconsistencies in the claim is that the appellant says that he reported the incident to his manager Aaron de Jonge. However, if the accident occurred on 21 November 2019, this was not possible as Mr de Jonge had left the company on 5 November 2019.

[50] As well as this, Mr Nant points out other discrepancies including the dimension of timber involved, not being produced on the date of the alleged accident and the fact that a report of the accident has not reached any of the company’s records.

[51] However, I conclude on the balance of probabilities that a work-related accident did occur to the appellant and I agree with Judge Beattie and Judge Joyce that a precise date of the accident is not a requirement of the Act.

[52] I conclude from all that I have read that when this accident occurred, it was a reported as the appellant says but that it was in large measure shrugged off by him and I infer it was not therefore regarded as needing to be properly reported to the company by the employee, Aaron to whom it was reported.

[53] It took the appellant two months or more until 11 January 2020 to go and see his GP. However, the report to the GP is a straightforward one, that the appellant had his right wrist jarred between the timber.

[54] When it came to his ACC claim, the appellant listed three witnesses. Each of these witnesses made statements.

[55] In reading the witness statements, I conclude that they are straightforward and that there is no suggestion of collusion about them. Mr Karena, for instance, is careful to say that he just heard about the incident and did not witness it. Otherwise, his obviously hearsay account is consistent with what others including the appellant have said.

[56] The witness Lee Tevaga was the person with whom the appellant was working on the day in question. He says:

We picked off a 2 by 8 timber from the machine. Mark picked up his end of the timber with one hand (right) as we walked to the pile, Mark accidentally twisted his wrist. At the time Mark thought it was better after a while and that is not the case now. I know this incident caused Mark an ongoing health issue with his hand.

[57] The witness Tasi Inu says in his statement:

As I was leaving the E-Grader table, I saw that Lee and Mark were carrying a piece of 190 x 45 I believe, as they were about to load the piece onto the packet. It got caught onto the lug cause the piece wasn't lifted high enough. I don't remember Mark seeking first aid straight away but I do remember our supervisor and production manager at the time came down to the E-Grader to take photos of the incident.

[58] The appellant himself says:

Lee and I were taking a length of timber off the E-Grader table when Lee didn't lift his side high enough and hit the lug "stopper" at the end of the table causing the timber to twist and jar my wrist. I reported this to my supervisor Kumar and

Aaron, the production manager about 15 mins after the incident, Aaron took photo of what happened. Aaron said will see how it goes. I said ok, fair enough.

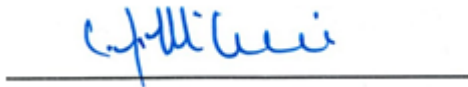
I would like to point out the reason that the date is hard to remember is because I was switching between the E-Grader and the boron treatment plant at that time.

My pain barrier is quite high and put up with a lot before sorting my problems out and don't like to let my work mates down.

[59] To reach a finding that this accident did not occur as is generally described, I would have to conclude that each of the witnesses have fabricated something that did not occur. There is nothing in their separate accounts that suggests concoction.

[60] I therefore find that on the balance of probabilities the accident occurred and that the appellant is entitled to cover. The appeal is therefore allowed.

[61] The parties have leave to file memoranda relating to costs should the need arise.



Judge C J McGuire
District Court Judge

Solicitors: ACC and Employment Law, Ellerslie
Medico Law, Grey Lynn