

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 153      ACR 11/19**

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

Hearing: 9 August 2022  
Held by AVL

Appearances: M Darke for the Appellant  
F Becroft for the Accident Compensation Corporation

Judgment: 15 August 2022

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**RESERVED JUDGMENT OF JUDGE P R SPILLER**  
**[Suspension of entitlements - s 117(1), Accident Compensation Act 2001]**

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**Introduction**

[1] This is an appeal from the decision of a Reviewer dated 18 September 2018. The Reviewer dismissed an application for review of WorkAon's decision dated 7 March 2018, suspending Ms Hopkins' entitlements.

**Background**

[2] Ms Hopkins was born in December 1989. She worked in a supermarket.

[3] On 21 July 2017, an ACC injury claim form was filed for Ms Hopkins' injury said to have occurred that day, when she strained her back reaching for an item at work. Ms Hopkins was employed by Progressive Enterprises, an accredited employer, so the claim was managed by WorkAon on behalf of the Corporation. An incident report from the same day recorded:

Alisha was in manup picking when she felt a slight pain in her tailbone. She continued to pick a little longer and when she coughed the pain got worse, so she reported it immediately.

[4] On 9 August 2017, Ms Hopkins' claim for cover, for lumbar sprain and sciatica, was accepted. Weekly compensation commenced and she received treatment and vocational rehabilitation.

[5] On 12 September 2017, a medical certificate was completed by Dr Kai Andreas, GP, which certified Ms Hopkins as fit to return to normal work hours (as tolerated) on 18 September 2017. Ms Hopkins returned to work and the claim file was closed.

[6] On 14 February 2018, Dr Andreas filed a medical certificate for Ms Hopkins citing a "reaggravation" and right radicular symptoms. Dr Andreas stated that Ms Hopkins required an MRI scan.

[7] Also, on 14 February 2018, the Corporation noted that Ms Hopkins reported in a telephone conversation that she had continued to have minor back problems until the recent "flare-up".

[8] On 20 February 2018, an MRI was undertaken. Dr Adam Worthington, Radiologist, advised:

No focal disc lesion or neural compromise.

The examination is within normal limits without definite cause for symptoms detected.

Prominent sacral perineural/Tarlov cysts are more pronounced on the right with more extensive extraforaminal components than typically seen.

These are usually considered incidental asymptomatic findings, however given the clinical presentation suggest spinal surgical opinion.

[9] On 6 March 2018, Dr Anthony Burgess, Occupational Medicine Physician and Branch Medical Advisor, reviewed Ms Hopkins' medical information, including the MRI report and a request from Dr Andreas for referral to an Orthopaedic Specialist. Dr Burgess advised:

The MRI scan shows evidence of rather significant perineural cysts which are likely to be the cause of her pain, and this warrants review with an orthopaedic spinal surgeon.

The cysts are in no way caused by this (or any) traumatic event and although they are benign, they can cause nerve related symptoms, and this appears to be the case here.

[10] On 7 March 2018, WorkAon issued a decision determining that Ms Hopkins' covered injury of lumbar sprain and sciatica had resolved, and that therefore she no longer had any entitlement on the claim. Ms Hopkins's entitlement to treatment and vocational rehabilitation was suspended two weeks' thereafter, and she lost her entitlement to weekly compensation (she was no longer in actual receipt of weekly compensation).

[11] On 4 April 2018, Dr Moana Taylor, GP, referred Ms Hopkins for an outpatient appointment at an Orthopaedic Clinic. That same day, Dr Taylor provided a medical certificate confirming that Ms Hopkins was fit to return full-time to her previous job.

[12] On 5 April 2018, Dr Taylor received a response from the Orthopaedic Clinic:

Tarlov cysts are common, benign and not a target for operative or other treatment for back pain symptoms.

[13] On 10 April 2018, Dr Taylor completed another medical certificate advising:

This is a letter of support for the above patient who suffers chronic low back pain which has flared due to lifting heavy objects. She's advised to avoid heavy lifting if this continues to aggravate her back pain.

[14] On 6 June 2018, Mr Darke filed an application for review of the 7 March 2018 decision, on behalf of Ms Hopkins.

[15] On 21 August 2018, Dr Burgess provided further comment on the claim:

I note the date of this covered injury was 21/07/2017. The event noted was plausible for sustaining a lumbar sprain injury and it appears initially this resolved in an expected timeframe with a return to work within 2 months of the injury event.

Lumbar sprains can cause incapacity early on in the time course however this will resolve over a period of a few weeks but no longer than 3 months.

There is no indication here that any other injury was sustained during this event however there has been a subsequent deterioration in symptoms some 4-5 months later. Based on these symptoms an MRI scan was arranged to investigate a possible disc prolapse. The MRI scan was carried out on 20 February 2018 and noted to show no evidence of disc prolapse and a normal examination apart from the presence of prominent perineural cysts (Tarlov cysts).

These cysts are non-traumatic in origin and usually asymptomatic however as noted by the radiologist who reported on the MRI the symptoms reported by the claimant could be caused by the cysts and therefore orthopaedic assessment was deemed appropriate.

What is established however is that there was no traumatic pathology seen on the MRI scan. Furthermore, a lumbar sprain is not a plausible cause of ongoing symptoms – such an injury would be and appeared to be spent by September 2017 and certainly does not explain the subsequent deterioration some months later. As such a sprain caused by this event was well and truly spent prior to the noted exacerbation of symptoms from February 2018.

[16] On 5 September 2018, review proceedings were held. On 18 September 2018, the Reviewer dismissed the review, on the basis that the medical evidence did not show, on a balance of probabilities, that Ms Hopkins' symptoms and diagnosed condition were as a result of her injuries sustained on 21 July 2017.

[17] On 7 January 2019, a late Notice of Appeal was lodged.

[18] On 19 March 2020, Dr Burgess provided a report. He described the initial injury as a possible lumbar sprain. Dr Burgess commented:

Lumbar sprain injuries are self-limiting with a range of recovery times from a few days, to at the very longest three months. ... the MRI scan from February 2018 noted no other pathology present other than "Prominent sacral perineural/Tarlov cysts". ... This would therefore provide a very reasonable explanation for her symptoms and presentation. In summary therefore the minor nature of the [July 2017] event along with the timeframe since the event and MRI findings all support the fact that had a lumbar sprain been sustained on 21 July 2017 that this was resolved by February 2018 and in my opinion well

before this. The clear cause of any ongoing symptoms would therefore relate to the cysts noted on the MRI.

[19] Dr Burgess endorsed a recommendation for a spinal surgeon to look at whether the cysts were responsible for Ms Hopkins' symptoms. However, despite a number of requests to various surgeons, the referral was not accepted.

### **Relevant law**

[20] Section 117(1) of the Act provides:

The Corporation may suspend or cancel an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.

[21] In *Johnston*,<sup>1</sup> 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*<sup>2</sup> 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.

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<sup>1</sup> *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

<sup>2</sup> *McDonald v ARCIC* [2002] NZAR 970 at [26], citing *Hill v ARCIC* DC decision 189/98, 5 August 1998 at 12—13.

[22] In *Ambros*,<sup>3</sup> the Court of Appeal envisaged the Court taking, if necessary, a robust and generous view of the evidence as to causation:

[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 ...

[23] In *Furst*,<sup>4</sup> Judge Barber stated:

[13] ACC must have a “*sufficient basis before it is not satisfied that a claimant is entitled to continue to receive the entitlement*”. If the position is uncertain, “*then there is not a sufficient basis*” The “*not satisfied*” test is not met in these circumstances”. *Ellwood v the Corporation* [2007] NZAR 205. The “*not satisfied*” test requires a positive decision ... equivalent to being satisfied that there is no right to entitlements. This test would not be met where the evidence was in the balance or unclear: *Milner v the Corporation* (187/2007).

[14] Section 26 of the Act defines “*personal injury*” as physical injuries suffered by a person. Personal injury caused “*wholly or substantially*” by a non-work gradual process, disease, or by the ageing process is excluded. 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 injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be cover: *MacDonald v ARCIC* [2002] NZAR 970, at 26.

[15] There must be a causal nexus between the covered injury and the condition of the claimant for which entitlements were sought at the time of ACC's decision to suspend or decline entitlements: *Milner*.

[16] Causation cannot be established by showing that the injury triggered an underlying condition to which the appellant was already vulnerable, or that the

<sup>3</sup> *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

<sup>4</sup> *Furst v Accident Compensation Corporation* [2011] NZACC 379. See also *Ellwood v Accident Compensation Corporation* [2012] NZHC 2887; and *Booker v Accident Compensation Corporation* DC Huntly 205/00, 17 August 2000.

injury accelerated the condition which would have been suffered anyway:  
*Cochrane v ACC* [2005] NZAR 193.

[24] In *Stewart*,<sup>5</sup> 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.

...

[33] The cases consistently highlight that the question of causation cannot be determined by a matter of supposition. There must be medical evidence to assist the respondent Corporation, and now the Court, to determine that question. A temporal connection, in itself, will be insufficient. There needs to be a medical explanation as to how the ongoing condition has been caused by the originally covered injury. In this case the evidence does not establish this.

## Discussion

[25] The issue in this case is whether the decision made by WorkAon on 7 March 2018, suspending Ms Hopkins' entitlements on the basis that her ongoing symptoms were not causally related to an injury suffered in an accident on 21 July 2017, was correct. The Corporation is entitled to suspend Ms Hopkins' entitlements if it is not satisfied, on the basis of the information in its possession, that she is entitled to continue to receive them.<sup>6</sup> However, the Corporation needs to be satisfied that there is no right to entitlements, and, where the available evidence is uncertain or unclear, the "not satisfied" test is not met.<sup>7</sup>

[26] The Corporation submits:

- Ms Hopkins' injury was relatively minor, consistent with the fact that there was a relatively short period of weekly compensation and she was able to return to work;
- Her symptoms resolved and there was then a significant gap;

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<sup>5</sup> *Stewart v Accident Compensation Corporation* [2003] NZACC 109.

<sup>6</sup> Section 117(1) of the Act.

<sup>7</sup> See n 4 *Furst*, at [13] and the authorities cited there.

- While symptoms re-emerged, there was no basis to link those symptoms several months down the line; and
- an alternative explanation became available.

[27] Dr Burgess, Occupational Medicine Physician, has repeatedly advised that Ms Hopkins' cysts, which are in no way caused by any traumatic event, are likely to be the cause of her pain. This evidence is uncontested.

[28] The Court acknowledges the submissions of the Corporation. However, the Court notes that the medical evidence before the Corporation, when it suspended entitlements, did not provide a definite cause for Ms Hopkins' recently detected symptoms, and repeatedly pointed to the need for a spinal surgical opinion which was not then obtained:

- (a) Dr Worthington, Radiologist, in reporting on the MRI scan of 20 February 2018, noted that:
  - (i) no definite cause for symptoms was detected;
  - (ii) there were more pronounced/extensive sacral perineural/Tarlov cysts, usually considered incidental asymptomatic findings; and
  - (iii) a spinal surgical opinion should be obtained.
- (b) Dr Andreas, GP, in response to the MRI report, requested that there be a referral to an Orthopaedic Specialist.
- (c) Dr Burgess, Occupational Medicine Physician and Branch Medical Advisor, in response to the MRI report, noted (without having seen Ms Hopkins):
  - (i) the "rather significant" perineural cysts were "likely to be" the cause of Ms Hopkins' pain, as they "can" cause nerve-related symptoms, and this "appears to be" the case here;
  - (ii) the MRI findings warranted review with an orthopaedic spinal surgeon.



[29] The Court further notes, for completeness, that the medical evidence as to Ms Hopkins' symptoms has remained inconclusive in the absence of a review with an orthopaedic spinal surgeon. Dr Burgess, in a later report, again recommended that a spinal surgeon look at whether the cysts were responsible for Ms Hopkins' symptoms. However, this review has not eventuated.

### **Conclusion**

[30] In light of the above considerations, the Court finds that the Corporation did not have sufficient information in its possession to be not satisfied that Ms Hopkins was entitled to continue to receive her entitlements, and thus to suspend them. The available medical evidence having been unclear/uncertain, the "not satisfied" test in section 117(1) of the Act was not met.

[31] For the above reasons, the appeal is allowed, and the review decision of 18 September 2018 is set aside.

[32] Ms Hopkins is entitled to costs. If these cannot be agreed within one month, I shall determine the issue following the filing of memoranda.



P R Spiller  
District Court Judge

Solicitors for the Respondent: Medico Law.