

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 155 ACR 13/22

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

Hearing: On the papers

Appearances: The Appellant is self-represented
B Marten for the respondent

Judgment: 15 August 2022

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Personal injury – ss 25-26 , Accident Compensation Act 2001]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 13 December 2021. The Reviewer dismissed an application for review of the Corporation’s decision dated 12 July 2021 declining Mr Henderson cover and surgery funding for his right shoulder rotator cuff tear.

Background

[2] Mr Henderson was born in December 1951.

[3] On 31 October 2018, Mr Henderson was using a weed-eater on a bank in his garden when some flax caught in the weed-eater, and wrenched his right shoulder.

[4] At first, Mr Henderson tried to self-manage his symptoms, but they became worse.

[5] In early December 2018, Mr Henderson saw his GP, Dr Ken Looi, who referred Mr Henderson to a physiotherapist.

[6] On 10 December 2018, Mr Henderson saw Mr Campbell Makea, Physiotherapist, who diagnosed a “sprain rotator cuff right side”.

[7] On 14 December 2018, a claim for cover was lodged with the Corporation and cover was (and remains) approved for sprain of the rotator cuff right side.

[8] On 16 August 2019, an x-ray and ultrasound of Mr Henderson’s shoulder were taken. Dr Rodney Wu, Radiologist, reported:

X-rays demonstrate mild narrowing of the AC joint. Ultrasound demonstrates subscapularis calcific tendinosis. Supraspinatus partial thickness tear and underlying tendinosis. There is an element of impingement.

[9] On 16 October 2019, Mr Henderson was examined by Dr Ruth Highet, Sports Physician. His symptoms included being sore at night and unable to lie down on his right side, as well as pain caused by activities requiring him to elevate his arm such as reaching to turn a light off, washing dishes, and waving. Dr Highet diagnosed “secondary impingement on background of likely labroligamentous/other chondral/labral injury left [sic] shoulder”.

[10] On 11 November 2019, Mr Henderson underwent an MRI scan. Dr Nick Kenning, Radiologist, reported:

The supraspinatus tendon displays diffuse intermediate signal over most of its length, and anteriorly there is a bursal sided tear which extends more than 50% at the tendon width at the footprint and measures up to 5 mm anteroposterior, though the articular sided fibres are intact, and the tear is not associated with retraction. ...

Quite marked tendinosis of the supraspinatus tendon with an associated high grade anterior bursal sided partial thickness tear. No rotator cuff muscle belly fatty atrophy.

[11] On 10 December 2019, Dr Highet noted that the “supraspinatus tear and bursal swelling will be causing him most of his current symptoms”.

[12] On 9 January 2020, Mr Henderson received a subacromial steroid injection in his shoulder.

[13] On 29 January 2020, Mr Andrew Meighan, Orthopaedic Surgeon, saw Mr Henderson and noted that the steroid injection had resolved the majority of his pain. Mr Meighan reported that Mr Henderson had a “near full thickness tear at the anterior part of supraspinatus with some signal in the tendon and high signal in the underlying bone”. Mr Meighan noted no cystic formation and no significant AC joint or acromial spurs. Mr Meighan advised that the presence of the tear would not necessarily require surgery, but that further investigation could be undertaken if the pain recurred.

[14] On 29 July 2020, Dr Highet reviewed Mr Henderson. She noted that his shoulder had again become painful, with lateral pain radiating down his arm. Dr Highet carried out a subacromial steroid injection.

[15] On 24 November 2020, a further ultrasound was taken, and Dr Ken Okawa, Radiologist, reported:

Heterogeneously thickened supraspinatus with high-grade partial-thickness tear. No full-thickness component. No tendon retraction. Likely similar compared to MRI from 2019.

[16] On 11 December 2020, Mr Meighan reviewed Mr Henderson and noted that his pain had settled after the steroid injection, and he would continue with conservative measures for the time being.

[17] On 14 May 2021, Mr Henderson again saw Mr Meighan, who reported that Mr Henderson remained very symptomatic with shoulder pain. Mr Meighan noted that he administered tests, which showed positive impingement and pain on testing

supraspinatus. Mr Henderson advised Mr Meighan that he would like to proceed with surgery in the form of arthroscopy and cuff repair.

[18] Later, on 14 May 2021, Mr Meighan sent a request for this surgery to the Corporation, with the specific diagnosis of “rotator cuff tear”. Mr Meighan noted that after Mr Henderson’s injury, he developed increasing discomfort over the lateral side of his arm and noticed some arm weakness. As to whether there were relevant pre-existing factors, Mr Meighan recorded that Mr Henderson had a previous AC arthropathy, but had no features suggesting a significant impingement condition. Mr Meighan drew the following causal medical link between the proposed treatment and the covered injury:

Forceful activity when he got a weed eater caught in some flax which jerked sharply injuring his shoulder.

[19] On 8 July 2021, Mr Alex Rutherford, Orthopaedic Surgeon conducted a file review and advised that a rotator cuff tear was causing Mr Henderson’s symptoms. However, Mr Rutherford concluded that a causal link between the accident and injury was not made out:

The medical evidence does not support a causal link between the client’s accident and the condition requiring surgery. The mechanism of injury is unlikely to have caused an acute traumatic tear of the rotator cuff. The delay in presentation is not consistent with an acute traumatic tear. There are significant tendonopathic changes within the supraspinatus suggesting a degenerative attritional tear rendered symptomatic.

No causal link can be established.

[20] On 12 July 2021, the Corporation declined cover for Mr Henderson’s tear on the basis of this report, attributing the tear to a pre-existing health condition.

[21] On 7 September 2021, Dr Rutherford provided the following additional comment:

Tendonosis is a term used to describe deterioration of the rotator cuff tendons. As our body changes, the tendon structure and composition at a microscopic level change. There is less fibrocartilage at the cuff insertion, there is disruption of the tendon’s attachment to bone, there are variations in the blood vessels and other complex changes. The collagen in tendons is slowly replaced by mucoid ground substance.

Over time, tendons shear and eventually tear. This is like getting a hole in your shoe, the material slowly wears down until one day you see a hole or a tear. The tendon tearing off does not result from a single episode of trauma.

The term quite marked tendonosis of the supraspinatus with an associated high-grade anterior bursal-sided partial thickness tear means that the shearing and wearing of the tendon is occurring predominantly on the bursal side or the superior side of the tendon where it may be impinging upon the overlying acromion.

The most likely cause of the client's supraspinatus tendon tear is degenerative wear and tear, gradual process.

[22] On 21 October 2021, Mr Meighan sent an email to Mr Henderson:

I can do a medical report for you, but this is not a clear cut case. Have you looked at getting legal help? – ACC will pay for you to get assistance in appealing this decision. I would agree with much of what Alex Rutherford has stated, and I would have to say he is a “straight shooter” and gives a balanced opinion.

There are changes seen in the tendon which likely reflect an age change. However some of this tendinosis could be due to post injury changes as there is considerable time between the injury and MRI/US scans. Also the US scan showed a posterior articular side tear of supraspinatus which is more typically caused by trauma – the bursal sided ones are often considered to be degenerative from the tendon abrading on the acromion bone.

So not a strong case but possible.

[23] On 2 December 2021, review proceedings were held. On 13 December 2021, the Reviewer dismissed the review, on the basis that Mr Henderson's right rotator cuff tear was not caused by his accident of 31 October 2018, and that the Corporation's decision of 12 July 2021 to decline Mr Henderson cover and surgery funding for that condition was correct.

[24] On 18 January 2022, a Notice of Appeal was lodged.

Relevant law

[25] 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.

[26] 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.

[27] In *Ambros*,² 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 ...

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

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

[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 ...

[28] In *J*,³ Kos P stated:

[52] In *Accident Compensation Corporation v Mitchell Richardson J* observed that the proper approach to construing the Act was that it be given a "generous and unniggardly" construction. We endorsed that approach in *Harrild v Director of Proceedings*. The importance of this principle lies where more than one available interpretation exists. If the Act is unavoidably niggardly or ungenerous, that is that. But if a reasonable choice presents, the more generous path should be taken.

Discussion

[29] The issue in this case is whether Mr Henderson's rotator cuff tear was a personal injury caused by accident, and so covered by the Corporation, or was a personal injury caused by a gradual process, which would not be covered.

[30] In order to obtain cover (and resulting entitlements), Mr Henderson needs to establish that his condition resulted from a personal injury by accident, which does not, in principle, include personal injury caused wholly or substantially by a gradual process or disease.⁴ If medical evidence establishes that Mr Broughton had pre-existing degenerative changes which were brought to light or which became symptomatic as a consequence of 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 covered.⁵ In construing claims brought under the Act, a generous and "unniggardly" construction is the proper approach where more than one available interpretation exists.⁶

³ *J v Accident Compensation Corporation* [2017] NZCA 441, [2017] 3 NZLR 804.

⁴ Sections 20(2)(a) and 26(2) of the Act.

⁵ See *Johnston* n1 above, at [12].

⁶ See *J* n3 above, at [52].

[31] This Court notes that the following key evidence, regarding Mr Henderson's claim for cover, is presently at hand:

- (a) On 31 October 2018, Mr Henderson wrenched his right shoulder, for which he was granted cover, and which caused ongoing pain symptoms which he managed at first and then (from 10 December 2018) received physiotherapy treatment.
- (b) On 16 August 2019 (over nine months after the accident), an ultrasound showed both a tear and underlying tendinosis.
- (c) On 11 November 2019 (over a year after the accident), an MRI scan showed an appreciable tear and quite marked tendinosis. A further ultrasound taken a year later showed similar results.
- (d) On 14 May 2021, Mr Meighan, an Orthopaedic Surgeon who examined Mr Henderson on several occasions from 20 January 2020, diagnosed rotator cuff tear requiring surgery, and drew a causal medical link between the proposed treatment and the covered injury of 31 October 2018.
- (e) On 8 July 2021, Mr Alex Rutherford, Orthopaedic Surgeon, conducted a file review without seeing Mr Henderson, and concluded that a causal link between the accident and injury was not made out (Mr Rutherford confirmed his view on 7 September 2021).
- (f) On 21 October 2021, Mr Meighan emailed Mr Henderson (though not as a formal medical report) responding to Mr Rutherford's opinion, noting that: some of Mr Henderson's tendinosis could be due to post-injury changes as there was considerable time between the injury and MRI and ultrasound scans; and the ultrasound scan showed a posterior articular side tear of supraspinatus which was more typically caused by trauma.

[32] The Court notes that no response was received from Mr Rutherford or any other medical specialist to the points raised by Mr Meighan, Mr Henderson's attending surgeon.

Conclusion

[33] In light of the above considerations, the Court finds that the evidence as to a causal link between Mr Henderson's accident and his rotator cuff tear is inconclusive and incomplete.

[34] The decision of the Reviewer dated 13 December 2021 is therefore quashed, and the Court directs that the Corporation:

- (a) Obtain a full report from Mr Meighan; and then
- (b) Obtain a further independent report from an Orthopaedic Surgeon, in light of all the medical evidence available.

[35] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors for the Respondent: Izard Weston.