

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 157 ACR 259/21

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

Hearing: 27 July 2022

Heard at: Auckland/Tāmaki Makaurau

Appearances: Mr B Hinchcliff for the appellant
Mr I Hunt for the respondent

Judgment: 16 August 2022

**RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Suspension of entitlements s 117 Accident Compensation Act 2001]**

[1] This is an appeal against a decision of the respondent of 18 January 2021 suspending entitlements in respect of claim 10048361893.

[2] In its decision of 18 January 2021, ACC said:

Your current condition is no longer the result of your personal injury of 25/09/2019.

Background

[3] On 25 September 2019, the appellant injured himself when, whilst driving, he braked heavily going into a corner.

[4] The next day, on 26 September 2019, the appellant presented at the Waitematā District Health Board emergency department. An ACC injury claim form was duly completed with the accident described as:

Self-presents with R neck pain sustained 1/7 ago when he braked hard when turning a corner in his car.

[5] Examination of the appellant in the emergency department revealed:

Pain R lateral neck over trapezius.

FROM neck – on movement

c/o dull sensation R when compared to L, however motor function intact

normal strength + reflexes

IMP (impression) sprain trapezius

[6] The appellant was discharged the same day and given a medical certificate for two days off work.

[7] ACC accepted cover for a neck and shoulder sprain following consultation with his GP, Dr Amso. The appellant's injury affected his ability to continue his work as a roof painter and he began to receive weekly compensation.

[8] On 14 November 2019, the appellant had an ultrasound scan of his right shoulder. The findings were:

Long head of biceps is enlocated with no tear

Subscapularis enthesopathy, no tear.

Supraspinatus low grade intrasubstance tear mid fibres. No significant high grade tear.

Low grade partial articular surface tear superior fibres infraspinatus, 13 mm length. No high grade tear.

Mild subacromial bursal thickening with pain and bursal impingement at 45 degrees abduction.

AC: glenohumeral joints unremarkable

CONCLUSION:

Low grade tear supraspinatus, infraspinatus.

Features of subacromial bursitis/pain syndrome.

Please consider bursal injection for diagnostic and therapeutic purpose.

[9] A report from Dr Kim, chiropractor, dated 5 December 2019 noted the appellant visited on 5 November 2019 with severe right shoulder pain.

[10] On that occasion, he had some shoulder stretching, massage and light force manipulation at the chiropractic clinic.

[11] The appellant visited the chiropractic clinic again on 30 November 2019 for a second session. The appellant reported that his pain level had dropped down to about 4-5 out of 10 and that without any movements there was no pain.

[12] On 31 December 2019, a report was received from Tom Adams, physiotherapist, who was of the opinion:

Given his symptom presentation and mechanism of injury, I don't think that these US findings are relevant.

On further assessment, he has no clear signs of significant shoulder pathology but did have some clinical as well as subjective findings more consistent with cervical radiculopathy.

[13] There is a report of an assessment by Mr Adams dated 19 December 2019 with a provisional diagnosis of C5 radiculopathy (cervical radiculopathy).

[14] On 19 March 2020, the appellant's case manager emailed the appellant's GP, Dr Amso, as follows:

Regarding the neck sprain and right shoulder sprain covered as a result of this accident on 25/09/2019, would you agree that this injury would have resolved by now?

[15] Dr Amso's response was:

...I think it should resolve by now and he is taking pain killers as prescribed with the ongoing physiotherapy.

...

I do not (know) why he is complaining from pain symptom.

[16] ACC sought an opinion from its clinical advisor who reviewed the appellant's reports dating back to the accident and on 6 April gave this analysis:

Given the time since the injury (six months), and the mechanism of injury, a car braking event, it is reasonable to suggest that these injuries would have long since resolved. I note that in response to questions posed to him in this regard, the GP supports his notion that sprains should have resolved by now and that further imaging and specialist review are indicated.

[17] On 3 July 2020, Dr Rod Nicholson (occupational medicine specialist) reported to the appellant's physiotherapist recording that the appellant's shoulder pain had settled but he continued to experience stiffness to the right side of his neck.

[18] Dr Nicholson said:

At this stage, the exact diagnosis is uncertain. He may still have symptoms consistent with a whiplash type injury although it is now 9 months since the original injury.

[19] He suggested a cervical X-ray to help with diagnosis but said that the emphasis should be more on return to work and "at this stage, it is likely that he would be able to return to his pre-injury job".

[20] He also suggested a cervical X-ray to help with the diagnosis.

[21] On 9 July 2020, ACC suspended entitlements on the basis that the medical information showed that his covered injury of the shoulder and neck sprains had resolved.

[22] On 8 September 2020, the appellant had an MRI of his cervical spine. In the report is this:

Impression:

Moderate C5-6 disc disease with height loss and endplate oedema more pronounced on the right. Very small disc bulges from C3-4 to C6-7, no canal or foraminal stenosis.

[23] On 15 October 2020, the appellant saw Mr Ferguson, spinal surgeon. In his report, Mr Ferguson said:

Imaging:

He has got an MRI scan which I would describe as being age appropriate with no evidence of significant neurological compression.

...

There has possibly been some mild damage to the C5/6 disc which may have occurred in 2019.

[24] On 1 December 2020, ACC's Clinical Advisor Physiotherapist, Ms Juniot, reviewed the evidence and concluded that, on the balance of probability, the mild damage to the C5/6 disc referred to by Mr Ferguson was not caused by the index event.

[25] In a decision letter of 18 January 2021, ACC suspended the appellant's entitlements to weekly compensation, treatment and rehabilitation.

[26] On 17 August 2021, following a referral from appellant's counsel, Dr Walls, Occupational Physician saw the appellant and reported on the consultation.

[27] Amongst other things, Dr Walls said:

Diagnosis and opinion

I would consider the braking incident of September 2019 aggravating a neck condition rather than causing a de novo condition. It is not clear what that neck condition is, the MRI scan findings of 2020 are not that dramatic.

...

With respect to your question as to whether the 26 September 2019 injury is resolved I would note, from the clinical history given to me, this would appear to be an aggravation of an underlying condition but I am really unable to comment with any certainty about what that injury is, presumably some nerve root compression.

[28] At the conclusion of his report, Dr Walls said:

I am not of the opinion this condition is fully resolved but I am unable to determine what is the cause of this (speculated) nerve root compression, whether this is degenerative or accident related.

I would not consider the episode of neck hyperflexion (which was not particularly forceful) sufficient to cause a significant injury and am unable to determine the pain generator from the imaging results to date.

[29] Finally, in response to the question: Does Mr Bogusz suffer from a work related gradual process condition? Dr Walls said:

Noting again the difficulties with identifying the actual injury/pain generator, I am reluctant at this time to attribute Mr Bogusz's current condition to a work related gradual process injury.

Appellant's submissions

[30] Mr Hinchcliff took the Court through the reports that followed the event of 25 September 2019, as set out in the Background section of this judgment.

[31] Mr Hinchcliff concluded by saying that there was evidence of whiplash but not clear evidence that the resulting injury/accident had resolved when ACC suspended entitlements. He submits however that the symptoms happened immediately after the accident.

Respondent's submissions

[32] Mr Hunt likewise took the Court through the reports that have followed the event of 25 September 2019.

[33] Amongst other things, Mr Hunt drew attention to the fact that spinal surgeon John Ferguson, in his report, suggested to the appellant it would be safe to return to work and all previous activities.

[34] Mr Hunt refers also to Dr Walls' report of 17 August 2021.

[35] He notes that Dr Walls was also asked to consider whether the appellant suffered from a work-related gradual process condition, which is not relevant to the matter before the Court today. He does note however that Dr Walls was unable to say whether the appellant's condition was degenerative or accident related.

[36] He also notes that Dr Walls would not consider the episode of neck hyper flexion sufficient to cause a significant injury.

[37] In essence, he submits that Dr Walls does not support the appellant's position.

Decision

[38] The ACC injury claim form completed at Waitakere Hospital on 26 September 2019 describes the appellant's injury by accident as follows:

Self-presents with R neck pain sustained 1/7 ago when he braked hard when turning a corner in his car.

[39] His examination at the hospital revealed pain to his right lateral leg over his trapezius. He had full range of movement of his neck but pain on movement. The impression noted in his hospital examination was "strain trapezius". The ultrasound scan on 22 November 2019, disclosed a "low grade tear supraspinatus, infraspinatus", which are not argued to be causally related to the event of 25 September 2019. It appears that the appellant saw a chiropractor twice in November and Mr Adams, a physiotherapist once in December. Mr Adams was of the view that the ultrasound findings were not relevant. He thought the findings were more consistent with cervical radiculopathy.

[40] ACC's Clinical Advisor Physiotherapist, Ms Juniot, was of the view on 6 April 2020, six months since the car braking event, it was reasonable to suggest that the right shoulder strain and neck sprain deriving from the accident event would have long since resolved.

[41] In reviewing the case in his report of 3 July 2020, Dr Nicholson was of the view that further physiotherapy appeared not to be advisable and at that stage, it was likely that the appellant would be able to return to his pre-injury job.

[42] An MRI carried out on 8 September 2020 did not advance matters, noting that the appellant had moderate C5/6 disc disease. Mr Ferguson, who saw the appellant on 15 October 2020, described the MRI scan as being age appropriate. In a further report dated 1 December 2021, Ms Juniot was likewise of the view that the C5/6 disc presentation was not caused by the index event. She said:

Disc bulges can occur with acute trauma, however, in this case Mr Bogusz's mechanism of injury where he was turning a corner while driving, is not consistent with high energy traumatic incidents such as a collision.

[43] Finally, there is report of occupational medicine specialist, Dr Walls, obtained by Mr Hinchcliff dated 17 August 2021. He concluded:

I would not consider the episode of neck hyper flexion (which was not particularly forceful, sufficient to cause a significant injury and am unable to determine the pain generator from the imaging results to date.

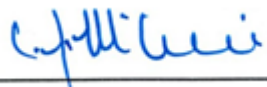
[44] The totality of the evidence therefore at its highest, in the appellant's favour, leaves us in a state of uncertainty.

[45] In so far as the decision that is primarily challenged on this appeal, namely that of 18 January 2021 suspending the appellant's entitlement to weekly compensation, I am bound to conclude on the evidence that the appellant has failed to show on the balance of probabilities that that decision was wrong.

[46] The merits of the decision of 2 December 2020 declining cover for a C6 disc injury were not argued on this appeal. Therefore, it not having been shown that on the balance of probabilities, that decision was wrong. That decision also stands.

[47] The appeal is therefore dismissed.

[48] There is no issue as to costs.



Judge C J McGuire
District Court Judge

Solicitors: ACC and Employment Law, Ellerslie
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