

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 158

ACR 125/21

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| UNDER | THE ACCIDENT COMPENSATION ACT 2001 |
| IN THE MATTER OF | AN APPEAL UNDER SECTION 149 OF THE ACT |
| BETWEEN | FITI SU'A Appellant |
| AND | ACCIDENT COMPENSATION CORPORATION Respondent |

Hearing: 29 July 2022

Heard at: Auckland/Tāmaki Makaurau

Appearances: S Macann on behalf of the appellant
Mr L Hawes-Gandar and Ms F Becroft for the respondent

Judgment: 16 August 2022

**RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Personal Injury s 26 Accident Compensation Act 2001]**

[1] This is an appeal against a decision of WellNZ on behalf of Oranga Tamariki dated 28 April 2020 declining cover for an abscess to the appellant's right foot said to have been caused by accident whilst he was at work on 16 January 2020.

Background

[2] In early December 2020, the appellant began a new job working for Oranga Tamariki at a Youth Justice residential facility.

[3] It is the appellant's evidence that he purchased new shoes for the job which involved being on his feet and walking around for the majority of each shift.

[4] In or around the end of December 2019, the appellant says he started to develop what he thought was a blister on the bottom of his right foot immediately below the big toe.

[5] By 10 January 2020, the appellant had become concerned about his right foot to the extent that he visited his GP, Dr Sandhu. Dr Sandhu noted:

Patient has sore right foot under the ball, no acute injury, feels as if it is a bee sting.

[6] The doctor then notes:

Limping, red swollen right front foot and big toe, possible gout.

[7] The surgery note continues:

Brief smoking cessation advice was given.

Alcohol drinking advice was given.

[8] Dr Sandhu was consulted again on 15 January 2020. In the record under the heading "History" is this:

Patient has ongoing right foot issues, tests indicate possible local infection, advised to return for follow up as patient did not attend today on time and has been squeezed in for a quick consult.

[9] When the appellant went to work that evening, he says that his foot became more painful. On 17 January 2020, he subsequently went to Middlemore Hospital and was seen by Mr Flint, Orthopaedic Surgeon. Mr Flint reported:

This gentleman is an uncontrolled diabetic not on any treatment at the present time, has been admitted with significant infected ulcer under the right first MTP joint with pus then expressed. He needs to go on the list to have this debrided and we will get our diabetes team to see him to talk about diabetic control.

[10] The appellant underwent a debridement operation on 20 January 2020 carried out by orthopaedic registrar Rose Binney. She noted:

Mr Su'a was brought forward for repeat wash out and debridement of his medial foot wound underlying his first metatarsal. This originated as a blister. He has poorly controlled diabetes.

[11] It appears that there is no record of the first "wash out and debridement".

[12] A further right medial foot abscess debridement and VAC dressing was carried out on 24 January 2020 with Mr Wang, registrar orthopaedic surgery noting:

This man has a diabetic foot abscess which was excised and drained and has been treated with recurring visits to theatre for debridement and VAC dressings. He was brought forward again today for further debridement as the wound was quite mucky at the last wash out.

[13] An ACC injury claim form was completed on 29 January 2020. It noted that the injury was caused as follows:

Fiti was doing extra walking in new shoes which rubbed and caused abscess.

[14] Following the lodging the claim for cover by the ward social worker on 29 January 2020, Oranga Tamariki arranged for a paper review by orthopaedic surgeon Mr Pai. In his reported dated 2 April 2020, Mr Pai noted that the location of the ulcer was in a site common for diabetic ulcers rather than for blisters relating to new shoes. He said blisters are usually more common over the heel counter or over the medial border or lateral border of the foot.

[15] On 28 April 2020, Oranga Tamariki issued its decision declining the claim.

[16] The appellant applied for review of the decision and obtained an opinion dated 17 March 2021, from orthopaedic surgeon Mr Danesh-Clough.

[17] Mr Danesh-Clough advised that in his opinion, the appellant's diabetes:

...certainly places him at a high risk of developing infection in his feet. However, there was an initiating event that caused the break in the skin that allowed the cellulitis and infection to develop. This was from an external traumatic cause with rubbing and pressure from his shoes.

...

In conclusion, my opinion is that this man did have a significant underlying predisposition to developing infection in his feet. However, there was an

external initiating factor with the blister that developed from the rubbing on his shoes that was the root cause of his infection.

[18] Earlier in his report, Mr Danesh-Clough said:

The underlying cause for his infection appears to have been some new shoes that he bought. His work involves prolonged standing on his feet. He had rubbing over the big toe MTP joint and developed a blister.

[19] Mr Pai gave a follow up report to say that after considering what Mr Danesh-Clough had said, his opinion remains the same. At the review hearing, Mr Su'a gave evidence on his own behalf saying amongst things:

And so the first two weeks were induction of which the second week we then spent time out on the floor, out in the units. So that was early December. I bought a new pair of shoes, sand shoes, for the purpose of work because I knew what sort of work was involved.

...

You are doing a lot of walking, especially – I worked – I was working – there was a lot of work available so I was working double shifts, i.e. from 2.30 pm in the afternoon through to 7 am the following morning; and particularly on the – what we call the late shift, which is 2.30 pm to 11 pm; yeah, it's pretty much 90% walking. And there was a time when I worked four double shifts one after the other, so in the space of 8 days I worked 96 hours and at that time I was wearing the new shoes and, yeah, I acquired blisters on my feet. I put it down to the new shoes.

...

Oh they – I got blisters, they – two on my right foot and one on my left foot; two of them being on the heels and one being sort of like – I'm not sure but just under the big toe type of thing, on the side. I'm not too sure how to explain that but – so, yes. And so I just carried on working through it..

...

Oh well yeah well the blisters were there and I think it was just the constant walking that, yeah, one of them eventually popped or burst.

[20] The appellant also gave evidence of the doctor visit on 10 January saying:

He just browsed at it from his desk and he just says:

Oh, it looks like gout.

And he just gave me some pain killers for the pain. And I says:

Oh, yeah, ok.

But I told him at the time:

I've never had gout.

He says:

Oh well, you know, there is always a first time.

And, yeah, it went on and I carried on working with the medication I just carried on working through.

[21] The appellant also confirmed his evidence that on 15 January due to a mix up in appointment times, the doctor saw him for less than two minutes, that he declined to look at the wound, and just said:

Oh, I can tell it's infected.

Appellant's submissions

[22] Mr Macann told the Court that the report of orthopaedic foot and ankle surgeon Mr Danesh-Clough was "the essence" of the appellant's case.

[23] He notes that when the appellant saw his GP on 10 January, the GP did not look at his foot. He just gave the appellant a prescription.

[24] Mr Macann says it all changed after 15 January 2020 when the blister burst and the following day he was admitted to accident and emergency at Middlemore Hospital.

[25] Mr Macann refers to the decision in *Primary Producers Cooperative Society*¹ where Judge Beattie was considering an issue of acute solvent neural toxicity as well as chronic solvent neurotoxicity. He said:

In the final analysis, I find that this finding is sufficient and this Court is not required to determine whether that condition is chronic or not for the purpose of establishing an entitlement to cover ...

[26] Mr Macann submits that in this case there was a physical injury being either the blistering or the bursting of the blisters and the ulceration, which then, as a result

¹ *Primary Producers Cooperative Society v Accident Rehabilitation and Compensation Insurance Corporation* [1999] NZACC 265.

of being diabetic, predispose Mr Su'a to the significant ramifications of those blisters.

[27] Mr Macann refers to *Potter*,² where the Court said:

... I am with Judge Barber when he wrote in *Johnston* that:³

[35] I accept that it is settled law that the respondent must take the appellant as it finds him and that the eggshell skull principle still applies. The effect of that rule is that if a person who has a pre-disposition to a certain type of injury actually suffers that injury, the existence of the pre-disposition does not disqualify that person from cover. The respondent cannot avoid responsibility if the consequences of the injury are much worse for the appellant than would be the case had he not suffered a pre-existing condition....

[28] Mr Macann therefore submits that the injury was the blistering that led to abscessing of the foot and that the external wound, once created provided an entrance for the cellulitis and infection to develop.

[29] Mr Macann submits that by way of confirmation of the appellant's position, Mr Danesh-Clough has indicated that Mr Su'a has been symptom free since he changed his type of shoes despite having an increased level of diabetic difficulties.

Respondent's submissions

[30] Mr Hawes-Gandar submits that there are three key issues to be determined in this case. The first is the factual issue, - did he suffer blisters from the new shoes? Counsel submits that the evidence is not really clear on this issue.

[31] Secondly, if the appellant did suffer blisters, were they caused by an accident. Mr Hawes-Gandar submits they were caused by a gradual process.

[32] Thirdly, he submits that if the appellant did get a blister from an accident, was the ulcer caused by a rubbing or by infection and his underlying diabetes.

[33] He refers to s 25 and questions whether in this case there was a specific series of events other than a gradual process.

² *Potter v Accident Compensation Corporation* [2014] NZACC 40, at [29].

³ *Johnston v Accident Compensation Corporation* [2009] NZACC 46.

[34] Mr Hawes-Gandar refers to *Waghorn*,⁴ Judge Ongley said:

There is no guidance as to the dividing line. Continuous processes such as wear on a joint would not be called a series of events. A logical approach to the problem, at least in the case of a pars defect, is that if the events are so gradually incremental that they cannot be distinguished one from the other, they should be regarded as a gradual process. Whereas a series of forceful events, each contributing in some significant way, would attract cover. That does not solve the evidential difficulty. A process, as in the present case, could involve a combination of both causes, that is to say a process of indistinguishable minor events as well as more significant stresses capable of causing a fracture.

[35] Mr Hawes-Gandar acknowledges that it is plausible that the appellant had blisters as described. However, the contemporaneous notes do not refer to blisters. He therefore submits that evidentially this matter is not quite established.

[36] He submits that if the appellant suffered blisters that this was a gradual process that came about over a month from commencement of his employment in December until he saw his GP on 10 January.

[37] He submits that a plausible explanation of the appellant's infection requiring surgery was his underlying diabetes.

Appellant's reply

[38] Mr Macann submits that on account of the appellant's diabetes, he was not aware that his new shoes were rubbing and that was because of his impaired immune response resulting from his diabetes. He did not have blisters before he wore his new shoes.

Decision

[39] The ultimate question to be answered in this case is whether the appellant suffered injury by accident that resulted an abscess to his right foot requiring surgical intervention. Understandably, in cases of this kind where questions are raised over the cause of the appellant's presentation, there will be close attention paid to not only what the factual sequence of events revealed but in particular what the medical professionals who were involved, recorded and did at the relevant times.

⁴ *Waghorn v Accident Compensation Corporation* [2013] NZACC 2, at [33]

[40] As *Ambros*⁵ reminds us:

Judges should ground their assessment of causation on their view of what constitutes the normal cause of events, which should be based on the whole of the lay, medical and statistical evidence and not be limited to expert witness evidence.

[41] In this case, the appellant commenced a new job working for Oranga Tamariki at a youth justice residential facility in December 2019.

[42] In his evidence before the reviewer, the appellant spoke of his new work role at Korowai Manaaki, a youth residential facility.

[43] After a week of induction, he was “on his feet” walking throughout the facility. He had bought a new pair of sand shoes because he knew the sort of work that was going to be involved.

[44] He then told the reviewer of working double shifts and in fact that his job was “pretty much 90% walking”. He said he got three blisters, two on his right foot and one on his left. One of these was under his big toe on the side. He said he just carried on working through it. Then, one of them eventually burst.

[45] He consulted Dr Sandhu on 10 January. He said:

He just browsed at it from his desk and he just says:

Oh, it looks like gout.

[46] The doctor’s notes on the consultation are thin. Being:

Patient has sore right foot under the ball, no acute injury, feels as if this is bee sting.

[47] The doctor prescribed gout medication as well as antibiotics.

[48] I accept the appellant’s evidence that the consultation was brief and did not include any close physical examination.

⁵ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340, at [67].

[49] The appellant was back on 15 January but due to a mix up of appointment times, the appellant was seen for less than two minutes. According to the appellant in response to his question to the doctor – do you want to have a look at the wound? The doctor said:

Oh, I can tell it's infected.

[50] It follows that the consultations of 10 and 15 January 2020 were both brief and cursory.

[51] The appellant's condition deteriorated rapidly thereafter, and he was admitted to hospital on 17 January.

[52] In his evidence before the reviewer the appellant describes blisters. Given the cursory nature of each of the GP consultations, I place no weight on the fact that blisters are not recorded in the brief surgery notes.

[53] What is clear is that the appellant was wearing new shoes for his new job which required substantial amounts of walking. And this was magnified by the fact that he frequently worked double shifts. It does not require the support of an opinion or detailed surgery record of a GP to be able to conclude that new shoes plus excessive walking was likely to cause blisters, and in the appellant's case did.

[54] ACC relies substantially on the paper file review of Mr Pai.

[55] Mr Pai was of the opinion that the appellant's foot ulcer was more likely related to his uncontrolled diabetes.

[56] The references included by Mr Pai at the end of his review focus exclusively on the effect of diabetes on the lower limbs. The fact that excessive walking may have caused blisters receive little attention with Mr Pai saying that the site of the abscess is the common site for diabetic ulceration rather than from blisters. Mr Pai says blisters are more common over the heel counter or over the medial border or lateral border of the foot and are superficial.

[57] His statement that blisters are “superficial” is a surprising one. Plainly they will be initially, but most adults alive today will themselves have had experiences of blisters becoming infected.

[58] I accept the appellant’s evidence that his feet and in particular his right foot was affected by blisters in the way that he describes and that this was due to a combination of new shoes and excessive walking.

[59] The appellant obtained a report from Mr Danesh-Clough, orthopaedic foot and ankle surgeon, a medical professional with more focussed expertise and qualifications than those of Mr Pai. Ultimately, Mr Danesh-Clough’s conclusion carries more weight than that of Mr Pai.

[60] Mr Danesh-Clough’s opinion was that:

This man did have a significant underlying pre-disposition to developing infection in his feet. However, there was an external initiating factor with the blister that developed from rubbing on this shoes that was a root cause of his infection.

[61] While it is undoubtedly true that the appellant’s underlying diabetes rendered him more susceptible to the ulceration, that in fact was what occurred and required surgery. As noted in *Potter*:

If a person who has a pre-disposition to a certain type of injury actually suffers that injury, the existence of the pre-disposition does not disqualify that person from cover.

[62] As to the proposition that this was a gradual process as opposed to an injury for the purposes of the Act, Mr Hawes-Gandar rightly refers to Judge Ongley’s decision in *Waghorn*.

[63] Judge Ongley said:

A logical approach to the problem, at least in the case of a pars defect is that if the events are so gradually incremental that they cannot be distinguished one from the other, they should be regarded as a gradual process. Whereas, a series of forceful events each contributing in some significant way, would attract cover.

[64] In our case, it is plain that the appellant took the appropriate step of purchasing sand shoes for his new job role knowing that it would involve a lot of walking. In essence therefore, he took appropriate steps to avoid any negative effects of excessive walking which as a matter of common sense would include the avoidance of blisters.

[65] Unfortunately, he was unsuccessful in that endeavour.

[66] I find that as soon as he became aware that he had blisters he took appropriate steps. This is not a case where, in Judge Ongley's words in *Waghorn*, the events were so gradually incremental that they could not be distinguished one from the other so as to be regarded as a gradual process. In this case, the blisters and the resulting infection, in a relative sense, occurred quite quickly as a result of appellant's work requirement to traverse his work facility on foot. Accordingly, I find that the appellant suffered personal injury by accident and is entitled to cover.

[67] Accordingly, the appeal is allowed and WellNZ's decision of 28 April 2020 declining cover for an abscess of the appellant's right foot, is reversed.

[68] The parties have leave to file memoranda in respect of costs, should the need arise.



Judge C J McGuire
District Court Judge

Solicitors: Medico Law Limited, Grey Lynn