

[3] On 1 May 2020, an x-ray and ultrasound were performed. These were reported to show a previous proximal tear of the MCL, medial tibiofemoral osteoarthritis with a partly extruded meniscus, a small moderate joint effusion and a Baker's cyst.

[4] On 10 May 2020, an MRI was performed. This was reported to show extensive internal derangement of the knee, with a complex medial meniscal tear, lateral meniscal tear, multi-ligamentous injury and medial tibiofemoral chondromalacia.

[5] On 3 August 2020, Mr Andrew Vincent, Orthopaedic Surgeon, reviewed Mr Coldrick. Mr Vincent reported that Mr Coldrick certainly had a lot of damage to his right knee, but that he "struggled to understand" that all of the pathology would have occurred during a twisting injury where he did not fall and carried on at work that day and the next. Mr Vincent noted that Mr Coldrick had not had any rehabilitation to date, that he was experiencing significant pain issues and that he had declined a cortisone injection. Mr Vincent recommended a good rehabilitation program, hopefully leading to successful non-operative management.

[6] On 22 September 2020, Fulton Hogan suspended Mr Coldrick's entitlements. Fulton Hogan noted that it had accepted cover for a sprain on 27 March 2020, but based on the medical information it had received since then, it considered that injury was spent.

[7] On 3 November 2020, Mr Vincent examined Mr Coldrick again, and observed that there had been some improvement since his last assessment. Mr Vincent noted:

... It is hard to pull all this together. I think what is certainly true is that Martin had a genuine accident in February this year. It is impossible for me to say how much of his ligament injuries occurred then or previously. As documented before Martin has never had a substantive knee injury that he can recall. It would be unlikely in a twisting [injury] like Martin describes for him to rupture his PCL and also damage both collateral ligaments. I suspect that something was pre-existing but he had an additional ligament injury in February. His arthritis in the medial compartment would have been pre-existing.

Given that he has had a significant accident and has definite weakness and laxity in his knee now, he needs a good rehab program. I think it should be the responsibility for ACC or his accredited employer program to fund a comprehensive gym-based rehab program to maximise and help him recover from what happened in February of this year. I wouldn't be expecting funding

to cover treatment of arthritis but certainly he has a loose knee and at least some of this almost certainly is subsequent to his injury from February.

[8] On 4 December 2020, Fulton Hogan wrote to Mr Coldrick, noting that it had overlooked a request from him for weekly compensation. Fulton Hogan declined this request on the basis that the reason for incapacity was not due to the knee sprain. Rather, it was due to the other non-injury related factors set out in Mr Vincent's reports.

[9] Mr Coldrick lodged a review of both decisions, and subsequently requested that Fulton Hogan also carry out a work-related gradual process injury (WRGPI) investigation.

[10] As part of the WRGPI investigation, Mr Coldrick was seen by Dr Andrew Hilliard, Occupational Medicine Specialist. Dr Hilliard noted that the most significant current medical issues for Mr Coldrick were his PCL deficient right knee and the osteoarthritis of the medial compartment. Dr Hilliard also emphasised the importance of a strengthening programme. He set out a review of the relevant clinical literature, and concluded that, in his view, a causal contribution from Mr Coldrick's work tasks was unlikely. He thought that it was more likely that the diagnoses were secondary to some previous trauma.

[11] On 10 June 2021, in response to questions put to him by Fulton Hogan, Dr Hilliard further reported that he did not think that Mr Coldrick's February accident would have caused the more significant pathologies present in the knee, but that a sprain could reasonably be linked to it.

[12] On 9 July 2021, review proceedings were held. On 6 August 2021, the Reviewer decided:

- (a) Fulton Hogan's decision suspending entitlements was not correct, and that it was accordingly quashed and substituted with a decision that entitlement to physiotherapy was reinstated; and
- (b) Fulton Hogan's decision declining weekly compensation was correct.

[13] On 1 October 2021, Mr Coldrick wrote to Fulton Hogan to ask when it was going to reinstate his “ACC”. That same day, Fulton Hogan replied stating “It has been reinstated. Please forward me any physio costs that you have incurred or a request for further physio to me and we can look at the entitlement request”. The following email correspondence then occurred between Fulton Hogan and Mr Coldrick’s solicitors, John Miller Law (JML):

JML: I am also interested in whether Fulton Hogan intends to fund further treatment for Mr Coldrick.

Fulton Hogan: We are waiting for a request from Mr Coldrick. What treatment is he asking for?

JML: Mr Coldrick requires six months of high intensity physiotherapy before they can make a decision regarding his requirement for surgery. I trust the funding of physiotherapy treatment will not be an issue?

Fulton Hogan: We have not received anything under this claim from any medical provider requesting additional treatment, we would therefore appreciate any medical information that you, or Mr Coldrick may hold that recommends this treatment in support of your request.

JML: Please find attached a request from Martin's GP for six months physiotherapy, will this be sufficient evidence?

Fulton Hogan: Unfortunately this is still not enough to justify the need for physiotherapy. We act just like ACC, so we do require the same thing as they would need. In that respect, the request needs to be on an ACC32 completed by a physio of Mr Coldrick’s choice which explains the need for treatment and how it is related to the covered injury of the knee sprain. We can then investigate this further, however we will also need an updated consent (attached) so we can get the notes from the surgeon and GP. Do you know who the surgeon is that is mentioned in Dr McGuire’s letter so we can write to him for more details about this need?

[14] On 8 November 2021, an ACC32 (Request for prior approval of treatment form) was completed by Mr Tom Williams, Physiotherapist. He noted that he had given seven treatments to date, had reviewed Mr Coldrick on 29 October 2021 to reassess his injury, and prior to that had not seen him since 28 August 2020. Mr Williams advised that the current diagnosis was:

Right knee injury (Extensive internal derangement injury with complex medial meniscus tear, lateral meniscal tear, multi ligamentous injury and medial tibiofemoral chondromalacia).

[15] On 10 November 2021, Fulton Hogan wrote to Dr McGuire. Fulton Hogan noted that it had received invoices with regard to the sprain claim, but that it was aware of other non-injury related factors affecting Mr Coldrick. Fulton Hogan asked for clarification as to whether Mr Coldrick's visits were still associated with the sprain, and if so why the sprain still required treatment after all this time.

[16] Dr McGuire replied to Fulton Hogan stating that he was not sure he was required to give any clinical details to Fulton Hogan and that, given his case had legal involvement, he was even less inclined to do so. Dr McGuire confirmed that the visits related to Mr Coldrick's knee.

[17] On 10 November 2021, Fulton Hogan declined the request for physiotherapy on the basis that it was requested to treat non-injury related factors not associated with the sprain.

[18] On 1 December 2021, Fulton Hogan issued a decision declining to cover the further conditions listed by Mr Williams in his ACC32.

[19] Mr Coldrick lodged a review of the physiotherapy decision and notified through counsel that he challenged whether there was jurisdiction to issue the decision. He argued that the principle of *res judicata* prevented Fulton Hogan from issuing the decision, and therefore prevented the Reviewer having jurisdiction to hear a review application in respect of it.

[20] On 24 March 2022, the Reviewer convened a hearing. On 14 April 2022, by way of a "Procedural Ruling as to Jurisdiction", the Reviewer found that *res judicata* did not apply, and that the matter could and should proceed to a substantive review hearing to determine the correctness of the 10 November 2021 decision. The Reviewer reserved costs pending the outcome of that hearing.

[21] On 18 April 2022, Mr Coldrick lodged a Notice of Appeal against the Reviewer's ruling, arguing that the review decision was wrong in law, and seeking orders that the principle of *res judicata* applied to Fulton Hogan's decision dated 10 November 2021, and that Mr Coldrick's physiotherapy be reinstated.

Relevant law

[22] Section 149 of the Accident Compensation Act 2001 (“the Act”) provides:

- (1) A claimant may appeal to the District Court against—
 - (a) a review decision; or
 - (b) a decision as to an award of costs and expenses under section 148.

[23] Section 145 (Review decisions: substance) of the Act provides:

...

- (3) The reviewer must—
 - (a) dismiss the application; or
 - (b) modify the Corporation’s decision; or
 - (c) quash the Corporation’s decision; or
 - (d) direct the Corporation to make a decision within a time frame specified by the reviewer if the Corporation has not made the decision in a timely manner as contemplated by sections 54 and 134(1)(b); or
 - (e) make the decision for the Corporation if it has not made a decision in a timely manner as contemplated by sections 54 and 134(1)(b).

Discussion

[24] The issues in this case are:

- (1) whether the Reviewer’s procedural ruling was a “review decision”, and, if so,
- (2) whether the Reviewer’s ruling as to *res judicata* was correct. If view of the Court’s decision on issue (1), the Court does not address issue (2).

[25] Ms Woodhouse submits as follows concerning the first issue. The Reviewer made a decision pursuant to section 145(3)(a) of the Act by setting out the outcome of the review as “Challenge as to jurisdiction dismissed”. The Reviewer elected to split the review into two components: the challenge to jurisdiction and the

substantive issue. It would be inappropriate to raise jurisdiction arguments in the substantive review.

[26] This Court acknowledges the submissions made on behalf of Mr Coldrick. However, this Court finds that the submissions do not align with the express words of the opening paragraphs of the Reviewer's procedural ruling:

1. For the reasons set out below, I find that:
 - a. the doctrine of *res judicata* does not apply to Fulton Hogan's decision of 10 November 2021; and
 - b. it follows that I have jurisdiction to make a decision under the Act in relation to the review application lodged by the appellant.
2. The substantive issue between the parties of whether Fulton Hogan's decision dated 10 November 2021 was correct is to be set down for hearing.
3. I shall determine the issue of costs after the conclusion of the substantive issue.

[27] It is clear from the above statements that the Reviewer did not make a decision, as defined by section 145(3) of the Act, as to the substance of Mr Coldrick's claim. Given that the Reviewer has not made a review decision, so defined, Mr Coldrick is not entitled, pursuant to section 149(1)(a) of the Act, to appeal to the District Court.

Conclusion

[28] In light of the above considerations, the Court finds that the Reviewer's procedural ruling was not a "review decision", and so this Court does not have jurisdiction to hear and decide this matter. This appeal is dismissed.

[29] This Court encourages the Reviewer to convene a hearing of the substantive matter as soon as possible.

[30] I make no order as to costs.

A handwritten signature in cursive script, appearing to read "P R Spiller".

P R Spiller
District Court Judge

Solicitors: Izard Weston for the Respondent.