

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 186 ACR 148/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	ABOOBEKER ISMAIL Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	WOOLWORTHS NEW ZEALAND LTD Second Respondent

Hearing: 2 September 2022

Appearances: Appellant in person (via Zoom)
 Mr C Hlavac for the First Respondent
 No appearance on behalf of the Second Respondent

Judgment: 28 September 2022

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Cover for personal injury s 20 and Suspension of entitlements - s 117(1)
Accident Compensation Act 2001]

[1] This appeal concerns a decision of Aon, on behalf of the second respondent Woolworths New Zealand Limited (an accredited employer), dated 12 November 2020, declining cover for bursitis and calcific tendinosis of the right shoulder and also declining a request for back dated weekly compensation.

Background

[2] The appellant was formerly employed with the second respondent Woolworths at a Countdown supermarket in Auckland.

[3] On 15 June 2019, Mr Ismail was seen by Dr Reynolds, a GP at the White Cross Medical Centre, who certified him unfit to work from 13 June 2019 until 19 June 2019. Although Dr Reynolds' letter did not specify the nature of his injury, on 17 June 2019, Mr Ismail was seen by a podiatrist for chronic heel pain and tendinous in both feet.

[4] On 24 June 2019, Mr Ismail resigned from his employment at Countdown.

[5] On 6 July 2019, Mr Ismail was seen by a different GP, Dr Jassal, and an ACC injury claim form was completed. The description of injury was:

Felt a pain while pulling a stack of pallets with a jack - pain in the right shoulder – ongoing since.

[6] The accident date was given as 23 May 2019 and the injury diagnosis was “shoulders sprain”.

[7] Dr Jassal's notes for 6 July 2019 record:

Mechanism of injury:

Felt a sharp pull in his right shoulder while he was trying to pull a heavy amount of palletes using a special jack.

Date of injury: 23 May 2019.

Since the injury, patient has been complaining of ongoing discomfort in the right shoulder. States generally worse at night with some difficulties sleeping on it. During the day, states he has reasonable range of motion but there are certain activities that can aggravate the discomfort.

...

A free range of motion of both right and left shoulder joints.

On the right shoulder joint: there is no tendinous along the clavicle.

There is some tenderness to the anterior aspect of the joint just under the AC joint.

...

Impression: shoulder sprain – right.

ACC 45 lodged and claim initiated...

Injury management discussed

Suggest analgesia...

Advised to seek further assistance from a physiotherapist.

[8] On 10 July 2019, the appellant was seen by a physiotherapist who recorded:

Subjective: pain pulling heavy stack of pallets with a jack in right shoulder. Been quite sore due to the heavy nature of work – was involved with Countdown. Has resigned as a result. Constant pain although lifting is not too sore.

[9] That physiotherapist also recorded that the appellant had active range of motion of the shoulder with “nil pain”.

[10] The physiotherapist also records:

“PALP: tender”– understood to mean that shoulder was tender to palpation

[11] Under the heading “Treatment” is noted:

Dry needling 25 x 50 mm anteromedial deltoid, post deltoid, DTM, TPR above, heat, advised management plan.

[12] Under the heading “Plan” is this:

Exs therapy as appropriate, ...

RX (prescription) – pain management

[13] The claim was referred to Aon who manage Woolworths’ work-related injury claims as an accredited employer under ACC’s partnership programme.

[14] On 23 July, the appellant completed a telephone questionnaire which included the following description of his injury on 23 May 2019:

Part of my duties was to carry heavy equipment on the pallet jack. While pulling pallet, I injured my arm (right shoulder). At the time, there was a pinch of pain. I thought nothing of it at the time, but it got progressively worse. ...

Didn't report (the injury) the work I was doing was no good for my health, so I have since resigned.

I did mention to my colleague but not to my superiors.

[15] The questionnaire also records that the appellant first sought medical treatment on 6 July 2019. He added:

I thought it would go away and rub some gel on it, but it wasn't getting better.

Shoulder is still sore – have been to physiotherapist.

[16] On 1 August 2019, Aon accepted cover for a right shoulder sprain.

[17] On 6 August 2019, the appellant attended his GP, Dr Jassal, whose notes record:

Patient here seeking medical certificate.

He states that he was unable to work since 13 June secondary to the injury.

He states that since our last review, the pain has increased and it appeared to be exacerbated following physiotherapy massage.

He gets some relief from analgesia.

He complains of some nocturnal pain.

o/e (on examination)

appears well and comfortable

there is reduced range of motion in the right shoulder.

Forward flexion and a reduction just to about 110-120 degrees.

There was some tenderness over the interior aspect of the shoulder.

There was no swelling redness.

[18] On 23 August 2019, an ultrasound was taken of the appellant's right shoulder which showed:

Calcific tendonitis of the supraspinatus tendon with a small intra substance tear.

Subacromial – subdeltoid bursitis of mild severity with symptomatic impingement.

[19] The appellant was seen by Dr Jassal on 27 August 2019 who recorded:

He has had his ultrasound of the right shoulder.

It shows subacromial and subdeltoid bursitis of mild severity. There is impingement as well.

He continues to have ongoing pain and discomfort.

He tells me he has continued working and his job as a shuttle driver has involved lifting bags.

Unfortunately, he pays with the pain while sleeping at night.

The range of shoulder movement remains limited. He remains tender under the ACJ area. Distally, NVI.

[20] Dr Jassal advised the appellant he should commence with physiotherapy and he also noted:

I also referred him to see an orthopaedic surgeon to consider further management and a steroid injection into the joint.

[21] Dr Jassal noted:

He will need to take some time off work, as such, ACC 18 provided.

[22] On 29 August 2019, the appellant was seen by Mr Faraj, orthopaedic surgeon, who recorded:

On examination

He has tenderness anterior to the acromion external rotation is 45 degrees forward flexion full coming down from full abduction gives him minor discomfort. He had a positive flexion internal rotation test.

Ultrasound examination – revealed calcific tendonitis with an intra substance tear of supraspinatus.

Recommendation

I spoke to him about his options and I feel the best plan to settle his pain is with a steroid injection.

...

I injected his subacromial space with kenacort A 40. I have explained to him the rotate cuff exercise I feel he will do well after doing these exercises.

[23] Aon subsequently sought advice from Dr Antony Burgess.

[24] Dr Burgess noted:

There are two concurrent conditions in the right shoulder, bursitis with impingement and calcific tendonitis.

Do you consider the current diagnosis has been caused by the accident?

Possibly the bursitis was initiated by this event, however, the calcific tendon change would predate this event.

Do you consider the covered injury for a right shoulder sprain has since resolved?

A sprain would have resolved by now, however, if the symptoms are due to bursitis and it is possible that this is being aggravated with shoulder use and continues to be a source of symptoms.

Do you consider that the current diagnosis is wholly or substantially caused by a gradual process, disease, infection, or the aging process?

The calcific tendonitis is a gradual process disease and therefore not caused by this event. The bursitis may be related to this injury event.

[25] Dr Burgess also noted:

The (appellant's) role appears to require frequent use of the arms in forward flexion with force for installation and stocking / destocking and palletising. If the symptoms are due to the bursitis then the injury would be plausibly preventing him from engaging in this role.

What do you consider to be tasks that may exacerbate the symptoms?

Lifting above chest height, using the arms in forward flexion with force.

Are there any other treatment or rehabilitation interventions that you recommend?

I would recommend an USS guided steroid injection into the bursa to see if this has any influence on symptoms. This would be somewhat diagnostic also to allow clarification around which condition is causing the symptoms.

Do you consider the recent incapacity from 13/7/19 – 08/09/2019 due to the event on 23/05/2019?

There is plausibility for this incapacity relating to bursitis.

[26] Aon subsequently agreed to pay weekly compensation back dated to 13 July 2019.

[27] Aon then referred the appellant to Dr Dryson, occupational physician, for the purpose of carrying out a medical case review and an initial medical assessment.

Dr Dryson subsequently provided two reports, a medical case review dated 29 October 2019 and an initial medical assessment dated 31 October 2019. In these reports, Dr Dryson diagnosed Mr Ismail is suffering from three conditions:

- a. Mild subacromial/subdeltoid bursitis – right shoulder
- b. Calcific tendonitis supraspinatus tendon – right shoulder
- c. Adhesive capsulitis – right shoulder

[28] Dr Dryson advised that:

Calcific tendinitis is a condition of unknown cause unrel (inaudible). It is not related to trauma. It is generally self-limiting but can cause problems such as adhesive capsulitis and this has clearly happened here.

...

Calcific tendonitis is not due to injury. It is a condition of unknown cause which runs a course of generally full resolution with no recurrence. In this case, it has proceeded to adhesive capsulitis, a known complication of calcific tendonitis.

[29] In his further report of 31 October 2019, Dr Dryson noted that this was “a complicated claim”. He again said calcific tendonitis is a condition of unknown cause, unrelated to injury, and it will generally resolve spontaneously and does not recur. He also said:

The subacromial bursitis was described as mild. It too would not be an explanation for reduced range of movement in planes concluding external rotation.

It is therefore my opinion that Aboobeker’s right shoulder condition is not an injury and is not due to any accident on 23 May 2019.

[30] Dr Dryson then went on to list work types that are currently medically sustainable.

[31] The various medical reports, including Dr Dryson’s reports, were considered by Aon, and on 31 October 2019, Aon wrote to Mr Ismail advising him of its decision to suspend his entitlements.

[32] Having been unsuccessful at review, Mr Ismail appeals to this Court.

[33] Following the review hearing, the appellant obtained a letter from Dr Ravi Bhaga, specialist orthopaedic surgeon, dated 7 July 2021 who says:

I hereby wish to advise that I have been treating Mr Ismail's RH shoulder since his return to South Africa, for the injury he sustained in the employ of Countdown supermarket in New Zealand on 23/05/2019.

Mr Ismail's first visit to me was on 25/05/2020. After the examination of an ultrasound report of the same date, which results were tear, bursitis and calcific tendinitis, which compared to the same results he had obtained on the 23/08/2019 from an ultrasound of his RH shoulder in NZ.

As he was in excruciating pain, I had suggested a corticosteroid injection which he agreed to and which I administered. I have seen him a few times since then and administered the injection to relieve the pain. I have last seen him on the 13/04/21, when another RH shoulder ultrasound report concluded no tear or bursitis except for a slight calcific tendinitis condition. He does not suffer any pain currently.

My findings after discussions with him and having a look at the ultrasound scans, was that of an injury that he had mentioned at his work place. Although the calcific tendinitis could be a degenerative condition, I in my humble opinion am not fully convinced, as he had never suffered any pain before the injury. The tear and the bursitis is the cause of the injury.

Appellant's submissions

[34] Mr Ismail told the Court that when he was injured in May 2019, he did not report the injury at the time. He thought the pain would subside and go away but it didn't. He saw his doctor and was referred to a physiotherapist. He said physiotherapy did not help. He referred to the ultrasound scan showing a tear in his supraspinatus tendon.

[35] He said the pain got progressively worse and he was referred for further medical investigations.

[36] He said that with his loss of employment and his injury, he and his wife went back to South Africa where his children are. He assured the Court that he was not making up any stories about his injury and that Aon appeared to be blaming it on his age.

[37] He told the Court that he accepts that things of this kind do happen with age but that in this case he suffered the trauma/injury at his work at Countdown.

First Respondent's submissions

[38] Mr Hlavac took the Court through the documents relating to the injury. He notes that in the report of the podiatrist of 17 June 2019 there is no mention of a shoulder injury. The shoulder injury is first mentioned by Dr Jassal who the appellant saw on 6 July 2019.

[39] Counsel submits that the questionnaire completed by the appellant on 23 July 2019 is not suggestive of an acute injury.

[40] He notes that the report of Dr Jassal of 6 August 2019, refers to a reduced range of motion in the right shoulder whereas earlier there had been a full range of motion.

[41] He acknowledges that in the ultrasound report of 23 August 2019, there is mention of a small intrasubstance tear of the supraspinatus tendon.

[42] He next refers to the report of orthopaedic and hand surgeon, Mr Faraj, but points out that Mr Faraj does not comment on causation.

[43] He acknowledges that the branch medical advisor Dr Burgess, on 3 September 2019, accepts that the bursitis may be injury related. He notes however that Dr Burgess says that the calcific tendonitis is a gradual process disease and therefore not caused by the injury event.

[44] He notes that Dr Dryson, also speaks of a third diagnosis of adhesive capsulitis (frozen shoulder).

[45] Mr Hlavac acknowledges that at the first review, cover was reinstated because it was not clear the effects of the "sprain" were spent. Weekly compensation was therefore reinstated until 19 February 2020.

[46] Mr Hlavac refers to the ultrasound findings of 13 April 2021 which found calcific tendinitis but no evidence of bursitis.

[47] Mr Hlavac refers to Dr Bhaga's report. He submits that Dr Bhaga's conclusion that the tear and the bursitis is the cause of the injury does not amount to causation for the purpose of the Act and that Dr Dryson and Dr Pai are not supportive of bursitis being the cause of injury.

[48] Mr Hlavac submits that over time the body ages and we have conditions as a result of age and that this is the position with the appellant being 71 years old as at the date of the ACC claimed injury.

[49] He says that the bursitis which had possibly caused the initial injury had healed by the time compensation stopped in June 2020.

Appellant's reply

[50] In reply, Mr Ismail said he accepted that tendinitis is a degenerative condition but that he had never had pain before the accident only after it.

[51] He also said that with all due respect to the doctors concerned he had never had adhesive capsulitis (frozen shoulder).

[52] Mr Ismail makes the point that the medical experts relied on by ACC have not examined nor seen him.

[53] He also confirmed that his work with Countdown involved lifting items above his head and that that along with the other heavy duties described in the medical notes, had caused the injury.

Decision

[54] As is frequently the case with claims arising for injury by accident, the accompanying documentation of the injury and its cause are often incomplete as they are in this case. It is natural for many even a majority of people to think that their injury will resolve and for a variety of reasons, economic and otherwise, recourse is not had to a medical professional until days even weeks after the injury have passed.

[55] In this case, the first medical report on file is from White Cross Glenfield and dated 15 June 2019. In it Dr Reynolds simply declares the appellant unfit for work from 13 June 2019 for six days. No mention of the actual injury is made.

[56] The next report is from a podiatrist dated 17 June 2019 and that refers to a chronic heel pain.

[57] The first record on file of an accident causing injury on 23 May 2019 is in the ACC injury claim form dated 6 July 2019.

[58] There the description of injury is:

Felt a pain while pulling a heavy stack of pallets with a jack – pain in the right shoulder – ongoing since.

[59] The claim form was completed almost six weeks after the injury event.

[60] The first report that focuses on the appellant's right shoulder is that of the physiotherapist dated 10 July 2019 which says:

Subjective: pain pulling heavy stack of pallets with a jack in right shoulder. Been quite sore due to the heavy nature of work – was involved with Countdown. Has resigned as a result. Constant pain although lifting is not too sore.

[61] Under the heading "Objective" is this:

Full AROM shoulder nil pain

Palp: tender; tone + post delt, anteromedial deltoid

Signific rounding of shoulders

Treatment: dry needling 25 x 50 mm anteromedial deltoid, post deltoid, DTM, TPR above, heat, advised management plan.

[62] The physiotherapist also completed a prescription for pain management.

[63] The physiotherapist's report is not straightforward.

[64] On the one hand, there is this:

Subjective: pain pulling heavy stack of palletes with a jack in right shoulder. Been quite sore due to the heavy nature of work – was involved with Countdown. Has resigned as a result constant pain although lifting is not too sore.

...

Palp (ation): tender, tone + post delt, anteromedial deltoid

[65] Then follows reference to a prescription for pain management

[66] On the other hand, the report also says:

Objective full AROM shoulder nil pain.

[67] I take the references to mean that at the time the appellant had a full active range of motion of his shoulder with no pain. The active range of motion was full in the sense that the appellant was able to perform movements without pain. This then stands along the side the fact that his shoulder was tender on palpation and there was constant pain with activities of the shoulder that placed it under load. Such conclusion is bolstered by what is contained in the telephone questionnaire carried out on 23 July 2019.

[68] This view appears to be confirmed by Dr Jassal who examined the appellant on 6 August 2019 and who found on examination:

Appears well and comfortable

There is reduced range of motion in the right shoulder. Forward flexion and a reduction just to about 110 – 120 degrees. There was some tenderness over the anterior aspect of the shoulder. There was no swelling redness.

[69] The ultrasound carried out on 23 August 2019 found:

Calcific tendinitis of the supraspinatus tendon with a small intra substance tear.

Subacromial-subdeltoid bursitis of mild severity with symptomatic impingement.

[70] Dr Jassal recorded again on 27 August 2019 that:

There is an impingement as well.

He continues to have ongoing pain and discomfort.

Dr Gassal on the same occasion also recorded:

The range of shoulder movement remains limited.

[71] Next there is the report of Dr Burgess, who acknowledged that the subacromial/subdeltoid bursitis maybe related to this injury event.

[72] Dr Burgess stated also:

The calcific tendinitis is a gradual process disease and therefore not caused by this event.

[73] Dr Dryson adds a diagnosis of adhesive capsulitis of the right shoulder which is inferentially the result of the accident and which, he says will generally take 12 to 18 months to fully resolve.

[74] Dr Dryson, in his report of 31 October 2019, after acknowledging diagnosis of calcific tendinitis, mild subacromial/subdeltoid bursitis and adhesive capsulitis, says:

It is therefore my opinion that Aboobeker's right shoulder condition is not an injury and was not due to any accident on 23 May 2019.

[75] Although Dr Dryson mentions the "small intra substance tear" of the supraspinatus tendon, he makes no comment on it further.

[76] There is a paper file review of 20 July 2020, by Mr Pai, who also comments that:

Most of the bursitis are usually non-traumatic information of the normal bursa.

[77] Mr Pai goes on to say:

I would not consider the findings as noted of subacromial bursitis as such being directly related to the stated event considering the time factor and his delayed reporting of the injury event.

[78] From the latter comment, I infer that Mr Pai does not rule out the subacromial bursitis being injury related but appears to rely on the appellant's delayed reporting as contraindicating it being caused by the injury event.

[79] In respect of the medical professionals involved in this case on behalf of ACC, it is noted there was no face to face examination of the appellant by them, and in Dr Dryson's case his focus as an occupational medicine specialist was identifying a medically sustainable work type for the appellant following his injury of 23 May 2019.

[80] This contrasts with the report of specialist orthopaedic surgeon Dr Bhaga of 7 July 2021. Dr Bhaga relates that he has been treating the appellant's right shoulder since his return to South Africa with the first consultation being on 26 May 2020.

[81] Dr Bhaga notes that the ultrasound report of the same day "which results were tear, bursitis and calcific tendinitis" compared with the same results that had been obtained from an ultrasound scan of his right shoulder in New Zealand.

[82] Dr Bhaga then said:

As he was in excruciating pain, I have suggested a corticosteroid injection which he agreed to and which I administered. I have seen him a few times since then and administered the injection to relieve the pain. I have last seen him on 13/04/21.

[83] Dr Bhaga then says:

My findings after discussions with him and having a look at the ultrasound scans, was that of an injury that he had mentioned at his workplace. Although the calcific tendinitis could be a degenerative condition, I in my humble opinion am not fully convinced, as he has never suffered any pain before the injury. The tear and the bursitis is the cause of the injury.

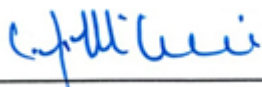
[84] Given Dr Bhaga's qualifications as a specialist orthopaedic surgeon, and as the appellant's treating physician, I take the view that he is more ideally placed than those medical specialists who have not had consultation with the appellant, to give an opinion on the cause of the appellant's presentation. His view is that the tear and the bursitis is the cause of the injury. In this regard, the comment of the branch medical advisor Dr Burgess on 3 September 2019 is supportive where he says, "The bursitis may be related to this injury event".

[85] Accordingly, in terms of *Ambros*¹ “the generous and unrigidly approach referred in *Harrild* may, however support the drawing “robust” inferences in individual cases”. And that therefore based on Dr Bhaga’s report and the similar view earlier held by Dr Burgess, I find on the balance of probabilities that a causal nexus between the accident event of 23 May 2019 and the appellant’s calcific tendinitis is proven.

[86] Therefore, the decision of the second respondent of 12 November 2020 declining to cover bursitis and calcific tendinitis of the right shoulder and declining a request for back dated weekly compensation is reversed.

[87] For the sake of completeness, the finding in this judgment does not impact upon the other steps that the respondent is required to take with work place injuries in order to return the appellant to vocational independence albeit in a role different from the one he was carrying out at the time of his injury.

[88] Should any issue as to costs arise, parties have leave to file memoranda in respect thereof.



Judge C J McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch

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