

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 193      ACR 5/22**

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

Hearing: 27 September 2022  
Held at: Auckland/Tāmaki Makaurau

Appearances: B Hinchcliff for the Appellant  
K Anderson for the Accident Compensation Corporation

Judgment: 4 October 2022

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**RESERVED JUDGMENT OF JUDGE P R SPILLER  
[Whether reviewable decision - s 6, and claim for weekly compensation, s 103(2)  
and cl 32, Accident Compensation Act 2001]**

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**Introduction**

[1] This is an appeal from two decisions of a Reviewer dated 23 December 2021:

- (a) declining jurisdiction in relation to a review of the Corporation's decision dated 10 August 2021 reiterating its decision of 7 November 2016 declining funding for surgery; and
- (b) dismissing a review of the Corporation's decision of 2 June 2021 declining Mr Fuller weekly compensation.

## **Background**

[2] Mr Fuller was born in December 1962. He worked as a linesman.

[3] In May 1987, Mr Fuller sustained a crush injury to his right hip and thigh. Cover was granted for “Contusion (intact skin) inc Crushing Hip, Upper leg, Thigh”. In August and October 1988, Mr Fuller received lump sum payments from the Corporation.

[4] On 16 February 1998, Mr Fuller’s right knee was x-rayed, and the report recorded “No bone or joint abnormality is detected”.

[5] On 12 March 1998, Mr Fuller’s GP, Dr Stuart Farmer, lodged an ACC medical certificate. Dr Farmer recorded that Mr Fuller said that his knee was troublesome after the May 1987 accident, and he had to abandon playing representative rugby. He recorded Mr Fuller said his knee had become increasingly painful over time, but he was still working.

[6] On 29 April 1998, Mr Barry Tietjens, Orthopaedic Surgeon, reported to Dr Farmer. Mr Tietjens’ diagnosis was patellofemoral joint pain and instability right knee, and possible posterior cruciate ligament injury right knee. He noted following the 1987 injury to Mr Fuller’s thigh, his x-rays were normal, and after three months he returned to playing rugby. However, Mr Tietjens noted two years before he saw him, Mr Fuller had stopped playing rugby. Mr Tietjens reported:

It is our impression that Malcolm’s symptoms arise predominantly from his patellofemoral joint. He may have suffered some damage to the patellofemoral joint at the time of his initial injury and may have been having further episodes of instability. Since then this has been aggravated by his reduced activity in the last two years. We cannot exclude a posterior cruciate ligament injury.

[7] On 28 April 2004, Mr Fuller suffered a further accident, and was granted cover for “sprain knee and leg knee right”.

[8] On 23 February 2005, Professor Stuart Heap of a radiology centre reported results of the examination of Mr Fuller’s right knee. The report noted minor

osteophyte formation and confirmed the impression as “general degenerative change but this is particularly affecting the medial joint compartment”.

[9] On 13 April 2005, Mr Mark Clatworthy, Orthopaedic Surgeon, reported to Dr Farmer. Mr Clatworthy noted that, since the May 2004 injury, Mr Fuller had had marked medial sided knee pain, swelling and catching not settling with conservative measures. Mr Clatworthy also noted some longstanding retropatellar pain. He reported that the x-ray showed no significant bony abnormality and believed that Mr Fuller had a medial meniscal tear that was symptomatic.

[10] On 10 May 2005, Mr Malcolm Hood, Physiotherapist, reported that in May 1987, following his accident, Mr Fuller was referred for a course of physiotherapy treatments to his right thigh haematoma. He had a markedly impaired gait and the knee was deteriorating.

[11] On 16 May 2005, Mr Clatworthy conducted surgery on Mr Fuller, funded by the Corporation. Mr Clatworthy’s operation notes recorded that the medial meniscus flap tear was resected, with 90% remaining.

[12] In 2011, Mr Fuller suffered a further accident, and received cover for contusion to his right knee and lower leg.

[13] On 10 December 2012, Mr Fuller suffered a further accident, and received cover for a sprain of his left shoulder and upper arm and a sprain of right knee and leg.

[14] On 17 April 2014, Mr Fuller suffered a further accident, in which he twisted his right knee. He received cover for medial meniscus derangement in his right knee.

[15] On 24 April 2014, Mr David Milne, Radiologist, reported that an x-ray of Mr Fuller’s right knee found minor osteophytic spurring involving articular margins of the medial and lateral compartments, and prominent osteophytic spurring involving the patellofemoral articulation.

[16] On 1 May 2014, an MRI scan revealed the presence of moderately severe osteoarthritis and a radial tear of the medial meniscus.

[17] On 8 May 2014, Mr Clatworthy noted that the MRI scan showed that Mr Fuller had medial compartment osteoarthritis and believed that the small radial tear was not “the main source of his worries”.

[18] On 29 July 2016, Mr S Jayaraman, Radiologist, reported “progression of right knee osteoarthrosis, particularly the medial and patellofemoral compartments”, and “mild right hip osteoarthrosis”.

[19] On 6 September 2016, Dr Farmer submitted an application to the Corporation for funding of a total knee replacement for Mr Fuller. Dr Farmer stated that Mr Fuller’s leg was crushed and his knee twisted in May 1987, he had day surgery to his knee, and he now had post-traumatic osteoarthritis of the knee and requires a knee replacement procedure. The application stated that x-rays showed “advanced medial and patellofemoral OA [osteoarthritis]”.

[20] On 25 October 2016, the Corporations Clinical Advisory Panel (“CAP”, comprising Ms S Gordon and Dr M Sexton) reported that the Corporation did “not have sufficient information from the 1987 injury to be able to establish a causal link”. Mr Fuller then submitted a detailed description of the 1987 accident and a report from Mr Tietjens dated 29 April 1998.

[21] In a report dated 3 November 2016, the new CAP opinion was that the Tietjens report had been considered but “a causal link has not been established”. The CAP noted that following the 1987 injury, the x-rays were reported as normal and Mr Fuller was able to return to rugby. The CAP said that “it also appears that the client has laterally deviated patellae and hyperextension and that this may have contributed to the wear of the patellofemoral joint”.

[22] On 7 November 2016, the Corporation advised Mr Fuller that it was unable to fund the knee replacement surgery:

We've looked at all the available information from your treatment providers and have enclosed a summary of this. This information shows that surgery is required to address osteoarthritis of the right knee. We've determined that this condition wasn't caused by your accident on 21/05/1987, which means that we're unable to cover this condition and we're unable to approve your specialist's request to pay for your surgery

[23] On 2 March 2017, Mr Clatworthy advised the Corporation that:

... unfortunately there is really not enough information to show that the injury that Malcolm suffered in 1987 has resulted in post-traumatic osteoarthritis .... I am sure you are familiar with the knee surgery ACC guidelines which stipulate which patients ACC will fund. I don't think Malcolm has enough evidence to show he meets the criteria.

[24] Mr Fuller applied for a review of the Corporation's refusal to fund surgery. On 13 July 2017, the Reviewer dismissed the review. No appeal was taken against the review decision.

[25] On 22 June 2019, Mr Fuller suffered a further accident, and was granted cover for a sprain of his right knee and leg and contusion to his ankle and foot.

[26] On 29 August 2019, Mr Matt Walker, Orthopaedic Surgeon, provided a report to Mr Fuller's GP, Dr Harry Hillebrand. Mr Walker assessed that Mr Fuller was clearly a candidate for total knee joint replacement because of the extent of his arthritis and the severity of his symptoms.

[27] On 15 October 2020, Mr Fuller asked the Corporation to reconsider its November 2016 decision not to fund the knee surgery and referred to Mr Hood's 2005 letter.

[28] On 7 December 2020, the Corporation reiterated its decision and advised that no new information had been provided that required it to make a fresh decision:

The letter does not contain any substantive new medical information on the matter of causation of the Osteoarthritis. As such it does not materially affect the decision made in 2016, so unfortunately I must inform you that ACC will not be issuing a new decision on this.

... ACC's decision of 7 November 2016 remains the same, therefore your request for elective surgery on your right knee osteoarthritis remains declined.

[29] Mr Fuller challenged the Corporation's reiteration of its 2016 decision in review proceedings.

[30] On 23 March 2021, the Corporation received a certificate stating that Mr Fuller was fully unfit to work due to his 2019 right knee sprain (noted in paragraph [25] above). Mr Fuller claimed weekly compensation.

[31] On 26 May 2021, the Reviewer held that the Corporation's letter of 7 December 2020, reiterating its 2016 decision, was not a new decision, and therefore there was no jurisdiction to review it. No appeal was taken against the review decision.

[32] On 1 June 2021, Ms Jasmine Rainford, Physiotherapist and Clinical Advisor, advised that clinical information did not support that Mr Fuller's ongoing incapacity was due to the covered right knee/leg sprain of 2019. It was observed that a sprain would have resolved in the timeframe.

[33] On 2 June 2021, the Corporation advised Mr Fuller that it declined his application for weekly compensation, because the available medical information did not support that his incapacity was caused by the 2019 accident.

[34] On 5 August 2021, Dr Hillebrand again challenged the Corporation's November 2016 decision on behalf of Mr Fuller:

Malcolms physio [Mr Hood] and myself wish to provide the following information in support of Malcolms claim for his right knee replacement to be covered by ACC ....

Could you please consider the following. The initial injury was a significant trauma and likely to cause post traumatic arthritis in the future.

Malcolm was discharged from physio [by] Mr Hood with full function, this does not equate to full healing or lack o[f] residual damage, nor does it accommodate the likelihood of compensatory mechanism to allow full function, in a relatively young man.

It would be almost accepted t[h]at after a significant knee trauma that there are long term sequalee in the form of premature, therefore post traumatic arthritis. As is evidenced on recent imaging.

[35] On 10 August 2021, the Corporation again reiterated its 2016 decision, on the basis that Dr Hillebrand's letter “does not contain any new medical information”. Mr Fuller challenged the Corporation’s reiteration of its 2016 decision in review proceedings,

[36] On 28 September 2021, Dr Chris Hanna, Sports and Exercise Physician, assessed that on balance, the evidence suggested Mr Fuller had had two significant injuries to his right knee and his current osteoarthritis was most likely post-traumatic in nature. Dr Hanna noted:

I believe that two injuries have occurred and resulted in the degenerative change ... The two main types of osteoarthritis (OA) we see are primary OA, which typically affects both sides of the body; and secondary OA, of which post-traumatic OA is a subset. Secondary OA only affects the involved joint. As the patient has had no problems with the left knee, and a history of significant trauma to the right knee, on the balance, it is more likely that his problem is related to the documented ACC covered injuries to the right knee. ...

The first injury appears to have been to the patellofemoral joint and the PCL. The PCL shields the patellofemoral joint from load, and when it is injured, overload of this joint can occur (Van de Veldt et al). The second injury was to the medial meniscus, resulting in meniscectomy, which has been shown to predispose to degenerative change (Petty and Lubowitz, Wang et al).

[37] On 1 December 2021, review proceedings were held as to whether the Corporation’s letter of 10 August 2021 was a reviewable decision, and whether Mr Fuller was entitled to weekly compensation.

[38] On 23 December 2021, the Reviewer held that the Corporation’s letter of 10 August 2021 was not a new decision but was a restatement of its previous decision declining to fund surgery, and therefore there was no jurisdiction to review it. The Reviewer found that the letters of Dr Hillebrand and Dr Hanna were not fresh medical evidence but were opinions on the same evidence that had been considered throughout.

[39] Also, on 23 December 2021, the Reviewer dismissed the review of the Corporation’s decision of 2 June 2021 declining Mr Fuller’s application for weekly compensation. The Reviewer found that there was insufficient evidence to support that Mr Fuller’s incapacity was due to his covered right knee sprain, and the medical evidence suggested that any incapacity was due to Mr Fuller’s severe osteoarthritis.

[40] On 11 January 2022, Mr Fuller lodged a Notice of Appeal in respect of the Reviewer's two decisions.

### **Relevant law**

[41] Section 6 of the Accident Compensation Act 2001 ("the Act") provides that a "decision" includes a decision about whether or not the Corporation will provide any entitlements to a claimant and about which entitlements.

[42] In *Osborne*,<sup>1</sup> Judge Beattie held:

[15] ... the mere confirmation of a prior decision does not constitute a new decision. This principle is enshrined in decisions of this Court and also of the High Court. Similarly the request of a claimant to reconsider or revise its original decision does not turn into a fresh decision if the Corporation declines to do so and maintains that its earlier decision was correct.

[43] In *Shann*,<sup>2</sup> Judge Ongley held:

[11] The position therefore, at the level of lodging a new claim with ACC is that the Corporation is obliged to consider new evidence with an open mind. However there is no statutory requirement for the Corporation to issue a new decision. The Corporation itself is authorised to review its earlier decisions in order to revoke cover, but a claimant does not have a similar avenue of statutory relief. The impression gained from experience in appeals is that, in practice, the Corporation issues a new primary decision when presented with the kind of new evidence that questions an existing decision to a degree that demands reconsideration. When presented with less compelling evidence the Corporation may simply confirm an earlier decision. There are a number of appeal decisions to the effect that mere confirmation is not a decision open to review, and there are other appeal decisions that regard new material as being so significant that the confirmation of the Corporation's earlier decision should be regarded as a new primary decision on a new question raised by the new evidence. ...

[46] In summary therefore, both appeals fail because they are barred by issue estoppel. The additional medical evidence does not introduce a new fact question that could be regarded as an issue that is different from that decided in earlier judgments. Secondly, the treatment injury claim is not a new basis for a claim for cover. It is the same claim for ongoing entitlements for physical consequences of personal injury. If cover were available for treatment injury, entitlements would be barred for the same reasons.

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<sup>1</sup> *Osborne v Accident Compensation Corporation* [2006] NZACC 105. See also *Pora v Accident Compensation Corporation* [2016] NZACC 205, at [7]-[8].

<sup>2</sup> *Shann v Accident Compensation Corporation* [2009] NZACC 53.



[44] In *Langley*,<sup>3</sup> Judge Ongley cautioned against cutting across statutory time bars and providing a new avenue of reopening old claims.

[45] In *Matthews*,<sup>4</sup> Justice MacKenzie stated:

... I consider that the test to be applied in this case is whether the claim... raised some new matter which required the Corporation to address some new and different question from that which it had earlier addressed, and did not simply seek to rely on different evidence or information to achieve a different answer to the same question as had been earlier addressed.

[46] Section 100 of the Act states:

- (1) A claimant who has cover, and who lodges a claim for weekly compensation –
  - (a) is entitled to receive it if the Corporation determines that the claimant is incapacitated within the meaning of section 103(2) and the claimant is eligible under clause 32, ...

[47] Section 103(2) provides:

The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

[48] Clause 32 of Schedule 1 to the Act provides:

- (1) The Corporation is liable to pay weekly compensation for loss of earnings to a claimant who -
  - (a) has an incapacity resulting from a personal injury for which he or she has cover; and
  - (b) was an earner immediately before his or her incapacity commenced.

## **Discussion**

### ***Was the Corporation's letter of 10 August 2021 a reviewable decision?***

[49] On 6 September 2016, an application was made for Corporation funding of a total knee replacement for Mr Fuller. The application was made on the basis that Mr Fuller's leg was crushed and his knee twisted in May 1987, he had day surgery to his knee, and he now had post-traumatic osteoarthritis of the knee and requires a

<sup>3</sup> *Langley v Accident Compensation Corporation* [2005] NZACC 119, at [37].

<sup>4</sup> *Matthews v Accident Compensation Corporation* [2009] NZAR 513, at [16].

knee replacement procedure. Included in the information provided was a detailed description of the 1987 accident and a report from Mr Tietjens, Orthopaedic Surgeon. On 7 November 2016, the Corporation advised Mr Fuller that it was unable to fund the knee replacement surgery. The Corporation made this decision on the basis that the available information from Mr Fuller's treatment providers showed that surgery was required to address osteoarthritis of the right knee, and the Corporation determined that this condition was not caused by the 1987 accident.

[50] On 5 August 2021, the Corporation's November 2016 decision was challenged on behalf of Mr Fuller by his GP, Dr Hillebrand. This was on the basis that Dr Hillebrand and a physiotherapist considered that Mr Fuller's initial injury was a significant trauma and likely to cause post-traumatic arthritis in the future. On 10 August 2021, the Corporation reiterated its 2016 decision, on the basis that Dr Hillebrand's letter did not contain any new medical information.

[51] Section 6 of the Act provides that a "decision" includes a decision about whether or not the Corporation will provide any entitlements to a claimant and about which entitlements. However, it has been held that mere confirmation of a prior decision is not a new decision, and that a claimant's request to reconsider or revise its original decision does not turn the prior decision into a fresh decision if the Corporation declines to do so and maintains that its earlier decision was correct.<sup>5</sup> If new medical evidence does not introduce a new question that could be regarded as different from that decided in the earlier decision, the consideration of that new evidence does not create a reviewable decision.<sup>6</sup> The test to be applied is whether the claim raised some new matter which required the Corporation to address some new and different question from that which it had earlier addressed, and did not simply seek to rely on different evidence or information to achieve a different answer to the same question as had been earlier addressed.<sup>7</sup>

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<sup>5</sup> *Osborne and Pora*, cited above at footnote 1, and *Langley*, cited above at footnote 3.

<sup>6</sup> *Shann*, cited above at footnote 2.

<sup>7</sup> *Matthews*, cited above at footnote 4.

[52] Mr Hinchcliff, for Mr Fuller, submits the evidence provided to the Corporation after 13 July 2017 is new evidence, and, on 10 August 2021, the Corporation made a new reviewable decision based on the new evidence.

[53] Mr Hinchcliff further submits the evidence of Dr Hillebrand, Dr Hanna, Mr Fuller, the additional orthopaedic report from 1998 found by Dr Hanna, and the Corporation's lump-sum payments paid to Mr Fuller, were not considered by the Corporation before its original decline decision. He notes, as in *Goddard*,<sup>8</sup> the new evidence obtained after the original review decision was relevant, cognisant and strongly found that the accidents had caused the knee degeneration condition.

[54] This Court acknowledges the submissions made on behalf of Mr Fuller. However, the Court refers to the following considerations.

[55] First, the decision made by the Corporation in November 2016, namely, that Mr Fuller's surgery was required to address osteoarthritis of the right knee and that this was not caused by his accident in 1987, was confirmed by a Reviewer, and no appeal was taken against that review decision.

[56] Second, the letter of the Corporation in December 2020, reiterating its November 2016 decision, was made on the extended evidence then available (including the report of Mr Hood, Physiotherapist), was confirmed by a Reviewer, and no appeal was taken against that review decision.

[57] Third, the evidence of Dr Hanna, Sports and Exercise Physician, was provided seven weeks after the Corporation, in August 2021, again reiterated its November 2016 decision, and so cannot be used as new evidence made available prior to the August 2021 decision.

[58] Fourth, the primary new evidence provided to the Corporation before its reiteration in August 2021, that of Dr Hillebrand, GP, addressed the same question as that which the Corporation addressed in its 2016 decision. This is clear in

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<sup>8</sup> *Goddard v Accident Compensation Corporation* [2012] NZACC 292 at [28].

Dr Hillebrand stating: “Could you please consider the following. The initial injury was a significant trauma and likely to cause post traumatic arthritis in the future.”

[59] Fifth, this Court deduces from the above that Mr Fuller, in seeking the Corporation’s review of its decision of November 2016, was seeking to rely on different evidence or information to achieve a different answer to the same question that had been earlier addressed. The new evidence addressed the same question as before, that is, whether or not Mr Fuller’s initial covered injury caused post-traumatic arthritis, thus requiring funding for surgery. Thus, the Corporation’s reiteration of August 2021 does not pass the test of being a new, reviewable decision.

[60] Sixth, the reference to the judgment in *Goddard* does not assist Mr Fuller’s submission. The issue in *Goddard* was whether the Corporation was correct to decline to accept late lodgement of an application for review, because it found there were no extenuating circumstances that prevented the appellant from making her application for review within the statutory time period. The section of the judgment referred to by Mr Hinchcliff is Judge Ongley’s acknowledgement that it would be unjust in some circumstances for a claimant to be denied an application for review where the claimant was unaware of crucial evidence that would support a review. Both the issue and the approach to new evidence in Mr Fuller’s appeal are distinctly different from those in *Goddard*.

***Was the Corporation’s decision of 2 June 2021 declining weekly compensation correct?***

[61] On 22 June 2019, Mr Fuller suffered a further accident, and was granted cover for a sprain of his right knee and leg and contusion to his ankle and foot. On 23 March 2021, the Corporation received a medical certificate stating that Mr Fuller was fully unfit to work due to his 2019 right knee sprain, and Mr Fuller claimed weekly compensation. On 1 June 2021, Ms Jasmine Rainford, Physiotherapist and Clinical Advisor, advised that clinical information did not support that Mr Fuller’s ongoing incapacity was due to the covered right knee/leg sprain of 2019, and observed that a sprain would have resolved in the timeframe. On 2 June 2021, the Corporation advised Mr Fuller that it had declined his application for weekly compensation, because the available medical information did not support that his

incapacity was caused by the 2019 accident. At review, Mr Hinchcliff conceded that the Corporation was correct to decline weekly compensation for the covered sprain.

[62] Section 103(2) of the Act provides that the question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury. Clause 32 of Schedule 1 to the Act provides that the Corporation is liable to pay weekly compensation for loss of earnings to a claimant who has an incapacity resulting from a personal injury for which he or she has cover. Mr Hinchcliff, for Mr Fuller, submits that, if cover is accepted, then the Corporation's decision is incorrect and the Reviewer should direct the Corporation to make a new decision on weekly compensation.

[63] This Court notes that no evidence has been produced which contradicts the Corporation's finding that Mr Fuller's ongoing incapacity, giving rise to his claim for weekly compensation, was not due to the covered right knee/leg sprain of 2019. The only medical evidence supporting Mr Fuller's incapacity being due to his covered right knee sprain was the medical certificate lodging the claim for weekly compensation. As noted by Ms Rainford, a sprain is a soft tissue which typically resolves within six weeks, and this Court accepts that it is unlikely that Mr Fuller's incapacity almost two years later would have been due to a sprain injury. In light of these considerations, this Court finds that the statutory test for payment of weekly compensation has not been met.

### **Conclusion**

[64] The Court finds that the Corporation's letter of 10 August 2021 was not a reviewable decision, and that the Corporation's decision of 2 June 2021 declining weekly compensation was correct. The decision of the Reviewer dated 23 December 2021 is therefore upheld. This appeal is dismissed.

[65] 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