IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 213 **ACR 53/22**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	KINKAID MCCARTHY Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	AFFCO HOLDINGS LTD Second Respondent

Hearing: 15 November 2022
Held at: Hamilton/Kirikirioa

Appearances: F Taylor for the Appellant
E Anderson for AFFCO Holdings (an accredited employer)

Judgment: 21 November 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for personal injury caused by a series of events –
s 25(1)(a)(i), Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 25 February 2022. The Reviewer dismissed the review of the decision of AFFCO Holdings' Injury Management Unit ("IMU"), dated 13 October 2021, declining cover for a right-wrist ligament sprain as a work injury.

Background

[2] Mr McCarthy was born in 1992. At the time of his injury, he was a meat trimmer employed by AFFCO and had been working on the trimming line for the previous three years. The plant was shut down at the end of August 2021 for four weeks for routine seasonal maintenance.

[3] On 28 September 2021, Mr McCarthy returned to work after the plant closure. After working a full day, he complained of a pain in his right wrist to Ms Leigh Hallberg, the Health and Safety officer on site. Ms Hallberg recorded that there was a visible lump by the middle of that day, and that this increased in size and became red by the next day. Ms Hallberg taped his wrist and advised him to see his doctor. Mr McCarthy was placed on light duties.

[4] On 29 September 2021, Mr McCarthy presented to an accident and emergency clinic. He was assessed by Dr Paul Martin, who recorded "Wednesday last week meat worker cutting and feels he has pulled muscle but feels a grinding feeling in the wrist R who had an x-ray undertaken which did not identify a fracture". Dr Martin diagnosed Mr McCarthy as having intersection syndrome, which is a tendon condition that can appear over time as a result of a repetitive movement. Dr Martin submitted an ACC45 claim for cover. This referred to an injury diagnosis of "S520 (sprain wrist ligament) right". Mr McCarthy was given four weeks off work for his wrist to rest and recover.

[5] On 4 October 2021, Mr McCarthy presented for an x-ray of his wrist. The x-ray was interpreted by Dr John Dumble. He found that Mr McCarthy's wrist had normal alignment and that an ultrasound might be useful if there was a concern about tenosynovitis.

[6] On 13 October 2021, the IMU issued a decision to decline cover for Mr McCarthy, as it was unable to identify a workplace accident, event or series of events that caused Mr McCarthy's symptoms. The IMU noted that Mr McCarthy's symptoms might be worker pain/discomfort due to his body adjusting to being back at work for the start of the new season. Mr McCarthy applied for a review of the decision.

[7] On 25 October 2021, Mr McCarthy presented to an accident and emergency clinic. He was assessed by Dr Hein Pretorius who deemed Mr McCarthy unfit for work from 17 October until 24 October due to ongoing wrist pain. Dr Pretorius also noted that Mr McCarthy was advised to see a physiotherapist.

[8] On 1 November 2021, Mr McCarthy returned to work, but his wrist began swelling and causing discomfort. He returned to the accident and emergency clinic, and was given another two weeks off work.

[9] On 2 November 2021, AFFCO's IMU requested that Mr McCarthy have an ultrasound taken of his wrist. The cost of the ultrasound was to be paid by IMU. However, Mr McCarthy declined the request for further imaging, on the advice from Dr Martin that this was unnecessary.

[10] On 10 November 2020, Dr Martin emailed AFFCO, asking it to reconsider its decision of 13 October 2021, and advising that he would support Mr McCarthy in challenging that decision. Dr Martin advised that he believed that Mr McCarthy had a clear history of acute injury:

> He gives a clear history of injuring his wrist on the Tuesday prior. Which was then exacerbated by work the next day. There was swelling documented. His examination was consistent with inflammation between two sets of muscle forearm (intersection syndrome).

[11] On 22 November 2021, Mr McCarthy returned to work. He subsequently changed roles from meat trimming to neck boning. He reportedly made a full recovery, and no further discomfort was reported.

[12] On 20 December 2021, a worksite assessment was undertaken by TBI Health with the purpose of providing advice on Mr McCarthy's workplace tasks. He noted no injury to have caused his discomfort but felt that the pain had come on gradually. He reported ongoing minor intermittent discomfort in his right wrist while working. Overall, his discomfort had improved significantly and did not stop him from engaging in work-related or home-related activities. The worksite assessment observed him working in the trimming role on the boning floor as well as in the neck-boning role. There were no pain barriers observed.

[13] On 17 January 2022, a Medical Assessment file review was undertaken by Dr Scott Newburn, Occupational Medicine Specialist. Dr Newburn reported:

> 1. What is the diagnosis?
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> The clinical diagnosis was of intersection syndrome. The swelling and discomfort as well as watching symptoms in the region of the dorsoradial wrist is consistent with intersection syndrome.
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> This is a gradual process tendon condition that usually developed over months to years.
>
> The chronological evidence does not suggest that this condition has developed as a consequence of the work, it developed within a day of return to work after a break. There has been no significant change in work task before or after the four-week holiday described on file leading up to 28 September 2021 development of intersection syndrome.
>
> 2. What was the accident or series of events that led to an injury?
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> I did not identify any accident on file 28 September 2021 including the claimant's personal statements that no acute injury event was sustained to cause the condition.
>
> I also note the claimant's familiarity with the work tasks over a 3-year period, and although they had taken the four-week holiday, there is no evidence that they had begun a new work task that is significantly new or novel as to consider the injury is a series of events injury.
>
> I conclude that I did not identify an accident or change in work tasks that would be considered likely to cause an acute sprain/strain diagnosis to the right wrist, or a series of events diagnosis of intersection syndrome.
>
> I conclude that the intersection syndrome has developed independent of the work tasks and has been rendered symptomatic or at most aggravated by the work tasks on 28 September 2021, rather than caused by the work tasks.
>
> 3. Do the above answers meet the criteria for a PICBA/Series of Events injury?
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> There is no evidence that the claimant's situation and diagnosis of intersection syndrome in the right wrist have developed as a Personal Injury Caused by Accident (PICBA) or Series of Events injury.
>
> I conclude there is insufficient evidence to provide cover for any diagnosis provided on file for the right wrist.
>
> As stated above, the completely redacted consultation 29 September 2021 potentially contains material evidence that could inform the opinions reached in this report. Redaction is usually for privacy reasons, and the claimant would need to provide consent to have that consultation unredacted in order for me to consider the information contained.

[14] On 1 February 2022, proceedings were held to review the IMU's decision of 13 October 2021 declining cover for a right-wrist ligament sprain as a work injury. At the review hearing, when asked by the Reviewer how repetitively using his wrist cutting meat was an accident, Mr McCarthy responded:

> I guess the fact that I injured myself, you know, would be seen as an accident. That's not, I guess, in my job description to strain ligaments while doing my job… so I guess I'd consider that an accident.

[15] On 25 February 2022, the Reviewer dismissed the review. The Reviewer found that the decision to decline cover was based on findings that the pain and discomfort suffered by Mr McCarthy (whether from a wrist sprain or an intersection syndrome) were not caused by a workplace accident or series of events.

[16] On 26 March 2022, a Notice of Appeal was lodged.

Relevant law

[17] Section 20(2)(a) of the Act provides that a person has cover for a personal injury which is caused by an accident. Section 26(2) states that "personal injury" does not include personal injury caused wholly or substantially by a gradual process, disease, or infection (unless it is personal injury of a kind specifically described in section 20(2)(e) to (h)). Section 25(1)(a)(i) provides that "accident" means a specific event or a series of events, other than a gradual process, that involves the application of a force (including gravity), or resistance, external to the human body. Section 25(3) notes that the fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.

[18] In *Johnston*,[1] France J stated:

> [11] It is common ground that, but for the accident, there is no reason to consider that Mr Johnston's underlying disc degeneration would have manifested itself. Or at least not for many years.
>
> [12] However, in a passage that has been cited and applied on numerous occasions, Panckhurst J in *McDonald v ARCIC* held:
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>> "If medical evidence establishes there are pre-existing degenerative changes which are brought to light or which become symptomatic as a

1 *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

> consequence of an event which constitutes an accident, it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered. The fact that it is the event of an accident which renders symptomatic that which previously was asymptomatic does not alter that basic principle. The accident did not cause the degenerative changes, it just caused the effects of those changes to become apparent ..."

> [13] It is this passage which has governed the outcome of this case to date. Although properly other authorities have been referred to, the reality is that the preceding decision makers have concluded that Mr Johnston's incapacity through back pain is due to his pre-existing degeneration and not to any injury caused by the accident.

> [14] … I consider it important to note the careful wording in the McDonald passage. The issue is not whether an accident caused the incapacity. The issue is whether the accident caused a physical injury that is presently causing or contributing to the incapacity.

[19] In *Ambros*,[2] the Court of Appeal envisaged the Court taking, if necessary, a robust and generous view of the evidence as to causation:

> [65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved. They proceed on their general impression of the sufficiency of the lay and scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person of common sense …

> …

> [67] The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the Court to draw robust inferences of causation in some cases of uncertainty -- see para [32] above. However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture … Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witness evidence …

[20] In *Waghorn*,[3] the appellant was a fast bowler at cricket who suffered repetitive stress, culminating in a jarred knee and sharp lower back pain while playing on a particular date, resulting in a stress fracture of the bones of the lower spine. Judge

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

3 *Waghorn v Accident Compensation Corporation* [2013] NZACC 2.

Ongley found that the appellant probably suffered a significant degree of stress fracture when he fell and allowed the appeal. His Honour stated:

> [33] … In aid of interpretation, it is noted that subs (a) refers to "a series of events, other than a gradual process". It is implicit in the text that a "series of events" may be a series of specific events or a gradual process. 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.

[21] In *Bouterey*,[4] the appellant took up running between five and 10 kilometres twice a day, and on a particular date while running he experienced pain in his low back, and two days later when running again the pain became more serious. The appellant was diagnosed with a stress fracture. Judge Beattie dismissed the appeal and stated:

> [14] The requirement for cover is that there is an accident event, or a series of accident events, which have caused the personal injury, and I consider that that wording requires that the series of events are all attributing to the physical injury that is subsequently identified. A gradual process, on the other hand, is where the events individually are not causing any physical injury, but are setting up a state of affairs which will ultimately result in the onset of a physical injury.
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> …
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> [18] It is the case that there is no evidence to suggest that any particular action of the appellant during the substantial amount of running he was undertaking caused the onset of any physical condition. Indeed, Mr Oakley has identified that it was the fact of the repeated stress which the appellant was causing to the bone in issue which ultimately caused the onset of what is described as a stress fracture. In those circumstances, I find that the statutory provision of a series of events cannot apply, and that the injury condition has arisen as a result of a gradual process over a period of months during the appellant's running activity.

[22] In *Calver*,[5] the appellant's mesothelioma (which resulted in her death) was caused by asbestos inhalation when (between the ages of four and 10) she hugged her father in his work overalls or played at a building site. Justice Mallon allowed the appeal and stated:

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4 *Bouterey v Accident Compensation Corporation* [2013] NZACC 123.

5 *Calver v Accident Compensation Corporation* [2019] NZHC 1581, [2019] 3 NZLR 261.

> [102] The addition in s 25(1)(a) of "a series of events, other than a gradual process" reflects the common law that there can be a series of accidents (events of force) that cause an injury which, although occurring more than once, are not a gradual process. An example has arisen in the context of cricket. In *Barrett v Accident Compensation Corporation* a semi-professional cricketer, a fast bowler, sought cover for surgery for a fracture. The cricketer contended there had been a particular instance when he felt low back pain while bowling and had to leave the field. ACC declined cover saying his fracture was from repetitive microtraumas and this was a gradual process. The Court held, on the balance of probabilities, the injury was the direct result of the bowling incident referred to by the cricketer. There had either been a series of individual stresses and a significant event that completed the fracture, or the significant event had initiated the fracture.
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> …
>
> [104] Mesothelioma develops because a person has inhaled asbestos fibres of a quantity that, for that particular person, is a sufficient dose to trigger (at a later date) the disease. In my view, in this kind of case, the "specific occasion" is the occasion that gives rise to the sufficient dose. That may be a single occasion (in which case there has been a "specific occasion" at this time). Or the sufficient dose may arise from several occasions (in which case the occasion on which the last bit of asbestos is inhaled that constitutes the necessary dosage is the "specific occasion"). As Dr Glass put it, where there are multiple exposures, any one can be seen as causative and which one is not material. There will, in the end, be an occasion that is causative.
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> …
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> [106] … On a purposive approach "a specific occasion" is intended to distinguish between injuries that are caused by a triggering external, non-continuous event and those that are caused only because of repetitive or continuous inhalation over time.

[23] In *Taylor v Roper*,[6] the appellant commenced a civil action claiming sexual assault and falsely imprisonment causing mental injury. In the judgment of the Court of Appeal, Justice Brown J stated:

> [43] Mr Little's submission for Ms Taylor appears to assume that, although there were a number of individual instances of conduct amounting to false imprisonment over a significant period of time, because those incidents constituted a continuous course of conduct they qualified as a gradual process for the purposes of s 21B(7). We do not agree. The concept is not merely about something happening repeatedly. There is the requirement of some type of process taking place. Moreover, the legislative history highlights injuries that may occur from "gradual or cumulative exposure", which suggests progressive development over days, weeks or months. Putting this together, in our view the reference to a "gradual process" is a reference to a transformative process occurring progressively over time.

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6 *Taylor v Roper & Attorney General* [2021] NZCA 691, [2022] 2 NZLR 671.

[24] In *Inghams*,[7] Judge Sinclair stated:

> [32] … there is no evidence that each time that Mr Samson undertook the lifting and twisting motion in the course of his work tasks, it involved a trauma which was substantially causative of his neck injury.
>
> [33] Instead, in my view, the assertion more properly appears to be that Mr Samson's work tasks by their repetitive nature set up a state of affairs which ultimately resulted in the onset of his neck injury.
>
> [34] For the above reasons, I do not consider that there was sufficient evidence before the Reviewer, and before this Court, to support the Reviewer's finding that Mr Samson's neck injury was caused by a series of accident events in the period identified in the decision.

Discussion

[25] The issue in this case is whether there is sufficient evidence that Mr McCarthy's condition is a personal injury caused by a *series of events* (attracting cover) as opposed to a *gradual process* (not covered). Section 25(1)(a) of the Act provides that "accident" means a specific event or a series of events, other than a gradual process, that involves the application of a force (including gravity), or resistance, external to the human body. A "series of events" is a sequence of forceful events, each contributing to the injury in some significant or substantive way, as opposed to events which are so gradually incremental that they cannot be distinguished one from the other.[8] The series of events must all attribute to the physical injury that is subsequently identified, as opposed to a gradual process, where the events individually do not cause any physical injury, but set up a state of affairs which ultimately result in the onset of a physical injury.[9] For there to be a series of events, there might be a series of individual stresses and a significant event that completed the injury.[10] On the other hand, a gradual process refers to a transformative process occurring progressively over time.[11]

[26] Mr McCarthy submits as follows:

- His injury was the consequence of a series of events.

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7 *Inghams Enterprises v Accident Compensation Corporation* [2019] NZACC 4.
8 *Waghorn*, above n 3, at [33], and *Inghams*, above n 7, at [32].
9 *Bouterey*, above n 4, at [14].
10 *Calver*, above n 5, at [103]-[104].
11 *Taylor*, above n 6, at [43].

- His work involved using a knife cutting carcases for more than ten hours a day.
- The nature of his work was of a repetitive nature, and there was some level of force required when trimming carcases.
- The cause of his pain was due to excessive repetitive use on the day in question, and that was when his injury occurred.
- The diagnosis of Dr Newburn was based on medical records and not a personal examination of Mr McCarthy, and it is contradictory and in parts appears to support Mr McCarthy's position.
- The view of Dr Martin, who examined Mr McCarthy and believed that Mr McCarthy had a clear history of acute injury, should be preferred.

[27] This Court acknowledges Mr McCarthy's submissions. However, the Court refers to the following considerations.

[28] First, Mr McCarthy's own evidence is more in line with that of a transformative, incremental process than a sequence of forceful events, each contributing to the injury in some significant or substantive way. He acknowledged that there was no injury to have caused his discomfort but felt that his pain had come on gradually. His application for review referred to excessive repetitive use on the day, and at review he guessed that the fact that he injured himself would be seen as an accident. The chronological evidence does not establish that his condition developed as a consequence of a series of events at his work, as the condition developed within a day of return to work after a break and there had been no significant change in work tasks before or after the absence from work.

[29] Second, the diagnosis of Dr Martin, the day after Mr McCarthy reported pain at work, was that of an intersection syndrome, which is a condition more in line with that of a transformative process occurring progressively over time.

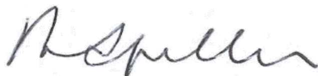
[30] Third, Dr Newburn, who conducted a file review of Mr McCarthy's claim, noted that Mr McCarthy's swelling, discomfort and watching symptoms in the

region of the dorsoradial wrist were consistent with clinical diagnosis of intersection syndrome, which (Dr Newburn said) is a gradual process tendon condition that usually developed over months to years. Dr Newburn found no evidence that Mr McCarthy's situation and diagnosis of intersection syndrome in the right wrist had developed as a series of events injury. Dr Newburn concluded that Mr McCarthy's intersection syndrome had developed independently of his work tasks and been rendered symptomatic or at most aggravated by the work tasks on 28 September 2021, rather than caused by the work tasks. This Court acknowledges that the body of Dr Newburn's report is unclear in parts and open to differing (and possibly contradictory) interpretations, but his final diagnosis and conclusions were clear and there is no subsequent medical report to rebut his diagnosis and conclusions.

Conclusion

[31] In light of the above considerations, the Court finds, on balance, that there is not sufficient evidence that Mr McCarthy's condition was a personal injury caused by a series of events as opposed to a gradual process. The decision of the Reviewer dated 25 February 2022 is therefore upheld. This appeal is dismissed.

[32] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors for the Respondent: Braun Bond and Lomas.