

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 215

ACR 2/22

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF
THE ACT

BETWEEN CARLOS FERRARI FRANCISCO ALVES
Appellant

AND
ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: 15 November 2022
Held at: Hamilton/Kirikiria

Appearances: The Appellant is self-represented
C Hlavac for the respondent

Judgment: 22 November 2022

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Personal injury - s 26(2), Accident Compensation Act 2001]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 10 December 2021. The Reviewer dismissed an application for review of the Corporation's decision dated 22 September 2021, revoking cover for a right-sided rotator cuff tear.

Background

[2] Mr Alves was born in 1977. He worked in various fields, including as a carpenter and as a builder's labourer.

[3] On 22 February 2019, Mr Alves saw his GP, Dr Sonia Sparrow, who lodged an ACC claim form for an injury to his right elbow/forearm. Cover was subsequently accepted by the Corporation.

[4] On 29 March 2019, Mr Alves saw Dr Sarah Beable, Sport and Exercise Physician, regarding his right elbow injury. Dr Beable wrote to One-on-One Physiotherapy regarding Mr Alves' right elbow injury, noting:

Examining Carlos today, he does tend to sit with a slightly rounded shoulder posture and protracted scapular. He has mild scapular dyskinesis on the side of the shoulder movement ...

[5] Dr Beable added that Mr Alves was receiving assistance from One-on-One Physiotherapy regarding his overall postural retraining and scapular strength and stability, as Dr Beable considered that "this is part of what is occurring for him".

[6] On 17 September 2019, Mr Alves hurt his right shoulder moving a heavy desk at home. He was moving the desk almost above his head and trying not to let it fall when it started to slip, prompting a sharp pain in his shoulder.

[7] On 3 December 2019, Mr Alves presented for treatment with Mr Robert Moore, Chiropractor. Mr Moore diagnosed "cervical strain with associated muscular hypertonicity. Lumbar facet irritation with muscular hypertonicity, right inf GH – aggravate bursa". On the same day, Mr Moore lodged an injury claim form, on behalf of Mr Alves, for a sprained right shoulder and rotator cuff sprain.

[8] On 9 December 2019, the Corporation accepted cover for a right shoulder sprain and right rotator cuff sprain.

[9] On 10 December 2019, Mr Moore noted that Mr Alves' right shoulder was still sore and had been aggravated by his work. Mr Moore confirmed the diagnosis of "sprain shoulder joint right side" and "sprain rotator cuff right side".

[10] On 17 December 2019, Dr Grant Meikle, Radiologist, reported on an x-ray and an ultrasound conducted on Mr Alves' right shoulder. The x-ray showed that the shoulder was normal, showing no acromial spur and no change over the greater

tuberosity. The ultrasound showed a supraspinatus partial tendon tear and bursal fluid.

[11] On 6 January 2020, Mr Moore noted that Mr Alves reported improvements. On 14 January 2020, follow-up chiropractor notes recorded that Mr Alves had re-aggravation with overhead drilling. On 17 March 2020, further notes recorded that Mr Alves had shoulder pain and that he had been under stress.

[12] On 18 May 2020, the Corporation received a medical certificate noting that Mr Alves was fully unfit to work from 18 to 20 May 2020 because he had aggravated his original injury. On 26 May 2020, the Corporation received further medical certification that Mr Alves was fully unfit to work from 25 May 2020 to 14 June 2020.

[13] On 10 June 2020, the Corporation received Mr Alves' application for weekly compensation from 18 May 2020 onwards, arising out of his injury on 17 September 2019.

[14] On 17 June 2020, Mr Alves presented to Dr Beable, to seek medical evidence in support of his claim. She confirmed that the ultrasound reported a normal AC joint with a normal rotator cuff apart from partial thickness articular tear involving the mid-tendon of supraspinatus.

[15] On 7 July 2020, the Corporation declined Mr Alves' application for weekly compensation. This was on the basis that there was insufficient clinical evidence to support the requested incapacity being causally linked to the accident event of 17 September 2019. Mr Alves sought a review of that decision.

[16] On 13 July 2020, Mr Alves presented to Mr Moore, who provided a report on Mr Alves' condition.

[17] On 16 July 2020, Mr Alves underwent an MRI scan of his right shoulder. Dr Mike McKewen, Radiologist, reported a small partial thickness tearing in the

rotator cuff, with still normal preservation of the muscle bellies, and mild inflammation in the subacromial space with some fluid there.

[18] On 21 July 2020, Mr Alves presented to Dr Beable, who stated that the MRI scan:

... demonstrated a partial thickness insertional tear of the superior fibres of the insertion of infraspinatus extending to the posterior fibres of supraspinatus consistent with partial thickness insertional tearing with surrounding oedema which to me does suggest some acute component which would be in keeping with his history ...

[19] On 27 July 2020, Ms Maddy Martin, Physiotherapist, noted that the timing of Mr Alves' reporting of his injury coincided with a period of rest over Covid lockdown and his return to work, which she felt could indicate an acute aggravation of underlying pathology. Ms Martin noted that in his work, Mr Alves undertook a number of repetitive activities, such as shoulder flexion, overhead activities and using tools in a repetitive manner such as hammering, drilling, and shovelling. An MRI scan undertaken showed pathology involving three out of the four rotator cuff tendons which was more suggestive of gradual process changes than a one-off traumatic injury. Ms Martin concluded that Mr Alves' condition was more suggestive of an aggravation of an underlying, pre-existing condition, rather than an acute injury.

[20] On 23 October 2020, Mr Alves was examined by Mr Gary McCoubrey, Orthopaedic Surgeon. He commented on the x-ray which showed that the shoulder was normal, with no acromial spur and no change over the greater tuberosity. The ultrasound scan done on the same day showed a partial thickness tear in supraspinatus with fluid present in the bursa. The MRI investigation noted a small partial thickness tearing in the rotator cuff, with still normal preservation of the muscle bellies, and mild inflammation in the subacromial space with some fluid there. In relation to cause, Mr McCoubrey advised:

Carlos essentially has had a partial thickness rotator cuff tear which was symptomatic for approximately six to nine months and then settled down with focused physiotherapy, scapular stabilising and strengthening exercises, which is what we would have hoped. His story sounds like an acute injury and his plain x-ray shows no pre-existing features and his MRI scan confirms no pre-existing features of rotator cuff disease.

[21] On 12 November 2020, Mr Tim Lamb, Registered Nurse, reported that the clinical information on file did not support a traumatic rotator cuff tear. He noted that the Corporation's published Consideration Factors for ACC cover for rotator cuff tears that factors which were less supportive of a possible causal link between an accident and an identified rotator cuff tendon tear, included:

- (a) delay between the date of injury and the initial presentation for treatment;
- (b) a good range of motion at the time of initial presentation; and
- (c) the mechanism of the accident.

Based on those factors, Mr Lamb did not consider that the information supported a link between Mr Alves' accident event and his partial thickness supraspinatus tear.

[22] On 24 January 2021, Mr McCoubrey further reported, noting the history of the accident that he had been given by Mr Alves:

The history I got from him where he was lifting a desk in an awkward position with his arm in abduction, it slipped straining his shoulder and he felt a sharp pain at that time. To me this appears a reasonable mechanism to cause a partial thickness tear in his rotator cuff. The fluid seen in the bursa overlying this is commonly associated with partial and full thickness tears due to ongoing inflammation in the subacromial space and the fact that it is still present some three (3) months afterwards suggests ongoing irritation in the shoulder at that stage.

The ultrasound scan had confirmed a supraspinatus partial thickness tear and this is the most obvious feature also seen on the MRI scan, the other suggested tears that are reported are very subtle and I don't feel clinically relevant. MRI scans are very highly sensitive sometimes over call pathology but he certainly has normal muscle bellies in his supraspinatus subscapularis and infraspinatus with no signs of fatty atrophy or infiltration suggesting there is no significant pre-existing tears in these muscles. His plain x-ray also shows a normal glenohumeral joint and preserved acromiohumeral distance there is no resorptive change over the greater tuberosity and no acromial spur, again no signs of any significant pre-existing disease in this shoulder.

Therefore it sounds like Carlos had an injury to his shoulder which was quite rightly managed conservatively. When I saw him he was asymptomatic and therefore no surgery for this condition was suggested and this is the natural history of a lot of partial thickness tears of the rotator cuff, once the initial inflammation has settled down and they work through physiotherapy and the shoulder is strong again we can manage to compensate for some small tears which appears to be exactly the case for Carlos.

[23] On 12 February 2021, the Corporation emailed Mr Alves noting that cover needed to be requested in an appropriate way and the Corporation was not bound to recognise cover or to investigate the prospect for cover in the absence of an application for cover. Cover was usually specifically requested by medical professionals in specified formats. The Corporation advised that to make it easier for Mr Alves, he could give the Corporation written permission to lodge additional cover for the rotator cuff tear, and a decision would be issued with review rights. However, Mr Alves did not grant this permission.

[24] On 2 March 2021, a review hearing was convened. The Corporation reiterated its position that Mr Alves' right shoulder and rotator cuff sprain, which had resolved, did not cause his incapacity from work. The Corporation thought that the incapacity was caused by Mr Alves' right shoulder rotator cuff tearing, which represented a pre-existing gradual process condition. However, Mr Alves had not sought cover for the tear, even though the Corporation had offered to lodge such a claim internally. Mr Alves agreed to withdraw his application for review on the basis that the Corporation would consider a request by Mr Alves for additional cover for a rotator cuff tear, and the Corporation would issue a further decision which would attract fresh review rights.

[25] On 2 March 2021, Mr Alves wrote to the Corporation requesting cover for a right rotator cuff tear. Because a decision was not made within the statutory time limit, Mr Alves was deemed to have cover for that injury.

[26] On 27 March 2021, Mr Lamb reported that investigations had identified Mr Alves' symptoms to be due to a right supraspinatus tear and bursa impingement. He thought that, while this condition could be caused by an acute injury which leads to a trauma to the bursa (for example, a fall onto an outstretched hand), this would be expected to resolve within an acute timeframe, whereas the clinical evidence in Mr Alves' case did not support a traumatic cause but a degradative picture over time. Mr Lamb further pointed out that with regard to the right supraspinatus tear, the term "tear" in his context could be misleading. Although the term "tear" was commonly used in New Zealand when describing imaging features related to shoulder ligaments and vertebral discs, the term simply used common language to refer to that which

could be seen on imaging, that is, a loss of continuity. Accordingly, the use of “tear” in imaging of shoulders should not be taken to mean that the cause must have been traumatic. Mr Lamb again referred to the ACC Consideration Factors.

[27] On 7 May 2021, Mr Lamb reported that Mr Alves had cover for a sprain, shoulder right joint, and rotator cuff sprain. Mr Lamb noted that those injuries had now healed and considered that subsequent investigations had highlighted that Mr Alves’ symptoms were due to non-accident related pathology.

[28] On 13 May 2021, the Corporation issued a decision revoking the deemed cover decision for a rotator cuff tear. Mr Alves applied to review that decision.

[29] On 9 August 2021, following review proceedings, the Reviewer noted that, contrary to what the Corporation had initially considered to be the case, because Mr Alves’ claim was investigated by the Corporation as a complicated claim, it in fact had an extended time to make its decision. On that basis, there was no deemed cover decision which the Corporation would have been able to revoke by its letter of 13 May 2021. By agreement between the parties, the Reviewer quashed the Corporation’s revocation decision, and directed it to make a fresh decision on the question of whether Mr Alves should have cover for a right rotator cuff tear.

[30] On 22 September 2021, the Corporation issued a fresh decision declining cover for a rotator cuff tear. Mr Alves applied to review that decision.

[31] On 8 December 2021, review proceedings were held. On 10 December 2021, the Reviewer dismissed the review application. The Reviewer therefore preferred the evidence of the Corporation’s advisors, in particular, Mr Lamb and his reliance on the ACC Consideration Factors.

[32] On 1 April 2022, Mr Alves underwent a further ultrasound scan following a return of pain to his right rotator cuff. Dr Gabriel Lau, Radiologist, reported that the scan recorded no evidence of any rotator cuff tears, no bursal thickening and no evidence of impingement with abduction.

[33] On 14 June 2022, the Corporation’s Clinical Advisory Panel (CAP) provided a report. The CAP advised that a causal relationship between Mr Alves’ right shoulder problems and his 2017 and 2019 covered right shoulder accident and or other reported accidents had not been established. The CAP noted that Mr Alves had clinically recorded signs and symptoms of chronic subacromial impingement prior to his 2019 accident; his mechanism of injury on this accident was not consistent with an acute shoulder rotator cuff tendon tear; the absence of clinically recorded symptoms for 10 weeks did not support the impression of an acute cause; the initial physical examination findings were non-specific; and the imaging was consistent with gradual onset, chronic shoulder subacromial impingement. The CAP also concluded that the available clinical information did not contain objective evidence of acute shoulder tendon tearing, and that Mr Alves had had chronic right shoulder acromial impingement for a long time and his ACC-covered accidents had stirred up his right shoulder symptoms.

Relevant law

[34] 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.

[35] 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:

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

“If medical evidence establishes there are pre-existing degenerative changes which are brought to light or which become symptomatic as a 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.

[36] 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 ...

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

[37] In *Jones*,³ Judge Beattie stated:

[21] If the parties or specialists themselves are seeking to have specialist opinions on medical matters within their speciality considered on Accident Compensation issues, then it is necessary for such specialists to flesh out any opinion as to a causal nexus by giving proper logical and medical reasoning for that opinion. A tick in a box is not sufficient where the Court is presented with contrary evidence by way of opinion and reasoning and which is given from a proper medico-legal perspective.

[38] In *Wilson*,⁴ Judge Ongley stated:

[21] The Court is not qualified to draw any independent medical conclusions. The question for the Court concerns the weight to be given to medical professional opinions for or against the appellant's claim. That enquiry may be guided by the persuasive reasoning of a particular opinion, the skill and experience of the practitioner, the recital of authoritative sources, the first hand examination of the patient or observation of the development and progress of symptoms, and possibly by a level of agreement between a number of practitioners.

Discussion

[39] The issue in this appeal is whether Mr Alves' rotator cuff tear was caused by an accident on 17 September 2019, or whether it is likely to be pre-existing or degenerative related and brought to light or aggravated by the incident on 17 September 2019. In order for Mr Alves to obtain cover under the Act, he is required to show that his personal injury was *caused by* an accident.⁵ Mr Alves must show that his accident produced a physical injury that caused or contributed to his incapacity.⁶ The Court may draw a robust inference on causation in cases of uncertainty, based on what constitutes the normal course of events.⁷ However, the fact that Mr Alves suffers a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.⁸ Further, Mr Alves's personal injury does not, in principle, attract cover if it is caused wholly or substantially by a gradual process, disease, or infection.⁹

³ *Jones v Accident Compensation Corporation* [2004] NZACC 246.

⁴ *Wilson v Accident Compensation Corporation* [2009] NZACC 189.

⁵ Accident Compensation Act 2001, s 20(2)(a).

⁶ *Johnston*, above n 1, at [14].

⁷ *Ambros*, above n 2, at [67].

⁸ Section 25(3).

⁹ Section 26(2).

[40] The Corporation submits as follows:

- Based primarily on the informed, fully considered and reasoned conclusions reached by the Corporation's Clinical Advisory Panel, Mr Alves suffered a degenerative rather than an acute tear.
- The Panel's findings are supported by the earlier views of Mr Lamb, Registered Nurse, based on the clinical information on file, that there was not a traumatic rotator cuff tear.
- The Panel's findings should be preferred to the views of Mr McCoubrey, who provided a brief, general opinion which did not consider all relevant factors, such as Mr Alves' delay in presentation after his incident and the development of his symptoms.
- The evidence thus does not support a conclusion that Mr Alves' right rotator cuff tear was caused by the accident which occurred in September 2019. Rather, it is submitted that the evidence confirms a longstanding pre-existing right shoulder condition (chronic shoulder subacromial impingement) which was aggravated or brought to light by the accident in September 2019, but which did not cause it.

[41] This Court acknowledges the Corporation's submissions and in particular the report of the Corporation's Clinical Advisory Panel. However, the Court notes the CAP's acknowledgement that it had not had the opportunity to interview or examine Mr Alves, and its report was provided two years and nine months after Mr Alves' injury. Mr Lamb's opinion was also based on a paper review without the benefit of an examination of Mr Alves. The Court also refers to the following considerations.

[42] First, there is Mr Alves' evidence that his injury in September 2019 when moving a desk almost above his head, and trying not to let it fall when it started to slip, prompting a sharp pain in his shoulder, caused the injury to his rotator cuff. He states that he started taking ibuprofen and then sought medical treatment, and he continued in his work as he was concerned that he would lose his job, but was eventually forced to take time off when the pain was unbearable. He states that his

employment and health record shows that he does not have any underlying condition as claimed by the Corporation. This Court considers this evidence as important background information in assessing what constitutes the normal course of events concerning Mr Alves' injury.

[43] Second, the x-ray done on Mr Alves' right shoulder, in December 2019, showed that this was normal, with no acromial spur and no change over the greater tuberosity. The ultrasound scan done on the same day showed a partial thickness tear in supraspinatus with fluid present in the bursa.

[44] Third, the MRI scan of Ms Alves' right shoulder, in July 2020, showed a small partial thickness tearing in the rotator cuff, with still normal preservation of the muscle bellies, and mild inflammation in the subacromial space with some fluid there.

[45] Fourth, Dr Beable, the Sport and Exercise Physician who examined Mr Alves in June 2020, confirmed that the ultrasound reported a normal AC joint with a normal rotator cuff apart from partial thickness articular tear involving the mid-tendon of supraspinatus. Dr Beable again attended Mr Alves in July 2020 and stated that the recent MRI scan demonstrated a partial thickness insertional tear of the superior fibres of the insertion of infraspinatus extending to the posterior fibres of supraspinatus consistent with partial thickness insertional tearing with surrounding oedema. Dr Beable assessed that Mr Alves' condition suggested some acute component which would be in keeping with his history. Dr Beable also observed that Mr Alves had delayed presenting for medical attention after his injury as he was very motivated to keep his job.

[46] Fifth, Mr McCoubrey, the Orthopaedic Surgeon who examined Mr Alves in October 2020 and reviewed the imaging results, assessed that Mr Alves had had a partial thickness rotator cuff tear which was an acute injury and that he had no pre-existing features of rotator cuff disease. When later asked to review Mr Alves' condition, Mr McCoubrey observed from the facts of Mr Alves' injury in September 2019 that this appeared a reasonable mechanism to cause a partial thickness tear in his rotator cuff. Mr McCoubrey then carefully reviewed the findings of the x-ray,

ultrasound and MRI done on Mr Alves, and noted that there were no signs of any significant pre-existing disease in his shoulder. Mr McCoubrey also noted that Mr Alves' progress since the injury was the natural history of many partial thickness tears of the rotator cuff.

[47] This Court finds in light of the persuasive reasoning of Mr McCoubrey, his skill and experience as an Orthopaedic Surgeon, his first-hand examination of Mr Alves, and the agreement of his findings with Dr Beable (the Sport and Exercise Physician who also examined Mr Alves), that his report is to be preferred to the paper reviews conducted by Mr Lamb and the Corporation's Clinical Advisory Panel.

Conclusion

[48] In light of the above considerations, the Court finds that Mr Alves' rotator cuff tear was caused or at least contributed to by an accident on 17 September 2019, rather than pre-existing or degenerative-related and brought to light or aggravated by the incident on 17 September 2019.

[49] This appeal is therefore allowed, and the review decision of 10 December 2021 is set aside.

[50] Mr Alves may be entitled to costs/disbursements. If these cannot be agreed within one month, I shall determine the issue following the filing of memoranda.



P R Spiller
District Court Judge

Solicitors for the Respondent: Young Hunter