

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 70**

**ACR 215/21**

UNDER THE ACCIDENT COMPENSATION ACT  
2001

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

BETWEEN LORENA CUERVO-HERNANDEZ  
Appellant

AND ACCIDENT COMPENSATION  
CORPORATION  
Respondent

Hearing: 20 April 2022  
Held at: Auckland/Tāmaki Makaurau

Appearances: The appellant was self-represented  
F Becroft for the respondent

Judgment: 3 May 2022

---

**RESERVED JUDGMENT OF JUDGE P R SPILLER**  
**[Claim for personal injury – ss 25-26 , Accident Compensation Act 2001]**

---

**Introduction**

[1] This is an appeal from the decision of a Reviewer dated 20 August 2021. The Reviewer dismissed an application for review of the Corporation’s decision dated 19 April 2021 revoking cover for a L5/S1 disc protrusion.

**Background**

[2] Ms Cuervo-Hernandez was born in 1987. She worked as a barista.

[3] On 12 September 2017, Ms Cuervo-Hernandez was lifting boxes and felt pain in her back. On 21 September 2017 a claim was filed for lumbar and coccyx strains. On 25 September 2017, the claim was automatically accepted. Ms Cuervo-Hernandez was initially not certified unfit for work, and she carried on with her work as a barista.

[4] During September and October 2017, Ms Cuervo-Hernandez received funded acupuncture treatment. The notes referred to coccygeal and low back pain.

[5] On 4 September 2019, Dr James McGarvey, Sport and Exercise Physician, reported and said that Ms Cuervo-Hernandez had had fluctuating pain since an accident two years earlier. He arranged for Ms Cuervo-Hernandez to undergo an MRI scan.

[6] On 16 September 2019, the MRI scan showed moderate L5/S1 disc disease with a broad posterior annular fissure and bulge.

[7] On 29 October 2019, Dr McGarvey reported, noting the MRI evidence of L5/S1 disc change. He referred Ms Cuervo-Hernandez for a steroid injection. The steroid injection was undertaken in November 2019, which improved her pain. However, the pain flared again after the injection.

[8] On 10 January 2020, Dr McGarvey saw Ms Cuervo-Hernandez again and reported that the pain was improving. He referred her to a musculoskeletal physician, for an opinion regarding ongoing intervention and treatment of the sacroiliac joint.

[9] On 29 May 2020, Dr Charles Ng, Musculoskeletal Physician reported to the Corporation, noting chronic low back pain of uncertain origin. He listed, in the diagnosis section of his report, probable L5/S1 discogenic pain from an annular tear with possible right sacroiliac joint pain. He answered yes to a question about whether there was a link between symptoms and the ACC-covered personal injury.

[10] On 18 June 2020, Dr Ng reported back to Dr McGarvey after undertaking inflammatory blood screening. Dr Ng thought that Ms Cuervo-Hernandez's pain was arising from an abnormal L5/S1 intervertebral disc. Dr Ng recommended conservative treatment, being ongoing physiotherapy with Mr Nigel Nairn. Mr Nairn subsequently applied to the Corporation for additional physiotherapy funding.

[11] On 10 August 2020, the Corporation issued a decision declining further funding because it was not satisfied that the treatment was related to the covered coccyx and lumbar sprains. Ms Cuervo-Hernandez applied for a review of that decision.

[12] On 28 August 2020, Mr David Candy, Clinical Advisor, provided advice on the claim. He concluded that a causal link between the accident event and the current condition had not been established, and the covered sprains would have resolved. He did not think the disc disease shown on the MRI scans was injury related.

[13] On 3 September 2020, the Corporation issued a further decision declining cover for L5/S1 disc narrowing and a large posterior annular tear, on the basis those conditions were not caused by the September 2017 accident. Ms Cuervo-Hernandez applied for a review of the decision.

[14] On 14 October 2020, Dr Ng reported again and diagnosed the injury diagnosis as lumbar disc protrusion and annular tear. The same day he filed a medical certificate with an additional diagnosis request for an L5/S1 disc annular tear and protrusion.

[15] On 15 December 2020, a review proceeded regarding both the August 2020 and September 2020 Corporation decisions. On 31 December 2020, the Reviewer issued a decision quashing both decisions. He noted that Dr Ng's medical certificate requesting additional cover for the L5/S1 disc protrusion on 14 October 2020 had not been actioned and that therefore Ms Cuervo-Hernandez had deemed cover for a

L5/S1 disc protrusion. He directed the Corporation issue a decision confirming deemed cover for an L5/S1 disc protrusion and to reconsider physiotherapy funding.

[16] On 8 January 2021, the Corporation confirmed deemed cover for a L5/S1 disc protrusion but indicated that it would be investigating whether the condition should remain covered. The Corporation then sought advice on the claim from Mr Hamish Millward, Physiotherapist and Clinical Advisor. In his view, there was no basis to conclude that the L5/S1 disc protrusion was injury related. He therefore recommended revoking deemed cover.

[17] On 19 April 2021, the Corporation issued a decision revoking deemed cover for the L5/S1 disc protrusion. Ms Cuervo-Hernandez applied for a review of that decision.

[18] On 18 May 2021 the Corporation issued a further decision declining cover for L5/S1 disc narrowing and a large posterior annular tear, arising out of the accident on 12 September 2017. The Corporation noted that the annular tear/fissure at L5/S1 was considered to be degenerative in nature, with the history of symptoms inconsistent with an acute disc injury. The L5/S1 disc was also described as dehydrated with loss of disc height, a hallmark feature of degenerative change and not considered to be a single one-off event. However, the Corporation also issued a decision on 18 May 2021, approving the request for physiotherapy funding for the period when Ms Cuervo-Hernandez had deemed cover for the L5/S1 disc protrusion.

[19] For the review, the Corporation obtained further advice from Mr Vasudeva Pai, Orthopaedic Surgeon. On 29 May 2021, he reported as follows:

In my opinion her ongoing symptoms cannot be explained on the basis of a lumbar sprain or coccygeal sprain that occurred in 2017 following the stated lifting event and sprains usually resolve within 2 to 6 weeks. There are no documents between September 2017 and September 2019 thus suggesting that it is more than likely her sprain had resolved. Presently she has symptoms which in my opinion may be related to non specific pain or related to disc degeneration at L5/S 1 level or early osteoarthritis of the right sacroiliac joint or pain sensitisation as stated by Dr Ng. ...

There is no doubt that the MRI shows an annular tear at L5/S1 and in my opinion an annular fissure is an appropriate term to be used than the previously used annular tear and these annular changes in my opinion are substantially

related to degeneration rather than being related to any specific injury event. Annular fissures and nuclear degeneration often occur concurrently and they occur in the early stages of disc degeneration and are associated with a faster subsequent nuclear degeneration. ...

Her MRI appearance of 16/9/2019 has been rightly diagnosed as L5/S 1 disc disease which is a common condition and very often asymptomatic. The findings of disc degeneration as noted on the imaging are the result of several factors acting individually or collectively such as genetic and age related constitutional factors. There are many articles published regarding degeneration in a younger age group. A study in spine 2009 15:34 has reported prevalence of degeneration in young (age 21 years) in Finnish young adults with high incidence of around 30% between 20 to 30 years of age in an asymptomatic population. The degenerative findings appear to be more common at L5/S 1.

[20] On 20 July 2020, the review of the Corporation’s decision of 19 April 2021 was heard. On 20 August 2021, the Reviewer upheld the Corporation’s decision, noting that there was no clinical or other medical evidence in support of a causal link between the L5/S1 disc protrusion and Ms Cuervo-Hernandez’s accident in 2017.

[21] On 20 September 2021, a Notice of Appeal was lodged.

### **Relevant law**

[22] 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.

[23] In *Cochrane*,<sup>1</sup> Miller J found:

[25] An appellant may not establish causation simply by showing that the injury triggered on underlying condition to which the appellant was already vulnerable (the ‘eggshell skull’ principle) or that the injury accelerated a condition that would have been suffered anyway (the ‘acceleration’ principle): *McDonald v*

---

<sup>1</sup> *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 (HC).

*ARCIC* ... The question is simply whether the necessary causal nexus continues to exist between the injury and the condition.

[24] In *Coleman*,<sup>2</sup> Judge Cadenhead stated:

[34] The issue, here, is whether the appellant can show that the accident was wholly or substantially related to the need for the operation. If that accident merely rendered symptomatic an underlying condition of ageing and that was the whole or substantial need for the operation that would not be sufficient. In *Gazzard* (High Court Wellington CIV 2005-485-2388, 22 May 2006) Justice Miller held that a temporal connection was not sufficient, when the medical evidence established that cause complained was a function of degeneration rather than injury.

[25] In *Johnston*,<sup>3</sup> 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:

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.

[26] In *Sparks*,<sup>4</sup> Judge Ongley stated:

[29] By s26(2) and (4) of the Injury Prevention, Rehabilitation, and Compensation Act 2001, personal injury does not include personal injury caused wholly or substantially by a gradual process, disease, or infection, or by

---

<sup>2</sup> *Coleman v Accident Compensation Corporation* [2007] NZACC 18.

<sup>3</sup> *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

<sup>4</sup> *Sparks v Accident Compensation Corporation* [2006] NZACC 45.

the ageing process. The legal test for entitlements requires sufficient evidence to show that need for assistance arises as a consequence of the covered injury. Where there is an accompanying degenerative or gradual process condition, entitlements will not be available if the personal injury is caused wholly or substantially by that condition. In the present case therefore, the appellant has to be able to point to evidence demonstrating that the condition, as it was when the need for surgery was identified in August 2004, was substantially and effectively caused by the covered injury and not by a pre-existing process.

[27] In *Stewart*,<sup>5</sup> Judge Barber stated:

[33] The cases consistently highlight that the question of causation cannot be determined by a matter of supposition. There must be medical evidence to assist the respondent Corporation, and now the Court, to determine that question. A temporal connection, in itself, will be insufficient. There needs to be a medical explanation as to how the ongoing condition has been caused by the originally covered injury. In this case the evidence does not establish this.

[28] In *Bloomfield*,<sup>6</sup> Judge Joyce noted:

[18] In this case, and when all is rendered down, the extension of cover claims pursued on appeal by Mr Bloomfield rest mainly on the foundation of a temporal connection argument. On occasion, a temporal connection may be of significance in the context of other, helpful to a claimant, evidence. But the mere presence of such a connection will usually do no more than raise the post hoc ergo propter hoc fallacy.

## Discussion

[29] The issue in this case is whether or not an L5/S1 disc protrusion was an injury suffered in an accident on 12 September 2017. In order for Ms Cuervo-Hernandez to obtain cover under the Act, she must show that her personal injury was *caused by* an accident.<sup>7</sup> There must be sufficient evidence pointing to proof of causation, on the balance of probabilities, for a Court to draw even a robust inference on causation.<sup>8</sup> The fact that Ms Cuervo-Hernandez suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.<sup>9</sup> A temporal connection between an accident and symptoms, without sufficient supportive medical evidence, does not establish causation.<sup>10</sup> Ms Cuervo-

---

<sup>5</sup> *Stewart v Accident Compensation Corporation* [2003] NZACC 109.

<sup>6</sup> *Bloomfield v Accident Compensation Corporation* [2014] NZACC 1.

<sup>7</sup> Accident Compensation Act 2001, s 20(2)(a).

<sup>8</sup> *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340 at [70].

<sup>9</sup> Section 25(3).

<sup>10</sup> See *Stewart* n5 above, at [33]; and *Bloomfield* n6 above, at [18].

Hernandez's personal injury will not, in principle, attract cover if it was caused wholly or substantially by a gradual process or disease.<sup>11</sup>

[30] Ms Cuervo-Hernandez submits as follows. As a 30-year-old woman at the time of her accident, she had never experienced back problems before. Since the date of the accident, she has experienced ongoing pain, and so she draws a temporal link between her condition and the accident. She refers to the report of Dr McGarvey, Sport and Exercise Physician (dated September 2019), who noted that Ms Cuervo-Hernandez had had fluctuating pain since an accident two years earlier. She also refers to the report of Dr Ng, Musculoskeletal Physician (dated 29 May 2020), who answered yes to a question about whether there was a link between symptoms and the ACC-covered personal injury; and his report (dated October 2020), which diagnosed three years of back pain arising from L5-S1 disc annular tear and protrusion.

[31] The Court acknowledges Ms Cuervo-Hernandez's submissions and acknowledges her ongoing back issues and the temporal link between them first occurring and her accident. However, the Court refers to the following considerations.

[32] First, there is a significant gap between Ms Cuervo-Hernandez's injury of September 2017 (in relation to which she was granted cover for lumbar and coccyx strains) and the series of medical appointments from September 2019 leading to her claim for a L5/S1 disc protrusion.

[33] Second, the MRI scan taken in September 2019 showed moderate L5/S1 disc disease.

[34] Third, the reports of Drs McGarvey and Ng do not adequately analyse and report on a causal link between Ms Cuervo-Hernandez's injury of September 2017 and her chronic low back pain. Dr Ng referred to the chronic low back pain as being of uncertain origin.

---

<sup>11</sup> Section 26(2).



[35] Fourth, Dr Pai, Orthopaedic Surgeon, directly addressed the issue of whether there was a causal link between Ms Cuervo-Hernandez's injury of September 2017 and her chronic low back pain and advised that there was none. Dr Pai assessed that any relationship to the injury incident of September 2017 and Ms Cuervo-Hernandez's present symptoms were speculative rather than causative, and that she more than likely had a lumbar sprain following the injury event which resolved. Dr Pai further assessed that Ms Cuervo-Hernandez had symptoms which may be related to non-specific pain, or related to disc degeneration at L5/S1 level or early osteoarthritis of the right sacroiliac joint or pain sensitisation.

### **Conclusion**

[36] In light of the above considerations, the Court finds that Ms Cuervo-Hernandez has not established that her L5/S1 disc protrusion was an injury suffered in an accident on 12 September 2017.

[37] The decision of the Reviewer dated 18 August 2020 is therefore upheld. This appeal is dismissed.

[38] I make no order as to costs.



P R Spiller  
District Court Judge

Solicitors: Medico Law for the respondent.