

**183IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 71

ACR 88/21

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

Hearing: 26 April 2022
Held at: Auckland/Tāmaki Makaurau

Appearances: B Hinchcliff for the appellant
F Becroft for the respondent

Judgment: 3 May 2022

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Revocation of cover - s 65(1), Accident Compensation Act 2001]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 12 April 2021. The Reviewer dismissed an application for review of the Corporation's decisions dated 25 September 2020. The Corporation revoked cover for lumbar disc prolapse with radiculopathy and declined entitlement to loss of potential earnings.

Background

[2] Mr Porter was born in 1991. On 2 April 2005, Mr Porter suffered a back injury sustained following a fall from a horse. Mr Porter was granted cover for lumbar sprain to the L5/S1 pseudarthrosis.

[3] On 4 April 2005, an MRI was undertaken, and this found:

... a mild band of T2 hyperintensity in the right sacralised transverse process of the transitional lumbosacral vertebra adjacent to the pseudarthrosis formed with the sacrum. Appearances are consistent with a minor injury to the pseudoarthrosis but no definite fracture. No other abnormality seen and no sign of bony injury elsewhere in the pelvis.

[4] Over the following years, Mr Porter suffered from intermittent back pain, presenting to GPs and the Emergency Department, with reference made from time to time to the horse accident. In 2017, a trip to the Emergency Department resulted in x-rays of the lumbar spine which were reportedly grossly normal with no acute fracture.

[5] On 29 April 2019, Mr Porter was seen by Dr Sam Rawlings, and a coughing fit three days earlier was noted with back pain, and numbness in the right legs since. The note referred to a past medical history of fibromyalgia. Mr Porter was referred to the Orthopaedic Unit at a hospital, where x-rays showed mild loss of disc height at L5/S1 but otherwise no abnormalities. Mr Porter was admitted overnight and seen by Mr Chris Fougere, Orthopaedic Surgeon. He was discharged on pain medication and scheduled for a further review in two weeks.

[6] On 22 May 2019, an MRI scan of Mr Porter's lumbar spine was taken. The scan showed a disc protrusion at L4/5, contacting the L4 nerve root, and facet joint arthrosis at L4/5.

[7] In June 2019, Mr Porter was admitted for a further review. A medical note of 10 June 2019 described the MRI results as very reassuring and Mr Porter's clinical presentation as a little unusual.

[8] On 24 June 2019, the Corporation received a medical certificate certifying Mr Porter as unfit in relation to the 2005 accident. Dr Thye Leow, GP, who signed the certificate, provided a copy of the MRI scan. The clinic note from 24 June 2019, when the medical certificate was filed, read:

2005- fell from a horse and hurt lower back. Soft tissue damage and had MRI which didn't show a disc problem. Ongoing pain since then. Severe episodes 3 to 4 times a year but sometimes he didn't seek help. Coughing and exacerbation of pain 2 months ago. Three weeks off work from orthopaedic hospital in the last 3 months and was off work completely for 2 weeks. Was discharged on Sevredol but ran out yesterday and having severe pain again. MRI scan this time PIO L4/L5 on both sides, numbness in soles, paresthesia down to the legs. Weakness at times. Going to see the spine team in 4 months time.

[9] On 16 July 2019, a further MRI scan was undertaken under sedation. The scan confirmed transitional L5 mild disc disease at L4/5 with an annular tear and contact with the L5 nerve root.

[10] On 14 August 2019, Mr Porter was again admitted to hospital, and was referred to Mr Michael Barnes, Orthopaedic Surgeon, for review.

[11] On 23 August 2019, Mr Barnes saw Mr Porter. Mr Barnes noted a long history of intermittent pain in the right leg and, more recently, an increase in leg pain and severe back pain. He noted the horse accident and Mr Porter's advice that he had severe pain in the right leg which took about a year to resolve, and, since then, he had intermittent radiating pain. The pain had evidently become more persistent in May 2019, when he was admitted to hospital for a two-day stay. Mr Barnes did not think that the scan results accounted for the leg pain. He thought that the pain was probably a reflection of permanent nerve damage caused by a disc protrusion in 2005.

[12] On 3 September 2019, Mr Barnes reported again, advising that Mr Porter had not improved and that he wanted to proceed with a fusion operation. Mr Barnes noted that he would make an ACC application on the basis of the 2005 injury.

[13] On 6 September 2019, an assessment report and treatment plan ("ARTP") was completed by Mr Barnes. In relation to causation, he advised:

This man fell from a horse in 2005. That was when all the problems with his lumbar problems began. Initially he had severe pain down the right leg. He almost certainly had a disc protrusion but no scan was undertaken. Since that time he has had intermittent leg pain and intermittent lower back pain. This has been severe for the last 5 months. His most recent MR scan at Auckland Hospital shows persistent desiccation and mild narrowing of the L4/5 disc with a right sided disc protrusion at the entry zone to the neural foramen. I am designating this disc L4/5, noting that he has a transitional L5 vertebrae. I do not have access to the radiology report from Auckland Hospital and it is possible that a different nomenclature has been used.

[14] On 23 September 2019, the Corporation approved the cost of fusion surgery. The Corporation also advised that it had updated the cover details and was also now covering lumbar disc prolapse with radiculopathy.

[15] On 1 October 2019, Mr Porter lodged an application with the Corporation for loss of potential earnings (LOPE) for the injury that occurred on 3 March 2005.

[16] On 10 October 2019, Mr Porter's surgery proceeded.

[17] In November 2019, Mr Barnes referred Mr Porter for pain management. Mr Barnes' referral to Dr Nick Penney of Integrative Pain Care noted that no imaging had been undertaken at the time of the 2005 accident, but that the history was consistent with a disc protrusion. Dr Penney also advised that Mr Porter's back pain had improved, but that there had been no change in his leg pain, post-surgery. Mr Barnes wrote:

Presumably the leg pain is a reflection of nerve damage due to sustained compression following the injury in 2005.

[18] In January 2020, Dr Penney reported to the Corporation following assessments, and outlined the pain input that would be provided. He described Mr Porter as presenting with chronic pain.

[19] On 4 February 2020, Mr Barnes noted that Mr Porter's severe back pain had resolved.

[20] On 14 February 2020, Mr Porter's file was reviewed by Dr Tim Sprott, Medical Advisor. He noted that Mr Barnes' advice and surgery recommendation were premised on the belief that no imaging was undertaken in 2005, but an

orthopaedic services report from the hospital in April 2019 referenced an MRI scan from 2005, which did not report any signs of nerve compression. Dr Sprott considered that this raised doubts about the causal link between the injury sustained in the accident and the subsequent episodes of pain. He recommended obtaining further historical records and then, when the records were available, getting further advice from Mr Barnes.

[21] A clinical records request was then made. The MRI scan of 4 August 2005, and further GP notes and notes from the hospital, were provided.

[22] On 14 April 2020, Mr Barnes noted that Mr Porter was delighted with his progress.

[23] Questions for Mr Barnes were drafted by the Corporation and a referral sent to him for review. On 24 August 2020, Mr Barnes responded advising:

I note the MRI report from Auckland Hospital performed 4 April 2005. This is the day Kye was admitted after falling from a horse.

This does not really help me to explain the cause of his ongoing neck pain and leg pain from the time of that injury. It is still possible, as I speculated, that there was a disc protrusion which was not present on the day of injury but may have developed over the subsequent weeks because of injury to a disc which progressed to a protrusion.

I am sorry but I simply cannot be any more certain in terms of the aetiology of his chronic back pain and leg pain in light of the scan report you have recovered.

[24] On 15 September 2020, the file was examined at by Dr Sprott. He noted that current evidence did not support a causal relationship between the 2005 accident injury and the current lumbar spine symptoms, which had arisen independently of the accident. Dr Sprott considered it likely that the current changes had arisen due to mechanical stressors related to congenital L5/S1 pseudoarthrosis.

[25] On 25 September 2020, the Corporation issued a decision revoking cover for a lumbar disc prolapse with radiculopathy. The same day, the Corporation issued a decision declining Mr Porter's application of 1 October 2019 for LOPE, on the basis that the condition that had caused his incapacity was not causally related to the event

of 3 March 2005. On 6 October 2020, Mr Porter Mr Porter applied for reviews of the 25 September 2020 decisions.

[26] On 25 January 2021, Ms Catherine Noventa, Physiotherapist, assessed that the 2005 MRI scan indicated a significant injury to Mr Porter, and that it was likely that there was some injury to the disc at the time of the accident, which then progressed over the following years.

[27] On 17 March 2021, the matter proceeded to review. On 12 April 2021, the Reviewer dismissed both applications. The Reviewer confirmed that there was sufficient evidence for the Corporation to revoke cover for the lumbar disc prolapse, given that there was no evidence that a lumbar disc prolapse had been suffered in the accident. The Reviewer also confirmed that the decline of LOPE was correct, given that Mr Porter's incapacity was linked to the lumbar disc prolapse and the surgery to treat it.

[28] On 13 April 2021, a Notice of Appeal was filed against the Reviewer's decision.

[29] On 11 August 2021, the Corporation's Clinical Advisory Panel ("CAP") provided further advice for the appeal. The CAP was comprised of four Orthopaedic Surgeons, a Physiotherapist, a Sports Medicine Specialist, an Occupational and Environmental Medicine Specialist, and a General Surgeon. The CAP accepted that the 2005 fall was noteworthy and that it was possible that Mr Porter suffered a minor injury to his right transverse process. However, the CAP found that there was no evidence of any persistent anatomical or physiological damage from that accident. In terms of the developing prolapse theory, the CAP advised:

The CAP concluded that the most likely cause of Mr Porter's L4/5 disc prolapse was the congenital abnormalities at his lower lumbar spine.

The CAP noted that a definite contributor is Mr Porter's transitional lower lumbar spinal anatomy with sacralisation of his L5 vertebrae and enlarged transverse processes articulating with the afar bilaterally. This is a definite predisposing factor to Mr Porter's L4/5 disc degeneration. ...

The CAP agreed with Mr Barnes' comment in his 24/8/2020 report, where he noted that "as he speculated", there a disc protrusion could have developed later. The CAP noted that this theory is speculation and there is no objective

evidence to support Mr Barnes' impression before he had reviewed Mr Porter's 2005 MRI scan.

Relevant law

[30] Section 65 of the Accident Compensation Act 2001 ("the Act") provides:

(1) If the Corporation considers it made a decision in error, it may revise the decision at any time, whatever the reason for the error.

...

(3) A revision may—

(a) amend the original decision; or

(b) revoke the original decision and substitute a new decision.

[31] In *Bartels*,¹ Gendall and Ronald Young JJ stated:

[31] ... We are satisfied that all Parliament meant was that the Corporation can today, with the factual and other material it now has, look back at the decision previously made and decide if it was "made in error". A simple example will illustrate the position. A claim is made for a broken arm. An x-ray is inspected which confirms the break and thus cover accepted. Later it is discovered that either the x-ray has been misread or someone else's x-ray has been read and that the x-ray of the claimant reveals no break. This is "new evidence" and would be highly relevant to a decision under s 390 to revoke the original decision as made "in error". ...

[33] Finally, we agree with the Corporation's submissions ... that where decisions previously made are clearly made in error that those decisions should not be left to advantage or disadvantage either claimants or the Corporation. This is a publicly funded insurance scheme for those who suffer personal injury by accident. Those who suffer personal injury by accident should have cover under the Act and those who do not should not get cover when none is due.

[32] The Court has, on several occasions, accepted that the Corporation was entitled to revisit and revoke an earlier decision that it had made.²

[33] Section 105(2) of the Act provides:

The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in work for which he or she is suited by reason of experience, education, or training, or any combination of those things

¹ *Accident Compensation Corporation v Bartels* [2006] NZAR 680.

² *Stowers v Accident Compensation Corporation* DC Christchurch 167/2009, 5 October 2009; *Paku v Accident Compensation Corporation* [2017] NZACC 143; *Crosswell v Accident Compensation Corporation* [2019] NZACC 37; *Garing v Accident Compensation Corporation* [2019] NZACC 63; and *Herbst v Accident Compensation Corporation* [2020] NZACC 109.

Discussion

[34] The issue in this case is whether the Corporation, in 25 September 2020, had sufficient grounds to revoke cover for Mr Porter's lumbar disc prolapse with radiculopathy, on the basis that its original decision to grant cover was made in error. The issue of entitlement to LOPE flows from the cover decision.

[35] The Corporation has the right to revoke the original decision it made in favour of Mr Porter, and substitute a new decision, if it considers that it made the original decision in error, whatever the reason for the error.³ Thus, where new evidence emerges in Mr Porter's case which clearly points to the Corporation's original decision having been made in error, the Corporation is entitled to revoke cover as not being due to Mr Porter.⁴ In relation to Mr Porter's claim for loss of potential earnings (LOPE) or weekly compensation, the Corporation is required to determine he is unable, because of his personal injury, to engage in work for which he is suited by reason of experience, education, or training, or any combination of those things.

[36] Mr Porter submits that the Corporation had insufficient basis to revoke cover, and that he has an injury-related incapacity and therefore ought to be entitled to either LOPE or weekly compensation. Mr Porter refers in particular to the views of Mr Barnes, Orthopaedic Surgeon, who advised the Corporation in August and September 2019 that Mr Porter's pain was probably a reflection of permanent nerve damage caused by a disc protrusion in 2005. Mr Porter also refers to the view of Ms Noventa, Physiotherapist, that there appeared to be a causal link between the 2005 accident and the need for surgery for Mr Porter's subsequent condition.

[37] The Court acknowledges the submissions made by Mr Porter, and the views of Mr Barnes and Ms Noventa. The Court accepts that Mr Porter suffered an accident in April 2005 causing a back injury, for which he was granted cover for lumbar sprain; that he was diagnosed in May 2019 with a disc protrusion at L4/5, contacting the L4 nerve root; and that, in September 2019, the Corporation approved the cost of fusion surgery and cover for lumbar disc prolapse with radiculopathy. However, the Court refers to the following considerations.

³ Section 65 of the Act and *Bartels* (see n1), at [33].

[38] First, two days after Mr Porter's back injury in April 2005, an MRI scan showed a minor injury to the pseudoarthrosis but no definite fracture, no other abnormality was seen, and there was no sign of bony injury elsewhere in the pelvis. The view of Ms Noventa, Physiotherapist, that the 2005 MRI scan indicated a significant injury, appears to be at variance with the wording of the MRI scan report.

[39] Second, the Corporation's decision in September 2019 (14 and a half years after the accident), to grant Mr Porter cover for lumbar disc prolapse with radiculopathy in relation to the April 2005 accident, was taken without knowledge of the April 2005 MRI scan.

[40] Third, the advice of Mr Barnes in August and September 2019, upon which the Corporation based its decision in September 2019, was also provided in ignorance of the April 2005 MRI scan, and was based on his mistaken view that there was permanent nerve damage caused by a disc protrusion in the 2005 accident.

[41] Fourth, the subsequent advice of Mr Barnes, after having been informed of the April 2005 MRI scan, was revised to one of speculation that it was still possible that there was a disc protrusion which was not present on the day of injury, but may have developed over the subsequent weeks because of injury to a disc which progressed to a protrusion. With respect, this revised view does not satisfactorily establish, with objective evidence, a causal link between Mr Porter's 2005 accident and his subsequent disc prolapse.

[42] Fifth, the Corporation's Medical Advisor, Dr Sprott, noted (after the discovery of the April 2005 scan) that current evidence did not support a causal relationship between the 2005 accident and the current lumbar spine symptoms, which had arisen independently of the accident. Dr Sprott considered it likely that the current changes had arisen due to mechanical stressors related to congenital L5/S1 pseudoarthrosis.

[43] Sixth, the Corporation's Clinical Advisory Panel ("CAP") provided advice in support of the Corporation's revocation of cover. The CAP comprised four Orthopaedic Surgeons, a Physiotherapist, a Sports Medicine Specialist, an

⁴ See *Bartels* n1, at [31] and [33].

Occupational and Environmental Medicine Specialist, and a General Surgeon. The CAP found that there was no evidence of any persistent anatomical or physiological damage from the 2005 accident. The CAP concluded that the most likely cause of Mr Porter's L4/5 disc prolapse was disc degeneration caused by congenital abnormalities at his lower lumbar spine.

[44] Seventh, in relation to Mr Porter's claim for claim for loss of potential earnings (LOPE) or weekly compensation, it is noted (for completeness) that he was not an earner at the date of his accident and so his claim for incapacity-related compensation is confined to LOPE. Mr Porter's incapacity arose because of his disc prolapse which, in light of the Corporation's correct decision of September 2020 revoking cover for lumbar disc prolapse, is no longer covered, and therefore does not afford entitlement to LOPE.

Conclusion

[45] In light of the above considerations, the Court finds that the Corporation correctly revoked cover for disc prolapse, on the basis of evidence which had been overlooked, and which confirmed that there was no disc prolapse following the accident. The radiological evidence that emerged in Mr Porter's case, after the original decision, clearly points to this decision having been made in error. The disc pathology, no longer covered, is the cause of Mr Porter's incapacity, and therefore Mr Porter does not have any entitlement to LOPE in relation to his incapacity.

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

[47] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors: