

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2021] NZACC 131 ACR 340/18

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

Hearing: 19 July 2021

Heard at: Christchurch/Otautahi

Appearances: The appellant in person
 Mr I Hunt for the respondent

Judgment: 10 August 2021

**RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Treatment Injury – Causation s 26 Accident Compensation Act 2001]**

[1] This is an appeal against a decision of the respondent dated 11 July 2018 declining a claim for cover for a treatment injury.

Background

[2] In April 2018 a claim was lodged on behalf of the appellant by his general practitioner Dr Stoney, diagnosing the appellant as suffering from a neck sprain.

[3] In the consultation dated 10 April 2018 Dr Stoney has recorded:

Subjective: has seen an integrated rehabilitation professional at TBI Health. Was given exercises and stretches to do which made him feel dizzy, disoriented.

Objective:

O/e

Reduced range of movement neck.

No neurological symptoms.

Imp: neck sprain secondary to exercises given by rehab.

[4] On the same day Dr Stoney lodged an ACC claim form with a diagnosis of neck sprain and description of injury:

Given back exercises and stretches which caused dizziness.

[5] The date of accident is listed as 10 April 2018.

[6] The respondent obtained notes from TBI Health which showed that the first appointment with the appellant had been on 29 January 2018. The assessment notes report provided by Mr Dan Sainsbury recorded, after setting out details of the current symptoms that the appellant had reported:

Some neck and back pain managed with osteopath. Manages time with his pain.

[7] The same initial report referred to a detailed current history.

[8] Mr Sainsbury also noted under the heading:

Generic objective assessment.

Observation: had to stand up 4 x during assessment two hours in duration sitting. Able to flex to knees pulling – worse on extension. Squat/crouch sore at 1.4 range of depth.

[9] The appellant saw Mr Sainsbury again on 12 February 2018. The clinical note includes:

Treatment: discussion on pain and sensitisation and the amplification of pain peripherally and centrally. How can we help with effecting that nervous system rather than the ongoing cause as Stuart sees it.

Exercise details:

To research peripheral and central sensitisation.

[10] Mr Sainsbury saw the appellant again on 19 February 2018. Included in the clinical notes is the following:

Treatment:

RV sensitivity to pain – in relation to previous back and current granuloma, discussion on treatment and graded exposure style.

Exercise details:

HEP squat top of shin touch 2 x 2 2-3 x a day.

[11] The appellant saw Mr Sainsbury again on 26 February 2018. The clinical notes include:

Discussion on pain being similar from any origin, discussion on being able to change the processing that occurs, discussion on habituation and sensitisation.

Exercise details:

Think on habituation and avoidance.

Analysis: barriers to engaging does not think will work only here because has to be.

[12] The appellant saw Mr Sainsbury again on 5 March 2018. The clinical note includes the following:

Subjective:

No change doesn't think this works for him. Has been seen by psychologist and is engaging in this through ACC. Again believes his pain is not going to change despite the discussions had. In fact after the crouches done two weeks ago has a sore neck now and a headache and thinks this is because of them.

...

Treatment:

Discussion on where he sees the programme going, again that likely not the right place for him currently.

...

Analysis:

No major progress with buy in to effectiveness of programme.

Plan:

Continue with psych involvement if gets to a point where ready to move through with the programme then can be re-referred.

[13] The respondent wrote to Mr Sainsbury on 19 June 2018 and asked him to answer two questions:

1. In your opinion could the prescribed exercises from TBI Health cause a neck sprain? Please explain.
2. Do you have any other comments.

[14] Mr Sainsbury responded on 4 July 2018. He said:

Mr Jones performed two different exercises within our clinic. One of the exercises was a squat exercise in which Mr Jones lowered himself from a standing position to touch his knees with his hands, the other was a step back lunge to touch one knee with his hands. Mr Jones completed three repetitions of these exercises. In my clinical notes there was a complaint during the exercise that Mr Jones felt a “pulling” in his usual pain area of the lower abdomen and testicle.

The next week at our appointment, Mr Jones complained that following the exercises his low abdominal and testicular pain had flared up for the rest of the afternoon and he had not done them since. There was no report of dizziness, disorientation or neck pain at this time in the clinical notes. The next appointment (two weeks later) Mr Jones complained that he had a sore neck and headache following the exercises.

The squat and lunge exercise prescribed are typically a functional activity to load the lower limbs as opposed to the neck or arms. The changes in posture during these exercises would be in keeping with day to day activities such as getting up and sitting down from a chair or picking a small object from knee height.

Both activities do involve a change of posture and therefore the neck itself will undergo some slight movement and change of position. I would not consider that the forces on the neck during these movements are sufficient to cause a neck sprain.

[15] In response to the question “do you have any other comments?” Mr Sainsbury wrote “no”.

[16] This information was then assessed by the respondent after consultations involving Ms Jones, Ms Chua, Ms Drummond and Ms Kaveney – all treatment injury cover specialists, together with Lindsay Barwick and Mr Warren McGuire, the treatment injury claims practice manager.

[17] The outcome as later recorded was to decline the claim on the basis that:

The forces on the neck during the movements were not sufficient to cause a neck pain.

The activities were such as getting up and sitting down from a chair or picking up a small object from knee height. Both activities do involve a change in posture and therefore the neck itself will undergo some slight movement and change of position.

[18] The respondent accordingly wrote to Mr Jones on 11 July 2018 declining the claim.

[19] On 12 March 2018 the appellant obtained a letter from Anudharma Marshall Spinal Care which said:

I have known Stuart as a patient for a number of years.

He will come for treatment of his lumbar and cervical vertebra facet joint dysfunction causing related nerve pain and mobility impairment.

His recent referral to TBI Health by ACC has unfortunately upset his usual condition due to the stretch and exercise procedure he was requested to perform for another unrelated specific health condition.

He consulted myself for treatment on Wednesday 7th and Friday 9th March.

I have advised Stuart not to undertake this form of exercise he was given as this could result in the same problem again.

[20] The appellant sought a review of ACC's decision.

[21] The appellant's GP, Dr Stoney, provided a further report on 30 August 2018.

Dr Stoney said:

This letter is to confirm that Stuart Jones consulted me on 10th of April 2018. He reported having attended an appointment with Mr Sainsbury, a physiotherapist, who he was advised to see by his ACC case manager, presumably as part of his rehabilitation from his painful sperm granuloma. Mr Jones described experiencing dizziness and disorientation following a series of step back lunge exercises. Prior to seeing me that day, Mr Jones had already sought treatment from his osteopath. When I examined Mr Jones I noted a reduced range of movement in the neck.

Mr Jones is concerned that his ACC claim for his neck sprain has been declined, when his symptoms seem so clearly related to treatment he was given. He's also concerned that he may require further treatment for his sprain and will have difficulty funding this when his claim was declined.

Your compassionate consideration of Mr Jones's claim would be appreciated.

[22] Dr Stoney provided a further brief letter on 30 October 2018 as follows:

This is to confirm that Mr Stuart Jones consulted me on 10 April 2018 regarding neck pain and dizziness, following the physiotherapy treatment at TBI Health. Mr Jones had not consulted with me regarding neck problems prior to 10 April 2018.

[23] The appellant's application for review was unsuccessful and this appeal was lodged.

The Appellant's Submissions

[24] The appellant refers to the letter of Anudharma Marshall of 12 March 2018 to the effect that TBI Health has unfortunately upset his usual condition due to the stretch and exercise procedure he was requested to perform.

[25] He described how Mr Sainsbury held his torso during the lunges and how he eventually had to walk out. The next day he made an appointment with the osteopath because his neck was sore.

[26] He refers to Dr Stoney's letter of 30 August 2018 which recorded a reduced range of movement in the appellant's neck.

[27] He refers to Dr Stoney's further letter of 30 October 2018 which records that the appellant had not consulted him regarding neck problems prior to 10 April 2018.

[28] He refers to his Notice of Appeal and points out that ACC and the Reviewer did not dispute that he had suffered a personal injury being a neck sprain.

[29] He points out that a "lunge" is defined as a sudden forward stretch of the body and not, as Mr Sainsbury described it in his report of 4 July 2018 as being in keeping with day to day activities such as getting up and sitting down from a chair or picking up a small object from knee height.

[30] He refers to Dr Stoney's letter of 15 October 2019 which records that the appellant's pain continues.

The Respondent's Submissions

[31] Mr Hunt took the Court through the documents in the common bundle.

[32] He notes that in the report of Anudharma Marshall of 12 March 2018 the therapist acknowledges knowing the appellant for a number of years and that "he will come for treatment of his lumbar and cervical vertebra facet joint dysfunction causing related nerve pain and mobility impairment."

[33] Mr Hunt submits that Dr Stoney's letter of 30 August 2018 appears to not be a diagnosis but rather a summary of the appellant's own belief as to what has occurred.

[34] Mr Hunt submits that the appellant has failed to adduce any evidence or analysis which establishes that he should be granted cover for a treatment injury.

The Appellant's Reply

[35] The appellant said he had never had a sprained neck until he did the exercises prescribed by Mr Sainsbury.

[36] He said that Ms Colvin from ACC, told him that he could have more "sessions" so long as he did not go to Fairway. In other words the appellant could have more therapy sessions if he did not seek to review ACC's decision.

[37] He says that ACC was bloody minded from the start and that he had "walked out" from TBI Health with a neck sprain.

Decision

[38] At issue in this case is the decision of the respondent dated 11 July 2018 declining a claim for cover for a treatment injury.

[39] The appellant's case is that he suffered a neck sprain while being treated by physiotherapist Dan Sainsbury in early 2018.

[40] In Mr Sainsbury's notes of the consultation of 29 January 2018 he recorded that the appellant has some neck and back pain managed with an osteopath.

[41] This is corroborated in the letter of Anudharma Marshall of 12 March 2018 which records:

He will come for treatment of his lumbar and cervical vertebra facet joint dysfunction causing related nerve pain and mobility impairment.

[42] When the appellant consulted his doctor on 10 April 2018 the doctor records that the appellant "was given exercises and stretches to do which made him feel dizzy, disoriented".

[43] In his letter of 4 July 2018 to ACC the physiotherapist said:

Mr Jones performed two different exercises within our clinic. One of the exercises was a squat exercise in which Mr Jones lowered himself from a standing position to touch his knees with his hands, the other was a step back lunge to touch one knee with his hands.

...

The squat and lunge exercise prescribed are typical of functional activity to load the lower limbs as opposed to the arms or neck. The changes in posture during these exercises would be in keeping with day to day activities such as getting up and sitting down from a chair or picking a small object from knee height.

[44] The evidence as it stands leads me to conclude that the exercises performed with the physiotherapist were relatively mild and not intended to have an outcome to result in dizziness or disorientation.

[45] The appellant points out that Ms Colvin of ACC offered him further treatments with an osteopath, and that this is evidence that ACC's decision to decline cover for a treatment injury was wrong.

[46] However, in her note of that telephone conversation Ms Colvin records:

I said that if he just wants a number of treatments with osteo we can pay for that on the basis that the decision is sound and we are standing by it – but to resolve the dispute.

[47] I regard Ms Colvin's response in this way was pragmatic and sensible. I do not regard it as affecting whether or not ACC's decision relating to cover was right or wrong.

[48] In the review decision of 13 October 2018, the Reviewer notes that in a very brief report of examination of the appellant on 27 September 2018 osteopath Jan Duncan found a whiplash type injury "on the lower cervicals on the left". The report then went on to say:

This injury is usually caused by an extension of the neck or rapid extension and then flexion from sudden force.

[49] For our purposes however this brief report does not link this finding to the treatment injury complained of.

[50] Ultimately, I agree with the finding of the Reviewer that on the totality of the evidence, the forces involved in the lunge exercise would not be sufficient to cause a neck sprain. Mr Jones has not provided any evidence to show that the exercises prescribed by Mr Sainsbury plausibly caused such an injury.

[51] Accordingly, I must dismiss the appeal.

[52] There is no issue as to costs.



Judge C J McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch, for the respondent