IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 147 ACR 254/12

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

Hearing:	11 May 2021
Heard at:	Dunedin/Ōtepoti
Appearances:	The appellant on own behalf Mr Hunt for the respondent
Judgment:	30 September 2021

RESERVED JUDGMENT OF JUDGE DENESE HENARE
[Weekly compensation; incapacity s 103 Accident Compensation Act 2001]

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[1] The appellant, Mr Langston suffered injury in a rugby accident in March 1980. He did not claim cover for personal injury by accident until December 2003. He received cover for a prolapsed disc at C6/7 following the decision of Judge Beattie in 2008.[1]

[2] Mr Langston then sought back dated weekly compensation which the Corporation declined by decision dated 7 July 2010 for the period from 1 July 1981 to 31 March 1990. The decision referred to the delay in filing the claim for cover until 2003 which prejudiced any "ability to obtain verifiable information "as to earnings" and "in not being able to monitor and verify" Mr Langston's incapacity.

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1 *Langston v Accident Compensation Corporation* [2008] NZACC 7

[3] The Corporation informed Mr Langston on 28 November 2011 it would back pay weekly compensation for the period 12 October 1989 to 31 March 1990. The Corporation subsequently reached agreement with Mr Langston regarding the period 4 April 1988 to 11 October 1989. The review decision of 4 April 2012 modified the Corporation's 2010 decision in these respects noting Mr Langston otherwise failed in his review application for the period 1 July 1981 to 3 April 1988. The Reviewer noted no evidence of medical certification of incapacity for employment for this period and in consequence was unable to consider this issue.

[4] Judge Walker presided at the first hearing in February 2020 and her judgment issued on 28 May 2020[2]. I put this judgment aside because Judge Walker accepted Mr Hunt's submission that the additional documents provided at hearing by Mr Langston should be referred to the Corporation for consideration and she directed accordingly. For this reason, Judge Walker was unable to determine this appeal.

The Corporation's review of the additional evidence produced at first hearing

[5] The Corporation wrote to Mr Langston on 28 September 2020 following consideration of the additional documents produced by Mr Langston, and stated:

> **Analysis:**
>
> Letter from Dr Reid
>
> "Thank you for your letter of 27 Jan with respect to this man. He has not been seen in this practice since 1.12.03, and he has changed medical practitioners. His notes have been transferred to his new practitioner.
>
> I know and remember his case well, and he complains of neck pain which he attributes to a rugby accident in 1980. Unfortunately he was not seen in this practice for that injury, and he states that he attended the emergency Dept at the hospital, which did not complete an M45. I thus have no record of his accident, and the first mention of a neck problem in our notes (which I no longer have) was seven years after the onset of the problem.
>
> In answer to your questions
>
> 1) From memory Mr Langston did have periods of incapacity from back pain, and after 1987, from neck pain. I am unable to quantify these."
>
> Letter from Mr Langston to Diane Barbara, CM ACC. 11/4/2009 4th paragraph. Page 1/7, 22/4/2009 EOS Documents.

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2 *Langston v Accident Compensation Corporation* [2020] NZACC 67.

For the period 29 March 1980 to July 1981, I did not have any time off work whilst I was working for Cooke Howlison Ltd, other than appointments for medical attention for this accident."

Conclusion:

You have asked for medical comment on

"**He has gone to review and appeal claiming that he was also incapacitated from working between 01/01/1980 and 03/04/1988"**

MA response:

1. There is comment from Prof Gillett which his opinion on the likelihood of rugby injury in 1980 having caused a cervical disc injury. This is provided some years after the event.

2. There is Prof Bishara's 1998 comment that the diagnosis is a chronic pain problem. There is no comment on work capacity.

3. There is other medical comment from Drs MacLeod, Anderson and Ragapathy which are not contemporaneous and do not comment on work capacity to any clear extent.

4. There is no other contemporaneous medical information that would be the best and most reliable medical information upon which I can answer your question.

5. There is Mr Mee's letter which indicates Mr Langston was working at Cooke Howlison.

6. There is Mr Langston's letter detailing his employment, albeit with difficulties, over this period.

7. There is Dr Reid's letter in which he says he does not remember Mr Langston having time off work over the 1980-88 period for his neck.

8. Finally there is Mr Langston's letter saying he did not have time off work, over this period.

9. It would be reasonable to say Mr Langston was symptomatic with respect to his neck, over this time, but there does not appear to be convincing evidence of incapacity over this time.

[Emphasis added]

[6] The Corporation concluded there was "no contemporary medical evidence of any incapacity, or continuing incapacity, over the period in question" and the information provided by Mr Langston does not establish "a clear picture of incapacity" for the period in question. The Corporation declined to make any changes to the 2010 decision.

[7] On 13 November 2020, Judge Walker issued a minute confirming Mr Langston had withdrawn appeal ACR 224/12 and was continuing with ACR 254/12 (this appeal for

determination). Judge Walker then set timetable directions to progress the appeal to second hearing. Judge Walker could not preside at the second hearing due to her retirement.

Issue

[8] The issue in the appeal is whether Mr Langston was continuously incapacitated since the March 1980 accident to 3 April 1988 having regard to the following evidence which comprises:

[a] The bundle of documents filed for the purpose of the first hearing before Judge Walker in February 2020.

[b] The separate bundle of documents compiled by the Court in accordance with the directions in the minute of 13 November 2020 and provided to the parties by the Court in November 2020. This bundle includes the decisions of Judges Beattie and Walker, transcript of hearing before Judge Walker, submissions and memoranda filed by Mr Langston and Mr Hunt, affidavits from Mr Langston dated 18 September 2007 and Mr Mee dated 18 February 2008, the submission of Mr Langston dated 11 February 2020 and 11 documents including from radiology, pain assessment and medical practitioners from February 2004 to 18 May 2020. The Court observes the medical reports were produced at hearings either before Judge Beattie or Judge Walker.

[c] The further separate bundle of documents referred to in the Corporation's letter dated 28 September 2020, and as also appended to Mr Hunt's memorandum dated 28 October 2020.

Legal Principles-the Test for Incapacity

[9] The test for incapacity is set out in s 103(2) and (3) of the Accident Compensation Act 2001 (the Act) which relevantly provides:

> **103** Corporation to determine incapacity of claimant who, **at time of personal injury, was earner, on unpaid parental leave, or recuperating organ donor**
>
> ….

(2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

(3) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.

[Emphasis added]

[10] The High Court decision in *Vandy*[3] holds that in order to be incapacitated and then eligible for weekly compensation accordingly, a claimant must be in employment at the time of suffering the personal injury and not when subsequently affected by the injury.

[11] The fact that Mr Langston's claim is retrospective in nature raises obvious issues. As Judge Cadenhead observed in *Jamieson*[4]:

> [30] I have considered the cases of Rakei-Clark (AI 412/01) and Reid (AI 60/99) and from these cases the following principles are discernible in cases having a factual scenario similar to the present:
>
> [i] It is upon the appellant to show on a balance of probability that at the date of the alleged incapacity, because of the injury for which he had cover, he was incapacitated within the terms of the statute.
>
> [ii] **Retrospective certification of incapacity will be acceptable in certain circumstances. However, the onus is on the claimant to produce evidence establishing a clear picture, or strong and supporting evidence other than contemporary medical certificates, of a continuing incapacity over the period in question.**
>
> [iii] From the alleged date of incapacity the appellant has to show that within at least fourteen days he was an earner.
>
> [Emphasis added]

[12] In *Almond*[5] the Court considered there was need to consider contemporaneous medical evidence or "careful specialist opinion".

[13] In *Tonner*,[6] the High Court held that a clear picture of incapacity over the relevant period must be established. Muir J stated:

> [42] **This case exemplifies the difficulties often associated with retrospective claims under s 103.** Indeed, it is one of the more extreme examples, given that by the time the

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3 *Vandy v Accident Compensation Corporation* [2011] 2 NZLR 131.
4 *Jamieson v Accident Compensation Corporation* [2004] NZACC 80 at [30].
5 *Almond v Accident compensation Corporation* [2013]NZACC 241.
6 *Tonner v Accident Compensation Corporation* [2019] NZHC 1400.

claim was made, over 15 years had elapsed from the date of the accident and over five years from the date on which Mr Tonner had ceased working. Two years prior to the claim, his own psychiatrist Dr Kritzinger recorded in correspondence acknowledging the likelihood of PTSD as a consequence of the accident, that:

> I think retrospective attribution of disability to his mental condition will be part of an entirely different debate and may be very difficult to illuminate given the time frame since the accident.

[43] **For this reason, the authorities have consistently identified that the onus is on such claimants to establish a clear picture of incapacity over the relevant period and that, in such context, retrospective medical certificates will be treated with caution.**[7]

[44] **A defining feature of many claims in this category is the absence of contemporaneous medical evidence confirming incapacitating injury or condition. Often there will be an attempt to infill that lacuna with retrospective medical assessments and/or an applicant's personal affirmation of incapacity. It is the frequent refrain of applicants that they are effectively penalised for stoicism in the face of incapacitating injury or condition and for 'soldiering on" in their employment despite disability**.[8]

[Emphasis added]

[14] In *Farrelly*[9] the Court addressed issues as to proof of incapacity, retrospectively. Judge Ongley stated:

> **Decision**
>
> [70] It is fair to say that the claim for backdated weekly compensation does raise a serious question and is not entirely lacking in evidence of continuous incapacity. If the appellant's own evidence were to be accepted as being reliable on the medical question, his claim would succeed. But the problem for the appellant's case is the lack of reasonably persuasive medical evidence, The appellant's claim relies heavily on his own assessment of his incapacity. I find the following considerations support the respondent's case in this appeal:
>
> (a) The onus of showing incapacity lies with a claimant, subject to ACC's obligation to make proper enquiries. In this retrospective claim, the circumstances clearly require the claimant to provide the evidence of his past incapacity.
>
> (b) Incapacity is a precise concept. It requires evidence of the physical and mental demands of pre-injury employment and evidence of the nature and consequences of the injury, in sufficient detail to reach a conclusion whether the claimant could continue that employment. Determination of incapacity also requires reasonably precise dates in order to align a finding of incapacity with pre-injury employment tasks and earnings at the date of incapacity. Those fairly precise findings have to be identified in relation to a contemporaneous application for weekly compensation. A

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7 *Jamieson v Accident Compensation Corporation* [2004] NZACC 80 at [30]; *Bell v Accident Compensation Corporation* [2011] NZACC 22.

8 Courtney J in *Jones v Accident Compensation Corporation* [2013] NZHC 2458 at [19], that the concept of "soldiering on" is not a principle of law precluding a finding of incapacity. Rather , it is an evidential consideration.

9 Ibid n4 para [70].

> retrospective claim cannot be treated as requiring less evidence than a contemporaneous claim.

[15] Mr Hunt referred to the decision of *Knight v Accident Compensation Corporation*, and after analysing a line of authorities, Judge MacLean stated: [10]

> A common theme coming through all the decisions I have referred to, is that the Court should approach retrospective certification, as to continuous incapacity with caution, and there needs to be a clear picture established of continuing incapacity. The case of Jamieson is of assistance because it, as here, involved the concept of "reigniting of entitlements".

The position of the parties

[16] Mr Langston filed written submissions on 10 December 2019, 11 February 2020 and 2 November 2020 and provided oral submissions at hearing, and he produced documents relating to the period 1980 to 1990.

[17] Mr Langston submitted he was incapacitated from July 1981 when he was sacked from his job as a mechanic and he has been incapacitated ever since then.

[18] Reviewing the transcript of hearing before Judge Walker, Mr Langston stated:

- He provided details of his employers to his case manager
- When he returned to New Zealand in 1983, he worked for Dunedin Engineering and then transferred to Fulton Hogan from 1984 to 1986
- He had to leave his employment because of his neck pain.

[19] Mr Langston's sworn statement dated 18 September 2008 sets out a chronology of his employment 1981 to early 1988 when he went onto the unemployment benefit on 4 April 1988. Mr Langston stated:

> **March 1980**: rugby neck injury.
>
> **1981**: I lost my mechanics job at Cooke Howlison, Dunedin in approximately July 1981. This is because of my rugby accident in March 1980.

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10 *Knight v Accident Compensation Corporation* [2016] NZACC 174 at [73].

> On 31 August 1981 I left New Zealand to work in Australia and left behind the bad situation. I was in mind to gain some type of suitable employment and also seek medical help for my damaged neck.
> I arrived in Sydney Australia and travelled to Melbourne where I found a job in a transport yard at Bayswater, doing general mechanical/engineering and welding repairs but my neck caused me trouble, so I sought treatment there. … I worked on and lived in Melbourne for about a year. I left then and went to Adelaide, staying with a friend and working a processing factory. I tried treatment there with a naturopath without much success returning to Melbourne briefly, but because of continuing pain I returned to home in Dunedin on 14 January 1983.
>
> **1983**: I sought medical assistance in Dunedin firstly through my GP Dr Reid who referred me to Mr McMillan, orthopaedic surgeon Dunedin Public Hospital, and was put through a bizarre and unsatisfactory examination which left me in pain from my neck injuries. I first saw Mr McMillan in 1981.
> While living on an employment benefit I did a welding course at polytech, passing the tests and receiving two welding tickets.
>
> **May? 1983**: Started work at Dunedin Engineering Limited, I found my pain caused me to work at a less than satisfactory standard for my employer and I lost my job after about a year.
>
> **May? 1984**: Worked at Fulton Hogan Limited Fairfield, welding and engineering and was asked to leave after about two years as once again my neck injuries made working difficult. They said "I was a very good welder but took too long to do the job" and it was too expensive for them to continue employing me. They said they were very sorry for the situation.
>
> **June? 1986**: I acquired work at Arthur Ellis and Co Dunedin doing general factory maintenance on the twilight shift. This position got restructured and I was transferred to the factory on a production line. I then left due to pain and frustration. I worked overall about one and a half years at Arthur Ellis. Eventually this firm closed down.
>
> **Late 1987 – early 1988**: Worked briefly at Ferrum Engineering Co. -could not perform adequately to their standard because of neck pain and was asked to leave.
> This was the beginning of my being on unemployment benefit from 4/4/88, according to Work and Income records, through to 1994.

[20] The reports on which Mr Langston particularly relies in support of his case, are from Professor Gillett, Dr Acland, Dr Ragupathy, Dr Hill and Mr Finnis. All of whom provided reports from 1999 to 2013. There is also a signed statement from Mr Allan Mee who was the Commercial Service Manager from 1979 to 1989 at Cooke Howlison Limited, employer of Mr Langston for the period 1977 to 1981.

[21] Professor Gillett provided three reports. His report dated 15 May 2000 and a further report, were produced for the purposes of the appeal concerning cover before Judge Beattie.[11] On 11 February 2020 Mr Langston produced an undated report from Professor Gillett who commented:

> I have previously stated when Paul Langston came to me with his neck problems I accepted that the most likely cause of the problem (on balance of evidence) was his neck injury sustained on or about 29 March 1980 in the course of a rugby game. Paul worked at less demanding occupations than as a car mechanic as a result of this injury and came to my attention in 1999. At that time he had a combination of problems in his neck including a disc prolapse and osteophytic changes resulting in nerve root compression affecting the C7 nerve root. His treatment for this problem had been deferred as he had been able to accommodate it for some years (as is characteristic of neck injuries). I **have previously given the opinion that this injury impeded his ability to work in his preferred occupation from 1980 onwards and would reaffirm that opinion in the context of his current claim.**
>
> (Emphasis added)

[22] A signed statement dated 18 February 2008 from Mr Allan Mee, states:

> … In our team we had a mechanic Paul Langston, Paul was on the staff before I started. He could carry out all of the duties that were required from him. But in 1980-81 we started to have problems with his work. When spoken to he complained he was having a problem with his neck after a rugby game. I kept a close watch on his performance. In 1981 the foreman Tony Clark complained that Paul could not carry out his duties. He was unable to lift objects which were required of him. Unable to bend over to service Bedford vans. I had a very serious talk with Paul to find out his problem to see if we could help in any way. He again blamed the problem on his football injury with his neck. I suggested to Paul that he may be should look at other employment where he would not have to carry out the duties that we expected of him. After mutual agreement with Paul it was decided that Paul would end his employment with Cooke Howlison.

[23] There is a letter from Dr Ragupathy dated 22 March 2010 which notes Mr Langston worked in different types of work as a mechanic or fitter welder "but has been unable to hold down any long-term jobs". Dr Ragupathy stated:

> [Mr Langston's injury] has resulted in initially his loss of job as a truck mechanic because he couldn't cope with the discomfort. He has tried multiple other jobs but as been unable to sustain long-term work because of his discomfort.

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[11] See paragraphs [12] and [13] set out in full.

[24] There is a Comprehensive Pain Assessment Integrated Report dated 12 July 2010 from medical assessor Dr Rick Acland who found that Mr Langston sustained a "significant neck injury" when playing rugby. Dr Acland stated:

> He did not seek immediate help [after the injury] but it was only approximately four days later that he went to Dunedin Hospital. No x-rays were taken. He did carry on playing rugby! I note that he was working as a mechanic and lost his job subsequently. He was always limited with head movement. **He did carry on working in some capacity … He does tell us that he has been sacked from his jobs as a mechanic on numerous occasions. He eventually stopped working in June 2006.**
>
> …
>
> **Shortly after returning to New Zealand from Australia in 1983…he recalls that he was at this time having a number of difficulties in his life and emotional well being, and as a consequence, having difficulty maintaining an employment role.**
>
> …
>
> **Functional History:**
>
> Functional background:
>
> Work: Paul has worked predominantly in the motor mechanics (truck) and engineering industry. He has also held a heavy traffic (HT) license and been truck driving in the past.
>
> …
>
> Current functional status:
>
> Work: Paul last worked in June 2006 doing house renovations. He was encouraged to sit his P class license to become a shuttle driver. He paid and passed the theory test and unfortunately failed to pass the medical test. He feels that he has exhausted his potential work options and is undecided about future employment directions.
>
> …
>
> Way in which pain affects employment
>
> **Paul was not specific with regard to certain particular aspects of his work which had become unmanageable and which aggravated his pains such that he found it difficult to restore a pain level, which would allow him to sustain his work to an acceptable level**. **Suffice it to say, he indicated that in general the physical nature of his work was proving to be too demanding for him to manage to an acceptable and consistent level.**
>
> Beliefs regarding pain and ability to maintain/resume employment:
>
> **Paul has acknowledged for himself that physically oriented work is no longer viable for him, and he would not pursue this type of work again.** Whilst he misses being employed and would like to think that he could find a position which he could sustain, he is unsure what alternative he could realistically consider as he always worked in similar type of work which is physically oriented and practical (i.e. hands on). He stated that he feels quite "at a loss" in this regard, and this is quite demoralising for him.

Expectations with regard to pain for the future

Paul is of the opinion that as he has experienced neck pain, functional loss and limited range of movement since the time he first injured his neck in 1980, it is very unlikely that this will change in the future, and this being the case, he predicts that his current situation will persist for the future.

[Emphasis added]

[25] The report dated 22 March 2010 of Dr Hill GPSI notes Mr Langston had persistent neck pain and as at 2010, he was not working. Dr Hill noted that pain had been challenging for Mr Langston in his different jobs. Dr Hill also noted Mr Langston lost his HT licence because of decreased range of motion in his neck. However, Dr Hill did not say when Mr Langston lost his licence or provide any detail about incapacity for employment.

[26] Mr Langston was subsequently referred to Mr Finnis, Neurosurgeon by Dr Hill. By report dated 17 June 2010, Mr Finnis set out the history to the covered injury and the nature of the surgery performed by Professor Gillett. Mr Finnis diagnosed axial neck pain and commented Mr Langston should continue with a non-operative approach. He noted Mr Langston is "motivated to try and correct his problem and certainly to get back to work".

[27] Mr Langston submitted the Corporation's response on 28 September 2020 from Mr Spencer for the Corporation, underlined the problem that the medical profession had not properly recognised his injury and his views about his incapacity. Mr Langston took issue with the Corporation's Medical Adviser, Dr Miller-Coote reaching conclusions without consulting or examining him.

[28] Mr Langston submitted the Corporation did not assess the additional documents properly. He stated most of the information had been disregarded because the only reference made was to Dr Reid, Mr Langston's GP, who Mr Langston says did not know he had a serious neck injury. Further, the letter did not mention Professor Gillett or Mr Mee who support his position.

[29] Mr Langston stated he is being "punished" by trying to prove something now that was not adequately taken care of in the past." He stated:

> … I was left with a serious neck injury from that accident and tried to carry on as per usual but with correct medical recognition, I would not have been carrying on as per usual…I went 18/20 years without true medical recognition, so therefore, evidence of

> earnings is a problem, not due to my fault, due to lack of medical recognition at the time of the accident. Those men that I saw [Gavin Skeggs, Bruce McMillan] were not of sufficient standard.

[30] Mr Langston stated: "If I'd had Grant Gillett as the surgeon in 1980, I wouldn't be in this situation … after the accident."

[31] Mr Langston's overall position is he has "been let down by the medical profession and yet it's on me to do the job that the medical profession failed to do."

[32] Mr Hunt referred to his written submissions dated 17 December 2019 as well as his oral submissions at both hearings.

[33] Mr Hunt submitted Mr Langston has not produced the requisite evidence to prove incapacity or earnings. A "lacunae or absence of evidence" exists.

[34] Mr Hunt submitted even if there was evidence of incapacity, there is no evidence to enable a calculation of any lack of weekly compensation payments there may have been. Mr Hunt submitted that it is "not possible" to see how the Corporation could have addressed the matter differently than it did, or how the Court could come to a different conclusion, either.

[35] Mr Hunt submitted there are no earnings information from the IRD before April 1990 and no details of earnings received from employers for the period July 1981 - March 1990.

[36] Referring to the Corporation's decision Mr Hunt submitted the delay in lodging the claim for cover until 2003 prejudiced the Corporation's ability to obtain verifiable information in relation to levels and periods of earnings. It also meant the Corporation was unable to assist Mr Langston in vocational independence at a time closer to the accident.

[37] In Mr Hunt's submission, any assessment of incapacity would be speculative, without any ability to provide an educated guess.

[38] Mr Hunt referred at length to the line of authority from the courts that retrospective evidence needs to be clear and strong, and the current state of evidence is not so.

Discussion

[39] At the outset, the Court acknowledges Mr Langston's overall frustration with the medical practitioners he consulted following his rugby accident, that his injury was not correctly dealt with at the time, that is some forty years ago.

[40] Mr Langston's submission that if he had been "medically recognised" closer to the time of the accident, he would have been incapacitated and put on weekly compensation, sums up the evidential difficulties with the medical evidence adduced in support of this retrospective claim. Nonetheless, Mr Langston and the Corporation have been able to achieve some agreement regarding backdated weekly compensation so that the period for determination before the Court is considerably narrowed from 1981 to 1988.

[41] It is usual practice that certification of incapacity takes place contemporaneously, by way of medical evidence. When, as here, cover was granted a significant time after incapacity, it is necessary for a claimant to prove incapacity.

[42] The legal test for the claim for cover for personal injury is different to the legal tests applying to incapacity for employment and entitlement to weekly compensation. The gateway to weekly compensation for Mr Langston is s103. Specifically, whether because of his personal injury, Mr Langston was unable to engage in his pre-injury employment when he suffered the personal injury under s 103(2). If he was unable to engage in such employment, then he is incapacitated for employment.

[43] It is the case, it is incapacity for pre-injury employment rather than a general state of incapacity, that is to be determined.

[44] I turn to consider the evidence before the Court.

[45] It is apparent that in order to undertake an accurate determination whether Mr Langston was continuously incapacitated requires a detailed understanding of what his pre-injury employment entailed coupled with an understanding of what he was able to do when he returned to work at the various mechanical/engineering jobs he referred to in his sworn statement.

[46] Against this starting point, Mr Langston gave evidence at hearing that he worked as a truck mechanic for Cooke Howlison from 1977 to 1981 when "I was put off my job. Allan Mee dismissed me". Mr Langston's evidence was not very specific about his employment tasks as a truck mechanic at his pre-injury job or at any of his jobs as a mechanic, including what tasks he could or could not perform.

[47] Mr Mee stated Mr Langston carried out all his duties "required of him" as a mechanic but he did not say what these tasks entailed. Mr Mee said the foreman complained in 1981 that Mr Langston had difficulties with lifting objects and bending over to service the vans. There is no doubt Mr Mee states Mr Langston indicated the rugby injury as the reason his work performance dipped. Mr Mee said Mr Langston kept working until a mutual agreement was reached by the parties that Mr Langston would leave his employment with Cooke Howlison. This appears to be about a month before Mr Langston went to Australia in August 1981 where he worked in mechanical/engineering and welding.

[48] In my opinion, Mr Mee's evidence is helpful to the extent that what can be said is Mr Langston's rugby injury played a significant part in the decision mutually agreed that Mr Langston leave his job.

[49] Mr Langston said he continued to play rugby for a season after his injury because of the prevailing culture, and he soldiered on in his mechanics job in the relevant period. Apart from a short period on the dole when he returned from Australia in 1983, he obtained employment with mechanical/engineering companies in the relevant period, albeit with the neck pain he continued to suffer. There is no reason to doubt Mr Langston's own evidence that his performance in his work played a role in his leaving his pre-injury employment. However, what is lacking is any detail in order to align a finding of incapacity with pre-injury employment tasks and earnings. The fact that Mr Langston worked in other jobs in mechanical/ engineering roles until he went onto the unemployment benefit on 4 April 1988, underlines further no clear evidence of incapacity because there were periods when Mr Langston did work. As noted in the case law, a retrospective claim cannot be treated as requiring less evidence than a contemporaneous claim.

[50] In the event, the evidence of Mr Langston and Mr Mee is not determinative of the requirements under s 103(2). Objective medical evidence of incapacity is required, as Muir J

noted in *Tonner*, "a defining feature of many claims in this category is the absence of contemporaneous medical evidence confirming incapacitating injury or condition."

[51] Mr Hunt submitted that a determination of historical incapacity is not always dependent on the presence or absence of contemporaneous medical evidence. However, strong and clear evidence is required where there is a question about the continuous or unbroken nature of the asserted incapacity. I agree it would be a rare case where the Corporation would be able to determine that a claimant was unable, because of personal injury to engage in employment in which he or she was employed, when the personal injury was suffered, in the absence of cogent medical evidence based on reliable evidence, rather than being speculative.

[52] The lack of a clear picture about Mr Langston's pre-injury employment tasks and what Mr Langston could or could not do carries over to the retrospective medical reports from Dr Acland, Dr Ragupathy, Dr Hill, Mr Finnis and Professor Gillett.

[53] Dr Acland's report states the obvious about an injury occurring in 1980. A careful reading of Dr Acland's report shows he refers to Mr Langston's self-reporting about the effects of pain without specific analysis in relation to incapacity for employment. In *Tonner*, it was held that pain does not equate with incapacity for employment.

[54] Mr Langston relies on Professor Grant Gillett whose two reports were produced for the purposes of cover, as follows:

- On 15 December 1999, Professor Gillett wrote:

> Unfortunately the advice he got around [the time of injury] was not to do anything about his neck and he has always thought that nothing could be done about it. Therefore he has put up with periods of severe pain which has grossly impaired his ability to do what he would like to do.

- On 15 May 2000, Professor Gillett wrote:

> Paul's story that he has been actually having trouble with his neck for the last 15-20 years is therefore extremely plausible and quite understandable given consultations that he had at the time and what would have been recommended then.

[55] In the undated report from Professor Gillett wrote:

> I have previously stated that when Paul Langston came to me with his neck problems I accepted that the most likely cause of the problem (on balance of evidence) was his neck

> injury sustained on or about 29 March 1980 in the course of a rugby game. **Paul worked at less demanding occupations than as a car mechanic as a result of this injury and came to my attention in 1999.……**
>
> this injury **impeded his ability to work in his preferred occupation from 1980 onwards and would reaffirm that opinion in the context of his current claim.**
>
> [Emphasis added]

[56] At hearing, Mr Langston stated the reference to car mechanic by Professor Gillett was in error. Apart from the general statements made by Professor Gillett, the difficulty with his evidence is there is no analysis of Mr Langston's pre-injury work tasks, other than a general description of his occupation. Further and most significantly, while Professor Gillett opined Mr Langston was impeded in his ability to work, he does not purport to offer any opinion as to whether or not Mr Langston was incapacitated for employment.

[57] Reviewing the medical reports relied on by Mr Langston, the Court cannot conclude Mr Langston was rendered incapable of performing his employment by reason of his personal injury. Likewise, the medical reports do not say Mr Langston was incapacitated when he left his various jobs. In the event, I find that Mr Langston extrapolates incapacity from the evidence he relies on and in turn, makes his own assessment of incapacity. That said, it is understandable given the problems Mr Langston acknowledged of no early medical recognition.

[58] The position of no convincing evidence of incapacity is also a feature of the documents referred to in the Corporation's letter dated 28 September 2020. Many of them state the obvious, that is Mr Langston suffered an injury for which he received cover following Judge Beattie's decision. Not all of the documents provided, relate to the relevant period before the Court. Of the 36 documents in the additional documents list, only 4 relate to the period for determination.

[59] Mr Langston submitted the analysis provided by Dr Millar-Coote is deficient and did not mention the reports he relied on. Whilst not all reports have been mentioned in the analysis, the Corporation's letter of 28 September 2020 is clear that:

> ACC has now carefully assessed all the information available to it, including the information referred to during the hearing of the appeal and the transcript of the hearing before Judge Walker. In addition, ACC sought the advice of its Branch Medical Adviser,

> who has considered this information-and in that respect, a list of the relevant documents considered by the Branch Medical Adviser is attached to the letter.

[60] The new bundle of documents before the Court contains the additional documents produced by Mr Langston as well as all documents considered by the Corporation to give a full picture of the background.

[61] Having read carefully all the documents in evidence, I find I am in agreement with the conclusions reached by Dr Millar-Coote. Further, none of the documents mention or purport to deal with incapacity for employment. I find the totality of the evidence does not establish a clear picture of incapacity over the period between 1 July 1981 and 3 April 1988.

[62] While there is no doubt that at the material period, Mr Langston had an injury and was entitled to cover, the Court is not satisfied on the balance of probabilities that Mr Langston was incapacitated in the relevant period in terms of the Act. The picture is not sufficiently clear, strong and cogent to meet the legal principles for a retrospective claim.

Decision

[63] The Corporation's obligation is to make proper inquiries. The Court is satisfied that it has done so.

[64] In my opinion, the evidence before the Court falls short of establishing incapacity on the balance of probabilities.

[65] Looking at the evidence overall, I am satisfied the Corporation was correct in concluding the information provided does not establish a clear picture that Mr Langston was incapacitated over the whole, or any part of the period between 1 July 1981 to 3 April 1988.

[66] Accordingly, the appeal is dismissed. There is no issue as to costs.

Judge Denese Henare
District Court Judge

Solicitors: Young Hunter, Christchurch for the respondent