

[3] On 25 May 2007, Mr Kors struck his head on a van door. On 28 May 2007, Antony Croucher, Physiotherapist, lodged a claim on Mr Kors' behalf for "neck sprain – right". The injury was described as: "Pain in back while working hunched over under car". On 29 May 2007, the Corporation granted cover for this injury.

[4] On 15 October 2007, Mr Derek Stanley-Clarke, Orthopaedic Surgeon, reviewed Mr Kors and noted that routine x-rays and an MRI "tends to exclude any significant pathology in the cervical spine apart from some early degenerative change", and that there had been "a previous diagnosis of fibromyalgic basis".

[5] On 24 October 2007, Mr Kors completed a Delayed Incapacity Questionnaire, which described the injury as follows:

Was entering car from drivers door to remove interior. As I was getting in hit head hard forcing head backwards & down felt pain in neck but arm problem did not come to next day. Excruciating pain.

[6] On 30 October 2007, Dr John Petrie, Rheumatology and Physical Medicine Specialist, reviewed Mr Kors. Dr Petrie diagnosed constant pain radiating down the arm on the right-hand side; and reported that "this is quite different from his fibromyalgia pain and I believe is a separate problem entirely".

[7] Mr Kors was certified as unfit to work and he began receiving weekly compensation.

[8] On 11 December 2009, Dr James Hegarty, Consultant Clinical Psychologist, reported:

- Mr Kors reported problems do not match the severity of his injuries. This is something that has been commented on by several assessors.
- In terms of brain injury, the injuries described by Mr Kors would be technically classified as "minimal" or "mild" at most.
- A series of mild head injuries such as those described by Mr Kors does not result in significant disability. The scientific literature is clear on this.
- Normally no ongoing disability would be expected following a series of injuries such as those described by Mr Kors:

- There is robust evidence from previous assessments of Mr Kors' purposeful under performance on testing.
- During the current assessment there was overwhelming evidence that Mr Kors' responses on a number of neuropsychological measures were artificially low, and the result of intentional under performance.
- Due to the nature, timing, and variety of assessment measures used the current findings cannot be explained by the experience of fatigue, anxiety, or low mood. Nor can they be explained by the presence of a severe brain injury.
- Similarly, the presence of a somatoform or conversion disorder would not be sufficient to explain Mr Kors' performance on tests of symptom validity.
- Overall, the objective information relevant to the severity of Mr Kors' injuries such as no reliable record of loss of consciousness, no record of PTA, or GCS, no abnormalities seen on a brain scan, and the accidents as described do not support the presence of a long term severe disability. The only reliable objective evidence we have of his subjective reports of disability (psychometric testing) show evidence of purposeful under performance and dissimulation.
- I can see only two possibilities. That Mr Kors has reported symptoms and disability for some financial and/or psychological gain, or; he has exaggerated and produced symptoms in order to be taken seriously and receive treatment for some legitimate distress. He strongly denied this latter possibility when I put it to him.
- If Mr Kors does suffer from any legitimate distress my professional opinion, based on the information at hand, is that this would be more likely to be psychological in nature rather than due to any identifiable physical trauma.

[9] On 15 February 2010, Dr Victor Hadlow, Orthopaedic Specialist, having attended Mr Kors, reported:

1. The primary reason for the client's current incapacity is longstanding fibromyalgia or chronic pain syndrome aggravated by a minor neck sprain and blow to the head on 25 May 2007.
2. The musculoskeletal aspects of the injury are now spent and there is no evidence of disability in the cervical spine nor in the right upper limb. Thus, it is not felt, from a musculoskeletal assessment, that the disabilities suffered are causally linked to the ACC-covered injury under the claim.
3. Under normal circumstances, the effects of such a neck sprain would be spent after six to 12 months. Ongoing disability would appear to be psychiatric in nature and without organic basis.

[10] On 17 March 2010, the Corporation suspended the weekly entitlements of Mr Kors for the first time, on the basis that his current condition was no longer the result of his covered injuries. This decision was upheld at review.

[11] On 2 July 2010, the Corporation wrote to Mr Kors suspending entitlements for head injury and chronic regional pain syndrome. The suspension was on the basis that it was a “secondary condition and does not attract cover in its own right”. Mr Kors applied to review this decision. On 28 March 2011, the Reviewer concluded that the Corporation had erroneously suspended entitlements before formally considering the question of cover. The decision was quashed, and the Corporation was directed to make a decision about cover for brain injury and chronic regional pain syndrome.

[12] On 22 June 2011, the Corporation issued a decision accepting cover for reflex sympathetic dystrophy and diffuse brain injury as additional injuries caused by the 25 May 2007 accident.

[13] On 22 June 2011, the Corporation also issued a decision that provided that Mr Kors was not eligible for weekly compensation or other entitlements relating to the new covered injuries. Mr Kors lodged an application to review this decision. The review was not set down for hearing within the required timeframes, and Mr Kors was deemed to have a decision in his favour as a result. Weekly compensation was reinstated.

[14] On 17 April 2016, Dr Ross McCormick, Impairment Assessor, completed a Whole Person Impairment Assessment in respect of Mr Kors. Dr McCormick considered four covered accidents. He determined that Mr Kors had an impairment rating of 13%, which included 7% whole person impairment due to the 2007 accident. In respect of the 2007 accident, Dr McCormick found:

0% whole person impairment due to his Reflex Sympathetic Dystrophy ... 0% cervicothoracic spine impairment ...

This analysis argues to me that although most of his post-concussion brain impairments are now almost certainly resolved he should still receive a May 2007 injury rating for his tinnitus, and for his hyperacusis leading to avoidance of noisy situations. This will impact on his ability to socialise in crowds.

Consequently I assign his 2% whole person tinnitus rating to his 2007 accident and 5% of his emotional and behavioural rating to his hyperacusis. This is a 7% whole person neurological impairment due to his May 2007 accident.

Mr Kors has total 7% whole person impairment due to his May 2007 accident, combine 0% spine, 0% Reflex Sympathetic Dystrophy and 7% neurological.

[15] In 2017, the Corporation investigated whether Mr Kors should have cover for his chronic pain as a mental injury.

[16] On 7 June 2017, Dr Greg Finucane, Psychiatrist, completed a mental injury assessment and diagnosed a pain disorder and factitious disorder. Dr Finucane's report stated:

The major consequence of the high number of injuries Mr Kors has sustained over the years is the chronic pain. His putative mild TBIs were all very mild indeed and not plausibly the cause of his ongoing difficulties. ...

There is no longer a plausible connection between a putative mild TBI or series of TBIs and the current mental condition. His mental condition appears to have arisen out of a decompensation in September 2007 which was due to various factors, including pain and work stress, but not directly due to any TBI or to any specific injury.

[17] On 7 July 2017, an External Medical Multi-Disciplinary Panel (comprising a Specialist Physician/Psychiatrist, a Pain Physician, a Neurologist and an Orthopaedic Surgeon) reported on the relationship between Mr Kors' current diagnoses and the accident of May 2007:

The Panel refers to multiple reports, but particularly James Hegarty's, as to why the accident of 2007 and subsequent head injuries are not consistent in any sense with his current distress and symptoms. The Panel notes the lack of loss of consciousness, no period of post-traumatic amnesia, the long period of delayed complaint of symptoms, the normal brain MRI, the lack of any pattern of deficit on multiple neuropsychological tests and the lack of mechanism - none of the accidents was of a nature that would be associated with brain damage to produce a cumulative concussion syndrome - such as seen in rugby or American Football players who collide at high speeds and with significant kinetic contact. No accident that Mr Kors endured with regards to his head injuries is outside of the norm for a mechanic or an unlucky/clumsy person working in confined spaces. There is no literature to support such low force injuries leading to the panoply of symptoms and disability that he describes.

In addition to the lack of a positive explanation, there is as noted [earlier] a highly consistent negative explanation - malingering, which better explains the situation, especially the inconsistencies of his testing and what is demonstrated by his own writing which is detailed, highly organised, directed and uses jargon and technical expressions in a generally reasonable if not always purely correct

fashion. Any errors he makes are not consistent with deficits of memory or logic, but a lack of clinical experience, understanding and insight into his self-state.

[18] On 1 September 2017, the Corporation declined cover for chronic pain as a mental injury.

[19] On 5 September 2017, the Corporation again suspended entitlements on the basis that the covered injuries were not the cause of Mr Kors' ongoing symptoms and incapacity for work. He applied for a review. At the review hearing on 14 February 2018, the Corporation's decision was quashed by consent. The Corporation was directed to: (1) refer Mr Kors to appropriate specialists for assessment, comment and opinion on whether his ongoing symptoms and incapacity were causally related to his covered neck sprain, mild head injury and CRPS of May 2007; (2) then issue a new decision on Mr Kors' entitlement to weekly compensation, treatment, and social and vocational rehabilitation; and (3) in the interim, reinstate and backpay Mr Kors' entitlements from when they were suspended (5 October 2017).

[20] On 3 April 2018, Mr Ron Dick, Neuropsychologist and Clinical Psychologist, reported:

The cognitive deficits as demonstrated with this current assessment cannot be considered to be the direct result of the covered injury dated 29 May 2007 or any other concussion injuries. ...

The activities that Richard currently engages in and his presentation does not support the long-term and enduring impairments that he presents with, especially given that the head injuries would have been mild and were unwitnessed and self-reported.

[21] On 13 March 2019, Dr Peter Wright, Neurologist, reported:

Richard does not suffer any disease related to his index accident, despite his strenuous effort to state otherwise ...

He has pre-existing chronic back pains. He has a restricted range of neck movements.

I have detected no compelling evidence of a brain injury having occurred. He did reportedly see stars and felt dazed which is potentially compatible with a minor concussion, but is not of any additional significance. He did knock his head, in an accident very unlikely to injure the brain more than minimally and

transitory effects. He did reportedly then bang it again up to about 10 times, none significant in their force, and together not able to cause his presenting problems.

He reports face, neck and arm pains which do not represent a pattern of neurologic injury.

His presentation is not based on organic disease. The evidence is the following

1. He demonstrated non-valid performance on serial neuropsychology testing attempts, largely invalidating his ability to present a reliable history and necessitating extreme care in interpreting both history and examination. Such non-valid performances are not related to any injury to the brain, and such an assumption is completely invalid.
2. He has pre-existing evidence of presenting with non-organic features in Australia.
3. He has never had any clinical evidence for complex regional pain syndrome, and his pain syndrome is not based on an organic pattern of structure and function
4. There is a clear mismatch, previously noted, in his own letter writing, which was detailed, highly organised, directed, using jargon and technical expressions which was inconsistent with proposed cognitive difficulties. ...

Conclusively he has non-organic symptoms, and their relationship to stressors is unknown. This tendency pre-existed the index accident.

[22] On 11 June 2019, Dr Gil Newburn, Mr Kors' treating Neuropsychiatrist, reported:

The most prominent issue today was his pain, involving in particular his right knee ...

Richard's chronic health condition is a result of his injuries, which will have lifelong consequences and require lifelong treatment.

[23] On 13 September 2019, Dr Saad Anis, Interventional Pain Specialist, reported:

On examination, Richard has no evidence of any CRPS injury of his right hand or arm. He had normal power, muscle strength and reflexes. He had some mild numbness to pinprick on the right hand, but there is certainly no evidence of significant sensory, vasomotor, sudomotor or trophic changes as would be required according to Budapest criteria for CRPS. ...

I see no evidence of a significant pain injury related to the index ACC accident. He previously had a history of fibromyalgia and chronic low back pain. This would indicate that his current pain on the balance of probabilities is much

more likely to be a central sensitization type of pain related to these pre-existing conditions.

[24] On 30 December 2019, the Corporation again suspended entitlements on the basis that the medical evidence showed that Mr Kors' current conditions were no longer the result of his personal injury of 25 May 2007.

[25] On 16 June 2020, review proceedings were held. On 6 July 2020, the Reviewer dismissed the review, on the basis that there was a near-unanimous medical consensus that Mr Kors' covered injuries were not a material cause of his present problems.

[26] On 12 July 2020, a Notice of Appeal was lodged.

[27] On 15 April 2021, Dr Alison Drewry, Principal Clinical Advisor, commented:

The concepts of "impairment" and "disability" are different. Impairment is objective and disability depends on the context. In the case of amputation of a left little finger, the "impairment" rating (5% of the whole person) is the same for a concert pianist and a gardener. However, the "disability" for a concert pianist would be greater than for a gardener ...

[28] Dr Drewry also commented on the whole person impairment assessment completed by Dr McCormick and noted:

A Whole Person Impairment assessment undertaken in 2016 has no relationship to a subsequent decision to suspend entitlements in 2019 on the basis that the covered injuries are no longer playing a role in a claimant's ongoing condition. An Impairment Assessment is based on the information available 'on the day'. Similarly, the notion of the 'permanence' of the impairment is based on the information available on the day, but the 'impairment rating' does not have any diagnostic or prognostic value and the 'WPI' may increase or decrease over time.

Dr McCormick undertook an impairment assessment in 2016 and found 7% WPI due to 'tinnitus and hyperacusis' attributable to the covered injury in 2007. Subsequently, Mr Kors has been assessed by a psychiatrist, a neurologist, and a neuropsychologist who all concluded that Mr Kors' current symptom reports have no relationship to the injury in 2007. The consensus of the specialists is that the symptom reports including 'tinnitus and hyperacusis' are unreliable and not corroborated by Mr Kors' function in day to day life, or examination and investigations. These opinions mean that Mr Kors' reports of tinnitus and hyperacusis cannot be taken at face value and are not rateable as 'permanent impairments'. I expect that if the current clinical information had been available

to Dr McCormick in 2016 he would have found that the reports of tinnitus and hyperacusis were unlikely to be genuine and he would not have found any impairment attributable to the May 2007 injury. The WPI would have been 0%. Similarly, if a permanent impairment assessment were undertaken now with the available clinical information a trained medical assessor would find the WPI = 0% in relation to the 2007 covered injuries.

The relevance of the two year time lapse is that a WPI rating has no independent medical ‘value’ as it is based on the information available at the time of the assessment: there is no guarantee of permanence. In Mr Kors’ case, over the two years more clinical information accumulated to support that there was no impairment related to the covered injuries in 2007.

Relevant law

[29] Section 67 of the Act provides:

A claimant who has suffered a personal injury is entitled to 1 or more entitlements if he or she—

- (a) has cover for the personal injury; and
- (b) is eligible under this Act for the entitlement or entitlements in respect of the personal injury.

[30] Section 117(1) of the Act provides:

The Corporation may suspend or cancel an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.

[31] In *Furst*,¹ Barber DCJ stated:

[13] ACC must have a “sufficient basis before it is not satisfied that a claimant is entitled to continue to receive the entitlement”. If the position is uncertain, “then there is not a sufficient basis. The “not satisfied” test is not met in these circumstances.” *Ellwood v the Corporation* [2007] NZAR 205. The “not satisfied” test requires a positive decision equivalent to being satisfied that there is no right to entitlements. This test would not be met where the evidence was in the balance or unclear: *Milner v the Corporation* (187/2007).

[14] Section 26 of the Act defines “personal injury” as physical injuries suffered by a person. Personal injury caused “wholly or substantially” by a non-work gradual process, disease, or by the ageing process is excluded. 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 injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered: *McDonald v ARCIC* [2002] NZAR 970 at 26.

¹ *Furst v Accident Compensation Corporation* [2011] NZACC 379.

[15] There must be a causal nexus between the covered injury and the condition of the claimant for which entitlements were sought at the time of ACC's decision to suspend or decline entitlements: *Milner*.

[16] Causation cannot be established by showing that the injury triggered an underlying condition to which the appellant was already vulnerable, or that the injury accelerated the condition which would have been suffered anyway: *Cochrane v ACC* [2005] NZAR 193.

[17] The question is whether the evidence as a whole justifies a conclusion that there is a nexus between injury and incapacity: *Cochrane*.

[32] In *Evans*,² Henare DCJ stated:

[26] ...the correct approach in determining whether a claimant is no longer entitled to an entitlement or entitlements is to consider whether the two components of s 67 continue to be satisfied. In other words, entitlements can only be suspended under s 117(1) if either of the two requirements in s 67 are not, or are no longer, met.

[27] With regard to the requirement under s 67(a) this is most often manifested when the covered injury is recorded as a sprain or a strain and the entitlement sought is for a more specific injury such as a rotator cuff tear or lumbar disc prolapse. In such situations, a causal inquiry is necessary to determine whether the tear or prolapse was indeed related to the injury for which cover was granted or whether the injury for which the entitlement is required occurred independently of the covered injury. Likewise, it is well established that a claimant cannot rely upon a non-covered injury to support a claim for entitlements, and in the absence of cover no entitlements can therefore flow.

[28] In contrast where there is no dispute over the extent of cover the question becomes whether the claimant is still eligible for a particular entitlement or entitlements pursuant to s 67(b). If the covered injury has resolved the claimant will for example no longer be eligible for weekly compensation as he or she is "no longer 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" pursuant to s 103(2) of the Act.

[33] In *Osborne*,³ Christiansen DCJ stated:

[34] ... it is not necessary for ACC to definitively establish what the cause of the ongoing pain was, as part of the causation analysis; and that it is clear from the medical evidence available that apparent pain sensitisation/pain syndromes have been identified pre the 11 March 2014 injury and that there are in fact other explanations for Mr Osborne's current condition which do not implicate the injury for which he has cover.

² *Evans v Accident Compensation Corporation* [2018] NZACC 53.

³ *Osborne v Accident Compensation Corporation* [2018] NZACC 147.

[34] In *Rakoczy*,⁴ Beattie DCJ stated:

[21] ... The concept of impairment is different from that of disability. Impairment is defined in Section 6 of the Act as meaning:

“A loss, loss of use, or derangement of any body part, organ system or organ function.”

“Disability” is no longer a word which is involved in the Accident Compensation Lexicon. In the former Acts of 1992 and 1998 “disability” was defined as meaning:

“Any restriction or lack of ability to perform an activity in a manner or within a range considered normal for the person, if the restriction or lack results from impairment.”

Discussion

[35] The issue in this case is whether the Corporation correctly suspended Mr Kors’ entitlements to weekly compensation on the grounds that his current conditions were no longer the result of a personal injury sustained on 25 May 2007.

[36] Mr Kors submits that his medical position remains unchanged from the Whole Person Impairment Assessment of Dr Ross McCormick dated 17 April 2016; and, if there is no medical change, then no entitlement change can be applied to the appellant. The appellant also relies on Dr Gil Newburn, Neuropsychiatrist, who commented that Mr Kors’ chronic health condition is a result of his injuries, which will have lifelong consequences and require lifelong treatment.

[37] The Court acknowledges the submissions and evidence presented on behalf of Mr Kors. However, the Court notes the following relevant considerations.

[38] First, the Corporation has the right to suspend an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.⁵ The Corporation must have a sufficient basis for its decision to suspend, as where it finds that there is not a causal nexus between the covered injury and the condition of the claimant for which entitlements were sought at the time of the decision to suspend.⁶

⁴ *Rakoczy v Accident Compensation Corporation* [2005] NZACC 189.

⁵ Section 117(1) of the Act.

⁶ *Furst v Accident Compensation Corporation* [2011] NZACC 379, [13] and [15].

[39] Second, there is a substantial body of medical opinion supporting the Corporation's decision that there was not a causal nexus between Mr Kors' covered injury of 25 May 2007 and his ongoing condition. This expert opinion has repeatedly pointed to the substantial mismatch between the nature of Mr Kors' injuries sustained in the accident of 25 May 2007 and the ongoing disabilities reported by him, and assessed that these are more likely to be attributed to other causes of a non-organic or psychiatric nature. This expert opinion is conveyed in the reports of:

- Dr James Hegarty, Consultant Clinical Psychologist (11 December 2009): he noted that the severity of Mr Kors' injuries, such as no reliable record of loss of consciousness, no record of PTA, or GCS, no abnormalities seen on a brain scan, and the accidents as described, did not support the presence of a long-term severe disability; and that any legitimate distress was more likely to be psychological in nature rather than due to any identifiable physical trauma.
- Dr Victor Hadlow, Orthopaedic Specialist (15 February 2010): he noted that the musculoskeletal aspects of the injury were spent and there was no evidence of disability in the cervical spine or in the right upper limb; and that the ongoing disability appeared to be psychiatric in nature and without organic basis.
- Dr Greg Finucane, Psychiatrist (7 June 2017): he reported that there was no longer a plausible connection between a putative mild TBI or series of TBIs and Mr Kors' current mental condition; and that this appeared to have arisen out of a decompensation in September 2007 which was due to various factors, including pain and work stress, but not directly due to any specific injury.
- An External Medical Multi-Disciplinary Panel (Dr Chris Kenedi, Specialist Physician/Psychiatrist; Dr Alan Farnell, Pain Physician; Dr Rosamund Hill, Neurologist, and Mr Jon Cleary, Orthopaedic Surgeon) (7 July 2017): they reported that there was no literature to support such

low-force injuries leading to the panoply of symptoms and disability that Mr Kors described.

- Mr Ron Dick, Neuropsychologist and Clinical Psychologist (3 April 2018): he reported that the activities that Mr Kors currently engaged in and his presentation did not support the long-term and enduring impairments that he presented with, especially given that the head injuries would have been mild and were unwitnessed and self-reported.
- Dr Peter Wright, Neurologist (13 March 2019): he reported that Mr Kors had non-organic symptoms, that their relationship to stressors was unknown, and that this tendency pre-existed the index accident.
- Dr Saad Anis, Interventional Pain Specialist (13 September 2019): he reported that there was no evidence of a significant pain injury related to the index ACC accident; and that his current pain was much more likely to be a central sensitization type of pain related to his pre-existing conditions of fibromyalgia and chronic low back pain.

[40] The Court notes the contrary view expressed by Dr Gil Newburn, Neuropsychiatrist. He reported on 11 June 2019 that Mr Kors' chronic health condition was a result of his injuries, which would have lifelong consequences and require lifelong treatment. However, the Court finds that the body of expert opinion, drawing on a range of medical expertise and in-depth analysis, substantially outweighs the contrary view of Dr Newburn.

[41] Third, the Whole Person Impairment Assessment, provided by Dr Ross McCormick on 17 April 2016, did not prevent the Corporation from exercising its right to suspend Mr Kors' entitlements. Dr Ross assessed Mr Kors as having, as at April 2016, an impairment rating of 13%, including a 7% neurological rating for tinnitus arising out of his 2007 accident and emotional and behavioural issues arising out of his hyperacusis. Dr Ross noted that "reading his available records and discussing Mr Kors' situation with him and his advocate suggests that Mr Kors' condition is permanent and stable according to the ACC definition". In relation to

Dr Ross' report, the Court refers to the comments by Dr Alison Drewry (at paragraphs [27]-[28] above), and notes that:

- the focus of Dr Ross' report was different from that of the Corporation's decision to suspend Mr Kors' entitlements. Dr Ross provided a report as to whether and to what extent Mr Kors had impairment as at April 2016. The Corporation suspended Mr Kors' entitlements in December 2019 on the basis that the medical evidence showed that his current conditions were no longer the result of his personal injury of May 2007.
- Dr Ross' report of April 2016 was based his assessment of the information available at the time of the report. By the time that the Corporation made its decision of December 2019, it had to hand the further information and assessments of Dr Greg Finucane (Psychiatrist), An External Medical Multi-Disciplinary Panel, Mr Ron Dick (Neuropsychologist and Clinical Psychologist), Dr Peter Wright (Neurologist), and Dr Saad Anis, (Interventional Pain Specialist). The result was that, by the time of its decision, the Corporation had a more than sufficient basis to decide that it was not satisfied that Mr Kors was entitled to continue to receive his entitlements.

Conclusion

[42] In light of the above considerations, the Court finds that the Corporation correctly suspended Mr Kors' entitlements to weekly compensation on the grounds that his current conditions were no longer the result of a personal injury sustained on 25 May 2007.

[43] The decision of the Reviewer of 6 July 2020 is therefore upheld. This appeal is dismissed.

[44] I make no order as to costs.

A handwritten signature in black ink, appearing to read "P R Spiller". The signature is written in a cursive style with a large initial "P" and "R".

P R Spiller
District Court Judge

Solicitors: Ford Sumner for the respondent