

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2021] NZACC 28 ACR 323/19

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| UNDER | THE ACCIDENT COMPENSATION ACT 2001 |
| IN THE MATTER OF | AN APPEAL UNDER SECTION 149 OF THE ACT |
| BETWEEN | JOSHUA WILLIAMS Appellant |
| AND | ACCIDENT COMPENSATION CORPORATION Respondent |

Hearing: 26 November 2020
Heard at: Dunedin/Otepoti District Court

Appearances: Mr E Williams, advocate for the appellant
 Mr I Hunt for the respondent

Judgment: 4 February 2021

**RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Incapacity – section 103 Accident Compensation Act 2001]**

[1] On 19 February 2019, the Corporation, having previously granted cover to the appellant in respect of an injury, namely a foot contusion, declined to provide backdated weekly compensation for loss of earnings, on the basis that a causal link between the condition causing incapacity and the appellant’s covered injury was not established.

[2] The issue on this appeal is whether this decision was correct.

Background

[3] The appellant sustained an injury to his right foot on 28 September 2018 when, as described in an ACR45 form submitted to the Corporation, the fork of a forklift dropped onto his right foot.

[4] On 28 September 2018, the appellant who then was 26, presented at the emergency department of Dunedin Hospital with a crush injury to his right foot. The notes say:

1300 today. Foot was crushed by the fork of the forklift whilst preparing a transport load, Joshua was wearing steel capped shoes at the time which protected his distal foot. He feels pain over the entire dorsum of the foot (which was not covered).

...

No signs of distress.

Able to weight bear and walk as normal.

Tender of proximal part of dorsal right foot no ankle joint tenderness.

Full range of movement at right ankle (minimal decrease in range compared to other foot due to swelling).

Reduced sensation of right dorsum of foot.

...

O/E (on examination)

Alert and orientated.

Not tender lat/med malleolous.

Not tender prox tib/fib.

Not tender in ankle on squeeze test.

Not tender or swollen high ankle.

Not tender base of 5th.

Mildly swollen across mid foot and tender here.

[5] Cover, sought for the injury described as “contusion of other and unspecified parts of foot ... right”, was granted by the Corporation on 1 October 2018.

[6] The ACC claim form submitted by Southern DHB on 1 October noted work capacity of eight hours per day from 28 September 2018 with restrictions and noted “may need to rest R foot”. A return to work on 3 October 2018 was noted.

[7] He was seen again at the emergency department on 4 October. The notes included:

Crush injury to foot 6/7 ago, seen in ED, x-ray – no fracture.

Swelling has improved since.

Dull pain in middle of foot mostly in the evening.

Can walk without pain during the day ...

Imp; R mid foot contusion, improving.

Plan:

D/C home.

Foot elevation.

Paracetamol PRN.

[8] At the time of the accident the appellant was employed as a truck driver at Pacific Auto Parts. He returned to work when the medical certificate ran out on 3 October 2018. His employment was terminated by mutual agreement with his employer on 18 October 2018.

[9] The appellant attended Dr Stokes, GP, on 6 December 2018. Dr Stokes' notes include the following:

Work injury in October.

Saw A & E.

Patient has not worked since.

No ACC18.

x-rays nothing abnormal discovered.

Patient has pain radiating down shin.

Observations and examination: tender upper tibia.

Impression: neuroma.

Plan: ACC18 covering time off.

Sadly this could have been acted upon a lot earlier.

...

[10] Dr Stokes completed an ACC18 medical certificate on 6 December 2018, noting that the appellant was fully unfit for work from 13 October 2018 until 11 January 2019 because "pain in leg stopping work".

[11] Having received the medical certificate, the Corporation obtained an opinion from Ms Nichols, Physiotherapist.

[12] She reviewed the appellant's care, and in her opinion and recommendations she included the following:

... does the covered injury cause incapacity?

No. A causal link between the identified cause of incapacity (neuroma) and the covered injury has not been established.

...

The GP notes record that the client has not worked since the accident however the medical certification does not begin from the injury date, but from approximately two weeks later. This is not considered to be consistent with the nature and expected recovery of the contusion/crush injury sustained which would have had maximal impact acutely, with reducing dysfunction as time passed/healing occurred.

The signs and symptoms identified by the GP on 6/12/2018 are not consistent with those of the injury covered on this claim. A causal link between the condition causing incapacity and the injury covered on this claim is not supported.

...

It appears that the covered foot contusion injury has resolved. Given the nature of the injury it is expected that the effects would resolve within approximately 6 weeks of the accident and the GP assessment findings of 06/12/2018 relate to a body site and symptoms not covered by this claim.

[13] On 17 February 2019 the appellant again saw Dr Stokes. His notes include:

Patient has had claim accepted. Patient has case manager. Patient has ongoing pain up leg not been referred to specialist not physiotherapy.

Patient has not come back for review as planned in January.

Due to delay in time I do not feel able to sign medical certificate back 5 weeks.

Observations and examination: tender dorsum of right foot.

Impression: patient delaying recovery by not coming back for planned reviews.

Plan: patient needs to have full assessment and treatment plan.

Asked case manager to contact me.

ACC18 two hours a day.

Physiotherapy for input.

[14] In a later entry on the same day Dr Stokes recorded:

Contact with ACC case manager.

Due to patient delaying presentation they are going to decline his time off.

I have to agree with that decision, patient has made little if any effort to aid recovery or keep in contact with GP.

[15] On 19 February 2019, the Corporation issued its decision that the appellant was not entitled to weekly compensation because, having assessed the medical information available, there was no causal link between his covered injury and incapacity to work.

[16] On 31 May 2019, Dr Stokes recorded:

Telephonic consult.

Father concerned that ACC have stopped this file.

Main issue appears to be the original injury was only for the foot but when I saw him in Dec Josh was complaining of leg pain so ACC declined claim due to different body sites.

Plan: Advised for father to come in with Josh to discuss case and see way forward.

[17] There is a further entry for 13 June 2019:

Patient here with dad.

ACC18 stated leg rather than foot.

Patient did have injury to right shin at the time.

ACC45 did not register shin injury.

Patient did present 3 months after injury.

ACC18 amended.

[18] The amended ACC18 form dated 13 June 2019 stated that the appellant was unfit for work from 13 October 2018 to 11 January 2019 due to foot, ankle and leg pain.

[19] The certificate also noted under diagnosis details:

Please add contusion right shin hospital notes confirm this.

The Appellant's Submissions

[20] Mr Eric Williams, the appellant's father, submitted that the Dunedin Accident and Emergency Department at which his son attended on two occasions was not the best place for an exact diagnosis as no bones were broken.

[21] His son found the pain in his right foot bearable but was not able to put weight on it for long periods of time. He tried returning to work on 13 October 2018 but lasted only an hour at his pre-injury duties.

[22] The appellant did not go to work after that day and was asked to return to work to discuss his future on 18 October 2018. The appellant told his employer that his foot was too sore to work and that he was seeking weekly compensation from ACC while his injuries healed.

[23] Mr Williams senior said:

The owner of Pacific Auto Parts (Joshua's employer) told him that if he went on ACC weekly comp. that his job was gone. I was present at that meeting and can state that Joshua's employer accused him of theft at that time. The theft issue was settled that day and Joshua's employment was terminated at the same time. Joshua's employment was terminated and not a mutual agreement.

[24] He said that Joshua's holiday pay did not last more than the initial two weeks, so he did not have any money to see his GP back at Mossburn. He said:

He is a very strong willed person, and like a lot of rural males, will only go to their doctor when absolutely necessary.

[25] He said:

This is why Joshua did not go to his GP until 6 December 2018. At this time Joshua could afford to go to the doctor and he was still suffering some pain and swelling. The bruise was still visible at this time. Dr Stokes examined Joshua on the 6th and in his opinion Joshua was unable to work from the last day he worked (13 October 2018) for three months.

[26] He notes that the Corporation did not contact Dr Stokes and concentrated on the mention of the word "neuroma".

[27] Mr Williams says:

Joshua did not get a diagnosis of neuroma from Dr Stokes and on 13 June 2019 Dr Stokes wrote another ACC18 medical certificate confirming pain in the leg, shin and foot.

[28] He says that if the Corporation were not satisfied with Dr Stokes' assessment of Joshua they should have sent him to another doctor for examination.

The Respondent's Submissions

[29] Mr Hunt submits that the Reviewer has appropriately summarised the background in this case, and it is to be noted that subsequent to the Corporation's decision declining weekly compensation, cover was sought and granted on 1 August 2019 for an additional injury namely an "abrasion lower leg – side: right". Mr Hunt refers to the detailed analysis of the available medical evidence by Ms Nichols, and it was her opinion that the appellant was not incapacitated in any relevant sense as a result of the right foot contusion injury.

[30] Mr Hunt notes that in Dr Stokes' record of 19 February 2019, there is this:

Patient has not come back for review as planned in January.

Due to delay in time I do not feel able to sign medical certificates back 5 weeks.

[31] He also notes the entry, later on 19 February after consultation with the ACC case manager, states:

Due to patient delaying presentation they are going to decline his time off.

I agree with that decision, patient has made little if any effort to aid recovery or keep in contact with GP.

[32] Mr Hunt refers to a number of cases relating to s 103 of the Act on the question of determining incapacity. In *Knight v Accident Compensation Corporation*, Judge MacLean said:¹

¹ *Knight v Accident Compensation Corporation* [2016] NZACC 174 at [67], citing *Reid v Accident Compensation Corporation* DC Wellington 222/2000, 28 August 2000 at [36]; and at [58], citing *Jamieson v Accident Compensation Corporation* DC Wellington 80/2004, 29 March 2004 at [31].

Where retrospective certification is to be accepted, this Court has referred to the need for a clear picture of incapacity which has continued throughout the period in question.

...

Generally what the Court is seeking in respect to retrospective certification is the need for a clear picture of an incapacity which has continued throughout the period in question.

[33] Mr Hunt notes that from the outset the appellant was able to weight bear as normal.

[34] He submits that the appellant has not shown for the purposes of s 103(2) that he was unable because of his personal injury to engage in employment in which he was employed when he suffered the personal injury.

[35] Mr Hunt submits that the case is to be decided on the medical evidence, and none has been produced by the appellant that he had incapacity from the covered injury during the period this appeal is dealing with.

The Appellant's Submissions in Reply

[36] Mr Williams emphasised that the appellant tried to return to work on 13 October 2018 and could not, and that in the consultation over a month later on 6 December 2018, the appellant had pain radiating down his shin and the doctor's observation was "tender upper tibia" and at that consultation an ACC18 form was issued covering the appellant's time off.

[37] He submits, therefore, that when Dr Stokes submitted the ACC18 form in June 2019, he was sure that the appellant had incapacity over the relevant period to January 2019.

Decision

[38] There is no doubt that the appellant suffered a significant injury when his foot was crushed by the fork of a forklift on 28 September 2018.

[39] He was treated the same day at the Dunedin emergency department. No fractures were found, and he was discharged with a medical certificate to return to work on 3 October 2018.

[40] On 4 October 2018, he again attended at the emergency department where his injury was found to be improving.

[41] He tried to return to work on 13 October 2018 but lasted only an hour at his pre-injury duties.

[42] Then the matter is complicated by what might be described as a breakdown in his relationship with his employer, and we are told that his employer said that his job was gone if he went on to weekly compensation. There was also a theft issue which we are told was settled on 18 October 2018, and at the same time the appellant's employment was terminated.

[43] This narrative is not challenged by the Corporation.

[44] Although the comments attributed to the appellant's employer "that his job was gone" if he went on weekly compensation, if correct, are bizarre, as are the other matters that attended the appellant's employment termination, what does seem uncontested is that on 13 October when he tried to return to work he lasted only an hour at his pre-injury duties, and we are told he did not go to work after that day. We are also told that on 18 October 2018 during the meeting with his employer, his employer was told that the appellant's foot was too sore to work.

[45] We are then told that for two weeks after his employment was terminated he resided with his father before moving back to Mossburn and that he did not have any money to see his GP Dr Stokes.

[46] Dr Stokes finally saw him on 6 December 2018 and noted that he had pain radiating down his shin.

[47] At that consultation it was noted there was to be an ACC18 form "covering time off". Dr Stokes also added:

Sadly this could have been acted up a lot earlier.

[48] When the appellant next consulted Dr Stokes on 19 February 2019 the doctor noted:

Patient has not come back for review as planned in January.

Due to delay in time I do not feel able to sign medical certificate back 5 weeks.

[49] And under the heading 'impression' the doctor noted:

Patient delaying recovery by not coming back for planned reviews.

Plan: patient needs to have full assessment and treatment plan.

...

ACC18 two hours a day.

[50] Later that same day Dr Stokes' notes refer to a telephone consultation with the ACC case manager which says:

Due to patient delaying presentation they are going to decline his time off.

I have to agree with that decision, patient has made little if any effort to aid recovery or keep in contact with GP.

[51] The doctor's disappointment with what he perceived to be a less than proactive attitude on behalf of the appellant is understandable. However, that is a somewhat different issue from that of whether, for the purposes of s 103(2), the claimant was unable, because of his personal injury, to engage in employment which he was employed in when he suffered the personal injury.

[52] It is noted that as at the consultation of 19 February, Dr Stokes was prepared to sign an ACC18 form limiting the appellant's work to two hours a day. The doctor also recorded that he had "ongoing pain up leg" and that on examination he had a "tender dorsum of right foot".

[53] I find that these factors noted by Dr Stokes lead me to conclude that the appellant has established for the purposes of s 103(2), that he was unable because of his personal injury "to engage in employment in which he was employed when he

suffered the personal injury for the period” for which he is claiming, namely 13 October 2018 to 20 January 2019.

[54] I also note that in the middle of the period in question, namely on 6 December 2018, Dr Stokes found him unable to engage in the employment in which he was employed when he suffered the personal injury.

[55] As the evidence stands there appears to be nothing to suggest that the appellant did not engage in rehabilitation during this period. In the consultation of 6 December 2018, gabapentin was prescribed but no other rehabilitation.

[56] While it is accepted that had the appellant seen Dr Stokes in January 2019, more focused rehabilitation leading quickly to an earlier ability to work would doubtless have followed. However, the present claim before the Court relates to unfitness for work with an end date of 20 January 2019.

[57] I conclude that there is sufficient evidence in the form of Dr Stokes’ notes of the consultation on 6 December 2018 to show that as at that time, in the middle of the period in question, the appellant was unfit for work.

[58] Dr Stokes’ notes from 19 February 2019 strongly suggest the appellant should have been assessed again in January 2019 and that his failure to return for a review then has delayed his recovery.

[59] Had that missed consultation occurred, it is reasonable to have expected it to have occurred in early to mid January 2019 which would have approximately coincided with the end of the period for which the incapacity is claimed.

[60] Finally, it does not appear from Dr Stokes’ notes of 6 December 2018 that any rehabilitation was directed at that stage. Rather, the doctor prescribed analgesia.

[61] It follows therefore that the appellant has established on the balance of probabilities that for the period in question – 13 October 2018 to 11 January 2019 – he was unable to engage in employment in which he was employed when he suffered his personal injury.

[62] Accordingly, the appeal is allowed. The respondent's decision of 19 February 2019 is quashed, and the appellant is entitled to weekly compensation for the period 13 October 2018 to 11 January 2019.

[63] Should there be any issue as to costs, the parties have leave to file memoranda in respect thereof.



Judge C J McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch for the respondent