

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2021] NZACC 38

ACR 182/18

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	TYRONNE WHITE First Respondent
AND	OVATION NZ LTD Second Respondent

Judgment: On the papers

Appearances: D Tuiqereqere for the Accident Compensation Corporation
L Sugrue for the Second Respondent
Mr White, the First Respondent, did not appear

Judgment: 19 February 2021

RESERVED JUDGMENT OF JUDGE P R SPILLER
**[Work-related personal injury, gradual process personal injury and natural
justice – ss 20(2)(g), 28, 140 and 142, Accident Compensation Act 2001]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 11 May 2018. The Reviewer quashed the decision (dated 30 November 2017) of WorkAon (on behalf of Ovation NZ Ltd (“Ovation”)), declining cover for a work-related personal injury. The Reviewer issued a new decision, granting cover for a gradual-process condition secondary to an earlier injury covered by the Corporation. The Corporation was not

notified of the review hearing and so did not have the opportunity to attend and be heard.

Background

[2] On 11 May 2008, Mr White suffered an injury to his right hand/thumb when he punched a plate glass window. Mr White received cover and entitlements from the Corporation, including funding for surgical repair of his right hand. This repair involved a tendon repair which subsequently failed and required an extensor indicis transfer. The tendon transfer was successful, allowing Mr White to regain good thumb extension.

[3] In October 2017, Mr White was employed with Ovation as a process worker. At 7.00 am on 3 October 2017, Mr White was in his workplace hanging sheep. Whilst doing so, his right thumb suddenly stopped functioning. Later that same day, Mr White saw the company nurse and then a GP, Dr Tom James, who certified Mr White as unfit to work. Dr James understood that Mr White appeared to have ruptured his 2008 transferred tendon and certified the incapacity on this basis.

[4] Mr White applied for weekly compensation, based on the 2008 claim. On 11 October 2017, a Corporation officer spoke with Mr White and then obtained internal clinical advice on the application. The clinical advice read:

Analysis: Mr White ruptured his extensor pollicis longus on the right thumb in May 2008. The initial repair failed but subsequent tendon transfer was successful and Mr White returned to work as a meat processor. ACC has received an ACC18 from Mr White's GP stating he appears to have ruptured the tendon again. The case owner has contacted Mr White who described an incident lifting a sheep resulted in his thumb not working properly again and nerve like pain.

Conclusion: Given the time since Mr White's successful tendon transfer it is most likely (if the tendon has ruptured) it is due to the new incident and therefore a new claim should be lodged.

[5] On 11 October 2017, the Corporation wrote to Mr White to advise that his thumb condition was due to a new injury and not the 2008 injury. As such, the Corporation informed Mr White that he was not entitled to weekly compensation on

the 2008 claim. The Corporation recommended that Mr White and his GP lodge a claim for cover for the new injury.

[6] Also on 11 October 2017, the Corporation emailed Dr James and advised:

I've just spoken with Tyrone, he has confirmed that his hand has been fine since 2008, until October 2017. I asked if there had been any new injury event or accident, and Tyrone advised that he had been doing his normal work (meat worker, Ovation) and the sheep he was working with kicked out at his hand, and then as he hung the sheep he felt a 'jolt' and 'nerve' type pain and lost function in the thumb. He says that the loss of function differs a bit from what it was like in 2008.

[7] On 17 October 2017, a claim for cover was lodged for a rupture of a tendon of the right thumb following the hanging up of a lamb leg on 3 October 2017. The claim was managed by WorkAon on behalf of Mr White's accredited employer, Ovation.

[8] Ovation disputed the claim, contending that the condition related to the previous 2008 covered injury. The employer checked CCTV footage of the workplace for the material time, and advised WorkAon that there was no noticeable event or accident on 3 October 2017.

[9] On 19 October 2017, Mr White was referred by his GP to Ms Jennifer Hicks, orthopaedic surgeon, for treatment. Ms Hicks diagnosed an exterior pollicis avulsion injury of the distal phalanx in the right thumb (a "mallet injury"), and treated this with extension splitting for eight weeks, with success.

[10] On 7 November 2017, WorkAon wrote to Ms Hicks, posing a number of questions to be answered, including: "can you please advise whether you consider this to be a new acute injury with no relation to the surgeon transfer surgery?"

[11] On 15 November 2017, following her examination of Mr White, Ms Hicks responded to WorkAon to advise that the diagnosis for the thumb condition was a mallet injury and that the injury was new. Ms Hicks further stated that there "is no relation to the original surgery, which is clinically intact". Ms Hicks further explained: "This is actually a relatively straightforward problem, unfortunately his

previous injury rather distracted people from the splinting that was required this time”.

[12] WorkAon subsequently sought advice from its internal medical advisor, Dr Burgess, an occupational medicine specialist. On 30 November 2017, Dr Burgess assessed that the mallet thumb was a gradual process condition secondary to the 2008 injury. Dr Burgess stated that there was “no evidence of recent trauma - swelling or bruising which would be expected for a sudden traumatic mallet injury”. Dr Burgess added that “the initial history appears to be that the tendon failed without a specific traumatic event”. Dr Burgess assessed that the more plausible mechanism for the injury was the 2008 injury.

[13] On 30 November 2017, WorkAon issued its decision declining Mr White’s claim for cover. The decision letter stated:

The medical evidence on file does not confirm that a traumatic event occurred on 3/10/17 and therefore it is considered that your current condition is more plausibly related to your 2008 non work related thumb tendon injury.

[14] On 6 December 2017, Mr White lodged a review from the decision by WorkAon.

[15] On 15 December 2017, Ms Hicks wrote to WorkAon, disagreeing with its decision. Ms Hicks stated:

We have had a message from Tyrone saying that his cover has still been declined by WorkAon. I would be advising Mr White that he should be taking this up with legal advisor, and so I think it would be very difficult to claim that a mallet thumb was sustained as part of a pre-existing injury. The question as to when the injury occurred, when clearly that is something that Tyrone needs to address, but as far as I can see, this is clearly post-traumatic injury dating from more recently than his original tendon transfer.

[16] On 19 December 2017, Dr Burgess provided a response to Ms Hicks’ letter. He stated that the diagnosis of mallet thumb was clear, but the cause was not. Dr Burgess stated:

Based on the original statements and examination carried out closer to the development of the mallet thumb, I would conclude that there was no significant

event. Given this and the history of previous mallet deformity with surgical repair, it would appear more plausible that a previous injury has caused a loss of integrity of the extensor tendon, and that with repetitive use over time, he has developed a mallet deformity. This would fit with a gradual process injury secondary to a previous covered injury pathology- ACC Act 20(2)(g).

[17] On 7 February 2018, Ms Hicks wrote to Mr White's GP in relation to the treatment and management of Mr White's mallet thumb injury. She noted that splinting has been provided for the injury and that "as expected, Tyrone's IP joint extension is now recovering as would happen to a mallet injury". Ms Hicks further stated:

[Mr White] is now nine weeks down the line from having started mallet splinting for an injury to his right thumb, after there was some confusion about whether or not this related to his previous tendon transfer. I have pointed out to him that I would support him fully in any disagreement ... as his recovery has proved that this was an injury unrelated to the original tendon transfer.

[18] On 20 April 2018, a review hearing was conducted. Mr White and Kevin Morrell for Ovation provided evidence, and counsel for WorkAon attended by telephone. The Corporation had not been advised of the hearing and so was not represented.

[19] On 11 May 2018, the Reviewer issued a decision which concluded:

The weight of the evidence supports a finding that the mallet thumb was more likely caused by a gradual process consequential on the 2008 accident. This means that cover is granted for mallet thumb in relation to Mr White's 2008 non-work accident claim under section 2(2)(g) of the Act.

[20] On 8 June 2018, a Notice of Appeal was filed by the Corporation. The grounds were that the Corporation was not provided with the opportunity to be heard at the hearing and so the Reviewer breached the principles of natural justice, and that the Reviewer reached a conclusion which was untenable on the basis of the clinical evidence presented. The Corporation arranged for specialist medical comment from Mr Tim Tasman-Jones, a hand and upper limb surgeon.

[21] On 19 December 2018, Mr Tasman-Jones provided a report. Mr Tasman-Jones noted the nature of Mr White's injury and the treatment that had been successfully provided. Mr Tasman-Jones noted that "extension splinting of the IP

joint of the thumb will not successfully treat an attrition rupture of the tendon transfer and surgical exploration and tendon grafting would be required". Mr Tasman-Jones assessed:

On balance, after reviewing the medical notes available, it appears far more likely that the client sustained a Mallet type avulsion injury to the IP joint of his right thumb on the 3rd October 2017 rather than an attrition rupture of his extensor pollicis longus from his previous surgical reconstruction dating back to the 2008 wrist laceration and multiply tendon repairs/reconstructions.

[22] Copies of Mr Tasman-Jones' report were filed with the Court and served on Ovation (the second respondent) by email. On 29 June 2019, a copy of the report was delivered to Mr White (the courier package was signed for by "Tyrone"). The Corporation and Ovation engaged in communication regarding the proceeding.

[23] On 30 July 2019, a case conference was conducted by telephone. Mr White did not attend. The Court made directions permitting Mr White an opportunity to consider whether to file evidence in response to Mr Tasman-Jones' report. Timetabling was also made for the filing of written submissions. The Registry was not able to contact Mr White following the case conference. The Corporation proceeded to file its written submissions on 25 September 2019.

[24] On 23 October 2019, counsel for the Corporation and Ovation filed a joint memorandum seeking orders that the review decision be quashed and that the matter be remitted back to review for a fresh hearing and a decision on Mr White's eligibility for cover for his injury. Ovation noted its agreement that the Corporation should have been given an opportunity to be heard and participate at review and that the most expedient course, in order to remedy the breach, was for a fresh review hearing to be conducted to determine the substantive issue. Ovation noted that it had made efforts to contact Mr White to ascertain his position with regard to the remission of the matter back to review. Ovation had made enquiries with Mr White's family members including his father who had advised that they were unaware of Mr White's whereabouts, but believed that he had travelled to Australia to live. Ovation's efforts to contact Mr White had, accordingly, been unsuccessful.

[25] On 12 November 2019, the Court issued a Minute of a teleconference held that day, with counsel for the Corporation and Oventions present. The Court noted that Mr White was not in attendance at the conference, despite a telephone call made to him using the contact number used in the database for him. Counsel for the Corporation suggested that it would be appropriate for the parties to consider more fully how to bring the issues to the attention of Mr White. The Court directed that counsel for the Corporation and Ovation were to confer and discuss the next steps forward to progress matters relating to the joint memorandum.

[26] On 5 February 2020, the Corporation addressed a letter to Mr White, and attached the notice of appeal, the review decision, Mr Tasman-Jones' report, submissions of counsel for the Corporation, and the joint memorandum of the Corporation and Ovation. The Corporation's letter advised Mr White that, if the District Court agreed to send the matter back for a new review hearing and decision, he would no longer have cover for his mallet thumb injury and the new review decision might determine that he was not entitled to this cover. The Corporation instructed private investigators to locate Mr White and serve the above documents on him.

[27] On 17 March 2020, a process server provided an affidavit of service stating that, on 2 March 2020, he spoke with a male who confirmed his name to be Tyrone White and served him with the supplied documents.

[28] On 23 March 2020, counsel for the Corporation advised that Mr White has now been formally served with the appeal documents and was aware of the appeal and the joint application by the Corporation and Ovation to seek orders remitting the matter back to review (and the consequences of this on his cover). Counsel noted that Mr White has been informed to contact the Registry if he wished to oppose the joint application or has any questions. Counsel proposed that the joint application be set down for hearing in an upcoming circuit. On 10 June and 23 November 2020, counsel confirmed that the application was ready to be set down for hearing.

[29] On 4 December 2020, the matter was set down for a hearing on 18 February 2021 at 10.00 am. Notice was sent by the Registry to the Corporation and to

Ovation, with a request to advise Mr White of the hearing date. In view of the COVID-19 lockdown in Auckland, this hearing was adjourned.

[30] On 18 February 2021, at 9.00 am, a telephone conference was convened. Attempts by the Registry to contact Mr White to advise him of this conference were unsuccessful. The conference was attended by counsel for the Corporation and Ovation. Counsel for Ovation advised that Mr White had not claimed for entitlement since 2018, and, being overseas, his eligibility to do so was limited. Counsel accepted that the review decision could be quashed and that the matter be remitted back to review for a fresh hearing and a decision on Mr White's eligibility for cover for his injury.

Relevant law

[31] Section 28 of the Accident Compensation Act 2001 ("the Act") sets out the requirements of a work-related injury. Section 20(2)(g) provides for "personal injury caused by a gradual process, disease, or infection consequential on personal injury suffered by the person for which the person has cover".

[32] Section 140 of the Act provides, in relation to the conduct of reviews:

The reviewer may conduct the review in any manner he or she thinks fit, but he or she must— ...

(c) comply with the principles of natural justice ...

[33] Section 142 of the Act further provides, in relation to persons entitled to be present and heard at review hearings:

The following persons are entitled to be present at the hearing, with a representative if they wish, and to be heard at it, either personally or by a representative:

(a) on every review, the applicant and the Corporation ...

[34] Section 155(1) of the Act provides, in relation to appeal proceedings:

The following persons are entitled to appear at the hearing of the appeal and to be heard at it, either personally or by a representative:

a) the appellant:

(b) any other person who had a right to be present and heard at the hearing of the review.

[35] Section 161 of the Act provides, in relation to decisions on appeal:

(1) The court must determine an appeal by—

(a) dismissing the appeal; or

(b) modifying the review decision; or

(c) quashing the review decision.

(2) If the court quashes the review decision, it must indicate the effect clearly. The effect may be, for example, to—

(a) endorse the Corporation's decision; or

(b) require the Corporation to take the action the court specifies in relation to the Corporation's decision; or\

(c) require another review to be conducted in accordance with directions the court gives. ...

[36] The *Guidelines to Practice and Procedure for Accident Compensation Appeals in the District Court* provides for recall of a judgment where “for some other special reason justice requires the judgment be recalled”.¹ Section 162 of the Act provides for further appeal to the High Court on a question of law.

Discussion

[37] The issue in this case is whether the Reviewer's decision of 11 May 2018 should be quashed and the matter be remitted back to review for a fresh hearing and a decision on Mr White's eligibility for cover for his injury. The assessment of this issue involves both procedural and substantive considerations.

¹ Judge Jan-Marie Doogue *Guidelines to Practice and Procedure for Accident Compensation Appeals in the District Court* (“ACA Practice Guidelines”) (Chief District Court Judge, 1 April 2017) at 16-17.

Procedure at the review hearing

[38] The reviewer's decision of 11 May 2018 followed the review hearing of 20 April 2018. At this hearing, Mr White and Ovation provided evidence, and counsel for WorkAon attended by telephone. The Corporation had not been advised of the hearing and so was not represented. In her decision, the Reviewer noted that she had considered Mr White's submission, WorkAon's case file and submissions, the evidence, the Act and relevant case law. She also noted that WorkAon, on concluding that there was no new injury in 2017 to Mr White, ought to have referred the matter back to the Corporation, and that the applicability of s 20(2)(g) claim had been raised but was not investigated. Notwithstanding the Reviewer's awareness of the Corporation's potential liability without having had the opportunity to be heard, the Reviewer granted cover for Mr White's 2017 injury on the basis that it was caused by a gradual process consequential on the 2008 accident.

[39] Section 140(c) of the Act provides that the reviewer, in conducting a review, must comply with the principles of natural justice. One of the cardinal principles of natural justice is *audi alteram partem* (hear the other side), which requires that a party should not be judged without being given the opportunity to respond to the evidence and argument presented. This principle was not complied with at Mr White's review hearing in relation to the Corporation, in that it was not advised of the hearing and so was not given the opportunity to respond to the evidence and argument presented before a decision was made which involved the Corporation's liability.

[40] Section 142(a) of the Act provides further that, on every review, the Corporation is entitled to be present and heard by a representative at the hearing. This section was overlooked at Mr White's review hearing, in that the Corporation was not advised of the hearing and so was not represented.

[41] Natural justice and the provisions of the Act clearly dictate that the Reviewer's decision be quashed and another review be conducted, with notice given to all relevant parties including the Corporation (as per s 161(2)(c) of the Act).

Process since the review decision

[42] On 8 June 2018, a Notice of Appeal against the above review decision was filed by the Corporation. The grounds were that the Corporation was not provided with the opportunity to be heard at the hearing and so the Reviewer breached the principles of natural justice, and that the Reviewer reached a conclusion which was untenable on the basis of the clinical evidence presented. The Corporation arranged for specialist medical comment from Mr Tim Tasman-Jones, a hand and upper limb surgeon. His report was provided on 19 December 2018, and copies were filed with the Court.

[43] Since then, repeated unsuccessful attempts have been made to contact and elicit a response from Mr White in relation to the appeal filed by the Corporation:

- On 29 June 2019, a copy of Mr Tasman-Jones' report was delivered to Mr White (the courier package was signed for by "Tyrone").
- On 30 July 2019, a case conference was conducted by telephone. Mr White did not attend. The Court made directions allowing Mr White an opportunity to consider whether to file evidence in response to Mr Tasman-Jones' report. The Registry was not able to contact Mr White following the case conference.
- On 23 October 2019, counsel for the Corporation and Ovation filed a joint memorandum seeking orders that the review decision be quashed and that the matter be remitted back to review for a fresh hearing and a decision on Mr White's eligibility for cover. Ovation noted that it had made efforts to contact Mr White to ascertain his position with regard to the remission of the matter back to review. Ovation had made enquiries with Mr White's family members, including his father, who had advised that they were unaware of Mr White's whereabouts, but believed that he had travelled to Australia to live. Ovation's efforts to contact Mr White had been unsuccessful.

- On 12 November 2019, the Court issued a Minute of a teleconference held that day, with counsel for the Corporation and Ovations present. The Court noted that Mr White was not in attendance at the conference, despite a telephone call made to him using the contact number used in the database for him.
- On 5 February 2020, the Corporation addressed a letter to Mr White, and attached the notice of appeal, the review decision, Mr Tasman-Jones' report, submissions of counsel for the Corporation and the joint memorandum of the Corporation and Ovation. The Corporation's letter advised Mr White that, if the District Court agreed to send the matter back for a new review hearing and decision, he would no longer have cover for his injury and the new review decision might determine that he was not entitled to this cover. The Corporation instructed private investigators to locate Mr White and serve the above documents on him.
- On 17 March 2020, a process server provided an affidavit of service stating that, on 2 March 2020, he spoke with a male who confirmed his name to be "Tyronne White" and served him with the documents supplied by the Corporation.
- On 18 February 2021, at 9.00 am, a telephone conference was convened. Attempts by the Registry to contact Mr White to advise him of this conference were unsuccessful.

[44] The Court is aware that s 154(1) of the Act provides that any person who had a right to be present and heard at the hearing of the review is entitled to appear at the hearing of an appeal. Mr White therefore has the right to appear at the hearing of the Corporation's appeal involving his claim for cover. The Court is satisfied that his entitlement to appear has been respected, through the repeated and extraordinary efforts to notify him of the appeal proceedings initiated by the Corporation. Mr White has, despite clear evidence that he has received notice of the proceedings, not available himself of his entitlement to respond. The Act acknowledges his choice in that it provides that he is *entitled* to appear rather than is *required* to appear.

[45] In terms of any prejudice to Mr White in the Court quashing the review decision and remitting the matter back for a fresh review, the Court notes that:

- Mr White has not claimed for entitlements relating to his injury for an extended period, and his ability to do so is currently circumscribed by the fact that he is overseas.
- Mr White may exercise his right to ask for recall of this judgment on natural justice grounds, or to appeal against this judgment.
- The Court, by remitting the matter for a fresh review, is not making a decision to terminate his right to cover under the Act.
- Attempts will be made to notify Mr White of the new review proceeding, and he may then exercise his right to attend and be heard at the review hearing.

Substance of the review decision

[46] A legitimate consideration for the Court in deciding whether to quash a review decision and remit the matter to a fresh review, is whether the appellant has an arguable case to present. The Court stresses that the decision in this matter is for the new Reviewer to make. However, the Court considers that there are strong substantive grounds for the matter to be heard afresh.

[47] The key issue in this matter is whether Mr White's injury was a gradual process condition secondary to his injury in May 2008 or was a work-related injury in October 2017. The Reviewer concluded that the weight of the evidence supported a finding that Mr White's injury was more likely caused by a gradual process consequential on the 2008 accident. This finding was based primarily on the report of Dr Burgess, an occupational medicine specialist, to this effect.

[48] However, the Court notes the contrary view of Ms Hicks, orthopaedic surgeon, who examined and treated Mr White following his 2017 injury. She initially advised that the injury was new, and that there was no relation to the original

surgery. She later confirmed that Mr White's injury was clearly post-traumatic injury which was more recent than his original injury and treatment, and that his recovery had proved that his injury was unrelated to the original surgery.

[49] The Court also notes the report provided by Mr Tim Tasman-Jones, a hand and upper limb surgeon. He advised that it appeared far more likely that Mr White sustained his injury in October 2017 rather than as a consequence of his 2008 injury and its treatment.

[50] The Court is therefore satisfied that there is a *prima facie* case for the Corporation to present in support of its review proceedings.

Conclusion

[51] For the above reasons, the appeal is allowed, and the review decision is set aside. The decision of the Reviewer of 11 May 2018 is quashed and the matter is remitted for another review to be conducted afresh.

[52] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors: Medico Law, Auckland for the appellant.