

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 60

ACR 50/21

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

Hearing: On the papers

Submissions: L Martins for the appellant
P McBride for the respondent

Judgment: 12 April 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Weekly compensation - s 103(2), Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 2 March 2021. The Reviewer dismissed an application for review of the Corporation's decision dated 21 October 2020 declining to grant Mrs Martins weekly compensation.

Background

[2] Mrs Martins was born overseas in 1967. She moved to New Zealand around 2005.

[3] On 13 July 2010, Mrs Martins slipped on ice and fell backwards hitting her head. On 20 July 2010, Dr Anne Hutchison diagnosed a whiplash type injury. Cover was granted for a neck sprain and a lumbar sprain.

[4] On 7 June 2013, Mrs Martins suffered an injury to her lower back caused by lifting a heavy bucket. The Corporation granted cover for a lumbar sprain.

[5] On 13 March 2017, while carrying a large bag of linen up a flight of stairs, in the course of her cleaning work, Mrs Martins lost her balance and twisted her back. On 21 March 2017, Dr Simone Hart noted the impression of lumbar sprain. The Corporation granted cover for a lumbar sprain.

[6] Between 20 March 2017 and 21 June 2017, weekly compensation was paid to Mrs Martins, and she also attended her GP (Dr Hart), a chiropractor and a physiotherapist.

[7] On 17 June 2017, a “Stay at Work return to work” report stated:

Everlaine is not going to be going back to doing her same job anymore as she is moving overseas at the start of next month. She notified her ACC case manager Carolyn King of this yesterday on 16/6/17. Carolyn has spoken with both Everlaine and the physio about okaying continuing Everlaine’s rehab until the end of the month and her ACC compensation will end on 21/6/17. Everlaine is both aware of and agreeable with her ACC compensation ending on that date, and will be attending her rehab appointments at Remarkable Physios until the end of the month.

[8] On 29 June 2017, a further “Stay at Work return to work” report stated:

[Mrs Martins] will not be doing cleaning overseas, however she is at a physical point now that she would be able to do that functionally if required. ACC is aware of client moving and not returning to job and had okayed the client to finish the strengthening program.

[9] In early July 2017, Mrs Martins moved to Australia.

[10] On 3 October 2018, a CT scan done on Mrs Martins recorded “minor multilevel lumbar spondylosis but without significant spinal canal narrowing at any level”.

[11] On 26 October 2018, a Workers' Compensation Medical Certificate, provided by Dr Lindsay Hantom, recorded that Mrs Martins was not able to work from 26 October 2018 to 25 January 2019, and that "CT shows degenerative facet joint changes".

[12] On 5 February 2019, Mr Peter Winstanley, Orthopaedic Surgeon, commented:

CT scan has been performed which shows evidence of degenerative lumbar spondylosis present and facet joint arthropathy present.

Mrs Martins presents with symptomatology associated with her lumbar spine secondary to her degenerative spondylosis and facet joint arthropathy. ...

[13] On 6 February 2019, Mr Winstanley commented further:

Mrs Martins has degenerative spondylosis present within her lumbar spine. ...

Mrs Martins' incapacity to return to work activity relates to an injury sustained while performing cleaning activity on 13 March 2017 in New Zealand. ...

[14] On 8 February 2019, Mr Winstanley commented further:

I have only seen Mrs Martins on one occasion on 5 February 2019. ...

The condition which she had in 2017 would have been an aggravation of her pre-existing degenerative spondylosis present within the lumbar spine.

The condition which Mrs Martins has would be associated with fluctuation of symptomatology present within her lumbar spine depending on her activity level.

I am unable to give an opinion as to the degree of symptomatology Mrs Martins has had since 2017 as my initial review was only on 5 February 2019. I am unable to issue any certification for her capacity to perform work activity from 2017 until February of 2019.

I am of the opinion that at my review on 5 February 2019 that Mrs Martins' symptomatology present within her lumbar spine would be consistent with lumbar spondylosis.

[15] On 29 April 2020, Mr Martins, through her husband (and representative), sought weekly compensation, for symptoms as a result of the covered injury of 13 March 2017. At the time of the application, she was certified by her GP as unfit for her work for three months.

[16] On 25 September 2020, Ms Poornima Viswanathan, Rehabilitation Physiotherapist, advised:

The client has two previous relevant claims (10013274389 [13 July 2010] and 10023662815 [7 June 2013]) under which the client was covered for sprain injuries involving the lumbar spine. Given the nature of the previously covered injuries (sprain), the effects of these sprains would be considered well resolved and would not be considered to be contributing the client's current presentation.

The client has cover for a lumbar sprain ... A sprain is an acute injury which is expected to resolve through a process of natural healing within 6-8 weeks. From a clinical perspective, the effects of the covered sprain would be considered to have resolved by the time weekly compensation was ceased in June 2017.

It is noted that the client had a CT scan of the lumbar spine in Australia in 2018 which reported multi-level gradual process degenerative changes. These changes would not be considered to be causally related to the covered accident event. The client was also reviewed by an orthopaedic surgeon in Australia who noted that the client's symptoms were associated with degenerative changes in the lumbar spine and that the condition which the client had in 2017 would have been an aggravation of pre-existing degenerative spondylosis in the lumbar spine.

Overall, the covered sprain is considered resolved and the ongoing symptoms are considered related to gradual process degenerative change in the lumbar spine. The client's ongoing symptoms are not considered causally related to the covered injury or accident event.

[17] On 21 October 2020, the Corporation declined Mrs Martins weekly compensation for her injury on 13 March 2017, on the basis of the advice received from Mr Viswanathan. Mrs Martins sought a review of this decision.

[18] On 2 February 2021, review proceedings were held. On 2 March 2021, the Reviewer dismissed the review, on the basis that it was more likely that Mrs Martins' incapacity was caused by an underlying degenerative condition than by a covered injury.

[19] An Australian Worker's Compensation Medical certificate from Dr Hantom, dated 9 February 2021, stated that Mrs Martens was fit for restricted duties only from 20 January 2021 to 1 July 2021. Dr Hantom noted that Mrs Martens had low back pain on minimal exertion, could not do any heavy work, and had ongoing depression.

[20] On 16 March 2021, a Notice of Appeal was lodged.

[21] On 5 March 2021, Dr Winstanley confirmed:

In regard to your email dated 4 March 2021, in the information I have been provided Mrs Martins did sustain an injury as described in the report when lifting heavy bags while cleaning on 13 March 2017 in New Zealand.

This injury has caused an aggravation of pre-existing, asymptomatic degenerative lumbar spondylosis which is a constitutional condition.

The effects of the sprain injury of 13 March 2017 is such that it has produced an aggravation of the underlying spondylosis. This aggravation is such that the effects of that have now ceased but symptoms continue associated with the lumbar spondylosis. ...

The injury of 2017 was not responsible for the development of the lumbar spondylosis which, as said, is a constitutional condition.

Relevant law

[22] Section 20(2)(a) of the Accident Compensation Act 2001 (“the Act”) provides that a person has cover for a personal injury which is caused by an accident. Section 26(2) states that “personal injury” does not include personal injury caused wholly or substantially by a gradual process, disease, or infection (unless it is personal injury of a kind specifically described in section 20(2)(e) to (h)). Section 25(3) notes that the fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.

[23] Section 100 of the Accident Compensation Act 2001 (the Act) provides that a claimant who has cover and who lodges a claim for weekly compensation is entitled to receive it if the Corporation determines that the claimant is “incapacitated within the meaning of section 103(2)” and “is eligible under clause 32 ... “.

[24] Section 103(2) provides:

The question 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.

[25] Schedule 1, Part 2, Clause 32 of the Act provides:

The Corporation is liable to pay weekly compensation for loss of earnings to a claimant who-

- (a) has an incapacity resulting from a personal injury for which he or she has cover; and
- (b) was an earner immediately before his or her incapacity commenced.

[26] In *Ambros*,¹ the Court of Appeal noted the following on causation:

[65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved. They proceed on their general impression of the sufficiency of the lay and scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person of common sense ...

[67] The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the Court to draw robust inferences of causation in some cases of uncertainty -- see para [32] above. However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture ... Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witness evidence ...

[27] In *Jackson*,² Priestley J noted:

... In general terms under Part 1 of the statute, if an accident, as defined, causes a personal injury as defined (s 29) then there is cover. The causal nexus between accident and injury must be established as a factual matter and on the balance of probabilities. ...

[28] In *Gazzard*,³ Judge Beattie stated:

[28] It is a basic principle of the Act that a claimant only has a right to a statutory entitlement when that claimant can establish that entitlement arises as a consequence of the personal injury by accident for which cover was granted. In the case of weekly compensation the requirement must be that a claimant is

¹ *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

² *Jackson v Accident Compensation Corporation* HC Auckland AP404-96-01, 14/2/2002 at [38]. See also *Calver v Accident Compensation Corporation* [2019] NZHC 1581, [2019] 3 NZLR 261.

³ *Gazzard v Accident Compensation Corporation* [2001] NZACC 313, upheld on appeal (HC Wellington, CIV 2005-485-2388, 22 May 2006, Miller J).

incapacitated, as that condition is defined under the Act. The incapacity must be caused by or as a consequence of the personal injury by accident. In other words there must be a direct causal nexus between the injury which was suffered in the accident and the physical condition which is causing the incapacity at the time when that enquiry is being made.

[29] An approach which has been repeatedly endorsed by the High Court was outlined by Judge Beattie in *Hill*:⁴

... 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 the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered. The fact that it is the event of the accident which renders symptomatic that which previously was asymptomatic does not alter that basic principle. The accident did not cause the degenerative changes, it just caused the effects of those changes to become apparent ...

[30] In *Waghorn*,⁵ Ongley DCJ noted that “it is not a question of mere aggravation, nor of any asymptomatic condition becoming symptomatic”.

[31] In *Farrelly*,⁶ Ongley DCJ noted:

[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

⁴ *Hill v Accident Rehabilitation and Compensation Insurance Corporation* [1998] NZACC 189 at page 12. See the High Court judgments in *McDonald v Accident Rehabilitation and Compensation Insurance Corporation* [2002] NZAR 970 at [26] and [30], *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 at [25], and *Johnston v Accident Compensation Corporation* [2010] NZAR 673 at [12].

⁵ *Waghorn v Accident Rehabilitation and Compensation Insurance Corporation* [2013] NZACC 2 at [40]. See also *Lyth v Accident Compensation Corporation* [2010] NZACC 198.

⁶ *Farrelly v Accident Compensation Corporation* [2013] NZACC 420.

the date of incapacity. Those fairly precise findings have to be identified in relation to a contemporaneous application for weekly compensation. A retrospective claim cannot be treated as requiring less evidence than a contemporaneous claim.

...

Discussion

[32] The issue in this case is whether Mrs Martins' incapacity, for which she has claimed weekly compensation, was caused by a covered injury, suffered in an accident in March 2017, or by an underlying degenerative condition.

[33] As noted above, Schedule 1, Part 2, Clause 32 of the Act provides that the Corporation is liable to pay weekly compensation for loss of earnings to a claimant who has an incapacity *resulting from* a personal injury for which he or she has cover. Thus, Mrs Martins must establish that she unable, *because of* her personal injury, to engage in the employment in which she was employed when she suffered the personal injury.⁷ Mrs Martins must show a direct causal nexus between the injury which was suffered in her 2017 accident and the physical condition which is causing her incapacity at the time when her enquiry is being made.⁸ If medical evidence establishes that Mrs Martens has pre-existing degenerative changes which are brought to light, aggravated or become symptomatic as a consequence of her accident, it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered.⁹ A retrospective claim, as in Ms Martins' case, requires reasonably persuasive medical evidence, and cannot be treated as requiring less evidence than a contemporaneous claim.¹⁰

[34] Mrs Martens' most recent submission is that medical evidence shows that she is entitled to receive backdated compensation from the time that she suffered an accident on 13 July 2010, and that the accident on 13 March 2017 aggravated her lumbar spine condition. This Court notes the submissions made by Mrs Martins, and accepts that she has continued to have back pain, resulting in her inability to do

⁷ Section 103(2) of the Act.

⁸ See n3 *Gazzard*.

⁹ See n4 *Hill* and n5 *Waghorn*.

¹⁰ See n5 *Farrelly* at [70](b).

heavy work (as is recorded by Dr Hantom in a medical certificate dated 9 February 2021). However, the Court refers to the following evidence.

[35] First, the Corporation's decision of 21 October 2020, which was confirmed on review and is the subject of this appeal, was in response to Mrs Martens' claim for weekly compensation as a result of her covered injury on 13 March 2017. (Mrs Martens appears to have confirmed her claimed link to the 2017 injury in her written submission in support of her appeal (dated 14 March 2021), in which she seeks weekly compensation from June 2017 (she having received compensation up to that time)). This Court must therefore focus on whether Mrs Martens' ongoing condition is linked to her covered injury on 13 March 2017, not her earlier injury on 13 July 2010. In any event, as noted in the report (dated 25 September 2020) of Ms Viswanathan, Rehabilitation Physiotherapist, the effects of Mrs Martins' sprain on 13 July 2010 (as well as her later sprain on 7 June 2013) would be considered well resolved and would not be considered to be contributing her current presentation.

[36] Second, evidence shows that Mrs Martens was well aware of and consented to her weekly compensation, for her injury on 13 March 2017, ending on 21 June 2017. "Stay at Work return to work" reports of 17 and 29 June 2017 record that Mrs Martens was agreeable to her compensation ending on 21 June 2017, and that she was at a "physical point" when she would be able to do her cleaning work functionally if required.

[37] Third, a CT scan done on Mrs Martins on 3 October 2018 recorded minor multilevel lumbar spondylosis, and this scan was confirmed by Dr Hantom (on 26 October 2018) as showing degenerative facet joint changes.

[38] Fourth, Mr Winstanley, Orthopaedic Surgeon, having seen the above CT scan and attended Mrs Martens, has repeatedly advised that the sprain injury which Mrs Martens incurred on 13 March 2017 caused an aggravation of her pre-existing asymptomatic, degenerative lumbar spondylosis, this being a constitutional condition. Mr Winstanley has explicitly stated that the injury of 2017 was not responsible for the development of Mrs Martens' lumbar spondylosis.

[39] Fifth, Ms Viswanathan, Rehabilitation Physiotherapist, having reviewed Mrs Martens' medical records, advised that her covered sprain on 2017 was resolved and her ongoing symptoms related to gradual process degenerative change in the lumbar spine and were not considered causally related to the covered injury.

Conclusion

[40] In light of the above considerations, the Court finds that Mrs Martins has not established that her incapacity, for which she has claimed backdated weekly compensation, was caused by a covered injury suffered in an accident in March 2017, rather than by an underlying degenerative condition.

[41] The decision of the Reviewer dated 2 March 2021 is therefore upheld. This appeal is dismissed.

[42] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', is written over a faint rectangular stamp.

P R Spiller
District Court Judge

Solicitors: McBride Davenport James, Wellington