

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 78

ACR 259/20

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

Hearing: 27 April 2022
Held at: Auckland/Tāmaki Makaurau
By AVL

Appearances: M Heunis for the appellant
L Hawes-Gandar and Ms F Becroft for respondent

Judgment: 5 May 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for weekly compensation - s 103(2) and Schedule 1, Part 2, Clause 32,
Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 5 November 2020. The Reviewer dismissed an application for review of the Corporation's decision dated 15 September 2020, declining to accept Mr Hookway's application for weekly compensation.

Background

[2] Mr Hookway was born in 1965. He worked as a delivery truck driver.

[3] On 9 July 2018, Mr Hookway experienced sudden pain in his neck while using a hand cart to manoeuvre a heavy LPG gas bottle up a staircase.

[4] On 23 July 2018, Mr Hookway visited his GP, Dr Miranda Moorghen, and a claim for cover was lodged in respect of a left neck sprain and a left thoracic sprain. He was granted cover for cervical and thoracic sprains, as well as a disc prolapse with radiculopathy at the C6/7 level, as a result of this accident.

[5] Mr Hookway's symptoms appear to have deteriorated over time. On 6 August 2018, Dr Charles Dundas, GP, certified Mr Hookway unfit for work.

[6] On 22 August 2018, an MRI scan was done on Mr Hookway. Dr Eileen McGlynn, Radiologist, summarised the findings as follows:

Hypertrophic degenerative change with diffuse disc bulges and mild disc protrusions causing mild impression on the anterior spinal cord on the right on the C4-5 level, on the left at the C5-6 level, and certainly at the C6-7 level. Associated neural foraminal narrowing most pronounced on the left at the C5-6 and C6-7 levels with associated mild impression on the exiting C6 and C7 nerves, respectively. No spinal stenosis.

[7] On 4 September 2018, Dr Erin Ratahi, Orthopaedic Surgeon, reported that there were degenerative changes noted throughout the thoracic spine, which could account for the pain Mr Hookway was experiencing. Dr Ratahi also noted moderate to severe foraminal narrowing on the left side of his cervical spine, which he believed to be contributing to the symptoms in Mr Hookway's left arm.

[8] On 26 September 2018, Dr Ratahi reported further that Mr Hookway's diagnosis in relation to the injury on 9 July 2018 was "multilevel foraminal stenosis, most significant at C5/6 and C6/1". Dr Ratahi advised that he considered Mr Hookway's disability and capacity a result of "symptomatic cervical foraminal stenosis". Dr Ratahi recorded that Mr Hookway reported radicular symptoms, affecting his left upper limb, consistent with stenosis, at the time of his examination. In terms of Mr Hookway's underlying condition, Dr Ratahi noted:

The patient is reported to have disc osteophytes at multiple levels, indicative of a pre-existing condition, however the symptoms have only developed following his injury, indicating that there may be a role of the disc bulges reported, which may have occurred acutely.

[9] Dr Ratahi concluded that he did not consider the current symptoms to be due wholly to the patient's pre-existing disease, but that "[i]t is substantially due to the disease process which has been made symptomatic by the patient's injury".

[10] On 17 October 2018, Mr Bill Sanderson, Orthopaedic Surgeon, noted that investigations had identified degenerative changes at multiple levels. Mr Sanderson advised that Mr Hookway has degenerative disc disease in his lower cervical spine, and that his problems were due to an aggravation of that underlying disease. However, Mr Sanderson noted that Mr Hookway had experienced new symptoms in his left arm since the accident. Mr Sanderson suggested that the symptoms were likely due to a nerve compression/irritation resulting from the accident having caused a minor disc prolapse at the C6/C7 level:

In my opinion, Allen has degenerative disc disease in his lower cervical spine which has previously not been a problem for him. It is most likely that, in the recent incident when pulling the heavy cylinder up a flight of steps, that he has aggravated his osteoarthritic spine and suffered a small prolapse of disc material at the affected levels, causing pressure on the adjacent nerve roots. ...

It is most likely that the nerve root compression is due to a minor prolapse of disc material at the time of the recent injury. It is recognised that Allen has significant degenerative change in the neck and has had previous neck pain. He has not however had previous referred pain in the left arm which requires some involvement of the spinal nerve roots

He did not have that prior to the incident, and therefore it should be accepted that the nerve root compression is due to new pathology involving the nerve roots. This would be consistent with a very minor disc bulge or prolapse, as seen on the MRI scan.

[11] Mr Sanderson noted that the left arm symptoms were improving satisfactorily, and that he expected a full and uneventful recovery.

[12] On 29 October 2018, Mr Hookway's claim was reviewed by the Corporation's Medical Advisor, Dr Paul Noonan. Dr Noonan noted that there was significant underlying degenerative disease, but, based on Mr Sanderson's advice, recommended that cover be added for cervical disc disorder with radiculopathy.

[13] On 31 October 2018, the Corporation issued a decision, extending cover to include cervical disc disorder with radiculopathy.

[14] The Corporation arranged for Mr Hookway's assessment and rehabilitation through an external provider. On 18 September 2018, Ms Clare Kirkham, Occupational Therapist, completed an initial assessment and plan, after meeting with Mr Hookway and his employer. As part of the programme, Mr Hookway participated in a physiotherapy supervised gym strengthening programme from November 2018 to February 2019.

[15] From February 2019, Mr Hookway began returning to limited work duties and gradually increased his work hours.

[16] On 5 March 2019, Dr Jim McLeod, Occupational Physician, reported:

Allen is currently fit to return to his pre-injury role of Delivery Driver of LPG tanks. This is occurring via a GRTWP and is appropriate. I anticipate him being fit for full duties, without restriction, in the next three to four weeks.

[17] Dr McLeod noted that Mr Hookway had made a good recovery from his radicular pain symptoms but was at risk of suffering further injury and radicular pain due to the heavy nature of his work and his pre-existing multi-level disc disease.

[18] On 4 April 2019, Mr Hookway's GP, Dr Dundas, provided a medical certificate, certifying that Mr Hookway was fit to return to normal duties and work hours from 8 April 2019.

[19] On 10 April 2019, Ms Kirkham reported that Mr Hookway had been cleared to return to full time work by his GP, and that he had commenced full-time work and normal duties, without issue.

[20] On 10 April 2019, the Corporation wrote to Mr Hookway, advising that his weekly compensation would stop due to his medical clearance to return to work.

[21] On 11 July 2019, Dr John Malloy, Musculoskeletal Specialist, reported that Mr Hookway had struggled after returning to work, and had resigned from his job on 19 June 2019. Dr Malloy recounted the findings of the previous medical imaging and reporting but did not offer any suggestions regarding diagnosis or treatment.

[22] The Corporation contacted Mr Hookway to enquire about whether he needed further assistance. On 15 July 2019, Mr Hookway visited Dr Dundas, who certified Mr Hookway unfit for work from 24 June 2019 to 7 July 2019, because of “flare-up of neck pains”.

[23] On 16 August 2019, Mr Hookway’s claim was reviewed by the Corporation’s Medical Advisor, Dr J Odedra. He acknowledged that Mr Hookway appeared to be suffering from ongoing symptoms but advised that these were most likely caused by his degenerative disc disease and not the covered injuries.

[24] On 16 August 2019, the Corporation issued a decision declining to pay weekly compensation, on the basis that Mr Hookway’s incapacity, from June 2019, was not caused by his covered injuries. Mr Hookway applied for a review of this decision.

[25] On 9 March 2020, the Corporation’s decision was quashed by a Reviewer, who directed the Corporation to obtain an opinion from an occupational physician regarding Mr Hookway’s capacity for work, and then issue a new decision.

[26] The Corporation obtained a workplace assessment dated 17 March 2020, and then requested an opinion on capacity from Dr David Ruttenberg, Occupational Physician.

[27] On 4 June 2020, Dr Ruttenberg, having seen Mr Hookway, reported:

The covered injury here appears to be other cervical disorder, notably in the C5/6 level, with symptoms of radiation down initially the left and subsequently right arm.

The diagnosis has been confirmed on review of imaging and in particular, MRI scans of the cervical spine arranged by Mr Ratahi, Orthopaedic Surgeon.

[28] Dr Ruttenberg noted that there was conflict between what Mr Hookway told him and the evidence on file, regarding whether Mr Hookway had been fit for work when he was certified as such and returned to work in April 2019. Dr Ruttenberg said that he could not comment on the accuracy of these opinions, and that he “could not state with full certainty” that Mr Hookway was not experiencing symptoms at the time he stopped working in June 2019.

[29] Dr Ruttenberg further noted that Mr Hookway’s pre-injury work was very heavy and advised that he would not have considered it suitable for someone such as Mr Hookway

“with cervical spine pathology and foraminal stenosis, and who is symptomatic”. On this basis, Dr Ruttenberg concluded that he did not think Mr Hookway had been fit for his role when he had returned to work in April 2019, or since.

[30] The Corporation sent Dr Ruttenberg a copy of the report from Mr Sanderson which he had not previously been provided with, and asked him for further comment to clarify whether he thought Mr Hookway lacked capacity due to his covered injuries as opposed to his pre-existing degeneration.

[31] On 20 August 2020, Dr Ruttenberg reported that:

... I noted in my last report that I was in agreement with him [Mr Hookway] that he would not have been fit for that particular work role given the entrenched pathology present in his cervical and thoracic spinal regions.

It was and remains my opinion however, that that particular lack of work fitness after being cleared in April 2019 and notwithstanding any comment otherwise by the supervising occupational therapist, relates to the degenerative change that was present and in the cervical and thoracic spinal regions. It is not as a result of radicular symptoms, foraminal compromise and any disc bulge and disc prolapse which was the original cause of symptomatology and for which cover was granted.

[32] Dr Ruttenberg noted Mr Sanderson’s opinion, that the accident had caused a minor disc prolapse and nerve root irritation, but advised that this was no longer the cause of Mr Hookway’s symptoms:

Mr Sanderson had commented on aggravation of a pre-existing symptom complex but it would appear that the aggravation relates to discal pathology, prolapse and some nerve root irritation.

If these symptoms are new and the discal pathology is new, then this represents change from what was present previously, and there would be cover in terms of him suffering an acute new pathological process.

His symptoms and pathology now however, if one is to use this construct is still of aggravation of a pre-existing symptom complex. But the acute on chronic component has long resolved.”

[33] On 15 September 2020, the Corporation issued a new decision, declining weekly compensation from 20 June 2019, on the basis that Mr Hookway was not incapacitated for his pre-injury employment due to his covered injuries. Mr Hookway applied for a review of the Corporation’s decision.

[34] On 9 October 2020, Dr Dundas advised that, when Mr Hookway had returned to work, “it was with some trepidation on his part and my part”, as he had still been experiencing pain.

[35] On 9 October 2020, review proceedings were held. On 5 November 2020, the Corporation’s decision on weekly compensation was upheld on review, on the basis that the medical evidence provided showed that it was more likely than not that Mr Hookway’s incapacity was not as a result of a covered injury.

[36] On 4 December 2020, a Notice of Appeal was lodged.

[37] Mr Hookway continued to have back and neck problems and returned to see Dr Malloy, who arranged for an MRI of the cervical spine. On 14 November 2020, Dr Andrew Dunkley, Radiologist, summarised the findings of the MRI as follows:

1. At C6/7 level a posterocentral disc bulge and high signal intensity annular focus with mild disc osteophyte complex compression of the exiting left C1 nerve root is unchanged. A new right paracentral to foraminal disc bulge now contributes to moderate compression of the existing right C1 nerve root.
2. Mild disc osteophyte complex compression of the exiting C6 nerve roots bilaterally at C5/6 level unchanged.
3. No Central canal stenosis.

[38] On 17 November 2020, Dr Malloy recorded that Mr Hookway was suffering from right-sided symptoms which did not appear to be consistent with the changes identified in the MRI, which he referred to as “age related”. Dr Malloy noted that it was possible that the symptoms were caused by “right C7 nerve root compression”, but he thought it most likely the symptoms were being caused by the zygapophyseal/facet joints:

... in the absence of a clear cause of pain arising from the discs, the very likely source of pain is the zygapophyseal joint, or joints. This diagnosis is more likely in the cervical spine than the lumbar spine and is more likely in the ageing individual than in young people.

[39] Dr Malloy was critical of the Corporation and the investigation and rehabilitation which had been provided to Mr Hookway.

[40] On 14 October 2021, Mr James Watt, Consultant Orthopaedic Surgeon, having seen Mr Hookway, diagnosed multilevel cervical spondylosis with longstanding right arm symptoms in the distribution of the C7 nerve root +/- C6 radiculopathy; and ongoing mechanical neck pain.

[41] On 6 December 2021, Mr Jonathan Manson, Consultant Orthopaedic Surgeon, having seen Mr Hookway, diagnosed “right upper limb radiculopathy. C5/6 and C6/7 levels most stenotic on MRI scan”.

Relevant law

[42] Section 20(2)(a) of 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(1)(a)(i) provides that “accident” means a specific event or a series of events, other than a gradual process, that involves the application of a force (including gravity), or resistance, external to the human body. 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.

[43] In *Johnston*,¹ France J stated:

[11] It is common ground that, but for the accident, there is no reason to consider that Mr Johnston’s underlying disc degeneration would have manifested itself. Or at least not for many years.

[12] However, in a passage that has been cited and applied on numerous occasions, Panckhurst J in *McDonald v ARCIC* held:

“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 an 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 ...”

[13] It is this passage which has governed the outcome of this case to date. Although properly other authorities have been referred to, the reality is that the preceding

¹ *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

decision makers have concluded that Mr Johnston's incapacity through back pain is due to his pre-existing degeneration and not to any injury caused by the accident.

[14] ... I consider it important to note the careful wording in the McDonald passage. The issue is not whether an accident caused the incapacity. The issue is whether the accident caused a physical injury that is presently causing or contributing to the incapacity.

[44] In *Ambros*,² the Court of Appeal envisaged the Court taking, if necessary, a robust and generous view of the evidence as to 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 ...

[45] In *Sparks*,³ Judge Ongley stated:

[29] By s26(2) and (4) of the Injury Prevention, Rehabilitation, and Compensation Act 2001, personal injury does not include personal injury caused wholly or substantially by a gradual process, disease, or infection, or by the ageing process. The legal test for entitlements requires sufficient evidence to show that need for assistance arises as a consequence of the covered injury. Where there is an accompanying degenerative or gradual process condition, entitlements will not be available if the personal injury is caused wholly or substantially by that condition. In the present case therefore, the appellant has to be able to point to evidence demonstrating that the condition, as it was when the need for surgery was identified in August 2004, was substantially and effectively caused by the covered injury and not by a pre-existing process.

[46] 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.

² *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

³ *Sparks v Accident Compensation Corporation* [2006] NZACC 45.

[47] 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.

[48] In *Gazzard*,⁴ 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 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.

Discussion

[49] The issue in this case is whether the Corporation was correct to determine that Mr Hookway was not incapacitated, from 20 June 2019, by his covered injuries, and so not entitled to weekly compensation from this time. The Corporation is liable to pay weekly compensation for loss of earnings to Mr Hookway if he has an incapacity resulting from a personal injury for which he has cover, and he was an earner immediately before his or her incapacity commenced.⁵ There must be a direct causal nexus between the injury which Mr Hookway suffered in his accident and the physical condition which is causing his incapacity at the time when the enquiry is being made.⁶ Mr Hookway's position is that he has had ongoing symptoms since his accident. He says that his covered injuries have never resolved and that they caused his incapacity from 20 June 2019.

[50] This Court accepts that, as a result of Mr Hookway's accident in July 2018, he has cover for cervical and thoracic sprains, as well as a disc prolapse and cervical disc disorder with radiculopathy at C6/7 level. The Court also accepts that Mr Hookway ceased employment on 20 June 2019 as a result of significant back and neck problems which affected his ability to continue working. However, the question remains whether there is a

⁴ *Gazzard v Accident Compensation Corporation* [2001] NZACC 313, upheld on appeal (HC Wellington, CIV 2005-485-2388, 22 May 2006, Miller J).

⁵ Schedule 1, Part 2, Clause 32 of the Act.

⁶ See *Gazzard* above n4, at [28].

causal link between the injury which Mr Hookway suffered in his accident and the physical condition causing his incapacity from 20 June 2019. In this regard, the Court notes the following evidence.

[51] First, in September 2018, Dr Ratahi, Orthopaedic Surgeon, assessed that there were degenerative changes throughout Mr Hookway's thoracic spine, which could account for the pain that he was experiencing. Dr Ratahi concluded that Mr Hookway's current symptoms were substantially due to the disease process which has been made symptomatic by his injury.

[52] Second, also in September 2018, Mr Sanderson, Orthopaedic Surgeon, noted that investigations had identified degenerative changes at multiple levels. Mr Sanderson advised that Mr Hookway has degenerative disc disease in his lower cervical spine, and that his problems were due to an aggravation of that underlying disease. Mr Sanderson noted that Mr Hookway's symptoms were improving satisfactorily, and that he expected a full and uneventful recovery.

[53] Third, in March 2019, Dr McLeod, Occupational Physician, reported that Mr Hookway had made a good recovery from his radicular pain symptoms and was currently fit to return to his pre-injury role.

[54] Fourth, in April 2019, Mr Hookway's GP, Dr Dundas, provided a medical certificate, certifying that Mr Hookway was fit to return to normal duties and work hours. Ms Kirkham, Occupational Therapist, reported that Mr Hookway had commenced full-time work and normal duties, without issue. As a result of Mr Hookway's medical clearance to return to work, the Corporation advised Mr Hookway that his weekly compensation would stop.

[55] Fifth, in August 2020, Dr Ruttenberg, Occupational Physician, assessed that Mr Hookway's lack of work fitness after April 2019 related to the degenerative change that was present in the cervical and thoracic spinal regions, and not as a result of the original cause of symptomatology for which cover was granted. Dr Ruttenberg considered that the acute, chronic component of his original symptoms had long resolved.

[56] Sixth, in October 2021, Mr Watt, Consultant Orthopaedic Surgeon, having seen Mr Hookway, diagnosed multilevel cervical spondylosis with longstanding right arm symptoms in the distribution of the C7 nerve root.

Conclusion

[57] In light of the above considerations, the Court finds that the Corporation correctly determined that Mr Hookway was not incapacitated, from 20 June 2019, by his covered injuries, and so was not entitled to weekly compensation from this time. The weight of medical evidence supports the conclusion that Mr Hookway's work incapacity from June 2019 was caused by degenerative change rather than his covered injuries, which had resolved.

[58] The decision of the Reviewer dated 5 November 2020 is therefore upheld. This appeal is dismissed.

[59] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors: Medico Law, Auckland for the respondent