IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 148 ACR 188/21

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

Hearing:	13 July 2023
Heard at:	Auckland/Tāmaki Makaurau
Minute:	8 August 2023
Appearances:	P Schmidt for the Appellant F Becroft for the Respondent
Date of Judgment:	14 September 2023

RESERVED JUDGMENT OF JUDGE D L HENARE
[Entitlement to Weekly Compensation
Section 103 Accident Compensation Act 2001

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[1] The appellant, Diane Tsirakoff, suffered a back injury when attending a karate class in November 1990. At that time, she was about 30 years old. She returned to her pre-injury employment a couple of months later and worked until January 1992.

[2] In late 2017, Ms Tsirakoff sought weekly compensation backdated to the time her payments ceased in 1991 on the grounds her incapacity for her pre-injury

employment is caused by the 1990 injury. Ms Tsirakoff challenges the Corporation's decline decision dated 11 September 2020 which states:

> ACC has carefully assessed all the information available and finds that we're unable to reinstate weekly compensation from the point payments previously ended in 1991. This is because the available evidence does not support that the back sprain for which you have cover is the cause of any persisting incapacity.

Issues

[3] The agreed questions for determination are:

[a] Whether Ms Tsirakoff's symptoms for the duration of the period claimed to 1991 are injury related?

[b] Whether the injury related symptoms (if established) are incapacitating?

Evidence of Ms Tsirakoff

[4] On 11 December 2019 Ms Tsirakoff provided a statement of evidence that at a karate class on 1 November 1990:

> I was lying flat on the floor when I was grabbed by my right hand and yanked to a seated position and spun around, slightly forward. My legs facing one way my torso the other way in a twisted fashion at the waist.

[5] Following the accident, she said she went home but "I couldn't stand the next day or walk at all for 2 months". She said she returned to work beginning February 1991, and "knowing of upcoming redundancies, I struggled with the pain and not being able to sit until my redundancy on 3rd January 1992". Ms Tsirakoff said she managed staff, doing data entry and training, standing most of the time.

[6] Addressing incapacity, Ms Tsirakoff stated:

> I have not been able to sit since 1990 to the current date without setting off sciatica in my left leg because of the damaged discs (now surgically repaired). I also suffered a soft tissue injury while being spun around. It has been difficult to get a precise diagnosis, but my understanding is that I have suffered damage to the iliotibial band (ITB), piriformis, gluteal area, front

> thigh, trochanter and hamstring. I also suffer numbness and pain on the top of the left foot and hamstring, which causes me to limp and trip to this day.
>
> I did try and return as a security guard but failed as it involved too much driving and standing.

[7] On 9 February 2023 Ms Tsirakoff filed a further statement of evidence detailing the karate accident and her symptoms; that she returned to work in anticipation of redundancy; her role enabled her to manage staff (mostly standing rather than sitting); retraining for security work; care of her mother and then father (she had official carer status for her mother from about the end of 1992); and ongoing back pain, all of which she confirmed at hearing. She stated:

> Back injury
>
> This injury has been a continuous problem since the day of the accident. I was unable to stand for the first month and it took another month before I could stand and walk to go to the Doctor for treatment. I injured the L4-5 S1 which effected (sic) my left leg, hip which had a large lump on the outside (trochanter); IT band, gluteal pain, quad and the hamstring is still numb to this day. …… I was yanked up by my right arm and spun on my left buttock twisting at the waist. Torso and legs in opposite directions.

[8] Ms Tsirakoff said she has had a mix of treatments of acupuncture, massage, physiotherapy, gym, pain clinic together with surgery in 2014.

Post hearing

[9] By consent, counsel filed a memorandum dated 18 July 2023 listing eight categories of documents lodged in evidence which they agree do not assist the Court in determining the issue of incapacity. Accordingly, the Court excludes these documents from the record.

Issue one: whether the symptoms claimed from 1991 are injury related?

Medical reports

1990

[10] Ms Tsirakoff's claim file after the 1990 accident is no longer available. Counsel agree the covered injury was a back sprain or strain. There are GP notes dating from 22 January 1991 to 15 June 1994 which are brief and largely illegible.

[11] The medical reporting recorded Ms Tsirakoff suffered from back pain for which she periodically received treatment, certain of which Ms Becroft submitted was often external to the Corporation.

[12] The patient notes to 1995 record Ms Tsirakoff engaging in Tai Chi and gym classes and receiving acupuncture and anti-inflammatory medication. Her wrist is mentioned as "karate – been bruised and tender" in a record of November 1991, and "slowly better" on 3 April 1992. Notes of 9 January 1994 and 5 July 1994 record "back improving". There are references to different claim numbers.

1996 to 2000

[13] The reporting shows Ms Tsirakoff sustained injuries in other body sites, as well as widespread generalised pain. There was a request for treatment made in February 1996 in relation to back pain following a car accident on 13 March 1994. There is a subsequent treatment request for the same injury, which indicates ongoing back pain, and a note that it was improving. There is mention of shoulder, back and buttock pain and intermittent reporting of her leg giving way alongside certain other claim numbers which are unexplained. On 10 October 1998 there is a note:

> Doing karate 9 years ago. Another guy pulled and lifted her (R) arm – sore R arm and leg and slipped lumbar disc – recurrent pain – clinic – massage/acup (sic acupuncture) cont. sore.

[14] There is mention of a lot of acupuncture treatment.

[15] Mr Barnes, Orthopaedic Surgeon reported on 15 January 1999, noting "longstanding symptoms" that were "somewhat difficult to explain". Mr Barnes noted Ms Tsirakoff was troubled by mid to low back pain and pain radiating to the left buttock and left posterior thigh. He stated:

> In addition, she has pain in the mid thoracic region and the right scapular region and feels a painful clicking sensation in her right shoulder at times. She is convinced there is some relationship between this pain and the pain in the low back and the left leg as when one is to the fore the other is less troublesome and vice versa. She has had several unusual episodes of pain radiating a little way down both arms but does not really have radicular pain in her right arm.

She is otherwise in satisfactory health.

[16] Mr Barnes noted Ms Tsirakoff first developed problems in 1990 with the karate injury but does not mention any other injury, including from the car accident. He also noted she had not worked for a number of years and was at that stage looking after her father, who had suffered a stroke. Though Ms Tsirakoff reported she was told she had a disc prolapse, Mr Barnes did not have evidence of the prolapse and he noted x-rays of the lumbosacral spine "are within normal limits." He suggested an MRI scan to rule out nerve root compression.

[17] On 18 February 1999, Mr Barnes reported the MRI scan had shown two level disc degeneration at L4/5 and L5/S1 with no significant disc herniations demonstrated. He said "historically she had at least one disc prolapse and it probably accounts for the permanent numbness in the left thigh" but the disc prolapse is not shown on the MRI scan. Rather, Mr Barnes referred to mild bulging of the discs with no pressure on the spinal nerves. He did not think that a surgical solution was indicated.

2000 to 2009

[18] There was a claim lodged in September 2001 when Ms Tsirakoff fell and wrenched her lower back. A medical certificate from her GP on work capacity completed at that time, recorded Ms Tsirakoff was able to continue her normal hours of work, although she states in evidence she was not working at that time.

[19] In November 2001 Mr Astley, orthopaedic surgeon, reported neck and shoulder girdle pain syndrome which he stated related to a wrenching type injury "which while at the time she didn't think of too serious a consequence" has left her with ongoing symptoms of pain around the top of the shoulder and radiating into her neck and down her arms. He noted she was not working. He opined "non-specific musculoskeletal dysfunction".

[20] Mr Hill, Chiropractic Sports Physician, reported in January 2002 shoulder pain symptoms which began when an instructor pulled on her shoulder during karate. He

noted pain ebbed and flowed so that "whenever she has a minor fall or works hard the back pain flares up again".

[21] In January, February and May 2002 Dr Quinn, Musculoskeletal Physician, reported pain in the right shoulder and left lower back coming and going, and left leg pain constantly present. He noted sitting is limited to 20 minutes. He diagnosed a chronic pain syndrome affecting the lower back, leg, and right shoulder.

[22] There are claims for accidents in 2005, the notes of which are illegible; in 2006 on exercise equipment; and in 2007 arising from a car accident noting leg pain symptoms and non-radicular sprain injuries.

[23] In February 2009, Ms Tsirakoff injured her shoulder in an accident. She was assessed by Mr Poon, Surgeon, and later by Mr Bull, Shoulder Surgeon, as having a partial thickness supraspinatus tear.

2010 to 2015

[24] In 2010, Ms Tsirakoff was referred for x-rays by her GP, with a reported history of lower back pain that was getting worse, with sciatica and tenderness at L5/S1. The GP considered whether there was a disc problem or osteoarthritis. An x-ray was taken on 1 December 2010 which identified degenerative changes at the lumbosacral junction with moderate loss of disc height and small marginal spurs.

[25] In January 2011, the GP referred Ms Tsirakoff to the hospital for treatment of her longstanding lower back pain. She was seen by the orthopaedic clinic in March 2011. Mr Haines, Physiotherapist, reported at the time she was on an Invalid's Benefit from WINZ. He did not think there was any significant spinal anatomy explaining Ms Tsirakoff's symptoms. He arranged a referral to the Auckland Regional Pain Clinic (TARPS).

[26] TARPS subsequently sought funding assistance from the Corporation. Around this time, Mr Ball provided further reports regarding the shoulder, and recommended surgery. Surgery proceeded later in 2011.

[27] Ms Tsirakoff's file was reviewed by Dr Wilson, Branch Medical Advisor, in June 2011. She noted a report from Dr Quinn in January 2002, which reported pain behaviours, and advised:

> In the first instance I do not think that any pain treatment is appropriate until after the shoulder surgery and secondly it must be established that the client has a pain disorder secondary to her covered injury before ACC funds treatment.

[28] The Corporation funded pain management on the 1990 claim.

[29] There are reports from TARPS from 2011 which refer to the 1990 injury and identify post-traumatic chronic low back pain. One such report indicates the 1990 injury had had a significant impact on Ms Tsirakoff's life, such that she has not worked since 1995.

[30] Another report from Ms Cornwall, Occupational Therapist from TARPS, dated 23 August 2011, indicates Ms Tsirakoff was working before the 1990 accident and that prior to 2003, she had had a stressful number of years, being a caregiver to both her mother, who had bipolar disorder, and her father, who suffered the effects of a stroke. The same report also indicates she was unable to sit for any length of time and as a result she had been unable to hold down a job since her accident.

[31] Subsequently, reports from TARPS focus on the shoulder and resolving pain following surgery. There is some suggestion Ms Tsirakoff was still focused on a potential surgical cure for her back pain, which TARPS saw as a barrier to effective pain management treatment.

[32] A further x-ray of the lumbosacral spine on 8 May 2012 showed moderately advanced spondylosis at L5/S1.

[33] In June 2012, Ms Tsirakoff was seen by Mr Howie, Orthopaedic Surgeon in the public system. Mr Howie noted the 1990 back injury and Ms Tsirakoff reporting she was not further investigated following that injury until 1999, when she saw Mr Barnes. He diagnosed disc disease at L5/S1 and recommended a lumbosacral fusion. The Assessment Report & Treatment Plan indicates in relation to causation: "severe

L5/S1 disc disease with history multiple injuries as above". The surgery request was reviewed by Mr Hunter, Orthopaedic Surgeon of the Clinical Advisory Panel (CAP), in August 2012 who opined the L5/S1 pathology was a gradual process disorder, not caused by one off trauma. He concluded it could not be linked to any of the previous claims. Based on this advice, the Corporation issued a decision declining surgery funding.

[34] The Corporation also considered further physiotherapy funding requests, which related to an injury in March 2012. The file was reviewed by Mr Burns, Clinical Advisor, who noted the significant history of lumbar and neck symptoms with input from Pain Management Services. In his view, imaging consistently showed no evidence of a traumatic injury, but did show multilevel degenerative changes. Entitlements were suspended on that particular claim.

[35] Mr Mee, Neurosurgeon, provided reports in August and September 2012, referencing neck and shoulder symptoms as well as a history of lower back pain. Mr Mee arranged an MRI scan of the cervical spine which he described as normal.

[36] In November 2012, Ms Tsirakoff applied for a review of the Corporation's decision declining funding for back surgery. That review was withdrawn by her then legal representative, in May 2013.

[37] Mr Ferguson, Orthopaedic Surgeon, saw Ms Tsirakoff at Auckland Hospital in August 2013. Ms Tsirakoff was also experiencing some knee pain which was the focus of Mr Ferguson's assessment. He did not identify a surgical solution for the identified pain.

[38] Mr Don, Orthopaedic Surgeon reported in the public system in October 2013. He recorded Ms Tsirakoff injured her back in the 90s with development of low back pain "and multiple injuries over time." Like Mr Ferguson, Mr Don noted "more recently she has injured her back with pain radiating into her left buttock and to the back of her thigh. He noted old imaging of collapse of the L5/S1 disc but provides no further explanation.

[39] Mr Ferguson provided a further report in December 2013, again focusing on the knee but providing a diagnosis of complex regional pain syndrome.

[40] Mr Don reported again in January 2014, describing a significant collapse of the L4/5 disc with an annular tear and small protrusion at L4/5. Given Ms Tsirakoff was struggling with ongoing pain, he accepted that surgery was an option.

[41] Mr Munro, Orthopaedic Surgeon reported in the public system in January 2014. He described a complex set of symptoms related to chronic lumbar back pain and the shoulder and a chronic pain problem "starting to become a singular point of focus in her life". His focus was also on the knee. His major concern was Ms Tsirakoff's experience of heightened pain compared to the organic pathology present.

[42] Ms Tsirakoff underwent fusion surgery to her back on 30 June 2014, in the public system. It appears the surgery improved some of her pain but not all of it, with ongoing problems with the left leg in particular.

2015 Onwards

[43] In early 2015 there was a request for funding for post-surgical physiotherapy treatment which was initially approved. However, the file was reviewed again in February 2015 by Mr Westhead, Physiotherapist, who noted back surgery had been declined by the Corporation in August 2012 and postsurgical treatment should also be declined. On 4 March 2015, the Corporation issued a decision declining further physiotherapy funding.

[44] Throughout 2015, there were further investigations into Ms Tsirakoff's ongoing back pain and Mr Don cautioned that a full year of waiting following the surgery was needed to see how things progressed. Consideration of possible piriformis syndrome was given in late 2015 but ruled out by Mr Twaddle, Orthopaedic Consultant, in a report dated 12 October 2015.

[45] In 2016, there was a further request for TARPS funding. Dr Wilson reviewed the file again in July 2016, emphasising the surgery had not been covered by the Corporation and any failure to improve after the surgery was also not covered.

[46] Despite that advice, in August 2016, the Corporation approved pain management funding on the 1990 claim.

[47] In 2014 Mr Hunter reviewed the 1995 imaging "the L5/S1 disc space is relatively narrow but insignificant developmental variation may be responsible at that level". He looked at the MRI scan noting degenerative changes as moderately severe at L5/S1 and mild at L4/5 level and "no significant disc herniations demonstrated". He noted the Clinical Advisory Panel in 2012 noted the degenerative L5/S1 disc as the result of a gradual disorder. He noted the pathologies in 2011 and 2012 imaging as not caused by one-off trauma and "cannot be causally linked to any of the previous 6 claims for funding of surgical treatment".

[48] A technical review of the history of lumbar spine symptoms followed which identified the following barriers to reinstatement of weekly compensation noting the earliest contemporaneous medical information in relation to the lumbar spine is in 1995 and uncertainty regarding the causal nexus between more recent entitlement requests notably the lumbar spine fusion, and the 1990 claim.

[49] On 24 July 2018, the Corporation issued a decision declining to reinstate and backdate weekly compensation on the basis the medical evidence did not support a continuous incapacity as a result of the covered injuries. The letter explained Ms Tsirakoff needed to be an earner immediately before a period of incapacity (thus, it was necessary to establish incapacity to 1992).

[50] On 1 August 2018, Ms Tsirakoff emailed the Corporation providing further details in relation to the 1990 accident, indicating she could not walk or stand for a month following it, and no x-rays or scans were undertaken at the time. She believed the Corporation should have funded her surgery in 2012, and various administrative errors had led to her situation. A formal review application was filed on 11 September 2018.

[51] Mr Clayton reviewed the file on 24 September 2018, considering the various issues raised by Ms Tsirakoff. He noted a s 79 award paid in the 1990's was not evidence in itself of an incapacity for work.

[52] Mr Monk, Orthopaedic Surgeon, reported in the public system on 8 April 2019. He confirmed Ms Tsirakoff's symptoms had improved with surgery and acupuncture treatment, but she had ongoing difficulties with sitting. He concluded:

> On balance, Diane's symptoms appear to be the same symptoms that she has had for the last 30 years, which have been markedly improved by lumbar spine decompression.

[53] On 7 May 2019, a further medical certificate was filed by Dr Lowe, who referred to the 1990 injury and the treatments and "days off" that Ms Tsirakoff had had. He noted she was working until 3 January 1992 and continued to complain of the problem in her back. He asked the Corporation to review her entitlement to compensation.

[54] In 2019 Mr Schmidt became involved representing Ms Tsirakoff. He suggested a conciliation meeting with a view to investigating the claim further.

[55] Conciliation proceeded on 1 November 2019. It was agreed the Corporation would refer Ms Tsirakoff to an orthopaedic surgeon for assessment and then, if required, a further assessment from an occupational medicine physician.

[56] An MRI scan was undertaken of the pelvis on 10 July 2020 which showed mild bilateral gluteus minimis insertional tendinosis associated with trochanteric bursitis.

[57] Mr Mills, Orthopaedic Surgeon, undertook a medical case review and reported on 17 July 2020. He undertook a clinical examination. He confirmed the records from 1990 to 1995 were deficient and any opinion regarding causation of the current condition, uncertain. He noted though the injury was initially recorded as a sprain or strain that Ms Tsirakoff returned to work following the accident in January 1991, making again any causal relationship between the current medical condition and the accident conjecture. He also noted there had followed multiple accident events from which it was not possible to exclude a contribution. He indicated the current

diagnosis was disc degenerative disease of the lumbosacral spine. In his view, the original lumbar sprain/strain could reasonably be considered to have resolved and it was not possible to link ongoing symptoms to that injury. He thought a review by a neurologist might assist.

[58] The file was then reviewed by Dr Sandhu, Medical Advisor, on 18 August 2020, who noted Mr Mills' advice and concluded:

> Based on available medical information as above, in my view, the index event dated 1/11/1990 at best caused a simple soft tissue sprain/strain of the lumbar region and that can be considered resolved. Initial brief incapacity from work was accepted, as noted by Mr Mills. Since the soft tissue sprain/strain is considered resolved, I do not support further assessment by occupational physician.

[59] Mr Clayton, Technical Adviser then looked at the file advising:

> We now have an explanation for why weekly compensation ended in January 1991. Ms Tsirakoff advised that she returned to her pre-injury employment in order to avoid missing out on a redundancy payment as her employer was closing.

Submissions for the appellant

[60] Mr Schmidt submitted after the karate accident Ms Tsirakoff suffered symptoms of sciatica from the left buttock to the top of her left toe. She experienced pain in her buttocks when trying to sit, which caused the sciatica to flare up. She had difficulty walking as her left leg would give way occasionally. Mr Schmidt submitted these symptoms persisted in the years that followed the 1990 accident.

[61] Having regard to the principles in *Ambros*,[1] Mr Schmidt invites this Court to draw inferences on the basis the reports consistently record the same symptoms and are best explained by Dr Snow.

[62] Mr Schmidt submitted if the Court accepts Dr Snow's view, Ms Tsirakoff's symptoms "would have been continuous and would not have resolved".

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

[63] Mr Schmidt submitted Ms Tsirakoff experienced some improvement in her sciatic symptoms following spinal surgery in 2014 and a temporary improvement in thigh/buttock pain in 2021 as documented by Dr Snow. In Mr Schmidt's submission, improvement in these conditions many years post injury is persuasive evidence these injuries are the cause of her pain.

Discussion

[64] There is no dispute Ms Tsirakoff suffered an accident at karate in 1990 which the Corporation provided cover for a back sprain or strain injury. There is agreement that the Court is not restricted to the covered injury and a determination may be made of an injury related to the 1990 injury. Mr Schmidt and Ms Becroft disagree as to the relationship between Ms Tsirakoff's chronic pain and the 1990 injury. Mr Schmidt submits the chronic pain is injury related; Ms Becroft says it is not. Ms Becroft submitted that the problem here is that specialists are largely attempting to backfill the facts when there is an absence of contemporaneous evidence.

[65] The Court agrees. It is difficult for a Court to achieve a clear picture of the facts over a long period when the evidence is piecemeal. That is the case here. There are gaps in the evidence from 1993 to 1999 and then from 2002 to 2009 and numerous accidents between 1993 and 2013, including accidents in 1993 and 1994. The Court observes the request for physiotherapy in October 1999 refers to the 1994 injury.

[66] Mr Mills noted 14 accident claims in respect of the lower back/spine occurring in the period from November 1990 to January 2013. He recorded also a document "Accident: Trauma Back 1990 – 2015" in which Ms Tsirakoff had catalogued a list of 19 injuries. There is a record of covered low back strain or sprain injuries sustained by Ms Tsirakoff in accidents between September 1993 and October 1998.

[67] Dr Snow opined while there is reporting of the initial injury in 1990, the early clinical assessments are not available. There are a myriad of claim numbers relating to back pain. Many references are to fluctuating pain.

[68] The claims record adds to a complicated picture of symptomology where some of the medical reports, even if informed of a set of symptoms, focus on some symptoms, but not others. Some reporting opines post traumatic disc degeneration, other reporting shows the pathology as not due to single, one-off trauma. I agree with Mr Schmidt that the medical reports, which are primarily orthopaedic in nature, provide little assistance when determining the cause of pain or the continuity of symptoms from 1990. The reports show practitioners relying on a history reported by Ms Tsirakoff and then grappling with diagnosis and treatment.

[69] By way of example, the difficulty is seen in the reporting of Mr Barnes, Mr Ferguson, Mr Howie and Mr Mills all orthopaedic surgeons.

[70] Mr Barnes noted longstanding symptoms from 1990 relating to the right shoulder area as well as the lumbar spine, pain down the left leg and recorded Ms Tsirakoff "was told she had a disc prolapse". He then noted pain was variable, that it had improved in these areas, but became severe in 1995. Mr Barnes' clinical examination related only to the lumbar region and straight leg raising. The MRI scan he arranged related only to the lumbosacral spine.

[71] Mr Ferguson noted Ms Tsirakoff was plagued by low back pain when he saw her in 2013. He noted:

> More recently she has injured her back with pain radiating into her left buttock and to the back of her thigh. Often, she gets pain down her left leg with pins and needles into the top of her foot.

[72] Mr Ferguson arranged an MRI scan of the lumbar spine. In his 2014 report he noted "her experience of pain is heightened compared to what we see on the MRI".

[73] Mr Mills also noted there had been multiple accident events since 1990 and it was not possible to exclude a contribution from them. He indicated the current diagnosis was disc degenerative disease of the lumbosacral spine. In his view, the original lumbar sprain/strain could reasonably be considered to have resolved and it was not possible to link ongoing symptoms to that injury. The orthopaedic surgeon thought a review by a neurologist might assist.

[74] I turn to consider Dr Snow's opinion. Dr Snow responded to questions following joint referral from counsel. Dr Snow discussed the 1990 injury and the back pain exacerbated by subsequent injuries. He noted an MRI scan showing degenerative changes at L4/5 and L5/S1 and minor disc protrusions. He noted the fusion surgery and the improving referred symptoms following it. In his view, there was little evidence of any major nerve injury, although there were signs of a minor nerve injury with an alteration in sensation probably representing impingement of the lateral cutaneous nerve of the left thigh. He commented:

> In my opinion it is likely that Diane's symptoms are multifactorial, and this may be why her presentation has been difficult to explain. It is likely that there was a previous disc prolapse causing impingement of the left S1 nerve root. This would be consistent with a history of sciatica, the MRI findings of degeneration at L4/5 and L5/S1, the reported improvement of her sciatic pain after the lumbar spine injury in 2014 and the findings of the nerve conduction studies. Clinically there is no ongoing evidence for significant S1 nerve root compression.

[75] He went on to say this kind of nerve injury could be a source of irritation, but not a disability. He summarised:

> … I believe that there is evidence for a previous S1 nerve root injury, irritation of the lateral cutaneous nerve of the thigh and perhaps a degree of irritation of the left trochanteric bursar. I believe the combination of the separate conditions has produced the complicated presentation that has eluded explanation by a single diagnosis.

[76] While Dr Snow acknowledged there was evidence of signs of a previous Sl nerve root injury, he was unable to comment on a causal link between the nerve injury and the 1990 claim. He stated:

> The specific question as to the relation between her current state and the injury that Ms Tsirakoff suffered in the accident on 1 November 1990 is impossible to answer with any certainty. **The episode was too long ago and there is insufficient documentation of any deficits at the time of the injury. We have little to rely on other than her history where she describes similar pain to the present from the outset. Based on this piece of information alone, this suggest that some process was started at that time which has been compounded by other issues both directly and indirectly related to that early injury. I am afraid unless there were very specific and comprehensive clinical assessments at that time that could be discovered that it is unlikely that we will be able to answer that question with more certainty.**

[Emphasis added]

[77] Dr Snow's report underscores the problem. It is unclear exactly what injury was sustained in 1990 and whether there is any correlation between the symptoms that developed over 30 years and that injury. The clinical record shows intermittent attendances with various medical practitioners; that Ms Tsirakoff suffered a wide range of ailments, multiple injuries to different body sites as well as non-injury conditions.

[78] In reviewing the evidence carefully, I have considered whether there is "clear supporting evidence"[2] whether Ms Tsirakoff's symptoms for the duration of the period to 1990 are injury related. While Dr Snow has In my opinion, the picture is of generalised pain.

[79] What can be said, is that Ms Tsirakoff's condition progressively worsened over time, ultimately leading to surgery in 2014. The Corporation declined to fund that surgery, not accepting that it was injury related. It is the case Ms Tsirakoff does not have cover for a disc injury or disc degeneration.

[80] I find at best, intermittent references to symptoms of back pain with bruising of the wrist and shoulder pain attributed to the 1990 accident. While Ms Tsirakoff stated she had been told of a disc injury and Dr Snow opined a previous nerve root injury irritation, there is no imaging evidence of this injury and Dr Snow does not say, that it was caused by the 1990 accident. Careful review shows Dr Snow's opinion is of a current diagnosis.

[81] The 1995 x-rays do not show disc prolapse with Mr Barnes stating the lumbosacral spine was within normal limits. A disc prolapse was not shown on the MRI imaging in 1999 with Mr Barnes noting "historically" there had been a disc prolapse. Rather, the 1999 MRI scan showed two level disc degeneration, and diffuse annular bulge that was not compromising the spinal nerve roots. He gave no opinion whether this pathology was due to trauma, particularly one-off trauma related to the 1990 accident.

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2 *Tonner v Accident Compensation Corporation* [2019] NZHC 1400 at [52] per Muir J.

[82] Dr Walls' evidence that the low back pain since the injury is compatible with a L5/S1 disc injury does not have any support from the reporting of the orthopaedic surgeons. Further, the Corporation did not accept liability to fund the 2014 surgery and the pathology then treated. Ms Becroft reminded the Court whether the need for that surgery is injury related, is not under challenge.

[83] Mr Schmidt submitted from an *Ambros* perspective, there is no rebuttal evidence to the opinion of Dr Snow. It is the case that Dr Snow was candid on the issue of medical certainty. *Ambros* does not require a decision maker to make a finding based on medical certainty. The evidence must be robust for a Court to draw inference. In the absence of clear evidence, noting the medical reporting raises more questions than not, I find the contemporaneous evidence is insufficient to show the various symptoms for the duration of the period claimed are injury related. I accept Dr Snow's opinion that the signs and symptoms are multifactorial and there are any combinations of separate conditions and pain symptomology, also noted by the Pain Clinic. At best, relying on the evidence of Ms Tsirakoff alone, but not medical reporting, I am prepared to accept contribution of back pain symptoms from the 1990 accident. However, it remains unclear what injury was suffered in 1990. The evidence is conjectural.

[84] I turn to consider the second issue.

Issue two: whether the injury related symptoms are incapacitating

Legal test

[85] Section 103 sets out the statutory test for incapacity. The question is whether a claimant is unable, because of his or her personal injury, to engage in employment for which he or she was employed when he or she suffered the personal injury.

[86] In *Jamieson*,[3] Cadenhead DCJ summarised the Court's approach to cases involving claims for retrospective incapacity:

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3 *Jamieson v Accident Compensation Corporation* [2004] NZACC 80, at [30].

> [i] It is upon the appellant to show on a balance of probability that at the date of the alleged incapacity, because of the injury for which he had cover, he was incapacitated within the terms of the statute.
>
> [ii] Retrospective certification of incapacity will be acceptable in certain circumstances. However, the onus is on the claimant to produce evidence establishing a clear picture, or strong and supporting evidence other than contemporary medical certificates, of a continuing incapacity over the period in question.

[87] In *Bell* Beattie DCJ considered the same issue and held:[4]

> [19] This Court has stated in a number of decisions that retrospective medical certificates will be treated with caution, and in those situations will require supporting evidence retrospective aspect.
>
> [20] In the present case there is simply no evidence of a medical nature pertaining to the appellant's physical condition between 9 June 2009 and September 2009, and it is a fact that during that period the appellant and her husband had a four-week overseas holiday.

[88] Similar commentary is available in *Palmer, Barnett, Farrelly,* and *Knight.*[5]

[89] The High Court decision of *Tonner*[6] also traverses the difficulties with retrospective claims. It involved a claim for retrospective weekly compensation in relation to a mental injury, dating back to 1997. Muir J discussed the issues:

> [42] This case exemplifies the difficulties often associated with retrospective claims under s 103. Indeed, it is one of the more extreme examples, given that by the time the claim was made, over 15 years had elapsed from the date of the accident and over five years from the date on which Mr Tonner had ceased working. Two years prior to the claim his own psychiatrist Dr Kritzinger recorded in correspondence acknowledging the likelihood of PTSD as a consequence of the accident, that:
>
> > *I think retrospective attribution of disability to his mental condition will be part of an entirely different debate and may be very difficult to illuminate given the time frame since the accident.*
>
> [43] For this reason, the authorities have consistently identified that the onus is on such claimants to establish a clear picture of incapacity over the relevant

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4 *Bell v Accident Compensation Corporation* [2011] NZACC 22.

5 *Palmer v Accident Compensation Corporation* [2006] NZACC 26; *Barnett v Accident Compensation Corporation* [2009] NZACC 154; *Farrelly v Accident Compensation Corporation* [2013] NZACC 420; and *Knight v Accident Compensation Corporation* [2016] NZACC 174.

6 *Tonner v Accident Compensation Corporation* [2019] NZHC 1400 at [42] – [44].

> period and that, in such context, retrospective medical certificates will be treated with caution.
>
> [44] **A defining feature of many claims in this category is the absence of contemporaneous medical evidence confirming incapacitating injury or condition. Often there will be an attempt to infill that lacuna with retrospective medical assessments and/or an Appellant's personal affirmation of incapacity. It is the frequent refrain of Appellants that they are effectively penalised for stoicism in the face of incapacitating injury or condition and for 'soldiering on' in their employment despite disability.**

[90] Ultimately the High Court in *Tonner* agreed the question in regard to retrospective incapacity was a factual one which required a consideration of the contemporaneous evidence during the period claimed. The Court confirmed that in Mr Tonner's case:[7]

> … the position [in regard to a lack of evidence of incapacity] was then fortified by the absence of reference to an incapacitating mental illness in any of the GP reports from the early 2000s.

Submissions for the appellant

[91] Mr Schmidt submitted the only specialist report from an occupational physician is from Dr Walls who concluded:

> I would be of the opinion that her pain and left lower limb weakness, particularly after sitting, would have precluded her from substantial engagement in work including the pre-injury work since the time of the accident.

[92] Mr Schmidt submitted the purpose of Dr Walls' assessment was to provide the best possible explanation in the absence of contemporaneous medical records between 1992 and 1999 and the evidential gaps that result

[93] Mr Schmidt submitted there was clear motivation for Ms Tsirakoff to return to her pre-injury work in anticipation of a redundancy payment. However, when she did so she was likely incapacitated because she performed her supervision/training role while standing. Further, she was able to take time off for acupuncture treatment.

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7 Ibid, at [52].

Discussion

[94] I accept Ms Tsirakoff's evidence at hearing that redundancy was a motivation to return to her pre-injury employment for a year, and her seniority at LD Nathan as basis for her employer allowing her to stand at work. The difficulty is while there is no reason to dispute her account, there is no contemporaneous evidence of assessment of her incapacity for pre-injury employment and that it was continuous over the 30 year period.

[95] The question is whether Dr Walls' report is sufficient to meet the test for retrospective incapacity for pre-injury employment over a 30-year period, as submitted by Mr Schmidt.

[96] Dr Walls noted that Ms Tsirakoff suffered ongoing low back pain since the injury which he says was compatible with a L5/S1 disc injury. I have already referred to the fact that Ms Tsirakoff does not have cover for a disc injury, nor is there clear evidence that she suffered disc injury in 1990.

[97] I accept the submission of Ms Becroft that the premise upon which Dr Walls' report is based, therefore appears flawed. That flaw permeates the balance of his report. Dr Walls presupposes causation when he notes the lumbar fusion that Ms Tsirakoff underwent in June 2014. It is not clear whether he knew the Corporation did not accept liability to fund that surgery. Whether the need for that surgery is injury related, is not under challenge. The evidence shows the Corporation did not accept responsibility for that surgery and the pathology being treated.

[98] Notwithstanding, Dr Walls describes the effects of what he calls the injury. In his 2021 assessment, he focuses on current symptoms. He diagnosed chronic low back pain syndrome with radicular symptoms, suggesting a link to the non-covered disc pathology. Based on a review of the historic documentation, and his clinical examination, Dr Walls reached a conclusion on work capacity:

> As far as I can determine **from the description given to me** and **the reports of the various contemporary medical reports,** Diane has not had any work capacity since the onset of her injury in November 1990.

[99] This is a conclusion made retrospectively based on self-reporting and a few of the historic reports which I conclude are insufficient from which to draw a robust conclusion on incapacity over a 30-year period. I find I can give little weight to Dr Walls' conclusion because it is premised on a flawed understanding of the injury itself. The problem is further compounded by the fact that Dr Walls' responses all relate to current incapacity as opposed to incapacity over the 30-year period.

[100] It is also the case Dr Snow focussed on current symptoms and opined there was little evidence for any "current major nerve injury" noting only signs of a minor nerve injury originating from the lateral cutaneous nerve of the left thigh. He opined this would not cause any current dysfunction, let alone any incapacity dating back to 1991. He could not comment on the relation between her current state and the 1990 accident because the accident was too long ago and there was insufficient documentation.

[101] Against this reporting, is Ms Tsirakoff evidence. In her answers to questions considered by Dr Thakurdas, there is mention of her multiple injuries from 1993 to 2013. Ms Tsirakoff stated, "The reason I had to stop work was the pain medication wasn't working as well and I couldn't do the job I was employed to do". Ms Tsirakoff outlined the data entry work; "My job at DOI was managing a small group of women in Data entry which involved sitting for long periods which increased the pain which meant more pain medication."

[102] Ms Tsirakoff explained in her more recent evidence that she returned to her pre-injury employment in order to qualify for a redundancy payment. Further, that she worked standing up, not sitting but if she did sit, it was for approximately 20-30 minutes. She said she also took time off during work hours for treatment. While there is no dispute as to the reasons Ms Tsirakoff returned to work, it appears according to her own evidence, that the only task she could not perform was when she had to sit for periods of time. Otherwise, she was able to carry out her supervisory role for about a year. On the face of it, there appears some reasonable

adaptation of her pre-injury tasks in *Crothers'* terms.[8] However, there is insufficient evidence for this Court to be able to reach any reasonable conclusion.

[103] I conclude the available evidence on a balance of probabilities, has too many gaps in it and is insufficient to show that Ms Tsirakoff has suffered a continuous incapacity for her pre-injury employment to the present day.

[104] Accordingly, the appeal is dismissed.

[105] There is no issue as to costs.

Judge Denese Henare
District Court Judge

Solicitors: Medico Law Limited, Auckland for the respondent.

8 *Crothers v Accident Compensation Corporation* [2018] NZCA 35.