

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 196 ACR 102/23

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

Hearing: 28 November 2023

Held at: Wellington/Whanganui-a-tara by AVL

Appearances: The Appellant is self-represented
F Becroft for the Accident Compensation Corporation (“the
Corporation”)

Judgment: 4 December 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
**[Claim for weekly compensation – ss 103(2), Schedule 1, cl 32, Accident
Compensation Act 2001 (“the Act”)]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 19 April 2023. The Reviewer dismissed an application for review of the Corporation’s decision dated 12 August 2022 agreeing to pay weekly compensation to Mr Panchalingam from 4 October 2013 to 22 December 2013 for his incapacity due to his covered injuries (shoulder and lumbar sprains).

Background

[2] On 23 August 2010, GP notes recorded that Mr Panchalingam lifted a 40-kilogramme heavy bag the week before, and had back and right elbow pain since.

[3] On 27 November 2010, GP notes recorded that Mr Panchalingam had had lower back pain since August 2010, and that this had flared a few days before.

[4] In July 2012, Mr Panchalingam twisted his mid-thoracic spine when lifting a box of vegetables.

[5] On 26 September 2013, Mr Panchalingam felt pain in both shoulders while lifting heavy boxes.

[6] On 27 September 2013, Mr Panchalingam saw Dr Dexter Loos, GP. Dr Loos diagnosed sprain of Mr Panchalingam's shoulder joint, and an ACC injury claim form was lodged for this sprain.

[7] On 1 October 2013, GP notes recorded that Mr Panchalingam attended the medical practice with ongoing pain in the shoulder. The notes also confirm that, in 2012, he had presented with both lower back pain and mid thoracic spine pain.

[8] On 11 October 2013, Mr Panchalingam's injury was automatically covered by the Corporation and allocated as a work-related injury.

[9] On 14 October 2013, Mr Panchalingam saw Dr Roger Parr, GP. Dr Parr diagnosed lower lumbar pain, also sustained on 26 September 2013. An ACC18 medical certificate claimed for this injury. The Corporation then also accepted cover for a lumbar sprain, and began investigating an entitlement to weekly compensation.

[10] On 15 October 2013, Mr Panchalingam completed a statutory declaration in relation to the accident. The injury description on the declaration reads (*verbatim*):

There was busy at work all boxes being full of fruits, coconuts, lime, lemons, cabbages, tomatoes so I didn't know which box court my arm, back plates. But there was sharp pain in my arm on 27/9/13 and after that it went to back, legs.

[11] On 14 November 2013, Mr Panchalingam's physiotherapist filed a request for prior approval for further treatment. The physiotherapy form provided the diagnoses of shoulder sprains and a lumbar sprain, and noted that the injury occurred "lifting a heavy box 30 to 40 kg hurt back and shoulders". The physiotherapist advised that the condition was resolving well, but that Mr Panchalingam required more treatments to increase his range of movement and strengthen his back. Physiotherapy notes were also provided from 30 September 2013, and detailed ongoing back and shoulder pain.

[12] On 21 November 2013, additional physiotherapy funding was approved.

[13] On 22 November 2013, Mr Vasudeva Pai, Orthopaedic Surgeon, reported that Mr Panchalingam had had various problems with his back since 2002, but could not remember events causing this. Mr Pai asked Mr Panchalingam about the list of previously covered sprain injuries from 2004, 2005, 2008, 2009, 2010, 2011 and 2012. Mr Panchalingam could remember only the events from about 2011 onwards. When asked in particular about the 26 September 2013 event, Mr Pai recorded:

He states that it was a busy day at work and he was delivering boxes full of fruit, coconut, lime, lemons and cabbages all day which involved lifting boxes for delivery. On the following morning he woke up with severe spasm and pain in the back as well as in the shoulders. He consulted his GP on the following day and was given some pain relief medication and was suggested physiotherapy. His shoulder symptoms improved with physiotherapy but pain in the back and left buttocks was quite slow to rehabilitate and is the reason he could not go back to work. He states that on last Sunday he was feeling better when he felt he could mow the lawns which he did for around 30 to 45 minutes but this caused intense pain in the back with the pain going on the lateral aspect of the left thigh, lateral aspect of the leg to the dorsum of the foot to the toe. That night he rested but on the following morning he had severe pain so much so that he could not lift his left leg and he found it difficult to get a comfortable position on the bed or on the toilet and he called an ambulance in the afternoon. He was assessed by the ambulance staff and he states that he was given three Panadol's and asked to lie down on the floor. He changes his physiotherapy to East Tamaki Physiotherapy who used a rubbing machine on his back (ultrasound massage). He states that he has been using crutches for the last 2 days. Presently he has quite severe and constant pain in the back as well as left sided sciatica.

[14] Mr Pai then reviewed the general practitioner notes. He thought that Mr Panchalingam had suffered multiple lumbar sprains with a more significant event in August 2012, when he fell and experienced pain in the lower lumbar spine to the

left buttocks and the upper part of the back of the left thigh. Mr Pai noted that Mr Panchalingam carried on working with some pain, then the September 2013 event occurred. Mr Pai confirmed that the shoulder issue had resolved and attributed Mr Panchalingam's back pain to disc degeneration, which pre-existed the 2013 injury.

[15] On 26 November 2013, an MRI of Mr Panchalingam's lumbar spine was undertaken. The scan showed an annular tear at L2/3, a left paracentral disc protrusion with nerve root compression at L4/S1, and left L5 nerve root compression. On 29 November 2013, Mr Panchalingam received a steroid injection in his lumbar spine.

[16] The file was then reviewed by Dr Jay Odedra, Branch Medical Advisor. He noted that lumbar spondylosis was common and that disc-related symptoms could occur spontaneously or be related to minor or major trauma. Dr Odedra thought that Mr Panchalingam was suffering a recurrence of sciatic symptoms on a background of underlying lumbar spondylosis.

[17] On 12 December 2013, Dr John Monigatti, Occupational Physician, advised:

It is clear that Mr Panchalingam has established multilevel lumbar spondylosis with an acute exacerbation of symptoms on 17 November 2013. What is unclear is whether or not he sustained an acute disc protrusion, or the enlargement of an existing protrusion, to have caused the radiculopathy symptoms on that date. Mr Pai implied that he did not think so but I believe it is a question to which ACC needs a direct response – unless you take the view that no accident occurred, which would render it irrelevant.

In my opinion any decision ACC might make would be more robust after clarification from Mr Pai, and this should be sought.

[18] On 16 December 2013, Mr Pai advised:

... there appears to be history of sciatic pain in November 2010 as per the GP reports provided to me and his present symptoms are similar. Therefore, in my opinion, it is more than likely he had pre-existing disc changes that caused recurrent backache for many years with one episode of sciatica in November 2010. ... it is more than likely he had recurrence of sciatica following lawn mowing, thus suggesting he had a progression of an existing protrusion ...

[19] On 18 December 2013, the Corporation issued a decision revoking cover for both a lumbar sprain and sprains of the shoulders, and advised:

ACC has decided that this claim should not have been accepted. This is because the information indicates the symptoms arose from normal work activities, and the medical evidence indicates that you did not sustain a new back injury, but aggravated a pre-existing back condition.

As a result, ACC has had to revoke the decision of 11/10/2013 and has declined your claim for cover. This means that ACC is not able to help with treatment costs or other support for your injury from 31/12/2013, and no weekly compensation will be paid.

[20] Over seven years then ensued. On 19 May 2021, Mr Panchalingam filed a late review application against the Corporation's decision, and this was accepted by the Corporation.

[21] On 12 August 2021, a Reviewer dismissed the review application on the basis that the Corporation had sufficient basis to revoke cover, in light of Mr Pai's advice. Mr Panchalingam filed a notice of appeal (ACR 207/21).

[22] The Corporation then offered Mr Panchalingam to:

- (1) reinstate cover for the lumbar sprain and sprain of both shoulders;
- (2) consider whether his disc pathology was causally related to the accidents in 2012 and 2013; and
- (3) issue a further decision on entitlement to weekly compensation.

[23] On 2 February 2022, Mr Panchalingam withdrew his appeal.

[24] On 10 March 2022, Dr John Ferguson, Spinal Surgeon, provided a report. He reviewed Mr Panchalingam's MRI scan from November 2013, and identified a broad based disc bulge at L2/3 where he said there was "an associated acute looking disc injury". He added:

From my point of view he has what is probably a pretty mild disc injury at L5/S1 and a similar injury at L2/3 that could conceivably be caused by the fall from the truck, but which we cannot definitively prove were. ...

Now, nine years later it is all I can do to say that this gentleman may well have sustained an injury in October 2013, I cannot however prove it. Typically speaking, had I seen this gentleman in 2013 I would have advised for a transforaminal epidural steroid injection in the same way he was and provided this gave him temporary relief of his symptoms, I would have given consideration to surgical treatment of the disc lesion. As it happened, this gentleman spent the better part of 7 years out of work because of fear and potentially lack of understanding of his disc injury. I do not know that it is reasonable to ask ACC to cover him for all of this time, however he should have been given advice that he had a disc injury, that the temporary result of the transforaminal epidural steroid injection could have been made permanent by either a discectomy or conceivably a discectomy and fusion at the L5/S1 level which would have got him back to his pre-injury level of function. He is currently pain free, not wanting treatment but should feel free to use this letter in an attempt to overturn ACC's decision regarding earnings related compensation if he sees fit.

[25] On 29 March 2022, the Corporation's Clinical Advisory Panel ("CAP"), comprising a General Practitioner, three Orthopaedic Surgeons, an Occupational Physician, and a General Surgeon, provided a report. The CAP concluded that Mr Panchalingam's lower back problems and disc pathology were part of a progressive, genetically based condition in the lumbar spine. The CAP did not think that the condition was causally related to any of the reported accidents. The CAP placed particular reliance on the fact that Mr Panchalingam's medical records painted a picture of persistent intermittent flare-ups of low back pain over many years; the common occurrence of back pain in the general population; a clinical course in 2013 that was inconsistent with him having suffered a disc injury; and symptoms which were more consistent with a soft tissue injury having been suffered. The CAP reviewed Mr Ferguson's March 2022 report, but pointed out that Mr Ferguson did not appear to have all of the records available to him, and that Mr Ferguson had not provided any rationale to support his conclusion regarding an acute injury.

[26] On 6 May 2022, the Corporation issued a decision confirming that cover for a lumbar sprain and a sprain of both shoulders had been reinstated, and that medical advice confirmed that those injuries would have resolved by November/December 2013. The letter also advised that the Corporation accepted that Mr Panchalingam was incapacitated due to lumbar and shoulder sprains between 27 September 2013 and 22 December 2013. The Corporation also confirmed that it was not approving cover for disc injuries to either L2/3 or L5/S1. Mr Panchalingam did not challenge the Corporation's decision.

[27] On 16 June 2022, Dr Scott Adams, Principal Clinical Advisor, gave advice in relation to Mr Panchalingam's period of incapacity. Dr Adams confirmed that it was reasonable to approve a three-month incapacity in relation to the soft tissue injuries, and that it was likely that those injuries would have resolved by 23 December 2023. Dr Adams noted that, when Mr Panchalingam saw Mr Pai on 22 November 2023, there were no clinical signs or symptoms to support the ongoing effects of shoulder sprains. Further, Mr Panchalingam's lumbar sprain injury was superimposed on a pre-existing lumbar spine spondylosis, and GP notes indicated that the effects of a lumbar sprain were largely resolved by early November 2013, with the subsequent deterioration being more in line with degenerative spondylosis and associated radiculopathy.

[28] On 22 June 2022, the Corporation issued a further decision confirming the acceptance of weekly compensation for Mr Panchalingam between 27 September 2013 and 22 December 2013, and declining cover for any disc injury.

[29] On 12 August 2022, Mr Panchalingam was sent a payment notification of \$6,842.25 in regard to the weekly compensation paid for the period 4 October 2013 to 22 December 2013.

[30] On 22 August 2022, Mr Panchalingam applied for a review of the Corporation's weekly compensation decision of 12 August 2022. The matter proceeded to a case conference, where it was confirmed that the issue was the Corporation's weekly compensation notification of 12 August 2022. It was also confirmed that no review application had been filed against the Corporation's 6 May 2022 cover decision, and Mr Panchalingam was advised that he would need to challenge that decision separately if that was also an issue for him.

[31] On 3 September 2022, the Corporation advised Mr Panchalingam that it would be making an interest payment of \$2,517.92 on his backdated weekly compensation (from 18 December 2013 to 11 August 2022).

[32] On 11 April 2023, review proceedings were held. On 19 April 2023, the Reviewer dismissed the review, on the basis that the Corporation's decision of 12

August 2012 was correct. This was because Mr Panchalingam's covered injuries would have resolved through the natural hearing process by 22 September 2013, and his continuing incapacity for work was due to his lumbar disc pathology, for which he had been declined cover.

[33] On 12 May 2023, a Notice of Appeal was lodged. On 23 May 2023, following a case conference, the Court determined that the recent Notice of Appeal was a new appeal (rather than a continuation of the withdrawn appeal ACR 207/21) and was against the Reviewer's recent decision in regard to weekly compensation.

Relevant law

[34] Section 67 of the Accident Compensation Act 2001 ("the Act") provides:

A claimant who has suffered a personal injury is entitled to 1 or more entitlements if he or she—

- (a) has cover for the personal injury; and
- (b) is eligible under this Act for the entitlement or entitlements in respect of the personal injury.

[35] Section 100 of the Act provides that entitlement to weekly compensation depends on the claimant's incapacity for employment and vocational independence. Section 103 provides:

- (1) The Corporation must determine under this section the incapacity of—
 - (a) a claimant who was an earner at the time he or she suffered the personal injury: ...
- (2) The question that 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.
- (3) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.
- (4) The references in subsections (1) and (2) to a personal injury are references to a personal injury for which the person has cover under this Act.

[36] Section 104 of the Act provides that, if the Corporation determines that the claimant is not incapacitated for employment, he or she is not entitled to weekly compensation.

[37] 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.

[38] In *Jamieson*,¹ Judge Cadenhead stated:

[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. ...

[46] I am of the view having regard to all the circumstances of this case, that the appellant cannot meet the criteria of showing that there was an unbroken chain of causation between his original injury which gave rise to cover, and the fact that the symptoms of that original injury pertained over the period of his unemployment as has been discussed.

[39] In *Scott*,² Judge Ongley stated:

[16] If the claim had been made at the time of leaving Braemar Hospital, the appellant would have been medically assessed for loss of earning capacity under the Accident Compensation Act 1982.

[17] ... The personal affirmation of a claimant concerning her past incapacity to work is not sufficient evidence as a basis for a retrospective claim. Ongoing claims of incapacity are always tested by medical examination and certification. A retrospective claim cannot reasonably be admitted by a lesser standard of verification. ...

[23] ... A backdated claim is necessarily presented without the process of certification and review that attends an ongoing claim for weekly

¹ *Jamieson v Accident Compensation Corporation* [2004] NZHC 80.

² *Scott v Accident Compensation Corporation* [2008] NZACC 174. See also *Farrelly v Accident Compensation Corporation* [2013] NZACC 420 at [70].

compensation. Except in cases where the continued incapacity is self obvious, it is well established that such a case cannot be accepted without supporting medical evidence or opinion that is reasonably persuasive and drawn from acceptable sources.

[40] In *Bell*,³ Judge Beattie stated:

[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 establishing a clear basis for the retrospective aspect.

[41] In *Tonner*,⁴ Justice Muir stated:

[42] This case exemplifies the difficulties often associated with retrospective claims under s 103. ...

[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 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 applicant's personal affirmation of incapacity. It is the frequent refrain of applicants that they are effectively penalised for stoicism in the face of incapacitating injury or condition and for 'soldiering on' in their employment despite disability ...

[52] ... 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.

Discussion

[42] The issue in this appeal is a decision by the Corporation, dated 12 August 2022, agreeing to pay weekly compensation to Mr Panchalingam from 4 October 2013 to 22 December 2013 as a result of an incapacity due to covered injuries suffered on 26 September 2013. Implicit in the weekly compensation approval is the decision that Mr Panchalingam was not entitled to weekly compensation beyond 22 December 2013. This was because the Corporation was not satisfied that any incapacity beyond that date related to the covered soft tissue injuries.

³ *Bell v Accident Compensation Corporation* [2011] NZACC 22. See also *Palmer v Accident Compensation Corporation* [2006] NZACC 26 at [19].

⁴ *Tonner v Accident Compensation Corporation* [2019] NZHC 1400.

[43] Mr Panchalingam disputes the Corporation's decision and says that he suffered more significant injuries in his accident, and that those injuries continued to incapacitate him beyond 22 December 2013. He claims that, after the accident in October 2013, he started to have major problems and was unable to work. He was able to work part-time from 3 March 2014 until 2017, when he had to take a break from working, and began working again only in 2019. He claims weekly compensation in respect of the periods between December 2013 and 2019 when his pain prevented him from working full-time or at all.

[44] This Court acknowledges Mr Panchalingam's submissions. The Court also notes the report of Dr Ferguson, Spinal Surgeon, on 10 March 2022, which identified Mr Panchalingam's injuries in 2013, but conceded that he (Dr Ferguson) did not know that it is reasonable to ask the Corporation to cover Mr Panchalingam for all of seven years that he was out of work. Further, the Court points to the following considerations.

[45] First, Mr Panchalingam's entitlement to weekly compensation is restricted to the consequences of injuries for which he has cover, namely, shoulder and lumbar sprains.⁵

[46] Second, Mr Panchalingam's entitlement to weekly compensation depends upon his inability, *because of his personal injury*, to engage in employment in which he was employed when he suffered the personal injury.⁶ There is substantial medical evidence that, by 23 December 2013, Mr Panchalingam's injuries had resolved and so there was no further injury-related incapacity:

- (a) On 22 November 2013, Mr Pai, Orthopaedic Surgeon, having assessed Mr Panchalingam, advised that his shoulder issue had resolved and that his back pain was attributable to disc degeneration which pre-existed the 2013 injury. On 16 December 2013, Mr Pai confirmed that it was more than likely that Mr Panchalingam had pre-existing disc changes that caused recurrent backache for many years.

⁵ Section 67 and Schedule 1, clause 32(a).

⁶ Section 103(2) and Schedule 1, clause 32(a).

- (b) On 26 November 2013, Dr Odedra, Branch Medical Advisor, assessed that Mr Panchalingam was suffering a recurrence of sciatic symptoms on a background of underlying lumbar spondylosis.
- (c) On 29 March 2022, the Corporation's Clinical Advisory Panel (comprising a General Practitioner, three Orthopaedic Surgeons, an Occupational Physician, and a General Surgeon) concluded that Mr Panchalingam's lower back problems and disc pathology were part of a progressive, genetically based condition in the lumbar spine; and that the condition was not causally related to any of the reported accidents.
- (d) On 16 June 2022, Dr Adams, Principal Clinical Advisor, assessed that it was reasonable to approve a three-month incapacity in relation to Mr Panchalingam's soft tissue injuries, and that it was likely that those injuries would have resolved by 23 December 2023. Dr Adams referred to GP notes which indicated that the effects of a lumbar sprain were largely resolved by early November 2013, with the subsequent deterioration being more in line with degenerative spondylosis and associated radiculopathy.

Conclusion

[47] This Court notes that Mr Panchalingam has not produced medical evidence to counter the above medical reports of Dr Pai, Dr Odedra, the CAP specialists and Dr Adams.

[48] In light of the above considerations, the Court finds that Mr Panchalingam is not entitled to weekly compensation beyond 22 December 2013. The decision of the Reviewer dated 19 April 2023, dismissing an application for review of the Corporation's decision dated 12 August 2022, is therefore upheld. This appeal is dismissed.

[49] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller
District Court Judge

Solicitors for the Respondent: Medico Law Limited.