

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2023] NZACC 210      ACR 215/18**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACCIDENT COMPENSATION ACT
BETWEEN	SHONA FEAVER Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	ALLIANCE GROUP LIMITED Second Respondent

Hearing:            3 October 2023

Heard at:           Christchurch/Ōtautahi

Appearances:      Mr P Sara for the Appellant  
                         Mr C Hlavac for the First Respondent  
                         Mr S Winter, advocate for the Second Respondent

Judgment:         18 December 2023

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**RESERVED JUDGMENT OF JUDGE C J MCGUIRE  
[Work Related Personal Injury s 30 Accident Compensation Corporation 2001]**

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[1]     At issue in this case is the decision of the second respondents, Alliance Group Limited, dated 15 October 2015 declining cover for a work-related personal injury, namely subacromial bursitis in respect of the appellant's right shoulder.

[2] Prior to this hearing, on 15 August 2023, Mr Hlavac filed a memorandum advising the Court that ACC had determined not to represent itself, but rather allow Alliance Group Limited to represent ACC's interests as well as their own. The Court accepts that position.

### **Background**

[3] There is disagreement between Mr Sara and Mr Winter as to the relevance of the appellant's background history in this case. Mr Sara says:

This matter has a long and torturous history which offers little value in its full rehearsal.

[4] Mr Winter says:

Ms Feaver has a history of right and left shoulder problems.

[5] In the circumstances, there seems little alternative but to provide some of the appellant's history.

[6] On 17 March 2013, the appellant injured her right shoulder when she tripped and fell into the bath. She was diagnosed with a rotator cuff sprain injury. ACC accepted cover for her diagnosed injury.

[7] On 19 March 2013, she underwent an x-ray and ultrasound.

[8] Dr Parker, Radiologist, reported on the ultrasound:

Biceps tendon: There is a small effusion around the biceps tendon. No other abnormalities seen.

Subscapularis tendon: Normal.

Infraspinatus tendon: Normal.

Supraspinatus tendon: No tear seen.

There is sonological evidence of impingement with bursal thickening on abduction of the arm.

[9] The x-ray report from Dr Parker said this:

There is sclerosis of the greater tuberosity of the humerus. There is irregularity of the AC joint and early degenerative changes seen in the glenohumeral joint. No other abnormality seen.

[10] On 12 December 2013, the appellant injured her right shoulder while lifting a carton of meat at work.

[11] On 9 January 2014, the appellant attended Dr Allen, GP, who filed a claim for cover with the accredited employer.

[12] On 14 April 2014, AGL advised Ms Feaver that it was cancelling her ongoing entitlements under the Act.

[13] The appellant challenged the decision. At review, the reviewer dismissed her application, finding at paragraph [40]:

AGL has met the onus of establishing that it had sufficient information to be “not satisfied” that Ms Feaver was entitled to receive ongoing entitlements ...

[14] Following this, the appellant filed a work-related gradual process injury claim with AGL. This was filed on 31 March 2015 by Dr Stout, GP, who diagnosed “shoulder impingement”.

[15] Dr Stout noted the impingement was due to “repetitive work involving abduction/flexion of the shoulders to more than 60 degrees”.

[16] AGL did not accept that much, if any, of her work involved abduction/flexion of the shoulders to more than 60 degrees and on 15 October 2015, AGL declined her claim for cover.

[17] On 21 December 2015, the appellant filed a review application challenging this decision.

[18] On 20 June 2018, Ms Anderson dismissed the appellant’s application for a review. She said:

Both Dr Newburn and Dr Nicholson noted that age-related degeneration was a relevant factor in the development of Ms Feaver's subacromial bursitis.

I therefore conclude that there is insufficient evidence that Ms Feaver's meat packing contained a particular property or characteristic that caused her subacromial bursitis.

[19] In April 2018, prior to the reviewer's decision, an agreed statement of facts was conveyed to Dr Nicholson, who was asked whether the appellant's work tasks, as broadly described in the agreed statement of facts, caused or contributed to the cause of her bursitis.

[20] Dr Nicholson responded by letter of 11 May 2018. He said that an important factor that was missing was how the tasks, as described, specifically related to the appellant's work; how often and for how long did she perform these various roles. He concluded that it was not possible at that stage to be able to correlate the potential effect of any of these tasks on causing injury to Ms Feaver unless the total exposure to those tasks was known. As mentioned, however, this information was not before the reviewer when she reached her decision of 20 June 2018.

[21] In October 2021 an opinion was sought from Independent Doctor Assessment Services, a medico legal opinion service managed by Professor Gorman of Auckland.

[22] The panel convened by Professor Gorman included himself as occupational physician and Dr Stewart Walsh, an orthopaedic surgeon. The panel's opinion dated 22 November 2021 concluded:

The panel opinion is that the subject has shoulder pain and dysfunction contributed to significantly by her 17 seasons of meat packing with repetitive lifting. Points to note: bursitis is a symptom of biomechanical dysfunction rather than a diagnosis. Pain/weakness leads to impingement with bursal inflammation.

This subject has been inadequately assessed both clinically and radiologically. It is likely that her repetitive work exposure could lead to chondral changes in the joint, rotator cuff tendonitis both of which are suggested on her x ray.

Dr SN's review of the literature was misled in that it was solely focussed on "bursitis" as a diagnosis with abduction shoulder range of the shoulder most likely to cause rotator cuff impingement. It is easy to blame age as a cause but in this case it is more likely that her repetitive overload work exposure is the primary cause.

[23] The second respondent commissioned an opinion from Dr Heydon, occupational physician. He was of the opinion that Ms Feaver's bursitis was unlikely to have been caused or significantly caused by her work. He said:

Overall evidence around occupation and specific shoulder conditions is rather uncertain, and inconsistent and the subject of debate. In general, I consider the elevation of the arm, ie. overhead work to be a more significant risk factor than force and repetition.

...

In my opinion, the risk of developing bursal thickening does not appear to be significantly greater for those who do the tasks that Ms Feaver did compared with those who do not do those tasks. I note that other abnormalities were found on imaging. Specific diagnoses are not clear, but in my opinion, possibly indicate early glenohumeral (shoulder) joint osteoarthritis, early chronic rotator cuff disease and acromioclavicular joint osteoarthritis. In my opinion these conditions also do not appear to be significantly greater for those who do the tasks that Ms Feaver did compared with those who do not do those tasks.

[24] Dr Heydon agreed that there was nothing in Ms Feaver's non-work activities which appeared likely as material contributors to the cause of her right shoulder bursal and other abnormalities. He concluded:

In my opinion Ms Feaver's work may have aggravated or rendered symptomatic the changes seen on imaging, but it does not appear that her work caused, or significantly contributed to the cause of the right shoulder abnormalities reported on imaging, and in my opinion, those appear more likely due to the aging process.

[25] A final response was provided by Professor Gorman on 8 February 2023. He said:

The most appropriate approach to take when confronted with a situation where the epidemiological data are weak – and sadly that is the case in almost all occupational injuries and illnesses because of the difficulty in objectively defining exposure in a way that enables comparison – is to undertake an analysis of biomechanical plausibility. As you are aware, both me and Dr Walsh regard your client's work activities and the duration as being entirely consistent with her current musculoskeletal problems. With respect to Dr Heydon's analysis, he appears to be having a bit of it both ways in that he identifies the weaknesses in epidemiology, but still uses it to support a particular argument.

### **Appellant's submissions**

[26] Mr Sara commenced his submissions identifying the two important issues:

- (a) Has the appellant suffered a physical injury; if so
- (b) Was it caused or contributed to by her work?

[27] He submits the appellant suffered an injury, namely symptomatic bursitis in the right shoulder. He submits that that condition is not the same as degenerative bursitis.

[28] Therefore, he says, it is not necessary to go through the “tortuous history” including the injuries over 17 years.

[29] He refers to Dr Nicholson’s report of 20 October 2014, where he says:

- My opinion therefore is that the workplace accident of 12 December 2013 has not caused her ongoing pain in her right shoulder. She may have experienced a right shoulder strain or sprain initially, however this is not apparent on ultrasound scan. In addition the shoulder sprain or strain is likely to have settled within a few weeks of the original injury.
- The ongoing right shoulder pain that she has experienced is more likely to be related to the bursitis that was detected in her right shoulder by ultrasound scan.
- It is therefore my opinion that she had an aggravation of a pre-existing condition in her right shoulder. In other words, the lifting incident in December has resulted in an aggravation of her subacromial bursitis and it is her bursitis, known to be a degenerative process, which has persisted and has resulted in her continuing to experience pain. Her description of pain occurring particularly at night or following physical activity fits with this diagnosis.

[30] Mr Sara submits that Dr Nicholson is saying that here we have a combination of the appellant’s age and her work tasks that have resulted in her condition.

[31] He therefore says that this meets the statutory requirements of s 30(2)(b)(i) where the work tasks have properties or characteristics that cause or contribute to the cause of the personal injury. He reminds the court that the work tasks do not have to be the sole and exclusive causes of injury.

[32] He refers to the report of Dr Newburn, advanced registrar in occupational medicine of 12 October 2015. Mr Sara says that the appellant’s work “did do something” with Dr Newburn commenting:

More likely in the course of Shona's work she is rendered symptomatic a previously asymptomatic and degenerative bursitis.

[33] He also said:

Biomechanics dictate that when the shoulder is abducted or flexed to 60 or more degrees, that the bursal space becomes even more narrow, and the impingement causes inflammation and pain over time which is not caused by the mechanics, but simply rendered symptomatic by the mechanics of the injury event.

[34] Mr Sara submits that the bursitis that the appellant had before the work tasks "kicked in" was not painful. But her work tasks as a packer caused or contributed to the symptomatic bursitis that she had, and this therefore is a new injury.

[35] Mr Sara next refers to the evidence of Dr Nicholson occupational medicine specialist. Dr Nicholson agrees that bursitis itself is a degenerative condition and is likely to be more common as we age. He then says:

However as identified by Dr Newman certain occupations can increase the risk of developing shoulder conditions particularly those that are highly repetitive or involve flexion – abduction greater than 60 degrees.

Conclusion. At this stage, I am still of the opinion that Shona's work as a packer involves repetition (packing and carrying 90-100 cartons per day) and that this level of repetitive action is likely to have increased the risk of developing a shoulder condition.

[36] It is common ground that a worksite assessment was not able to be carried out in respect of the appellant's work at the Alliance Group Limited's meat processing plant, as the system there had changed. However, an agreed statement of facts relating to the meat packing work which included:

- (a) Bagging
- (b) Vacuum machines
- (c) Bulk packing
- (d) Packing shoulders
- (e) Cleaning and bagging fillets
- (f) Backstraps.

It is noted that the weight of the boxes of meat could be 27.8 kgs.

[37] In the appellant's statement of evidence of 3 August 2021, she describes her work in the mutton room, packing the cuts of meat and picking up the bagged tray, turning around and placing it onto a conveyor belt behind the packer. She described the packing of boneless legs as a very high-speed process with the leg having to be picked up with one hand, placed quickly into a plastic bag. She said:

I used my right hand to grab the leg off the conveyor belt and my left hand to take the bagged leg from the machine and put it onto the conveyor belt. It would only be a matter of seconds between legs.

[38] She said the boxes were carried about three to four metres and placed onto a conveyor belt below waist height.

[39] She described another operation as putting unbagged meat into cardboard boxes. This continued until each box weighed 27.2 kgs. She said:

The three hardest jobs in my experience were bagging the legs, the wrapping job and packing the boxes at the end of the wrapping machine and then carrying them over to the conveyor belt as they were the heavier boxes.

It was in the course of doing this last particular job that I experienced the pain in my right shoulder.

[40] Mr Sara next refers to a report by Professor Gorman, occupational medicine specialist, who convened a panel and reported as follows:

The major issue for a panel to consider is whether or not there is a plausible causal link between the work that the subject undertook and her subsequent shoulder pathology. More specifically, the questions and sequence are whether her work as a meat packer contained a particular property or characteristic that caused or contributed to the cause of her bursitis; and, if that the risk of suffering bursitis is significantly greater for persons who perform tasks that the subject did than for persons who did not. The report concluded:

The panel opinion is that the subject has shoulder pain and dysfunction contributed to significantly by her 17 seasons of meat packing with repetitive lifting. Points to note:

Bursitis is a symptom of biomechanical dysfunction rather than a diagnosis. Pain/weakness leads to impingement with bursal inflammation.

This subject has been inadequately assessed both clinically and radiologically. It is likely that her repetitive work exposure could lead to chondral changes in the joint, rotator cuff tendonitis both of which are suggested on her xray.



Dr SN's (Dr Newburn's) review of the literature was misled in that it was solely focussed on "bursitis" as a diagnosis with abduction shoulder range of the shoulder most likely to cause rotator cuff impingement. It is easy to blame age as a cause when but in this case it is more likely that her repetitive overload work exposure is the primary cause.

[41] Next, Mr Sara refers to the report of Dr Heydon of 27 January 2023. Mr Sara says that Dr Heydon acknowledged that the work was "noxious" but was not prepared to accept that the work tasks caused or significantly contributed to the cause of the right shoulder abnormalities reported on imaging. In his opinion these appeared more likely to be due to the aging process.

[42] Mr Sara next refers to the report of Dr Gorman of 8 February 2023. In his report he says that he does not believe any occupational physician has the necessary expertise in shoulder biomechanics and he notes that the shoulder is a complex joint. He said that is why he added Dr Walsh, an experienced orthopaedic surgeon with specific expertise in shoulder disorders, to his panel.

[43] Mr Sara refers to Professor Gorman's statement:

The most appropriate approach to take when confronted with a situation where the epidemiological data are weak – and sadly that is the case in almost all occupational injuries and illnesses because of the difficulty in objectively defining exposure in a way that enables comparison – is to undertake an analysis of biomechanical plausibility. As you are aware, both me and Dr Walsh regard our client's work activities and the duration as being entirely consistent with her current musculoskeletal problems. With respect to Dr Heydon's analysis, he appears to be having a bit of a bet both ways in that he identifies the weakness in the epidemiology, but still uses it to support a particular argument.

[44] Referring to s 30, Mr Sara says that both Doctors Nicholson and Gorman are of the view that because of the particular characteristics of the employment task of both work types, the appellant was at greater risk of suffering personal injury than for those persons who did not perform it.

[45] Here Mr Sara says the work tasks caused quite specific pain and inflammation in her right shoulder. In other words, the work caused the bursitis to become painful.

[46] Accordingly, he submits that Alliance Group Ltd's decision of 15 October 2015 declining cover for work related personal injury is wrong and should be reversed.

### **Respondent's submissions**

[47] Mr Winter submits that this case has had a long and tortuous path and that it would be quite wrong to look only at recent evidence. He acknowledges that cover was granted for bursitis from two accidents in 2013. However, cover was eventually suspended. He said:

We can take it that the appellant has suffered injury and that s 30(2) is applicable.

[48] He says however that with bursitis, there is no distinction between what is naturally degenerative and what is work caused.

[49] He notes that in an email to Dr Nicholson on 29 July 2017, Mr Sara said:

We seem to now be clear that Shona's work in the carton room did not cause or contribute to her shoulder injury. I take it that you are still of the view that her work as a packer was causative of her shoulder injury?

[50] Mr Winter also notes that on 17 March 2013, the appellant injured her right shoulder when she tripped and fell into the bath and that at some point in 2014 ACC declined ongoing entitlements in respect of this claim.

[51] He also refers to an injury claim form filed on behalf of the appellant by her GP, Dr Stout, on 31 March 2015 with diagnosed "shoulder impingement".

[52] He notes that Dr Stout ticked the "gradual process" box in the injury claim form and put the appellant's impingement down to "repetitive work involving abduction/flexion of shoulders to >60 degrees.

[53] Mr Winter refers to photographs of the meat processing conveyor belt "to illustrate that all processing is at waist height and there is no abduction/or work above shoulder height".

[54] He notes that Dr Nicholson, in his report to Mr Sara of 20/10/14, explained that radiology had not shown any “obvious injury occurring” although it had revealed subacromial bursitis and Dr Nicholson remarked:

Thickening of the bursa is considered to be an indication of a degenerative process as opposed to an acute event.

[55] He notes that Dr Nicholson, like Dr Newburn, believed that the appellant has had an aggravation of a pre-existing condition in her right shoulder, but “aggravation” is not explained. He notes that Dr Heydon says that it is unlikely that bursitis is a work-related condition.

[56] Mr Winter submits that there have been a number of court decisions which have decided that bursitis does not represent a personal injury for the purposes of ACC cover. He refers to *Barnsley*,<sup>1</sup> where Judge Barber said:

I agree with Mr Barnett that pain, or the emergence of symptoms in association with a person’s employment, is not proof of an injury or that the employment caused the injury ... where a person has a pre-existing medical condition and symptoms of it are brought to light as a result of an accident or process, it does not follow that the accident or process was causative of the disease.

[57] As to causation, he notes that Dr Nicholson initially attributed the cause of the appellant’s bursitis to degeneration, rather than personal injury by accident or a work process.

[58] He refers to the report of Dr Newburn of 12 October 2015.

[59] He submits that Dr Newburn was very strong in his belief that the appellant’s condition was a degenerative one. He said:

In my view, Shona’s role does not have the qualities and characteristics that can be causative or contribute to the cause of right shoulder bursitis/impingement. It is far more likely that the activities of her role rendered a previous asymptomatic condition symptomatic.

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<sup>1</sup> *Barnsley v Accident Rehabilitation and Compensation Insurance Corporation* [1999] NZACC 68.

[60] He refers to the report of Dr Nicholson of 25 February 2016, where he repeats what he said in his 20 October 2014 report, that bursitis is a degenerative condition.

[61] He therefore submits, referring to *Ambros*,<sup>2</sup> that “risk of causation does not suffice”.

[62] He submits that Professor Gorman in his report of 22 November 2021 “really had a punt in all directions”.

[63] He refers to what Judge Barber said in *Barnsley v ACC*<sup>3</sup> where he says, at page 7:

I agree with Mr Barnett that pain, or the emergence of symptoms in association with a person’s employment, is not proof of an injury or that the employment caused the injury ... where a person has a pre-existing medical condition and symptoms of it are brought to light as a result of an accident or process, it does not follow that the accident or process was causative of the disease.

[64] He says that Judge Barber’s comments are applicable in our case. Thus, he said that there must be something more than an underlying condition being “rendered symptomatic”.

[65] He refers again to Dr Nicholson’s report of 20 October 2014 where he says, at the end of his report:

... In other words, the lifting incident in December has resulted in aggravation of her subacromial bursitis and it is her bursitis, known to be a degenerative process, which has persisted and resulted in her continuing to experience pain.

[66] He refers next to Dr Nicholson’s report of 2 February 2015, where the doctor says:

Age alone is a significant factor in the development of bursitis of the shoulder.

[67] He refers next to Dr Newburn’s report of 12 October 2015 and submits that Dr Newburn is very strong in his belief that this was degenerative. Dr Newburn says at page 4 of his report:

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<sup>2</sup> *Accident Compensation Corporation v Ambros* [2007] NZCA 304, paragraph [70].

I therefore reach the opinion that Shona's work situation is unlikely to have contributed to the cause or caused Shona's right subacromial bursitis. More likely in the course of Shona's work she has rendered symptomatic a previously asymptomatic and degenerative bursitis.

[68] Mr Winter says that Dr Newburn is "very strong" in his belief that the appellant's condition was degenerative.

[69] He notes that Dr Nicholson, in his report of 25 February 2016, acknowledges that bursitis is itself a degenerative condition and Dr Nicholson goes on to say that the appellant's work as a packer has likely increased the risk of her developing a shoulder condition.

[70] Mr Winter says, of Professor Gorman, that he has unfairly attacked Dr Heyden's objectivity, as he was a doctor at Silverfern Farms from 2000 to 2013.

[71] Mr Winter notes that Dr Newburn's report of 28 March 2014 was in fact peer reviewed by Dr David Beaumont.

[72] Mr Winter submits therefore that the weight of evidence is clearly against a finding of causation under s 30(2)(b)(i) and that there is no significantly greater risk for persons who perform the appellant's employment tasks.

[73] Mr Winter says that his client's position is that the claimant has not established on the balance of probabilities that a personal injury caused by work related gradual process has occurred and that on the balance of probabilities, the appellant is likely suffering from an age-related degenerative bursitis, which is effectively excluded by s 26. Accordingly, he submits the appeal should be dismissed.

### **Reply Submissions**

[74] Mr Sara comments that it is not inevitably the case that degeneration is not coverable. If a person develops osteoarthritis following a fracture, cover will continue. So Mr Sara says that the question must always be asked: What degeneration is it?

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<sup>3</sup> See *Barnsley* note 1 above.

[75] He notes that Dr Nicholson explains that there are two parts to degeneration – one that relates to the appellant’s age; and the other from what she does at work. He submits the latter is covered.

[76] He acknowledges that there were some acute injuries that she suffered and that she does suffer from bursitis.

[77] Here, however, she has suffered a work-related gradual process injury. Dr Nicholson is clear that her pain and dysfunction is not due to an acute injury and that is the reason why the Act provides for work-related gradual process injuries. He acknowledges that the appellant cannot get cover for age-related bursitis, only work-related bursitis and this is supported by Dr Nicholson and Professor Gorman.

[78] Mr Sara then gives the example of someone with a tendon tear in the shoulder who falls over in the garden, resulting in the tear being extended. That person is entitled to cover for the new portion of the tear.

[79] He submits that what is intended by the legislation is to grant cover where it is appropriate.

## **Decision**

[80] What is to be decided in this case is whether or not the appellant suffered a work-related gradual process injury, with the injury date of 12 December 2013. She reported this to her GP, Dr Allen, on 9 January 2014. The claim form has this description of the accident: “Lifting ... box of meat, shoulder pain, right shoulder.”

[81] She had her right shoulder x-rayed and scanned by ultrasound on 23 January 2014. Under the heading “Clinical” is this:

Sudden onset of pain right shoulder lifting.

[82] The ultrasound revealed this:

Impingement testing: The bursar is moderately thickened with positive sonographic impingement and clinical impingement, with range of movement of abduction to around 45 degrees.

[83] The appellant had worked for 17 seasons at the Longville plant, both as a meat packer and in the carton room.

[84] As Mr Sara reports, the claim for a work-related gradual process injury was initiated on 16 June 2015 and this initiative arose primarily from a medical report prepared by Dr Nicholson dated 20 October 2014.

[85] The first report of a specialist kind is dated 28 March 2014 from Dr Newburn, advanced registrar in occupational medicine, and his report was peer reviewed by Dr David Beaumont. It is inferred that Dr Beaumont is also involved in occupational medicine. On 10 April 2014, Alliance Group Limited wrote to the appellant confirming that all ongoing entitlements were declined pursuant to s 117 of the Accident Compensation Act.

[86] The appellant was seen by Mr Veale, orthopaedic surgeon, on 11 April 2014. He records her history as follows:

She tells me she injured her shoulder in December 2013 when she was lifting a box at work and had a sudden sharp pain over the antero-lateral aspect of her shoulder, which radiated down to her mid-humerus. Within 30 minutes she reported the injury, she had ice applied and told to return if it was not any better. She returned the following day because it was still sore, she had more ice placed on it and over the following week it got worse and worse. She was then placed on light duties and an x-ray and ultrasound were organised.

[87] Mr Veale noted that there was a bit of a dilemma with the appellant to know the next step. He said:

We are reluctant to operate as this creates yet another injury to an already hyper-sensitive shoulder.

[88] In her statement of evidence dated 29 July 2014, the appellant says that following her hurting her shoulder when she slipped getting into the bath on 17 March 2013, she got work at the fish market in Invercargill at the end of July and that she managed to do all the work in that job without difficulty, although sometimes her shoulder was sore at night. She then says:

28. The freezing works season started at around mid-November 2013 and I went back to my normal job as a meat packer.

29. I managed my normal work without incident until 12 December 2013.
30. I was doing the last run of the day and this was around 3.30pm.
31. I was working in the mutton room. The cuts of meat were wrapped by other workers then placed on the table. I alone was doing the packing.
32. There were two or three other workers doing the wrapping.
33. My job was to pick up the wrapped pieces of meat, pack them into a carton and then carry the carton over to a set of scales.
34. I can't remember whether I was packing shoulders or legs at that time. If shoulders were being packed, there would be six or seven per carton, depending on the size of the beast, and if I was packing legs, there would be five to seven per carton, again depending on size.
- ...
45. At 3.45pm I filled a carton and picked it up with both hands. My hands would be underneath the carton at about waist height. The cartons weigh anywhere from 20 to 27 kgs each.
- ...
48. I picked up this carton and twisted around, I felt pain in my right shoulder. The pain was from the point of my shoulder right down my upper arm. It was like a wrenching pain. Before that, I hadn't had any pain in my shoulder.
49. The pain was a burning pain. I would put the pain at 7 or 8 on the same scale as before. Because I was so busy, I just kept working with the pain. The shift ended at 4.25pm.
50. I told one of the other ladies that I had hurt my shoulder.
- ...
54. At the end of my shift I told my supervisor, Warren Shuttleworth, that I had hurt my shoulder. He told me to report at the medical centre, which I did. I had already changed from my work clothes at this stage. I was not examined at the medical centre. I was told to put some ice on my shoulder when I went home. I was told that if the shoulder got no better, to come back to the medical centre the following day.
55. My shoulder was very sore that night and I hardly got any sleep.
56. The following day, I went back to the medical centre. I did my usual job packing, but over the course of that day, went back to the medical centre and they put ice on it. I think ice was applied about three or four times that day.
- ...
60. An appointment was made for me to see the works doctor, Dr Allen. Dr Allen referred me for physiotherapy treatment, which was done on



the plant. I had a few sessions with physiotherapy, but this did not help at all. There was the Christmas holiday, which was about ten days and I returned to work in early January 2014.

61. A further lot of x-rays and ultrasound scans were ordered. The process of getting scans done took until March 2014.

...

63. I was referred to Mr Veale, orthopaedic surgeon, for my shoulder injury.

[89] Then follows a number of reports from physicians. Mr Sara obtained a report from Dr Rod Nicholson dated 20 October 2014. He is an occupational medicine specialist based in Auckland and he reviewed the appellant's reports. His opinion was that the work based accident on 12 December 2013 had not caused her ongoing pain in her right shoulder. He said:

The ongoing right shoulder pain that she has experienced is more likely to be related to the bursitis that was detected in her right shoulder by ultrasound scan.

It is therefore my opinion that she has had an aggravation to a pre-existing condition in her right shoulder. In other words, the lifting incident in December has resulted in an aggravation of her subacromial bursitis and it is her bursitis known to be a degenerative process, which has persisted and has resulted in her continuing to experience pain.

[90] Dr Nicholson reported again on 2 February 2015. He noted that the appellant's work involved carrying 90-120 cartons per hour, each weighing 20 to 27 kg.

[91] Dr Nicholson referred to NIOSH Musculoskeletal Disorders in Workplace Factors (A Critical Review of Epidemiological Evidence for Work Related Musculoskeletal Disorders of the Neck, Upper Extremity and Lower Back 1993). Dr Nicholson noted "In particular, there is a positive association between highly repetitive work and shoulder musculoskeletal disorders. Examples of studies performed includes such things as workers in the fishing industry, with an odds ratio of 3.0, ie. an increased risk of shoulder muscular disorders from performing repetitive activity. Under the heading "Conclusion" he says:

In Shona's situation, it is likely that her work as a packer which involved constant and repetitive movement of her shoulder, is likely to have contributed to her shoulder pain. There is also an additional component of contribution due to her age as well. Age alone is a significant factor in the development of

bursitis of the shoulder. It is my opinion that equal weight should be given to both her age as well as the repetitive nature of her work as being contributing factors of her shoulder pain (bursitis).

[92] On 12 October 2015, the second respondent obtained a report from Dr Scott Newburn, advanced registrar in occupational medicine.

[93] After referring to Dr Nicholson's report, in which reference was made to the fishing industry, Dr Newburn said:

The level of repetition and force used in that industry can be far greater than that experienced in the meat works, particularly in packing, which has quite a different risk profile in the activity, compared with such high repetition and force activities as boning or filleting. Shona's work simply does not have sufficient exposure to significant abduction and flexion of more than 60 degrees that is required as demonstrated in my literature review to increase risk of the condition of shoulder impingement (bursitis).

I therefore reach the opinion that Shona's work situation was unlikely to have contributed to the cause or caused Shona's right subacromial bursitis. More likely in the course of Shona's work, she is rendered symptomatic a previously asymptomatic degenerative bursitis.

[94] Dr Nicholson made a further report to Mr Sara on 25 February 2016 referring to Dr Newburn's review, Dr Nicholson said:

I have not been able to follow his line of thinking when he subsequently concludes that Shona's work is unlikely to have contributed. He has indicated that Shona's work as a packer is quite a different risk profile when compared to such a high repetitive and forceful activity as boning or filleting. He has stated that the level of repetition and force in the fishing industry is far greater than that experienced in meatworkers. I am uncertain as to where he has gathered this information in order to make this comparison. I would be of the opinion that the level of repetition would be similar and that both occupations require repetitive action when processing meat or fish fillets that would likely require the similar level of repetitive action with packing.

I do agree that bursitis itself is a degenerative condition and is likely to be more common as we age, however, as identified by Dr Newman, certain occupations can increase the risk of developing shoulder conditions, particularly those that are highly repetitive or involve flexion, abduction greater than 60 degrees.

### **Conclusion**

At this stage, I am still of the opinion that Shona's work as a packer involves repetition (packing and carrying 90-100 cartons per hour) and this level of repetitive action is likely to have increased the risk of developing a shoulder condition.

[95] On 22 November 2021, a report was obtained from Independent Doctor Assessment Services of Auckland. The panel convenor was Professor Des Gorman and the panel member was Dr Stewart Walsh, orthopaedic surgeon. The report concluded:

The major issue for a panel to consider is whether or not there is a plausible causal link between the work that subject undertook and her subsequent shoulder pathology. More specifically, the questions and sequence are whether her work as a meat packer contained a particular property or characteristic that caused or contributed to the cause of her bursitis; and, if that the risk of suffering bursitis is significantly greater for persons who perform the task that the subject did than for persons who do not.

The panel opinion is that the subject has shoulder pain and dysfunction contributed to significantly by her 17 seasons of meat packing and repetitive lifting.

[96] The second respondent obtained a report from Dr Heydon, occupational physician dated 27 January 2023. He concluded:

In my opinion, Ms Feaver's non-work activities, as I understand them, appear unlikely to have caused or contributed to the cause of the right shoulder bursal and other abnormalities reported on imaging.

In my opinion, Ms Feaver's work may have aggravated or rendered symptomatic the changes seen on imaging, but it does not appear that her work caused, or significantly contributed to the cause of the right shoulder abnormalities reported on imaging, and in my opinion those appear more likely to be due to the aging process.

[97] Mr Sara obtained a further report from Independent Doctor Assessment Services dated 8 February 2023. Professor Gorman said this:

The most appropriate approach to take when confronted with a situation where the epidemiological data are weak – and sadly that is the case in almost all occupational injuries and illnesses because of the difficulty in objectively defining exposure in a way that enables comparison – is to undertake an analysis of biomechanical plausibility. As you are aware, both me and Dr Walsh regard your client's work activities and the duration as being entirely consistent with her current musculoskeletal problems.

[98] I have taken time in this judgment to refer not only to the expert medical opinions, but also as to what actually happened to the appellant at and after her workplace "accident" on 12 December 2013. In this regard, I have referred extensively to the appellant's statement of evidence of 29 July 2014, and also to the descriptions she gave to various medical professionals of what occurred on that day.

[99] At about 3.45pm, as she picked up a carton and twisted around, she felt pain in her right shoulder. The pain was from the point of her shoulder, right down her upper arm. She describes it was like a wrenching pain and before that she had not had any pain in her shoulder. She also described it as a burning pain, at a pain scale of 7 or 8. What she describes is, frankly, an injury in common parlance.

[100] It is acknowledged that bursitis is a condition, rather than an injury. However, it is accepted that age alone is a significant factor in the development of bursitis, as Dr Nicholson and the other professionals have said.

[101] The ultimately question though is whether what occurred on that day caused or contributed to her bursitis.

[102] I find that Mr Sara is right to challenge the proposition that because degeneration causes bursitis, that the bursitis condition cannot be caused or contributed to by accidents, whether acute accidents or work related gradual process ones.

[103] Mr Sara posed an example of someone with a tendon tear in the shoulder who falls over in the garden and as a result, the tear is extended from two to five centimetres. He rightly submits that that person is entitled to cover for the new accident caused portion of the tear.

[104] He submits that what is intended by the legislation is to grant cover where it is appropriate. He accordingly submits that the appellant has made out her claim for cover in this case on account of the trauma she suffered when she lifted that carton of meat at approximately 3.45pm on 12 December 2013.

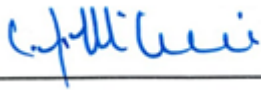
[105] I therefore find on the balance of probabilities that the appellant has proved that her accident that day, evidenced by the immediate pain from lifting the box of meat, caused or contributed to her bursitis.

[106] For the purposes of s 30, I find that she was performing an employment task that had a particular property or characteristic, the lifting and turning with boxes

containing 27 kgs of meat and that on this occasion, her work task contributed to the cause of personal injury and that because of the repetitive nature of the work, the risk of suffering personal injury is significantly greater for a person in the appellant's cohort who performs the employment task than for persons who do not perform it.

[107] Accordingly, the appeal is allowed.

[108] Costs are reserved.



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CJ McGuire  
District Court Judge

Solicitors: Mr P Sara, Barrister & Solicitor, Dunedin  
Mr S Winter, ACCE, Christchurch