

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 039

ACR 64/22

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	WAITEMATA DISTRICT HEALTH BOARD Appellant
AND	SHALINI SHARMA Respondent

Hearing: On the papers

Judgment: 14 March 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Work-related gradual process injury - s 30,
Accident Compensation Act 2001 (“the Act”)]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 15 March 2022. The Reviewer quashed Wellnz’s decision dated 7 July 2021 declining cover for a work-related gradual process injury to Ms Sharma’s left shoulder.

Background

[2] Ms Sharma was employed as a mental health nurse. On 8 November 2019, she suffered an injury when she restrained a patient.

[3] On 10 November 2019, a work injury report reported:

... both my shoulders sore from pain free hold, did pain free hold on patient and due to being highly agitated my both arm and shoulder feel very sore.

[4] On 21 November 2019, Ms Sharma reported that she was pain free and did not need intervention.

[5] Subsequently, the Corporation granted Ms Sharma cover for a bilateral sprain of the shoulder and upper arm, including a right neck spasm.

[6] On 28 November 2019, Ms Sharma consulted her GP. Ms Sharma advised that:

At work restraining patient for -10 mins who was aggressive 8 /11 -2pm, Soon after hands felt numb. The following day had to restrain the same patient. Only taken Codeine.

[7] The GP found that Ms Sharma was pain free but had tenderness over both trapezius muscles, with abduction of shoulder rotation on the left and internal rotation on the right. An impingement test was negative and rotator cuff power was normal. Physiotherapy and analgesics were prescribed and there was to be no heavy lifting.

[8] On 3 December 2019, Ms Sharma returned to her GP and advised that she felt as if something sharp was digging into both shoulder with the pain in both arms affecting her sleep. The GP noted bilateral neck tenderness with minor discomfort on forward flexion. Neurology was unremarkable. Overall, the GP's diagnosis was neck/trapezius strain. The GP completed an ACC 45 reflecting a work-place injury claim for sprain of the right neck and the left shoulder arising from the initial restraining event. Radiology carried out that day reported normal findings.

[9] Wellnz then requested its head of Occupational Health and Safety Service, Dr Courtenay Kenny, to consult with Ms Sharma as part of the investigation of the claim made.

[10] On 16 December 2019, Dr Kenny recorded that Ms Sharma stated that she had first developed pain in the tips of the shoulder and sides of the neck bilaterally since the restraint, and some “funny” sensations in the Cervical 8 distribution which were intermittent and were worse at night. Dr Kenny advised x-rays of the cervical spine to determine whether that pathology was present.

[11] The radiological examination revealed that, apart from some loss of the cervical lordosis, the spinal pathology was normal. Dr Kenny advised Ms Sharma that he considered that her symptoms resulted from a muscle tension/dysfunction rather than any significant spinal disease or injury. and expected the problem to resolve over time.

[12] On 6 August 2020, an ultrasound scan revealed symptomology consistent with subacromial bursitis/pain syndrome.

[13] On 24 August 2020, Mr Peter Mutch, Orthopaedic and Shoulder Surgeon, noted that Ms Sharma advised him that she felt that neither the physiotherapist who had treated her nor Dr Kenny had treated her complaint seriously. Mr Mutch referred to the ultrasound which appeared to have been done for the left side only and advised cortisone injections and physiotherapy.

[14] On 29 August 2020, a file review was carried out by Mr Pai, Orthopaedic Surgeon. Mr Pai assessed that that Ms Sharma’s clinical course was atypical for an acute rotator cuff tear and advised that bursal sided partial tears such as Ms Sharma’s were commonly related to tendinosis, occurring in 5% of 40-year olds and 10% of those aged over 50 years. Mr Pai noted that Ms Sharma had bilateral shoulder symptoms, which he said were more common with tendinosis related tears. He stated that the cause was multifactorial, and that such tears were substantially related to genetic and constitutional factors but could also be caused by excessive overhead movement of the shoulder.

[15] On 10 September 2020, Mr Pai provided a supplementary report. Mr Pai advised that bursal fluid (bursitis) was found in up to 29% of the asymptomatic population, and it was not possible to differentiate impingement symptoms from

subacromial bursitis from those of fluoridated cuff tear. He reiterated his opinion that acute bursitis was generally caused by repetitive movement of the shoulder and that he could not relate it to the incident in November 2019. Mr Pai stated:

I have gone through the report of Mr Mutch of 28/4/2020 and after his clinical assessment he has suggested that she has impingement syndrome which can occur both in the presence of a rotator cuff tear as well as subacromial bursitis (Journal of American Orthopaedic Surgeon Volume 19, no 11, page 701), and both conditions are treated with a cortisone injection (which she has already had on 6/9/2020) and home based shoulder mobilisation exercises. In my opinion, given her presentation and the provided investigations and her assessment it is not possible for me to differentiate impingement symptoms as to whether it is coming from the subacromial bursitis or the rotator cuff tear.

I cannot relate the incident of 8/11/2019 as causing acute bursitis which is generally caused by repetitive movement of the shoulder. I stand by the opinion as stated in my original report where I have taken into consideration the opinion as provided by Mr Mutch.

[16] Wellnz declined Ms Sharma's work-place injury claim.

[17] On 22 September 2020, Mr Mutch provided a subsequent report. He recommended that the claim needed to be submitted as a gradual process work injury claim. Mr Mutch advised:

I understand the framework with Wellnz, and it is designed to try and get people back to work, however in Shalini's case, she has had constant trauma to her shoulders and can speak to all of her colleagues in AT&R who suffer the same problem.

So, under the circumstances, I think ACC have made a mistake and need to reconsider their position. This is a classic gradual process condition exacerbated by events like those that occurred on the 8th of November. In fact, in Shalini's words, she has had numerous encounters with restraining clients, not only at the time of this incidence but subsequently not only with the same patient, but on a number of occasions.

[18] On 3 December 2020, Dr Sarah Wiseman, GP, noted that Ms Sharma's left shoulder was not good, that she was back at work, and that she had been advised to lodge a gradual process work injury claim.

[19] In February 2021, Mr Sharma's GP lodged an ACC 45 injury claim form for a work-related gradual process injury, namely, a left rotator cuff tendinopathy with impingement, from unresolved subacromial/subdeltoid bursitis. The accident was described as "restraining aggressive patient at work, felt pain in both shoulders".

[20] On 7 April 2021, Ms Sharma's claim for cover for a work-related gradual process condition was declined on the basis that Wellnz determined that Ms Sharma's condition was not caused by her work as a mental health nurse:

... there are no work tasks or factors in your work environment that can be identified as having caused your condition. Further, the work you do, and/or your work environment is not recognised as placing workers at significantly greater risk of developing impingement syndrome of shoulder.

[21] In May 2021, Alpha Consultants contacted Ms Sharma to set up a worksite assessment. On 13 May 2021, Joy Redhead, assessor, advised:

Shalini said that she didn't want me to come on to the ward. She didn't want anyone on the ward (eg colleagues) to think that her shoulder was impacting on her ability to work. She advised the shoulder was still painful, but that it comes and goes. She said that she doesn't want the assessment just now and then physio, maybe need a chiropractor or massage?

[22] On 17 May 2021, Ms Sharma advised Wellnz that she did not feel that it was fair for the assessment to be done at this time.

[23] On 28 May 2021, Mr Mutch provided a report in which he stated:

... she made a claim based on an injury trying to restrain a patient on the 8th of November, but this is one of several events that have marred her workplace because of the type of work that she does. She works in AT& R and not only herself, but other nurses there often suffer from shoulder pathology because of the constant restraining and lifting of patients under their care. So Wellnz have to look past the date of the initial claim and see this in the broader context, hence my stipulating that this is a condition that should be considered under Section 20, subsection 2 (E) Gradual Process Work-Related Injury.

The radiological findings can be explained by the fact that she has been exposed to repetitive trauma to the shoulder. This is an occupational hazard for nursing staff in this work environment. ...

... [her injuries] are related to consistent repetitive traumatic injury. Her job is such that she is exposed to shoulder injuries on a constant basis and if you had read my letter dated the 22nd of September, I have outlined this very fact that they are exposed to heavy, dependent patients where they are lifting and restraining on a day-to-day basis. ...

... Gradual Process means that over an extended period of time the shoulder is exposed to constant repetitive injury, constant pain and constant bouts of prolonged recovery. This causes damage to [t]issue so in looking at the MRI of her shoulder, you can easily argue that the changes that we see can be explained by constant exposure to repetitive trauma.

[24] On 27 June 2021, Dr John Monigatti, Occupational Medicine Specialist, provided an assessment based on the medical reports at hand and his consultation with Ms Sharma. Dr Monigatti concluded that there were no elements in the work conducted by Ms Sharma which created an increased risk of or were causative of any personal gradual process injury being sustained by her:

Although many of Mr. Sharma's employment tasks involve some degree of arm elevation, repetitive or sustained raising of the right arm beyond 450 for a substantial part of the working day does not appear to be a characteristic of them. There is high force gripping and heavy lifting, pushing and pulling in the calming and restraint situation but this happens only occasionally. There is no use of vibrating tools. Except for physical restraint, the nursing duties are carried out in a controlled manner and there is task variation with opportunities for flexibility of movement.

In my opinion, the characteristics causative of rotator cuff tendinopathy cannot be said to be present in Mr Sharma's employment tasks or environment, so this provision is not met. ...

I am not aware of any epidemiological studies on mental health nurses, specifically, from which to conclude the existence of a significantly increased risk in Mrs Sharma's occupational group. In my view the work does not have enough in common with the above-mentioned workers to permit a reasonable extrapolation.

[25] On 7 July 2021, Wellnz declined Ms Sharma cover for a work-related gradual process injury to the left shoulder. This decision was made on the basis that there were no work tasks or factors in her work environment that could be identified as having caused her condition and that the work she did and/or her work environment was not recognised as placing workers at significantly greater risk of developing impingement syndrome of the shoulder. Ms Sharma lodged an application to review this decision.

[26] On 18 November 2021, review proceedings were conducted. On 15 March 2022, the Reviewer found that Ms Sharma's left rotator cuff tendinopathy with impingement was a work-related gradual process condition. The Reviewer quashed Wellnz's decision and substituted it with the decision that Ms Sharma had cover under the Act for this condition.

[27] On 4 August 2022, a workplace assessment was carried out by Alpha Consultants Limited.

[28] On 16 September 2022, the Alpha Consultants workplace assessment was considered by Dr Rod Nicholson, Occupational Physician. After considering the workplace assessment and the medical reports and MRI imaging, he concluded that there was no evidence to be found of any gradual process work-related personal injury, and there was nothing in Ms Sharma’s employment task which could cause the complaints that she had.

Relevant law

[29] Section 30 of the Accident Compensation Act 2001 (“the Act”) provides:

30 Personal injury caused by work-related gradual process, disease, or infection

- (1) Personal injury caused by a work-related gradual process, disease, or infection means personal injury—
 - (a) suffered by a person; and
 - (b) caused by a gradual process, disease, or infection; and
 - (c) caused in the circumstances described in subsection (2).
- (2) The circumstances are—
 - (a) the person—
 - (i) performs an employment task that has a particular property or characteristic; or
 - (ii) is employed in an environment that has a particular property or characteristic; and
 - (b) the particular property or characteristic—
 - (i) causes, or contributes to the cause of, the personal injury; and
 - (ii) is not found to any material extent in the non-employment activities or environment of the person; and
 - (iii) may or may not be present throughout the whole of the person’s employment; and
 - (c) the risk of suffering the personal injury—
 - (i) is significantly greater for persons who perform the employment task than for persons who do not perform it; or
 - (ii) is significantly greater for persons who are employed in that type of environment than for persons who are not.
- (3) Personal injury caused by a work-related gradual process, disease, or infection includes personal injury that is—
 - (a) of a type described in Schedule 2; and

- (b) suffered by a person who is or has been in employment—
 - (i) that involves exposure, or the prescribed level or extent of exposure, to agents, dusts, compounds, substances, radiation, or things (as the case may be) described in that schedule in relation to that type of personal injury; or
 - (ii) in an occupation, industry, or process described in that schedule in relation to that type of personal injury.
- (3A) To avoid doubt, where a claim is lodged for cover for a work-related gradual process, disease, or infection, section 57 applies to require, among other things, the Corporation to investigate the claim at its own expense.
- (4) Personal injury of a type described in subsection (3) does not require an assessment of causation under subsection (1)(b) or (c).

[30] In *Ambros*,¹ the Court of Appeal stated the following in relation to causation:

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

...

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

...

[70] ... The generous and unniggardly approach referred to *Harrild* may, however, support the drawing of a robust inference in individual cases. It must, however, always be borne in mind that there must be sufficient evidence pointing to proof of causation, on the balance of probabilities, for a Court to draw even a robust inference on causation. Risk of causation does not suffice.

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

Discussion

[31] This Court has had the benefit of submissions from Mr Sharp for Wellnz. Ms Sharma was given repeated opportunities to provide submissions in response, but she has not done so.

[32] The issue in this case is whether Ms Sharma's left rotator cuff tendinopathy with impingement was a work-related gradual process injury. For Ms Sharma to establish a work-related gradual injury under section 30(2) of the Act, she must establish that:

- (1) her employment tasks or the environment in which her tasks were performed had a particular property or characteristic that caused or contributed to her personal injury by gradual process;
- (2) the property or characteristic identified is not found to any material extent in her non-employment activities or environment; and
- (3) the risk of suffering his personal injury is significantly greater for persons performing her employment task in that environment than for persons who do not perform that task in that environment.

[33] A Court may draw robust inferences of causation in some cases of uncertainty, grounded on its view of what constitutes the normal course of events, based on the whole of the lay, medical, and statistical evidence.²

[34] In present case, the primary evidence before the Reviewer comprised the competing opinions of Mr Mutch, the treating Orthopaedic and Shoulder Surgeon, and Dr Monigatti, an Occupational Medicine Specialist. Mr Mutch assessed that Ms Sharma had a classic gradual process condition exacerbated by events like those that occurred on 8 November 2019. Dr Monigatti assessed that the characteristics causative of Ms Sharma's condition could not be said to be present in Ms Sharma's employment tasks or environment, and that it could not be reasonably concluded that there was significantly increased risk of her injury in her occupational group.

² *Ambros*, above note 1, at [67].

[35] In view of the competing views of the above medical specialists, a worksite assessment would have been of particular significance in documenting, in some detail, the work tasks and the likely duration of those work tasks carried out by Ms Sharma. Unfortunately, Ms Sharma declined to participate in such an assessment, and so the Reviewer did not have the benefit of this evidence. However, subsequent to the review decision, a workplace assessment was carried out. After considering the workplace assessment and the medical reports and MRI imaging, Dr Rod Nicholson, Occupational Physician, concluded that there was no evidence to be found of any gradual process work-related personal injury, and there was nothing in Ms Sharma's employment task which could cause the complaints that she had.

Conclusion

[36] In light of the above considerations, the Court determines that the review decision of 15 March 2022 is quashed. The Court directs that another review be conducted by a different Reviewer, taking into account all the evidence presented to date, including the workplace assessment, and any further evidence that the parties wish to provide.

[37] I make no order as to costs.



P R Spiller
District Court Judge