IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 46 ACR 6/16

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

Hearing: 8 March 2023
Heard at: Dunedin/Ōtepoti

Appearances: The Appellant in person
Mr I Hunt for the Respondent

Judgment: 23 March 2023

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Personal Injury – Section 26; Causation, Accident Compensation Act 2001]

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[1] This is an appeal against a decision of the respondent dated 4 July 2014 declining cover for a neck sprain.

[2] The claim for cover submitted by the appellant's GP, Dr Elias, on 19 May 2014, described the injury is as "Injury to neck caused by accident in 2004".

[3] This accident was described by Dr Stephen Bentley, Musculoskeletal Physician, in his report of 28 April 2006 as follows:

> On 15 August 2004, Gaynor was doing a shoulder press at home, using a 1kg hand held weight, when she felt a discomfort, tension, pulling sensation, in the left side of her head, left medial and supra scapular regions and a similar feeling in the lateral aspect in the left leg. She consulted her GP and was referred to physiotherapy at Dunedin Hospital, where she attended regularly since her injury. Despite regular physiotherapy, Gaynor's

> symptoms have continued and she has pain on flexion of the cervical spine and her neck feels tight and stiff. She has had a shooting sensation/paraesthesia felt in her left arm and leg, particularly the left side after physical activity, for example, cleaning. Gaynor has had difficulty elevating the left arm. There appears to be a block or inhibition to her active elevation or flexion of the left shoulder associated with a pulling tight discomfort in the left suprascapular and medial scapular region. Gaynor has problems using the phone, she is unable to hold the phone with her left hand, and to a less extent the right hand, because of discomfort, weakness, tension and pulling in her neck and in her left shoulder girdle and arm. This is also associated with paresthesia in the left arm. Gaynor has difficulty sleeping on the left side, but also at times on the right. Gaynor likes to be very physically active, she says she is full of energy and needs to exercise, but is restricted in what she can do because of her symptoms.
>
> …
>
> In my opinion, Gaynor has primarily suffered a sprain of the cervicothoracic junction C7-T3 performing the shoulder press and she has persistent cervicothoracic dysfunction (painful and restricted C7-T3) and associated with this, she has tension and weakness of the left middle trapezius, tension in the left upper trapezius and levator scapulae and weakness of the medial scapular muscles and lower trapezius. She has an anterior tilted scapulae with tension in the pectoralis minor muscles and there is a restricted mobility of the left first rib associated with marked tension in the scalene muscles. Gaynor has restricted cervical mobility, particularly rotation to the left and this is likely to relate to mid cervical dysfunction and tension in the left cervical and cervicoscapular muscles. Gaynor's global weakness and blocked, grabbing sensation that restricts her left shoulder movement is, in my opinion, most likely related to the cervicothoracic joint dysfunction and associated left lower middle trapezius pain and dysfunction.

[4] Consultant Neurosurgeon, Mr Bishara, reported on 12 March 2007, concluding:

> If a disc lesion is excluded, the diagnosis of complex regional pain may be appropriate.

[5] In a report dated 11 September 2007, Mr Finnis, Neurosurgeon, concluded:

> Mrs Johnson does not have any significant cervical spinal injury or nerve root impingement. She has primarily a soft tissue injury, which has extended into a more generalised musculoskeletal pain problem with some neurological manifestations. She displays quite florid manifestations of an abnormal pain behaviour.

[6] In a report dated 18 September 2007, Dr Acland, pain specialist, diagnosed:

> Diffuse somatic pain with evidence of significant central sensitisation.

[7] In a psychosocial report dated 18 September 2007, clinical psychologist Jeni Blezard, under the heading of "Assessment Summary", said:

> Gaynor is clearly experiencing considerable physical discomfort with her L shoulder injury and the way in which this causes her ongoing pain and other symptoms is compromising her function considerably. There is a relatively high level of emotional

response for Gaynor, some of which will be heightened by virtue to the fact that she has a pre-morbid propensity towards anxiety and high arousability.

[8] In a report dated 20 October 2010, Orthopaedic Surgeon, Mr Swan, said:

> Specific Diagnosis and Causal Link to Covered Injury:
>
> In my opinion, her left shoulder is clinically, radiologically and ultrasonographically normal and is not the source of her pain or disfunction.
>
> There is clearly a neuromuscular disfunction affecting the cervical region with palpable tenderness and stringiness in the trapezius muscle and discrete tenderness in the scalene and pectoralis minor muscles.

[9] Eventually, on 10 April 2014, she was the subject of an impairment assessment by Dr Russell Meads. He summarised the history of her injury and treatment, including the following information from the appellant:

> She stated at the present time she has pain on the left side of her neck. She said this is severe. She feels it is a tight clamping pain, going from her spine down to her shoulder.
>
> The pain is worse with movement.
>
> The pain wakes her at night.
>
> She finds it difficult to lie on her left hand side.
>
> She stated that all of her left arm feels weak.
>
> She stated that her left arm gets numb and heavy.
>
> She stated that she is getting some tingling in her fingers.
>
> She stated that now the pain, heaviness and numbness is also affecting her right arm.
>
> She stated that she has no history of injury to her shoulder in the past.
>
> She stated she suffers from no medical illnesses of note.
>
> …

[10] In Dr Meads' assessment, the appellant sustained an injury resulting in possible impairment to her left upper extremity.

[11] In his summation of impairment rating, he said:

> It would seem that the overwhelming opinion by the experts who have seen her, that Gaynor has a cervicothoracic spinal problem that does not involve compromise to the spinal cord or nerve roots. This has set up pain around the cervical spine.

[12] Following ACC's letter of 4 July 2014 declining cover and her unsuccessful attempt to review that decision, a clinical neurophysiology report was carried out by Mr Taha on 22 October 2020, who concluded:

> There is no hard neurophysiological evidence of a left C4-8 radiculopathy. There is also no evidence of a focal or general axonal or demyelinating peripheral neuropathy in the left upper limb, nor is there evidence of myopathy. The only clearly abnormal finding was significantly impaired recruitment - ? cause.

[13] The appellant's GP at the time, Dr Wormersley, made a further referral to Mr Taha on 14 January 2021, saying:

> I am hoping you can update me regarding the plans for Gaynor's follow up post nerve conduction studies? She tells me these were completed before Christmas, but I have no correspondence to confirm this. She seems to have been expecting a clinical appointment with you to discuss surgical options – is this correct?
>
> She continues to be in significant pain and is relying heavily on diazepam and gabapentin for minimal relief.

[14] Mr Taha reported again on 14 April 2022 and said:

> Despite the severity of the pain that Gaynor has been experiencing, I cannot confidently relay this to an objective cause. Hence the diagnosis is not clear.
>
> If there was a nerve injury or nerve damage, which is not the case from testing being undertaken, I would expect the pain to improve over the years. It is extremely unlikely for no obvious cause of the pain to present all these years without at least an objective finding.
>
> The mechanism of injury in my opinion would not normally result in such symptoms. However, there are rare cases of unusual presentations for unusual accidents.
>
> This is not to say that Gaynor did not sustain an injury, but it does point to the fact that an objective cause of her symptoms cannot be supported.

Appellant's Submissions

[15] Ms Downes told the Court her injury occurred when she started weights with her sister coaching her. She said the injury occurred when she was doing a new repetition with the weights. She said she was lifting the weights up and down and something went wrong, which she described as "being hit by a ton of bricks".

[16] She spoke of ACC covering her injury, and then she says, "ACC cut me off".

[17] She said the muscle spasms she has experienced are horrendous and have resulted in admissions to the emergency department.

[18] She confirmed that she is a very active person and just wants to get on with her life. She says that the mental and physical stress of what she has been through has taken its toll.

[19] She said she would like to have a further MRI scan. It is noted that the scan she had on 11 February 2017 recorded:

> Image quality is very poor due to movement, due to patient discomfort.

[20] She refers to Professor Dirk De Ridder, Consultant Neurosurgeon, who examined her in March 2016 and in his report of 9 March, said:

> There is no cervical cause for the patient's symptoms. The decrease in hand-neck and hand-back movements suggest a bilateral shoulder problem. However, a functional problem is also possible.

[21] She told the Court she is used to being healthy and fit, but now she is severely restricted.

[22] She again emphasised that the muscle spasms were "horrendous".

Respondent's Submissions

[23] Mr Hunt submits that from ACC's perspective, there is no medical evidence nor opinion from a specialist that supports Ms Downes' position that she sustained a neck injury in 2004.

[24] Mr Hunt acknowledges that Ms Downes has a very strong belief in her injury, however he submits that the specialists are in effect saying there is no medical evidence to support her injury claim.

[25] Mr Hunt refers to Dr Meads assessment of zero whole person impairment.

[26] Mr Hunt refers to Dr Acland's finding of diffuse somatic pain with evidence of significant central sensitisation as well as the appellant's premorbid propensity towards anxiety and high arousal noted in the psychosocial report of Ms Blezard.

[27] He also refers to neurologist, Dr Wright's report of 7 July 2008 which refers to abnormal mobilisation of power and abnormal pain behaviour, seen by other health professionals.

[28] Mr Hunt also refers to the report of Dr Gerard Walker, ACC specialist in occupational and environmental medicine, of 24 May 2010. Dr Walker notes that 11 months elapsed between the accident date of 15 August 2004 and lodgement date of the claim on 18 July 2005.

[29] In his report, he also refers to earlier GP notes from 2004 and 2005 that do not refer to any shoulder problem.

[30] Mr Hunt concludes that in this case, there has been a "very intensive investigation" since 2004 that has failed to establish that there was an accident causing injury.

Decision

[31] The issue to be determined here is whether or not the appellant suffered an injury on 15 August 2004, namely a neck sprain, which was the subject of a claim for cover lodged by the appellant's GP on 19 May 2014.

[32] It is the appellant's position that this injury occurred while she was performing a shoulder press with hand weights.

[33] Prior to accident in 2004, the appellant had undergone an L5/S1 discectomy for spinal stenosis at the L5/S1 level. The appellant's evidence before this Court was that that particular condition was completely corrected by that surgery.

[34] The appellant's narrative in respect of the "shoulder press" injury is effectively that she pursued physiotherapy to cure this injury, but to no avail.

[35] Attempts to resolve injuries of this kind using physiotherapy are commonplace and it is therefore unsurprising that ACC's medical advisor, Dr Walker, has concluded that a review of the GP notes in the months that followed "does not provide much support for the view that a rotator cuff injury arose as has been accepted".

[36] The appellant impresses as a person who has throughout her life endeavoured to keep herself at a high level of health and fitness. And that remains her aspiration.

[37] She is forthright in her views and on more than one occasion during the hearing, she referred to the pain of spasms in her neck and shoulders as "horrendous."

[38] This self-view is borne out in what she has said to the various medical specialists and recorded in their reports.

[39] My conclusion, if for no other reason than the consistency of her reporting of this pain from spasms in her neck and shoulders over the last 18 plus years, is that her pain experience is real, because her pain is real.

[40] She is also critical of those medical professionals who, to her mind, treated her sub-optimally.

[41] Given the present pressure that medical professionals are under throughout the length of the country, I do not think her various criticisms of some that she saw are objectively justified, but they are criticisms made by a person who I accept has experienced crippling pain for many years.

[42] One medical professional that she was critical of was Mr Taha, consultant neurosurgeon.

[43] She, along with most other ACC claimants, prefers to be physically examined by the medical professional who is reporting on her injury. It seems that Mr Taha did not do this, which has resulted in the appellant's sub-optimal view of him.

[44] However, in his report of 14 April 2022, Mr Taha says:

> Despite the severity of the pain that Gaynor has been experiencing, I cannot confidently relay this to an objective cause. Hence the diagnosis is not clear.
>
> …
>
> The mechanism of injury, in my opinion, would not normally result in such symptoms, however there are rare cases of unusual presentations for unusual accidents.

> This is not to say that Gaynor did not sustain an injury, but it does point to the fact that an objective cause of her symptoms cannot be supported.

[45] It needs to be said, however, as set out in the background section of this Judgment, other medical professionals have accepted that the appellant has suffered an injury that has been the cause of her pain, including musculoskeletal physician, Dr Bentley, who in 2006 diagnosed a sprain of the cervico-thoracic junction.

[46] In September 2007, Mr Finnis, neurosurgeon concluded:

> Mrs Johnson does not have any significant cervical spinal injury or nerve root impingement. She has primarily a soft tissue injury which has extended into a more generalised musculoskeletal pain problem.

[47] Hamish Osborne, Sports Physician, in his report of 27 November 2011, said:

> The patient clearly has a presenting pain in the neck and shoulders on each of the five consultations she had with me. There was no change in her pain during her progression of the exercises, only improvement in function.

[48] Dr Meads concluded in his 2014 assessment:

> Gaynor has sustained an injury resulting in possible impairment to her left upper extremity.

[49] In fairness to all the medical professionals involved with her case, precise diagnosis of her injury has not been straightforward.

[50] In this case, applying the principles enunciated in *Ambros*[1], I conclude that the appellant has suffered injury by accident on 15 August 2004, which has resulted in real and substantial ongoing pain to her in the intervening years. *Ambros* provides that the court considers all of the evidence, including the lay evidence.

[51] In regard to the latter I have concluded that the appellant is essentially a witness of truth and whether or not her descriptions of the pain she feels might be overstated, I am satisfied they are real and that they derive from the accident sustained when lifting weights in 2004.

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

[52] It is in these rare and difficult cases where the Court has to review all of the evidence and acknowledge, as Mr Taha and others have, some rare injuries by accident are not yet properly understood in terms of precise medical causation.

[53] Finally, I note that the MRI report of 22 February 2017 includes this:

> Image quality is very poor due to movement due to patient discomfort.

[54] Having a very poor MRI image plainly is unhelpful diagnostically. Yet the comment is supportive of the appellant's position of real and significant pain in her neck and shoulder, such that she was unable to remain still during the scan.

[55] It is to be hoped that following this decision and the reversal of ACC's declined decision, such procedure, if diagnostically indicated, might be repeated to hopefully allow for a more precise diagnosis of the appellant's injury, that might lead to more successful therapeutic interventions.

[56] On the balance of probabilities therefore, I find the evidence establishes that the appellant did suffer an injury on 8 August 2004 while pressing weights, and accordingly, ACC's decision declining cover is reversed.

[57] Accordingly, the appeal is allowed.

[58] Costs are reserved.

CJ McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch