

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2024] NZACC 017      ACR 93/22**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	ESTATE OF ANTHONY BUIST Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing:      2 February 2024

Held at:      New Plymouth/Ngāmotu

Appearances:    M Buist for the Appellant  
                     T Gee for the Accident Compensation Corporation (“the  
                     Corporation”)

Judgment:      7 February 2024

---

**RESERVED JUDGMENT OF JUDGE P R SPILLER**  
**[Revocation of cover; claim for personal injury; suspension of entitlements**  
**- ss 20, 26, 65, 117, Accident Compensation Act 2001 (“the Act”)]**

---

**Introduction**

[1] This is an appeal from the decision of a Reviewer dated 28 April 2022. The Reviewer dismissed an application for review of the Corporation’s decisions dated 28 July 2021:

- (a) revoking cover for pyogenic (septic) arthritis;
- (b) declining cover for left shoulder rotator cuff tearing, arthropathy and joint osteoarthritis; and

- (c) suspending weekly compensation and home help entitlements.

## **Background**

[2] Mr Buist was born in April 1943, and was a dairy farmer.

[3] On 19 September 2020, when Mr Buist was 77 years old, he suffered an accident while calving a cow.

[4] Mr Buist was hospitalised on 26 September 2020 with septic arthritis to the left shoulder. On his admission, the hospital record noted:

Has been feeling lethargic for -8/52. Has been working hard on the farm - calving season - 70 hour weeks.

Has had left shoulder pain today. Tells me it is a muscle strain.

Also has had back pain on and off for a few days. Saw the osteopath.

Has bruising of right bicep - says 'got kicked by a calf'.

[5] On 26 September 2020, following an x-ray investigation of Mr Buist's left shoulder, Dr Raj Fernando, Radiologist, identified mild/moderate osteoarthritic changes at the glenohumeral joint, with advanced abnormality at the AC joint and a marked reduction in subacromial space, but no fracture or dislocation.

[6] Mr Buist was hospitalised from 26 September 2020 until 9 October 2020.

[7] On Mr Buist's discharge, 9 October 2020, the hospital record noted the following examination:

Right bicep bruised and bunched - ?bicep tendon tear, intact supination and elbow flexion power

The [left] shoulder was aspirated. Blood cultures were noted and 'grew Streptococcus Pneumoniae'. A left shoulder x-ray was noted as showing 'Degenerative changes plus probable rotator cuff abnormality'. A diagnosis was made of 'Sepsis secondary to septic arthritis L) shoulder'. ...

You had an infection in your joint that requires a long period of antibiotics into the vein.

You will continue antibiotics into the vein until 19/10/20 under guidance of the district nurses.

[8] On 14 October 2020, following an x-ray investigation of Mr Buist's left shoulder, Dr Andrew Taylor, Radiologist, identified an irregular rotator cuff, mild irregularity of the glenohumeral joint margins, and AC joint arthropathy. On the same day, an MRI scan identified severe subacromial/subdeltoid and subcoracoid bursitis, mild glenohumeral joint effusion, significant synovitis and capsulitis, and hypertrophic AC joint arthropathy.

[9] Mr Buist was hospitalised from 14 October until 30 October 2020.

[10] On 15 December 2020, Dr Chris Heatherton, GP, filed a claim form. Dr Heatherton diagnosed Mr Buist's conditions as contusion shoulder/upper arm left, pyogenic arthritis left, and rupture long-head biceps tendon right. Dr Heatherton described Mr Buist's accident as follows:

He was calving a cow and the[n] slipped and fell on the ground and landed on his left shoulder. Calf also kicked R upper arm.

[11] On 18 December 2020, following an ultrasound scan investigation of Mr Buist's left shoulder, Dr Praneal Sharma, Radiologist reported a full-thickness tear of the supraspinatus tendon; subacromial and subcoracoid bursitis with associated impingement; rotator cuff arthropathy; and glenohumeral and acromioclavicular joint osteoarthritis.

[12] On 8 January 2021, an MRI was performed on Mr Buist's left shoulder, and the radiologist reported: a full thickness tear of the supraspinatus tendon, subacromial and subcoracoid bursitis with associated impingement, rotator cuff arthropathy, and glenohumeral and acromioclavicular joint osteoarthritis.

[13] On 10 March 2021, Ms Launa Steel, Physiotherapist, reviewed the medical records and concluded, among other things, that:

There is no described mechanism of injury within the clinical notes by way in which the sepsis could plausibly be linked to the cited injury event. ...

Septic arthritis can develop when an infection spreads through the bloodstream to the joint. This can occur with any infection in the body (for example, a urinary tract infection) and the source of infection is commonly unknown. This client's infection appears to have been a bacterial one, however the source of this is not suggested in the medical notes.

[14] On 11 March 2021, the Corporation granted cover for “rupture long head biceps tendon – right; contusion, shoulder or upper arm – left; and pyogenic (septic) arthritis – left”. The Corporation stated that this approval was subject to an independent medical review funded by the Corporation, and further entitlements or Corporation-funded support may be subject to the findings of the report.

[15] The Corporation commenced weekly compensation entitlements for Mr Buist. The Corporation also provided home help, following an Integrated Assessment dated 6 April 2021 which identified the following needs:

Now that Tony [Mr Buist] is unable to complete farm tasks due to decreased shoulder ROM and strength, Margie [Mrs Buist] is required to fulfil these tasks. Margie now has less time to complete the household tasks and would benefit from assistance with vacuuming.

[16] On 30 May 2021, Mr Buist saw Dr John Ruttenberg, Medical Advisor to the Corporation. Dr Ruttenberg noted that the fact that there were no immediate symptoms reported by Mr Buist, added to the evidence of degenerative change in the rotator cuff, made the diagnosis of an injury-related cuff rupture of the left shoulder unlikely. Dr Ruttenberg also noted that the length of time for symptoms developing, plus the fact that there was no evidence of abrasion on the shoulder, made the entry of an organism unlikely. Further, the causative organism was a strep pneumoniae which did not indicate a skin entry, and would usually involve a staphylococcus.

[17] On 30 May 2021, the Corporation obtained a Medical Case Review report from Dr David Hartshorn, Specialist Occupational Physician. Dr Hartshorn noted that Mr Buist advised the following:

Mr Buist was clear at today’s assessment that despite these two events [a kick to the right biceps and a fall onto the left shoulder] during the calving manoeuvre he was able to complete the calving process and was able to continue with calving and other farm duties over a period of several days thereafter without any discernible symptoms relating to either the right or left shoulder.

[18] Dr Hartshorn reported as follows:

... the [x-ray] investigations indicated already established degenerative joint disease with a suggestion of rotator cuff arthropathy within the left shoulder. This is highly likely to predate the onset of the septic arthritis.

Overall it is unlikely that the fall onto the left shoulder resulted in an acute traumatic rotator cuff disruption. If this was the case, the expectation would have been that of sudden onset symptoms and immediate incapacity after the fall, which is clearly not the history given by Mr Buist.

The rotator cuff disruption is highly unlikely to have occurred as a result of the fall.

There is no evidence to suggest that the fall was the specific cause of the subsequent evolution of septic arthritis in the shoulder joint.

1. Thus the injury event was that of a kick to right bicep region and a fall onto the left shoulder. There is evidence to suggest that the kick to the right biceps area resulted in long head of biceps rupture on a traumatic basis. There is no evidence however to suggest a specific or well-defined injury to the left shoulder with an absence of any symptoms or functional limitation either immediately, within hours, or for the subsequent few days. Indeed Mr Buist remained functionally capable of pursuing of his usual duties over the hours and days following the event. It seems unlikely that there is any plausible link between the calving incident and the subsequent evolution of the septic arthritis on the left shoulder. The changes noted within the shoulder on subsequent radiologic investigation have the appearance of longstanding and well established changes with no evidence to suggest any well-defined injury related structural disruption that could be seen as a potential focus or source for a post-traumatic septic arthritis. As mentioned above, there does not appear to be any evidence to suggest an abrasion whereby skin organisms have had a portal of entry with respect to the subsequent infection.

The rotator cuff disruption is highly unlikely to have occurred as a result of the fall for the reasons outlined above. Furthermore there is radiologic evidence to suggest established humeral changes consistent with pre-existing rotator cuff arthropathy. The loss of subacromial space would also be consistent with already established cuff dysfunction.

2. The current diagnosis is that of ongoing loss of range of motion within the left shoulder associated with crepitus. This is not however painful. The current presentation is very likely that of rapid progression of the already established glenohumeral joint arthropathy secondary to the adverse impact of a septic arthritis on the articular cartilage. Thus the current diagnosis at the left shoulder is that of a combination of rotator cuff arthropathy with superimposed post-septic arthritis osteoarthritis exacerbating. This occurs upon a background of established rotator cuff deficiency with an absent supraspinatus and a full thickness tear extending into the anterior infraspinatus. The information suggests that these changes are likely to have been longstanding and predate the event of the 19/09/2020. There remains a right long head of biceps deformity and indeed a similar deformity on the left side. These factors are not contributing at all to any current symptoms or functional limitation. Mr Buist does not describe any significant issues with the right shoulder and the right shoulder largely examines normally at today's assessment.

3. Thus I do not believe there is good evidence to support the rotator cuff disruption and secondary rotator cuff arthropathy of the left shoulder as being due to the incident of the 19/09/2020 where Mr Buist fell on his left shoulder. The changes are well established at the time of the x-ray investigation one week

later. Neither is there any evidence to suggest that the fall was the specific cause of the subsequent evolution of a septic arthritis involving this joint.

There is some evidence to suggest that the right long head of biceps disruption may well have been caused by the event.

[19] On 28 June 2021, Dr Nick Crozier, Medical Advisor to the Corporation, advised that the cause of Mr Buist's incapacity was his left shoulder, not his right shoulder, and that the right shoulder injury was not the cause of any significant incapacity. Dr Crozier noted that, after the accident, Mr Buist was able to continue working for a week with his right shoulder injury. Dr Crozier recommended that the Corporation not accept Mr Buist's left septic arthritis as a personal injury caused by accident.

[20] On 28 July 2021, the Corporation issued a decision advising Mr Buist as follows:

#### **Revoke Cover**

ACC wrote to you on 11/03/2021 to accept your claim for your Pyogenic arthritis (septic arthritis) - left. In legal terms, this means ACC granted you cover for this injury.

ACC has looked carefully at all the information now available, and has decided that this injury should not have been accepted. This is because we have received new information from your treatment providers and considered this along with the original information and this confirms that Pyogenic arthritis should not be covered.

As a result, ACC has had to revoke the decision of 11/03/2021 and has declined your claim for cover of Pyogenic arthritis - left. This means that ACC is not able to help with treatment costs or other support for this condition.

#### **Decline Cover**

ACC has carefully assessed whether we are able to cover your LEFT shoulder rotator cuff tearing and arthropathy, and joint osteoarthritis as a result of your accident on 19/09/2020.

Unfortunately, we are unable to approve cover for these injuries based on the information that we have available. We realise this isn't the outcome you were hoping for so I wanted to let you know how we came to this decision.

How we made this decision

We have assessed all the available information and found there is not sufficient evidence to show these conditions were caused by your accident on 19/09/2020.

The medical notes identified mild/moderate to advanced degenerative changes within your left shoulder, which would be consistent with already established degenerative joint disease and that this is highly likely to have predated the onset of left shoulder symptoms. Given the extent of the degeneration it can also be assumed that it would predate your accident event of 19/09/2020.

You're still covered for the following injuries and we'll continue to support your recovery from them:

- Contusion, shoulder or upper arm - left
- Rupture long head biceps tendon – right

#### **Entitlement – weekly compensation**

ACC has carefully assessed all the information available and finds that we're unable to continue to provide weekly compensation from 31/10/2020.

The medical certificates from your GP note that you are recovering from surgery for left septic joint and bicep tendon rupture. As noted above ACC is revoking cover for the Pyogenic arthritis (septic arthritis) and therefore we cannot consider any period of incapacity related to this condition. With regards to the left bicep tendon rupture the medical information supports that the Pyogenic arthritis (septic arthritis) is the significant cause of incapacity not the bicep tendon rupture.

#### **Entitlement – home help**

ACC has carefully assessed all the information available and finds that we're unable to continue to provide home help support from 26/08/2021, this is due to the reasons detailed above.

Although ACC is unable to provide weekly compensation and home help support we may be able to offer other assistance towards your recovery and treatment costs. If you would like to discuss your options please contact me on the number below. ...

[21] On 31 March 2022, review proceedings were held. On 28 April 2021, the Reviewer dismissed the review, on the basis that the decisions of the Corporation were correct in light of the medical evidence.

[22] On 24 May 2022, a Notice of Appeal was lodged.

[23] On 2 August 2022, Mr Buist died. His appeal was continued by his Estate, through the Estate's executors, Margaret Buist, Mr Buist's wife, and Georgina (Georgie) Buist, Mr Buist's daughter.

[24] On 25 June 2023, Dr Hartshorn issued a further explanatory letter, as follows:

In order for the bacteria responsible for Mr Buist's infected shoulder to have entered the shoulder joint, they would have had to enter either (1) due to direct introduction of bacteria into the shoulder joint, or (2) due to bacteria being present in his blood stream (bacteraemia) and "seeding" the shoulder joint.

In order for bacteria to be directly introduced into the shoulder joint in the accident, there would have had to be a deep penetrating injury such as a stab wound or similar, several centimetres deep. This would have been noted in the records, on examination of the left shoulder. However, there is no indication in either the records or Mr Buist's history that there was any penetrating wound to the left shoulder. It follows that, in my opinion, direct introduction of bacteria into the shoulder joint in the accident is not consistent with the medical records and history provided.

It therefore appears probable that the infection in Mr Buist's left shoulder was caused by bacterial spread via Mr Buist's blood stream (bacteraemia). That infection could have originated in any one of a multitude of parts of the body. I have seen no evidence that it originated in the shoulder nor is likely to have been the result of any defined soft tissue injury in this area.

As mentioned above, it is frequently the case that joint infections occur without any known cause.

The pre-existing degenerative changes in the left shoulder, which were demonstrated on imaging at the time of initial medical review, represent a risk factor for septic arthritis in that joint should there be a bacteraemia from any source. Increased age has also been shown as a risk factor for septic arthritis.

It is also notable that no accident event was mentioned in the initial hospital records. Neither was there any report of symptoms in the left shoulder either immediately or within the first 48-72 hours post event during calving, and therefore does not appear to have been considered either by Mr Buist or the treating doctors to be a significant medical event at that stage.

### **The appellant's submissions**

[25] The submissions for the appellant are as follows. Until Mr Buist's accident, despite being aged 77, he was able to do the physically demanding work of a dairy farmer. In the accident, he was thrown across a muddy, trampled, soiled part of a paddock, landing heavily on his left shoulder. Over the next couple of days, he continued his day job, but started to get sick. About a week later, he was hospitalised with septic arthritis in the left shoulder. He never fully recovered and was never able to go back fully to work. Though there was not an open wound on the left shoulder, the accident was the cause of the septic arthritis in the left shoulder. Without the accident, it is more than likely that he would have been able to continue

with his work. He was therefore entitled to be compensated for the fact that he could not work for the rest of the season, totalling 246 days.

### **Revocation of cover for pyogenic (septic) arthritis**

#### *Relevant law*

[26] Section 65(1) of the Accident Compensation Act 2001 (“the Act”) provides that, if the Corporation considers it made a decision in error, it may revise the decision at any time, whatever the reason for the error.

[27] In *Bartels*,<sup>1</sup> Gendall J and Ronald Young J stated, in relation to the Injury Prevention, Rehabilitation, and Compensation Act 2001, s 390 (equivalent to s 65(1) above):

[28] ... the process under s 390 requires the Corporation to examine the earlier decision. It is after all, in the words of s 390, for the Corporation to establish “that the decision was made in error”. We are satisfied, however, that it is entitled to do so using material not available to it at the time of the original decision but which has become available since. We stress, however, that material must clearly establish that the original decision was made “in error” before it can invoke s 390.

...

[31] ... We are satisfied that all Parliament meant was that the Corporation can today, with the factual and other material it now has, look back at the decision previously made and decide if it was “made in error”. A simple example will illustrate the position. A claim is made for a broken arm. An x-ray is inspected which confirms the break and thus cover accepted. Later it is discovered that either the x-ray has been misread or someone else’s x-ray has been read and that the x-ray of the claimant reveals no break. This is “new evidence” and would be highly relevant to a decision under s 390 to revoke the original decision as made “in error”.

...

[33] Finally, we agree with the Corporation’s submissions ... that where decisions previously made are clearly made in error that those decisions should not be left to advantage or disadvantage either claimants or the Corporation. This is a publicly funded insurance scheme for those who suffer personal injury by accident. Those who suffer personal injury by accident should have cover under the Act and those who do not should not get cover when none is due.

---

<sup>1</sup> *Accident Compensation Corporation v Bartels* [2006] NZAR 680.

[28] The Court has, on several occasions, accepted that the Corporation was entitled to revisit and revoke an earlier decision that it had made.<sup>2</sup>

[29] In *Atapattu-Weerasinghe*,<sup>3</sup> Williams J held:

[22] ... it seems clear that s 65(1) and (2) cover two different situations. The first, where a decision has been made and is now felt to be erroneous; the second, where no decision has been made, cover is deemed to be granted, and the Corporation wishes to revisit that. *Bartels* does not speak to the second situation.

[23] ... The reverse onus, as provided for in *Bartels*, only makes sense because an actual error has been identified by the Corporation in the earlier decision. It seems entirely fair that, in that situation, the Corporation should be required to justify the change. But in the absence of such error, reversal of the onus makes no particular sense. ...

### *Discussion*

[30] The issue as to the revocation of Mr Buist's cover for pyogenic (septic) arthritis, by the Corporation on 28 July 2021, is whether the Corporation has established that its original decision on 11 March 2021, granting cover for this condition, was clearly made "in error". It has been established that the Corporation is entitled, with the factual and other material it now has, to look back at the decision previously made and decide if it was "made in error". When a Corporation's decision previously made, is clearly made in error, that decision should not be left to advantage or disadvantage either a claimant or the Corporation.<sup>4</sup>

[31] This Court notes the following considerations.

[32] First, the Corporation's decision to grant cover for pyogenic (septic) arthritis was made despite the prior advice of Ms Steel, Physiotherapist, who reviewed Mr Buist's medical records to date. Ms Steel noted that Mr Buist's infection appeared to have been a bacterial one, but that the source of the infection was not

---

<sup>2</sup> *Stowers v Accident Compensation Corporation* DC Christchurch 167/2009, 5 October 2009; *Paku v Accident Compensation Corporation* [2017] NZACC 143; *Crosswell v Accident Compensation Corporation* [2019] NZACC 37; *Garing v Accident Compensation Corporation* [2019] NZACC 63; and *Herbst v Accident Compensation Corporation* [2020] NZACC 109.

<sup>3</sup> *Atapattu-Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142.

<sup>4</sup> *Bartels*, above note 1, at [31]-[32].

suggested in the medical notes. Ms Steel advised that there was no described mechanism of injury within the medical records by which the sepsis of Mr Buist's left shoulder could plausibly be linked to the cited injury event.

[33] Second, the Corporation's decision to grant cover was made on a provisional basis. The Corporation advised that cover was being granted subject to an independent medical review funded by the Corporation and that Corporation-funded support may be subject to the findings of this report.

[34] Third, on 30 May 2021, Dr Ruttenberg, Medical Advisor to the Corporation, having seen Mr Buist, assessed that the diagnosis of an injury-related condition of the left shoulder was unlikely. Dr Ruttenberg noted that the length of time for symptoms developing, plus the fact that there was no evidence of abrasion on the shoulder, made the entry of an organism unlikely.

[35] Fourth, also on 30 May 2021, Dr Hartshorn, Specialist Occupational Physician, having examined Mr Buist and the relevant medical records, advised that there was no evidence to suggest that Mr Buist's accident was the specific cause of the subsequent evolution of septic arthritis in his left shoulder joint. Dr Hartshorn's diagnosis of the left shoulder was that of a combination of rotator cuff arthropathy with superimposed post-septic arthritis osteoarthritis exacerbating.

[36] Fifth, on 28 June 2021, Dr Crozier, Medical Advisor to the Corporation, having assessed the relevant medical evidence as to Mr Buist's left shoulder, recommended that the Corporation not accept Mr Buist's left septic arthritis as a personal injury caused by accident.

[37] In light of the above medical evidence, which is not contradicted by any other medical evidence, this Court finds that, by the time of the Corporation's revocation of Mr Buist's cover for pyogenic (septic) arthritis of his left shoulder, the Corporation had established that its original decision on 11 March 2021, granting cover for this condition, was clearly made in error.

## **Decline of cover for left shoulder rotator cuff tearing, arthropathy and osteoarthritis**

### *Relevant law*

[38] Section 20(2)(a) of the Act provides that a person has cover for a personal injury which is caused by an accident. Section 26(2) states that “personal injury” does not include personal injury caused wholly or substantially by a gradual process, disease, or infection (unless it is personal injury of a kind specifically described in section 20(2)(e) to (h)). Section 25(1)(a)(i) provides that “accident” means a specific event or a series of events, other than a gradual process, that involves the application of a force (including gravity), or resistance, external to the human body. Section 25(3) notes that the fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.

[39] In *Johnston*,<sup>5</sup> France J stated:

[11] It is common ground that, but for the accident, there is no reason to consider that Mr Johnston’s underlying disc degeneration would have manifested itself. Or at least not for many years.

[12] However, in a passage that has been cited and applied on numerous occasions, Panckhurst J in *McDonald v ARCIC* held:

“If medical evidence establishes there are pre-existing degenerative changes which are brought to light or which become symptomatic as a consequence of an event which constitutes an accident, it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered. The fact that it is the event of an accident which renders symptomatic that which previously was asymptomatic does not alter that basic principle. The accident did not cause the degenerative changes, it just caused the effects of those changes to become apparent ...”

[13] It is this passage which has governed the outcome of this case to date. Although properly other authorities have been referred to, the reality is that the preceding decision makers have concluded that Mr Johnston’s incapacity through back pain is due to his pre-existing degeneration and not to any injury caused by the accident.

[14] ... I consider it important to note the careful wording in the McDonald passage. The issue is not whether an accident caused the incapacity. The issue is whether the accident caused a physical injury that is presently causing or contributing to the incapacity.

---

<sup>5</sup> *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

[40] In *Ambros*,<sup>6</sup> Glazebrook J, for the Court of Appeal, envisaged the Court taking, if necessary, a robust and generous view of the evidence as 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 ...

[41] In *Sparks*,<sup>7</sup> Ongley DCJ stated:

[29] By s26(2) and (4) of the Injury Prevention, Rehabilitation, and Compensation Act 2001, personal injury does not include personal injury caused wholly or substantially by a gradual process, disease, or infection, or by the ageing process. The legal test for entitlements requires sufficient evidence to show that need for assistance arises as a consequence of the covered injury. Where there is an accompanying degenerative or gradual process condition, entitlements will not be available if the personal injury is caused wholly or substantially by that condition. In the present case therefore, the appellant has to be able to point to evidence demonstrating that the condition, as it was when the need for surgery was identified in August 2004, was substantially and effectively caused by the covered injury and not by a pre-existing process.

[42] In *Stewart*,<sup>8</sup> Barber DCJ stated:

[33] The cases consistently highlight that the question of causation cannot be determined by a matter of supposition. There must be medical evidence to assist the respondent Corporation, and now the Court, to determine that question. A temporal connection, in itself, will be insufficient. There needs to be a medical explanation as to how the ongoing condition has been caused by the originally covered injury. In this case the evidence does not establish this.

---

<sup>6</sup> *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

<sup>7</sup> *Sparks v Accident Compensation Corporation* [2006] NZACC 45.

<sup>8</sup> *Stewart v Accident Compensation Corporation* [2003] NZACC 109.

[43] In *Bloomfield*,<sup>9</sup> Joyce DCJ noted:

[18] In this case, and when all is rendered down, the extension of cover claims pursued on appeal by Mr Bloomfield rest mainly on the foundation of a temporal connection argument. On occasion, a temporal connection may be of significance in the context of other, helpful to a claimant, evidence. But the mere presence of such a connection will usually do no more than raise the post hoc ergo propter hoc fallacy.

[44] In *Sarten*,<sup>10</sup> Barber DCJ stated:

[26] I have referred above to the onus of proof on the appellant and the standard of proof. The appellant must establish, on the balance of probabilities, that his ongoing symptoms are the result of personal injury for which he has cover; he is not entitled to the benefit of any doubt; he cannot rely on possibilities; and he cannot call on the respondent to prove that it is not liable to provide cover. It is up to the appellant to prove his case.

[45] In *Marshall*,<sup>11</sup> Cadenhead DCJ stated:

[36] The appellant has not supplied any contemporaneous medical evidence to establish that she sustained any injuries on these dates or any other date that has been identified by the appellant. ...

### *Discussion*

[46] The issue here is whether the Corporation, in its decision of 28 July 2021, correctly declined Mr Buist cover for left shoulder rotator cuff tearing, arthropathy and joint osteoarthritis, on the basis that this pathology was not caused by his accident on 19 September 2020. Covered personal injury does not, in principle, include personal injury caused wholly or substantially by a gradual process.<sup>12</sup> The fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.<sup>13</sup> If medical evidence establishes that there are pre-existing degenerative changes which are brought to light or which become symptomatic as a consequence of an event which constitutes an accident, it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered.<sup>14</sup> A temporal connection between the accident and the condition, in itself,

<sup>9</sup> *Bloomfield v Accident Compensation Corporation* [2014] NZACC 1.

<sup>10</sup> *Sarten v Accident Compensation Corporation* [2004] NZACC 2.

<sup>11</sup> *Marshall v Accident Compensation Corporation* [2005] NZACC 219.

<sup>12</sup> Section 26(2) of the Act.

<sup>13</sup> Section 25(3).

<sup>14</sup> See *Johnston*, note 5 above, at [12].

is insufficient, and the claimant has to provide a medical explanation (particularly contemporaneous medical evidence) as to how the ongoing condition has been caused by the accident.<sup>15</sup>

[47] This Court accepts that, in the accident on 19 September 2020, Mr Buist fell and landed on his left shoulder, and, on 26 September 2020, he was hospitalised with septic arthritis in his left shoulder. However, the Court also notes the following considerations.

[48] First, Mr Buist's own evidence (as recorded by Dr Hartsthorpe on 30 May 2021), was that, despite the fall onto his left shoulder, he was able to continue with calving and other farm duties over a period of several days thereafter, without any discernible symptoms relating to his left shoulder.

[49] Second, the x-ray of Mr Buist's left shoulder, taken on 26 September 2020 (a week after the fall), identified mild/moderate osteoarthritic changes at the glenohumeral joint, with advanced abnormality at the AC joint and a marked reduction in subacromial space. On 9 October 2020, hospital records observed that this x-ray showed degenerative changes plus probable rotator cuff abnormality.

[50] Third, on 30 May 2021, Dr Ruttenberg noted that the fact that there were no immediate symptoms reported by Mr Buist, and the evidence of degenerative change in his rotator cuff, made the diagnosis of an injury-related cuff rupture of the left shoulder unlikely.

[51] Fourth, on 30 May 2021, Dr Hartshorn noted the lack of evidence to suggest a specific or well-defined injury to the left shoulder with an absence of any symptoms or functional limitation for the subsequent few days. Dr Hartshorn assessed that the degenerative joint disease and rotator cuff arthropathy within Mr Buist's left shoulder (as identified by the x-ray) were highly likely to have predated the onset of his septic arthritis. Dr Hartshorn observed that the changes noted radiologically within Mr Buist's left shoulder had the appearance of longstanding and well-established changes, with no evidence to suggest any well-defined injury-related

---

<sup>15</sup> *Stewart*, above note 8, at [33]; *Bloomfield*, above note 8, at [18]; *Sarten*, above note 9, at

structural disruption that could be seen as a potential focus or source for a post-traumatic septic arthritis.

[52] Fifth, on 28 June 2021, Dr Crozier advised that the cause of Mr Buist's incapacity was his left shoulder, and recommended that the Corporation not accept Mr Buist's left septic arthritis as a personal injury caused by accident.

[53] Sixth, on 25 June 2023, Dr Hartshorn observed that increased age and the pre-existing degenerative changes in Mr Buist's left shoulder represented risk factors for septic arthritis. Dr Hartshorn also noted the absence of any report of symptoms in the left shoulder within the first 48-72 hours post-accident event, and of any mention of an accident event in the initial hospital records, thus indicating that the accident was not considered either by Mr Buist or the treating doctors to be a significant medical event at that stage.

[54] In light of the above medical evidence, which is not contradicted by any other medical evidence, this Court finds that the Corporation, in its decision of 28 July 2021, correctly declined Mr Buist cover for left shoulder rotator cuff tearing, arthropathy and joint osteoarthritis, on the basis that this pathology was not caused by his accident on 19 September 2020.

### **Suspension of weekly compensation and home help entitlements**

#### *Relevant law*

[55] Section 67 of 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.

---

[26]; and *Marshall*, above note 10, at [36].

[56] Section 117(1) provides:

The Corporation may suspend or cancel an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.

[57] Section 79 of the Act states that the purpose of social rehabilitation is “to assist in restoring a claimant's independence to the maximum extent practicable”. Section 6 of the Act states that “practicable”, in relation to rehabilitation, means practicable after considering and balancing: the nature and consequences of the injury; the achievement of rehabilitation outcomes; costs; cost effectiveness; the availability of other forms of rehabilitation; and other relevant factors.

[58] Section 81(4) provides:

The conditions are—

- (a) a claimant is assessed or reassessed under section 84 as needing the key aspect; and
- (b) the provision of the key aspect is in accordance with the Corporation's assessment of it under whichever of clauses 13 to 22 of Schedule 1 are relevant; and
- (c) the Corporation considers that the key aspect—
  - (i) is required as a direct consequence of the personal injury for which the claimant has cover; and
  - (ii) is for the purpose set out in section 79; and
  - (iii) is necessary and appropriate, and of the quality required, for that purpose; and
  - (iv) is of a type normally provided by a rehabilitation provider; and
- (d) the provision of the key aspect has been agreed in the claimant's individual rehabilitation plan, if a plan has been agreed.

[59] In *Ellwood*,<sup>16</sup> Mallon J stated, in regard to equivalent provisions under the Accident Insurance Act 1998:

[65] I therefore consider that s 116 combined with the requirement in s 62 on ACC to make reasonable decisions requires ACC to have a sufficient basis before terminating benefits. If the position is uncertain then there is not a sufficient basis. The “not satisfied” test is not met in these circumstances.

---

<sup>16</sup> *Ellwood v Accident Compensation Corporation* [2007] NZAR 205.

[60] In *Furst*,<sup>17</sup> Barber DCJ stated:

[13] ACC must have a “*sufficient basis before it is not satisfied that a claimant is entitled to continue to receive the entitlement*”. If the position is uncertain, “*then there is not a sufficient basis*” The “*not satisfied*” test is not met in these circumstances”. *Ellwood v the Corporation* [2007] NZAR 205. The “*not satisfied*” test requires a positive decision ... equivalent to being satisfied that there is no right to entitlements. This test would not be met where the evidence was in the balance or unclear: *Milner v the Corporation* (187/2007).

[61] In *Newton*,<sup>18</sup> Powell DCJ endorsed the decision of Ongley DCJ in *Medwed*<sup>19</sup> in these terms:

[23]... While I have no information before me as to the reasons that cover for the Lake Hayes incident was declined it would be extraordinary and in my view quite inconsistent with s 67 of the Act if Mrs Newton could rely upon an injury for which cover has been declined as a ground to obtain entitlements in respect of a different covered injury.

[24] As both Mr Sara and Mr Hunt noted the attempt to rely upon the Lake Hayes incident gives rise to a situation very similar to that which was considered by His Honour Judge Ongley in *Medwed v Accident Compensation Corporation*. The appellant in that case attempted to rely upon an injury that allegedly occurred in 1994 (and which was subsequently declined by the Corporation) to support an application for surgery made in respect of a 2007 covered injury. Of relevance to the present case Judge Ongley concluded:

[26] The deciding point is however the status of cover under the Act. No cover had been obtained for the 1994 injury. The best medical opinion for the appellant was that the sole cause was the 1994 injury, and that it was unlikely that the later covered injuries were causative of the condition requiring surgery. I have rejected the argument that a treatment entitlement could be obtained without first obtaining cover for the specified injury. I find that even if the condition resulted from personal injury caused by accident in 1994, there is no entitlement without cover for that injury...

[25] In the hearing before me Mr Sara suggested it was perhaps time for *Medwed* to be revisited. Given the conclusions I have reached in respect of the scheme of the Act I disagree, and instead consider that Judge Ongley quite correctly set out the law as it stands, and in my view there can be no basis for any different conclusion.

---

<sup>17</sup> *Furst v Accident Compensation Corporation* [2011] NZACC 379. See also *Ellwood v Accident Compensation Corporation* [2012] NZHC 2887; and *Booker v Accident Compensation Corporation* DC Huntly 205/00, 17 August 2000.

<sup>18</sup> *Newton v Accident Compensation Corporation* [2015] NZACC 22.

<sup>19</sup> *Medwed v Accident Compensation Corporation* [2009] NZACC 86.

[62] In *Popoalii*,<sup>20</sup> Henare DCJ stated:

“[24] ... before the medical evidence adduced by both parties after the Corporation’s decision can be considered, this Court must first be satisfied that the Corporation had a sufficient basis to be not satisfied that Mr Popoalii had a right to continue to receive entitlements at the time the decision to suspend was made. Only if this can be established does the Court then consider whether there remains a sufficient basis to be not satisfied having regard to all the evidence now before the Court.

[25] ... for the Corporation to be satisfied as to whether a claimant remains entitled to an entitlement, the starting point is clearly s 67 of the Act...

[26] ... entitlements can only be suspended under s 117(1) if either of the two requirements in s 67 are not, or are no longer, met.

[27] With regard to the requirement under s 67(a) this is most often manifested when the covered injury is recorded as a sprain or a strain and the entitlement sought is for a more specific injury such as a rotator cuff tear or lumbar disc prolapse. In such situations, a causal inquiry is necessary to determine whether the tear or prolapse was indeed related to the injury for which cover was granted or whether the injury for which the entitlement is required occurred independently of the covered injury. Likewise, it is well established that a claimant cannot rely upon a non-covered injury to support a claim for entitlements, and in the absence of cover no entitlements can therefore flow.

### *Discussion*

[63] On 11 March 2021, Mr Buist was granted cover for rupture of his right long head biceps tendon, contusion of the left shoulder or upper arm and left pyogenic (septic) arthritis. The Corporation then commenced weekly compensation and home help entitlements. On 28 July 2021, the Corporation suspended Mr Buist’s entitlement to weekly compensation and home help, on the basis that these entitlements were not required to address a covered personal injury.

[64] The issue here is whether the Corporation’s decision of 28 July 2021, suspending Mr Buist’s entitlement to weekly compensation and home help, was correct. The Corporation may suspend an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.<sup>21</sup> The Corporation must have a sufficient basis before it is not satisfied that a claimant is entitled to continue to receive the entitlement.<sup>22</sup> For

<sup>20</sup> *Popoalii v Accident Compensation Corporation* [2018] NZACC 123.

<sup>21</sup> Section 117(1) of the Act.

<sup>22</sup> Ellwood, above note 16, at [65].

the Corporation to be satisfied as to whether a claimant remains entitled to an entitlement, the starting point is whether the claimant has cover for the personal injury and is eligible under this Act for the entitlement or entitlements in respect of the personal injury.<sup>23</sup>

[65] On 30 May 2021, prior to the Corporation's decision suspending Mr Buist's entitlements, the Corporation received the following medical advice, in relation to the three areas which the Corporation had previously covered:

- (a) rupture of the right long head biceps tendon: Dr Hartshorn advised that this rupture was not contributing at all to any current symptoms or functional limitation, Mr Buist did not describe any significant issues with the right shoulder, and the right shoulder largely examined normally at the assessment by Dr Hartshorn. Dr Hartshorn's assessment was confirmed by Dr Crozier, who noted that the right shoulder injury was not the cause of any significant incapacity.
- (b) contusion (bruise) of the left shoulder or upper arm: Dr Hartshorn advised that there was no evidence to suggest a specific or well-defined injury (such as an abrasion) to the left shoulder, with an absence of any symptoms or functional limitation for the subsequent few days. Dr Hartshorn advised that the current diagnosis at the left shoulder was that of a combination of rotator cuff arthropathy with superimposed post-septic arthritis osteoarthritis exacerbating.
- (c) left pyogenic (septic) arthritis: Dr Hartshorn advised that there was no evidence to suggest that the fall was the specific cause of the subsequent evolution of septic arthritis in the shoulder joint.

[66] In light of the above medical evidence, which is not contradicted by any other medical evidence, this Court finds that the Corporation, in its decision of 28 July 2021, correctly suspended Mr Buist's entitlement to weekly compensation and home help, on the basis that these entitlements were not required to address a covered

---

<sup>23</sup>

Section 67.

personal injury. The Corporation had sufficient basis for it to be not satisfied, in view of the information in its possession, that Mr Buist was entitled to continue to receive the entitlements of weekly compensation and home help.

### **Conclusion**

[67] This Court notes the difficulties experienced by the late Mr Buist in his last years, and the Court extends its condolences to his family on his passing. However, in light of the above considerations, the Court finds that the Corporation, in its decisions dated 28 July 2021, correctly:

- (a) revoked Mr Buist's cover for pyogenic (septic) arthritis,
- (b) declined cover for left shoulder rotator cuff tearing, arthropathy and joint osteoarthritis, and
- (c) suspended weekly compensation entitlements and home help.

[68] The decision of the Reviewer dated 28 April 2022 is therefore upheld. This appeal is dismissed.

[69] I make no order as to costs.

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

P R Spiller  
District Court Judge