IN THE DISTRICT COURT
AT WELLINGTON

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

[2024] NZACC 36 **ACR 72/22**

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

Hearing:	22 November 2023
Heard at:	Wellington / Whanganui-A-Tara
Appearances:	Ms M Bagnall for the Appellant Ms CD Wood and Mr J Sumner for the Respondent
Judgment:	22 February 2024

RESERVED JUDGMENT OF JUDGE C J MCGUIRE

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[1] At issue on this appeal is a decision by respondent dated 18 January 2021 declining cover for and funding for surgery to treat the appellant's cervical spine C4/5 and C5/6 herniation.

Background

[2] The appellant is aged 54. On 14 March 2013, he had an accident while skiing in Canada. At the review hearing, he described it as follows:

> I was … in Canada on a ski holiday and I had a high speed crash … when you learn to ski … you learn to fall as well. But in this instance … I was skiing … through some trees and a tree appeared in front of me. So, to avoid the tree, I had to throw myself out of the way so, the fall was a bad one … at high speed … so subsequently I was on the ground, I was dazed and I straight away had … bad pain in my neck and shoulder … my partner who was following me found me and rang Ski Patrol, who took me to the lodge and gave me the once over and they assessed that I didn't have any broken bones …

[3] On 5 April 2013, the appellant saw his GP, Dr Smith, who lodged an ACC injury claim form with the diagnosis of "sprain shoulder/upper arm".

[4] The surgery notes for 5 April 2013 are as follows:

> **Subjective**
>
> Fell over skiing in Canada.
>
> Pain in his right shoulder ever since.
>
> Pain felt in the trapezius and neck radiates down to shoulder.
>
> **Objective**
>
> No deformity, AC joint non tender, no tenderness over shoulder. Full active abduction and adduction, no pain full arc, full int/ext rotation negative impingement test. Negative apprehension test. Rotator cuff strength normal. Normal biceps.
>
> Tender trapezius.
>
> IMP trapezius strain.
>
> Physiotherapy was indicated.

[5] On 11 April 2013, the appellant received cover for "sprain or strain shoulder and upper arm, right".

[6] The appellant consulted his GP again on 6 May. The notes from that consultation are as follows:

> **Subjective**
>
> Ongoing pain in his neck with radiation to … right trapezius and deltoid.
>
> Further hx was during his ski crash his neck was involved.
>
> He is getting physiotherapy and this is helping. The pain is aggravated by extending his neck and rotation to the left.

> He works on a farm but the heavy duties are aggravating his pain.
>
> **Objective**
>
> Full flex and ext neck but pain aggravated at full extension. Reduced rotation to the left, sensation normal to upper limbs, BJTJ normal, normal power and tone to upper limb.
>
> No deformity, AC joint non-tender, no tenderness over shoulder. Full active abduction and adduction, no painful arc. Full int/ext rotation negative impingement test. Negative apprehension test. Rotator cuff strength normal. Normal biceps.
>
> IMP – neck strain and nerve root irritation.
>
> Plan continue physio.
>
> Trial of amitriptyline.
>
> Warn of side effect.
>
> Plan light duties.

[7] His GP provided an ACC 18 medical certificate dated 6 May 2013 with diagnoses of sprain shoulder/upper arm as well as neck sprain. He was declared fit only for light duties for the following seven days.

[8] On the same day, he had a cervical spine x-ray which yielded the following findings:

> The cervico thoracic junction is visualised.
>
> Multi level spondylitic change with osteophyte demonstrated. Normal prevertebral soft tissue contours.
>
> No fracture seen. No destructive bony abnormality seen.
>
> Right C5-6 bony foraminal narrowing secondary to osteophytes.

[9] The appellant saw his GP again on 7 July 2013. Under the heading "Subjective notes" was this:

> Further neck pain but it is improving.
>
> SL decrease in ROM normal power tone and sensation to upper limbs.
>
> Plan for acupuncture.

[10] At the review hearing on 7 January 2022 the appellant described the pain he experienced in his neck and trapezius following this accident, which continued to get worse, noting he could not lift his arm over his head, he then started to experience pins and needles going down his left arm. He had trouble sleeping, with headaches.

[11] ACC records that the appellant had seven sessions of physiotherapy and seven sessions of acupuncture following the March 2013 accident. He felt that acupuncture helped and the pain started receding.

The 2020 Accident

[12] The appellant had another accident on 8 March 2020 when he fell off his mountain bike. He came off the bike going downhill at approximately 20 kilometres per hour and went over the handlebars. He described what occurred at the review hearing:

> … going down a trail, I lost control of the bike and I went over the handlebars … landing on my shoulder and head and had a big flash of light when I banged my head on the ground and … just sort of lay there … again with very bad pain in my neck and shoulder and so … my partner and some other mountain bikers helped me back to the car and then the following day, I went, I booked myself an appointment with the physio.

[13] On 18 March 2020, the appellant's physiotherapist lodged an application for cover for a "neck sprain and left rotator cuff sprain".

[14] The physiotherapist notes of 18 March 2020 record:

> 8-3-20 fell off mountain bike onto L shoulder. Immediate P thru shoulder and neck. Nil LOC. Kept going and P worsened.

[15] The appellant had a cervical spine x-ray on 29 May 2020. The report included the following:

> FINDINGS:
>
> No fracture or dislocation is seen. There is some disc narrowing at C4-5 and C5-6 with some osteophytes protruding into the foramen at C6 on each side. No cervical rib.

> IMPRESSION:
>
> No bony injury.
>
> Moderate cervical spondylosis.

[16] The appellant attended the physiotherapist again on 8 June 2020. The following was recorded:

> Current symptoms: Nil improvement. Did have 3-4 days of relief following acupuncture. Tried surfing but aggravated ++. Continuing with exercises, affecting ability to perform work tasks.

[17] GP notes from 9 June 2020 noted that Mr Burson had landed on his left arm, shoulder and neck, which had been sore ever since. There was narrowing between C4 and C5 and that his physiotherapist was concerned about nerve compression.

[18] Mr Burson saw his GP on 15 June 2020. The GP noted he now had weakness in his left arm and furthermore that he had a past injury to his neck in 2013 that had caused radiculopathy. The GP's impression was a cervical disc prolapse.

[19] An MRI was undertaken on 24 June 2020, which showed:

> COMMENT:
>
> Sentinel level appears to be C5-6. Thought due to be bony and disc complex though canal narrowing is seen at the adjacent disc levels also, particularly at C4-5 where there is a small contribution from disc material. Apparent T2 signal cord change (see sagittal key image) concerning for cervical spondylitic myelopathy. Urgent orthopaedic opinion is advised as discussed with clinic nurse.

[20] On 26 June 2020, the appellant was seen by Mr Hadlow, orthopaedic surgeon. His report included the following:

> Diagnostic tests and imaging – MRI scans TR shows lower cervical stenosis C4/5, C5/6 in particular with a right sided C4/5 disc bulge. There is no cord signal change.
>
> Proposed management – at this point he has subjective pain predominantly in his neck and to a lesser degree on the left shoulder, without any neurological symptoms, and neurological signs are negative and there is no sign of myelopathic change in the cord on his MRI scan. Plan to continue non-operative care managing his pain with appropriate exercise and simple analgesia. I have recommended a follow-up MRI scan cervical spine in three months time to exclude any latent developing myelopathic process.

[21] The appellant was seen by his GP on 6 August 2020. The GP noted that when he attempted to do activities, he felt numbness over the left deltoid region and would have a significant increase in pain. Dr Smith also noted the original injury was in 2013 and "he had a left sided radiculopathy that did resolve after 12 weeks. He has had problems on and off since this time." The impression was a cervical disc prolapse for a second opinion. He referred Mr Burson to orthopaedic surgeon and spinal specialist, Mr John Ferguson.

[22] A further MRI of the cervical spine was taken on 16 September 2020, which showed:

> CONCLUSION
>
> Multi level degenerative changes unchanged.
>
> Cord signal abnormality extending from C4 to C7 is unchanged and likely due to degenerative myelomalacia.
>
> Multi level neural exit foraminal stenosis with probable impingement of the exiting C5 nerve root on the right and C6 on the left.

[23] The appellant was seen by Mr Ferguson on 29 October 2020. He reported:

> It was a pleasure to meet up with Wayne Burson for a second opinion on his cervical disc injuries.
>
> **Proposed Treatment:**
>
> ACC funded two level cervical disc arthroplasty. Note, I believe there should probably be two injuries involved here:
>
> 1. A 2013 ski injury where he was seen and treated by his general practitioner along with a physiotherapist with documented clinical left upper limb radiculopathy and weakness, but no MRI proof, and;
>
> 2. A mountain bike crash earlier this year with both MRI scan proven and clinical examination demonstrated cervical disc herniation symptoms and signs.
>
> In any event, this otherwise healthy 51 year old gentleman who works as an auto electrician now suffers from axial neck pain tending to the left had side, occasionally involving the regimental badge area and given deltoid and biceps weakness.
>
> …

> On examination:
>
> …
>
> **Neurologic exam:**
>
> …
>
> There is clear wasting of the left biceps, even given the fact that he is right hand dominant.
>
> He has significant weakness of the left biceps, brachioradialis and deltoid compared to the right, but has grade 5 power in all myotomes, but I would estimate approximately a 50 per cent reduction in elbow flexion strength.
>
> I understand he has been seen by a vascular surgeon and a search has been made for either an arterial or vascular occlusion but none found.
>
> …
>
> **Imaging:**
>
> He has an MRI scan which demonstrates disc injuries both old and new at C5/6 and C4/5, both contacting the cord, worse on the left hand side than on the right with no intrinsic cord signal change.
>
> **Impression and Treatment Plan:**
>
> This gentleman has now had symptoms probably from the C4/5 level for at least seven years and at the C5/6 level with evidence of change of cord shape and involvement of the affected nerves for at least four months. With the profound nature of the weakness, I really believe surgical treatment is in his best interest and would probably recommend an anterior cervical discectomy and disc replacement at both levels. We do need to understand exactly what is going on with the vascular tree in his upper left limb. It may be that the change in colour and the swelling we see of the vessels is a sympathetic mediated response related to his disc injuries, but I think it would be foolish to make this assumption. We will apply to ACC for funding, await their decision and chase his vascular notes. If these are unacceptable or incomplete, I will have him seen by Carl Muthu or Peter Vann to provide a further opinion before proceeding.

[24] An assessment report and treatment plan was completed by Mr Ferguson on 29 October 2020 for an anterior cervical discectomy and disc replacement – two level. The date of injury was stated as "2013/2020". The causal link was stated to be "Wayne injured his neck in a skiing injury in 2013 and again in 2020 after a mountain bike crash".

[25] The appellant sustained a further accident on 15 November 2020 when he walked into an overhanging branch, hitting his head. This caused severe pain across

his low neck. He saw his GP on 18 November 2020 and a claim was lodged and accepted for "cervicalgia – pain in neck". GP notes recorded a "palpable spasm in both trapezius muscles" and limitation and rotation in both directions and also flexion and extension of the neck. The GP thought that this had aggravated his cervical disc problem.

[26] ACC forwarded the surgery request to its clinical advisory panel. Mr Peter Hunter commented on 11 January 2021 and concluded (in part):

> The two level disc and facet changes causing cervical stenosis to be treated are primary degenerative which may have become symptomatic.
>
> …
>
> The imaging changes are of gradual process change and the contemporary clinical information does not suggest that there was an injury to the two cervical discs on 8/3/2020.
>
> On the information provided and available a causal link with any ACC covered injury for ACC to fund the proposed two level disc replacement surgery has not been established.

[27] On 12 January 2021, Dr Smith provided a medical certificate declaring the appellant fully unfit for work until 7 February 2021 due to "cervical disc prolapse and he is awaiting surgery".

[28] ACC subsequently issued a decision dated 18 January 2021 declining to cover or pay for surgery for Mr Burson's C4/5 or C5/6 disc herniations on the basis that it considered the need for surgery not primarily due to the March 2020 accident.

[29] On 21 January 2021, the appellant filed a review application of the decision.

[30] On 23 April 2021, the appellant was seen by Dr Segar, orthopaedic spine surgeon, regarding his left shoulder and arm weakness. He reviewed the two MRI scans available and gave this opinion:

> There is a question as to the disc injury and if the changes in his cervical spine were pre-existing. Unfortunately, he did not have an MRI of the cervical spine prior to or shortly after the original injury in 2013. Without knowing the state of his spine at the time of the injury in 2013, it is impossible to know if he had any pre-existing changes in the cervical spine. It is possible that the original injury led to a C4/5 and C5/6 cervical disc injury and subsequent degeneration.

> In the intervening eight years, a post-traumatic disc degeneration pathway is a possibility.

[31] On 17 August 2021, Mr Ferguson met with the appellant for a pre-operative visit. He noted the appellant understood the financial risk by paying cash while engaging with the respondent, but he had had enough of the pain.

[32] The surgery was performed by Mr Ferguson on 15 November 2021.

[33] Mr Ferguson provided a post-operative comment on 17 December 2021, after reviewing the appellant six weeks after his anterior cervical discectomy and disc replacement C4/5, C5/6. He said:

> Having met, examined and now operated on Wayne, I remain comfortable with the fact that what we are dealing with here is a post-traumatic rather than a frankly degenerative pathology. He has two injuries, a 2013 ski injury where he was seen and treated by his general practitioner with what sounds like left upper limb radiculopathy which spontaneously improved and was not MRI, and a mountain bike crash earlier this year with both MRI scan proven and clinically demonstrated cervical disc herniation with resultant radiculopathy. At the time of surgery, there was no significant osteophyte found within the foramen, rather there was calcified and soft disc posterior to the vertebral body. This in my mind is totally in keeping with an acute-on-old injury and I feel comfortable supporting Wayne's appeal against ACC. Further proof that we are dealing with an acute rather than a degenerative phenomena is his excellent and rapid response to decompression. Were the nerve injuries of longer standing duration, one would expect they would take longer to recover than they have.

[34] On 7 January 2022, the appellant's GP, Dr Smith, provided a letter as follows:

> Wayne was skiing through trees on 14 March 2013 and he crashed at high speed. He tumbled landing on his head and shoulders. He subsequently developed left shoulder and trapezius pain as well as neck pain. His left arm went numb and weak. This injury has been documented in my medical notes. The mechanisms of injury and symptomology is consistent with a disc prolapse during the injury. Prior to this injury, he had no sensation or motor changes in his left arm.

[35] ACC's principal clinical advisor – orthopaedic surgery, Mr Peter Hunter provided further comment on 19 January 2022. He was asked whether the information following the surgery from Mr Ferguson and the appellant's GP altered the previously provided opinions. Mr Hunter said:

> Previous CAP advice to ACC re surgical funding two level cervical disc replacements was on 11/01/2021. The new information does not provide a causal link to a covered injury for ACC to fund surgical treatment now performed.

[36] Following the lodging of this appeal, Mr Ferguson provided further comment to the appellant's counsel in a report dated 19 October 2022. Regarding the effects of the 2013 accident, Mr Ferguson said:

> It is also further noted that he had severe pain and loss of feeling down the left arm, which would not be entirely consistent with an isolated rotator cuff or shoulder injury and from my professional and personal point of view, it is almost certainly more consistent with an injury to either a cervical root or indeed a bow to the cervical cord and an injury to the cervical root. The GP echoed this, with the impression being that of a neck strain with nerve root irritation.

[37] Regarding the 8 March 2020 mountain bike accident, he said:

> Almost certainly this contributed further to Mr Burson's cervical pathology. Certainly, he believes it made him symptomatic and following this injury there is clear evidence of some form of acute contusion to the cord in the either new development or old presence following the 2013 injury of intrinsic cord signal change apparent on T2. This is what led him to be urgently referred to Simon Hadlow and given the relative capacious central canal, the appearance of myelomalacia would argue strongly for the direct and accurate blow at one point in time, either pre-existing from 2013 or being more recent, occurring in 2020. This would argue against Mr Hunter's suggestion that the imaging changes are suggestive of a gradual process change as I do not believe there is enough long term degenerative phenomena at work in the cervical spine to have led to the myelomalacia seen within the cord.

[38] In terms of his surgical findings, Mr Ferguson said this:

> There was a mix of calcified and soft disc. There was no evidence of ossification of the posterior longitudinal ligament which would suggest an underlying degenerative or inflammatory phenomenon. The osteophytes were from my point of view creating by far the smaller amount of neural compression within the foramina and therefore I would suggest that it was the soft disc that was the primary compressive lesion which is most likely to have been post-traumatic.

[39] He also added:

> The operation note did note some calcified fragments, but one must remember the operation occurred more than seven years following the original injury.

[40] The respondent obtained a report from its clinical advisory panel that included a number of orthopaedic surgeons, including Mr Hunter.

[41] As to whether the 14 March 2013 skiing accident caused injuries to his C4/5 and C5/6 cervical spine, the panel said:

> The evidence does not support that a C4/5 and/or C5/6 cervical disc injury was caused by the 14 March 2013 accident event, or any such injury that has caused post-traumatic degenerative change. The accident event has likely caused a soft tissue injury only, but may have aggravated the client's underlying cervical spondylosis.

[42] The panel also said:

> The evidence does not support that a C4/5 and/or a C5/6 cervical disc injury was caused by the 8 March 2020 accident event.

[43] The panel said:

> The accident event has likely caused soft tissue injury only, but has also likely aggravated the client's long standing cervical spondylosis.

[44] The panel found that the appellant's need for surgery:

> Was to treat two level cervical spondylosis, degenerative in nature. Surgery was not required to treat an injury caused by the 8 March 2020 accident event.

[45] The panel commented:

> In general there is no difference between ordinary age related degeneration and so-called "post-traumatic" degeneration. The supposition that these findings are post-traumatic is speculative.

[46] The panel went on:

> Mr Ferguson has argued that the primary compressive lesion identified during surgery was soft disc material, although acknowledged the presence of calcified fragments. However, there is no history of the disc material, and the evidence therefore equivocal and insufficient to infer causation. Calcification also indicates chronicity and is a characteristic of age related gradual process disc degenerative change. It does not suggest a traumatic disc herniation.
>
> The client has reported an improvement in symptoms following surgery. The rapid recovery reveals the pain generator was addressed, but does not offer evidence that can attest to the cause of the client's cervical spondylosis.

[47] The CAP concluded by saying there was no evidence to support that the 14 March 2013 accident caused a significant C4/5 and C5/6 disc injury, or any injury of sort, that resulted in a “degenerative cascade” or “post-traumatic” spondylosis.

Appellant’s Submissions

[48] Ms Bagnall submits that what supports the appellant’s case is firstly the temporal link between the two accidents and the need for spinal surgery. She submits secondly that the appellant’s narrative has been consistent throughout regarding the accidents that he suffered and their effects. Thirdly, she says the traumatic origins of the need for surgery is medically supported. She took the Court through what had occurred in 2013 and the fact that the appellant suffered a left shoulder upper arm sprain along with injury to his right shoulder.

[49] She refers to the physiotherapists note of 5 July 2013 which records:

> Further neck pain but it is improving as well as SL (slight) decrease in ROM (range of movement).

[50] Her point is that this is almost four months after the accident and it therefore supports the appellant’s position that the accident was significant. She notes that the appellant gave evidence at the review hearing that it was not practical to see a doctor straight away, as the appellant was flying out the next day back to New Zealand.

[51] She also notes that after the 2013 accident, the appellant gave evidence at the review hearing that he would occasionally get muscle fatigue “in the shoulder” and suffer from headaches after a physical day at work, something which he had never experienced in the past.

[52] Following the mountain bike crash of 8 March 2020, he was diagnosed with a neck sprain and left rotator cuff sprain. However, on 8 June 2020, the physiotherapist reported “nil improvement”.

[53] With the physio noting concerns re nerve compression, on 25 June 2020, ACC records a phone call from Dr Leigh, the note of which is:

> Has cord compression, needs urgent referral to Simon Hadlow. He has phoned their rooms and they will be in contact as soon as referral arrives.

[54] The MRI report of 24 June 2020 notes:

> Indication: Fall from mountain bike landing on the left side of the neck and shoulder. Reduced flexion and extension and rotation. Normal sensation and reflexes. Decreased power. Radicular pain.

[55] Ms Bagnall notes that the appellant's GP recorded on 15 June 2020 that the appellant now had weakness in his left arm and furthermore that he had a past injury to his neck in 2013 that had caused radiculopathy. On 6 August 2020, the GP noted that when he attempted to do activities, he felt numbness over the left deltoid region and would have a significant increase in pain. She also points out that Dr Smith also noted that the original injury was in 2013 and that:

> He had a left sided radiculopathy that did not resolve after 12 weeks and that he has had problems on and off since that time.

[56] Mr Bagnall also submits that the mechanism of injury in each case, being the high speed skiing crash and the "over the handlebars" mountain bike crash was more likely than not causally linked to his need for surgery. In that, he is supported by the surgeon, Mr Ferguson.

[57] She says the fact is that the appellant was in so much pain, he went ahead and paid for surgery.

[58] She notes the appellant's GP's report of 7 January 2022 that the 2013 accident rendered his left arm "numb and weak" which Dr Ferguson said in his report of 19 October 2022 would be entirely consistent with an isolated rotator cuff or shoulder injury:

> From my professional and personal point of view, it is almost certainly more consistent with an injury to either a cervical root or a bow to the cervical cord and an injury to the cervical root.

[59] Ms Bagnall points out that therefore that the clinical advisory panel was not correct in saying there was no clinical evidence to support that the appellant had left sided cord or nerve root injury.

[60] Ms Bagnall submits that Mr Ferguson's evidence should therefore be preferred to that of the clinical advisory panel.

Respondent's Submissions

[61] Mr Wood refers to s 20 of the Act which imposes the prerequisite that the personal injury must have been caused by an accident. He refers to s 25(3) which provides that the fact that someone has suffered a personal injury is not of itself to be construed as an indication that it was caused by an accident. Here he refers to s 26 which specifically provides that personal injury does not include personal injury caused wholly or substantially by a gradual process disease or infection.

[62] He notes that the Court of Appeal in *ACC v Ambros*[1] said that a court may only draw a valid inference based on facts supported by evidence and not on the basis of supposition or conjecture.

[63] He submits that the evidence does not support the position that the appellant's need for surgery was caused by the two accidents. He notes that the appellant made a good recovery from his 2013 accident and that there are no records of ongoing pain or real problems prior to 2020. He submits therefore that the 2013 accident had resolved years earlier.

[64] He notes that the x-ray taken on 6 May 2013 found "multi level spondylitic change with osteophyte demonstrated". He submits therefore that the 2013 accident resulted in a soft tissue injury which resolved. He submits that aggravation of the spondylosis by the 2020 accident was not enough, as there were already multi level degenerative changes. He notes that the 2020 MRI confirmed multi level degenerative changes. He submits that the evidence proves that the 2020 accident rendered symptomatic the age related changes in the appellant's spine.

[65] Ms Wood concludes by reminding the Court that the possibility of causation is not sufficient and here there is no clear causal link.

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[1] *ACC v Ambros* [2008] 1 NZLR 340

Appellant's Reply

[66] Ms Bagnall refers to the x-ray taken in 2013 that there was no evidence of structural changes to C5/6 disc, but the other evidence was that there was nerve root irritation. The appellant made a good recovery, but the pain generator remained. The symptoms continued for seven years until the 2020 accident and ACC's record of 6 August 2020 confirms:

> The original injury was in 2013 and he had a left sided radiculopathy that did not resolve after 12 weeks. He has had problems on and off since this time.

[67] So, on the balance of probabilities, she submits a causal link has been established between the two accidents and his need for surgery.

Decision

[68] On 14 March 2013, when the appellant was 44, he had an accident while skiing in Canada. He describes it as a high speed crash which occurred as he had to throw himself to avoid a tree he would otherwise have collided with. He said he was dazed and straight away had very bad pain in his neck and shoulder. He was taken back to the lodge by the ski patrol, where he was given a cursory examination. He was advised to go to a doctor for a proper check-up, but as he was flying out the following day to New Zealand, he waited and on 5 April 2013, saw his GP, who lodged a claim for ACC on his behalf. The diagnosis was sprain shoulder/upper arm right.

[69] The doctor's notes of 5 April 2013 record this:

> Fell over skiing in Canada. Pain in his right shoulder ever since. Pain felt in the trapezius and neck radiates down to his shoulder.

[70] A month later, on 6 May 2013, the doctor notes:

> Ongoing pain in his neck with radiation to his right trapezius and deltoid. Further hx (history) was during his ski crash his neck was involved.
>
> He is getting physiotherapy and this is helping. The pain is aggravated by extending his neck and rotation to his left.
>
> …
>
> IMP – neck strain and nerve root irritation.

[71] The next note from 5 July 2013 records:

> Further neck pain but it is improving.
>
> SL (slight) decrease in ROM normal power tone and sensation to upper limbs.

[72] An x-ray taken on 6 May 2013 of the cervico thoracic junction showed a multi level spondylitic change with osteophyte demonstrated.

[73] The appellant says that his GP sent him to Gregory Sheffield, physiotherapist, for some treatment.

[74] In evidence before the reviewer, the appellant was asked to comment on whether the injury improved or got worse on his return to New Zealand, he said:

> I had very bad pain in my trapezius and neck and I couldn't lift my arm over my head and it was very sore, so that's what I thought, um, that's when I went and saw Gary Sheffield, the physiotherapist, and he gave me some massages and exercises and attempted a manipulation, but I felt the condition was getting worse rather than improving, so I went back to my doctor.

[75] He also said:

> … the pain continued to get worse and then I started getting pins and needles going down my left arm. I was having trouble sleeping with headaches, I stopped taking the amitriptyline after a few weeks because it was giving me bad nightmares and I was feeling quite unwell mentally, I did not like that drug and yeah, it didn't treat me well.

[76] He described how he then got acupuncture and that this helped and eventually the pain had started receding.

[77] He then described the mountain bike accident of 8 March 2020 where he lost control of the bike and went over the handle bars:

> Landing on my shoulder and head and had a big flash of light when I banged my head on the ground and just sort of lay there again in very bad pain in my neck and shoulder.

[78] He describes being helped back to his car and booking an appointment with the physio the following day.

[79] An MRI scan on 24 June 2020 yielded the following comment:

> Sentinel level appears to be C5-6. Thought due be (sic) both bony and disc complex though canal narrowing is seen at the adjacent disc levels also, particularly at C4-5 where there is a small contribution from disc material. Apparent T2 signal cord change (see sagittal key image) concerning for cervical spondylitic myelopathy. Urgent orthopaedic opinion is advised as discussed with clinic nurse.

[80] A follow-up MRI scan was carried out on 16 September 2020, which found that "multi level degenerative changes unchanged".

[81] The appellant consulted spinal surgeon, John Ferguson, on 20 October 2020, who made the following comments:

> **Imaging:**
>
> He has an MRI scan which demonstrates disc injuries both old and new at C5/6 and C4/5, both contacting the cord, worse on the left hand side than on the right with no intrinsic cord signal change.
>
> **Impression and Treatment Plan:**
>
> This gentleman has now had symptoms probably from the C4/5 level for at least seven years and at the C5/6 level with evidence of change of cord shape and involvement of the affected nerves for at least four months. With the profound nature of the weakness …

[82] An assessment report and treatment plan for the proposed surgery was submitted by Mr Ferguson. ACC's principal clinical advisor – orthopaedic surgery, Mr Hunter, concluded:

> The imaging changes are of gradual process change and the contemporary clinical information does not suggest that there was an injury to two cervical discs on 8/3/2020.

[83] He accordingly found on the information provided and available that a casual link with any ACC covered injury had not been established.

[84] Therefore on 21 January 2021, ACC declined the appellant's application for surgery cover.

[85] Mr Ferguson reported again on 12 March 2021 to appellant's counsel, saying:

> I was a little surprised to see that he had been declined for his surgery and concerned at some of the errors that have been made in the declined opinion. Certainly, we are not suggesting that all his pathology stems from the 2020 injury. There is a well documented injury in 2013 which I believe set off the degenerative cascade. This is therefore post-traumatic disc degeneration, which is coverable by ACC.

[86] An opinion was sought from Dr Segar, spinal and scoliosis surgeon. In his report of 23 April 2021, he said:

> Without knowing the state of his spine at the time of the injury in 2013, it is impossible to know if he had any pre-existing changes in the cervical spine. It is possible that the original injury led to a C4/5 and C5/6 cervical disc injury and subsequent degeneration. In the intervening eight years, a post-traumatic disc degenerative pathway is a possibility. A pathway for this is well documented in the literature …

[87] By August 2021, the appellant had "had enough" and told Mr Ferguson that he was not prepared to go on the way he was. Accordingly, arrangements were made for the surgery. Anterior cervical discectomy and disc replacement C4/5, C5/6 was carried out by spinal surgeon, John Ferguson, on 15 November 2021.

[88] On 17 December 2021, Mr Ferguson reported to the appellant's GP, saying:

> At the time of surgery, there was no significant osteophyte found within the foramen, rather there was calcified and soft disc posterior to the vertebral body. This to my mind is totally in keeping with an acute-on-old injury and I feel comfortable supporting Wayne's appeal against ACC. Further proof that we are dealing with an acute rather than a degenerative phenomena is his excellent and rapid response to decompression. Were the nerve injuries of longer standing duration, one would expect they would take longer to recover than they have.

[89] With this appeal pending, ACC obtained the opinion of the clinical advisory panel, which included ACC's principal clinical advisor, Mr Hunter. The "stand-off" between the clinical advisory panel's views and those of Mr Ferguson is set out significantly in the background section of this judgment. I do note that the clinical advisory panel is less than dogmatic on a number of issues. One fact that emerges is that the matter before the Court would probably have been placed beyond doubt one way or the other, had an MRI scan been taken after the first accident in 2013. Ultimately, therefore, there is limited evidence now for it to be concluded in a

definitive medical sense whether the appellant's presentation requiring surgery was age related degeneration or of traumatic origin.

[90] What we do know is that the accident in 2013 was plainly a moderately serious one, with the appellant receiving medical attention on the ski field and being advised to see a doctor.

[91] Ms Bagnall emphasises the temporal link between the covered accidents and his condition requiring surgery. She also emphasises the appellant's consistent story relating to his injuries and in particular in the references in 2013 to nerve root irritation and, as counsel put it, there was more going on in his neck than just a sprain. This is to some extent borne out by references to nerve root irritation recorded by the appellant's GP and the fact that both shoulders were affected after the 2013 accident.

[92] There is also reference in the 2020 MRI report that at C4/5 level "there is a small contribution from disc material". It is noted too that the same report advised "urgent orthopaedic opinion".

[93] In this case, too, the appellant has the complete support of operating surgeon, Mr Ferguson.

[94] In his report of 19 October 2022, Mr Ferguson said, in terms of his surgical findings:

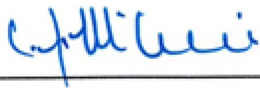
> There was a mix of calcified and soft disc. There was no evidence of ossification of the posterior longitudinal ligament which would suggest an underlying degenerative or inflammatory phenomenon. The osteophytes were from my point of view creating by far the smaller amount of neural compression within the foramina and therefore I would suggest it was the soft disc that was the primary compressive lesion which is most likely to have been post-traumatic.

[95] Ultimately, this Court decides whether on the balance of probabilities the appellant's need for surgery was caused by his accidents of 14 March 2013 and 8 March 2020. The surgeon is firm that there is a causal link and as the professional who has carried out the procedure, his view is to be given considerable weight.

[96] The temporal link is present and I also find that the appellant has been consistent and accurate in his reporting. While there is plainly an age related degenerative factor involved, I find on the balance of probabilities that the appellant's need for surgery arises from the covered 2013 and 2020 accidents.

[97] Accordingly, the appeal is allowed and ACC's decision of 18 January 2021 declining cover for and funding for surgery is reversed.

[98] Costs are reserved.



CJ McGuire
District Court Judge

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