IN THE DISTRICT COURT
AT WELLINGTON

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

[2024] NZACC 028 ACR 66/23

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	ENVIRO WASTE SERVICES LIMITED Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 9 February 2024

Held at: Auckland/Tāmaki Makaurau

Appearances: S Cook and M Smith for the Appellant
K Anderson for the Accident Compensation Corporation ("the Corporation")

Judgment: 14 February 2024

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for deemed decision - ss 135, 146; claim for work-related personal injury – ss 28 and 30, Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 28 February 2023. The Reviewer dismissed an application by Enviro Waste Services Limited (Enviro Waste) for review of the Corporation's decision dated 23 June 2022. The Corporation granted Ms Nichola Grattan, an employee of Enviro Waste, cover for her right-hand wrist ligament sprain as a work-related injury.

Background

[2] Ms Grattan was born in 1974. On 27 May 2021, she commenced employment at Enviro Waste as a waste sorter. Ms Grattan's role involved sorting through recycling materials and throwing them into large bins.

[3] On 11 October 2021, Ms Grattan reported to her employer, Ms Felicia Lawrence, that she had a sore right wrist. Ms Lawrence asked Ms Grattan whether she considered she was injured, and Ms Grattan answered: "No, in the past I've had pain and swelling in my wrist and its possibly RSI". Ms Lawrence organised an appointment with a physiotherapist. Ms Lawrence instructed Mr Tony Wilson (Branch Manager) to enter Ms Grattan's injury into Enviro Waste's incident and investigation recording system. Mr Wilson's entry stated that "I do not believe this is a work-related injury consistent with what Ms Grattan advised".

[4] On 12 October 2021, Ms Grattan attended the scheduled appointment with Mr Tim Ralfe, Physiotherapist. Mr Ralfe did not deem Ms Grattan medically unfit for work and provided Ms Grattan with strapping tape before returning to work that day. There was no claim made with the Corporation for a personal injury by accident.

[5] On 13 October 2021, Ms Grattan telephoned Ms Lawrence to advise that she was in pain and would not be able to work that day. Ms Lawrence and Ms Grattan agreed that a GP appointment should be scheduled to assess her wrist.

[6] On 13 October 2021, Ms Grattan attended the scheduled appointment with Dr John Lufkin, GP. Dr Lufkin's medical notes refer to a diagnosis of "tendonitis". Ms Grattan was provided a wrist splint at this appointment. Dr Lufkin did not deem Ms Grattan as medically unfit for work and referred her back to physiotherapy. There was no claim made with the Corporation for a personal injury by accident.

[7] On 14 October 2021, Ms Grattan arrived at work and was upset as the wrist splint was "chunky", and she did not think that she could work on the sort line productively. Ms Grattan also stated to Ms Lawrence that "she had problems with what she thought could be RSI as she had done a lot of fruit picking over the years

previously". Mr Wilson then took Ms Grattan to get a more ergonomic wrist splint from the chemist.

[8] From 14 October 2021 to 20 October 2021, Ms Grattan continued with her normal duties while wearing the ergonomic splint.

[9] On 20 October 2021, Ms Grattan attended a physiotherapy appointment with Mr Ralfe. He did not observe any obvious bruising or swelling. His findings were that Ms Grattan had reduced movement around the wrist, limited by pain felt at the radio-ulnar joint. Mr Ralfe did not deem Ms Grattan to be medically unfit for work.

[10] On the morning of 21 October 2021, Ms Grattan left work early due to discomfort she was experiencing in her right wrist.

[11] On 26 and 29 October 2021, Ms Grattan attended further physiotherapy appointments, and the results were the same as the result of the 20 October 2021 appointment. Mr Ralfe did not deem Ms Grattan medically unfit for work.

[12] On 5 November 2021, Ms Grattan attended an appointment with Mr Ralfe. Mr Ralfe recorded that Ms Grattan had developed some warmth and swelling over the distal end of the upper limb. The result of that appointment was that Ms Grattan was advised not to return to work that day as her wrist was quite swollen.

[13] On 8 November 2021, Ms Grattan telephoned Ms Lawrence and advised that she was in too much pain with her wrist, but that she would attend a GP appointment later that day.

[14] On 8 November 2021, Ms Grattan visited Dr Ben McHale, GP. Ms Grattan reported a painful right wrist since 8 September 2021. She attributed that to moving a heavy load of recycling after lockdown.

[15] On 10 November 2021, Dr McHale provided a medical certificate, certifying a "sprain of wrist", with the comment "moving heavy load of recycling". This certificate noted the date of injury as 11 October 2021. With that medical certificate, Ms Grattan's GP filed an ACC claim form with the date of injury as 11 October

2021. Dr McHale provided Ms Grattan with a ACC18 medical certificate deeming her medically unfit for work (retroactively) from 11 October 2021 to 22 November 2021.

[16] On 12 November 2023, Ms Grattan attended Mr Ralfe, who observed irritation at distal end of the ulnar as well as tenosynovitis.

[17] On 15 November 2021, the Corporation notified Enviro Waste that it had accepted a work-related injury claim for Ms Grattan, arising from moving a heavy load of recycling on 11 October 2021, and advised as follows:

> If Nichola Grattan doesn't work for you, or if you disagree that the injury is work related, please call us on 0800 222 096. There are a number of ways we can work with you to resolve any questions or concerns you may have.
>
> If we can't resolve things easily you may want to have our decision formally reviewed. To do this you'll need to apply in writing within three months of the date of this letter.

[18] On 17 November 2021, the Corporation spoke with Ms Grattan, and she told the Corporation that she hurt her wrist "doing pushback with recycling".

[19] On 22 November 2021, Ms Sue Walton, a claims manager engaged by Enviro Waste, emailed the Corporation as follows:

> The employer would like to dispute this claim as a work injury. …
>
> Can you please relook at this claim and confirm whether it can be moved away from the employer.

[20] On 24 November 2021, Ms Grattan produced medical certificate which declared her fully unfit to work from 24 November 2021 to 3 January 2022.

[21] On 2 December 2021, the Corporation spoke with Enviro Waste. In that call, Enviro Waste told the Corporation that it did not believe Ms Grattan's injury occurred at work. Enviro Waste's basis for this belief was that Ms Grattan had advised Enviro Waste that she "has always had issue with wrist", and had had RSI in the past while fruit picking. Enviro Waste believed that the nature of the work may have aggravated this issue. Later that day, the Corporation sent Enviro Waste a questionnaire (ACC121) entitled "Is your employee's injury work related?".

[22] On 6 December 2021, Ms Grattan and Ms Lawrence attended an appointment with Dr Fraser, GP. Ms Grattan was referred for an ultrasound and x-ray, and advised to arrange a hand therapist appointment.

[23] On 6 December 2021, Ms Grattan had an ultrasound. Dr Francois De Bruin, Radiologist, reported:

> Thickened tendon and sheath, hypoechoic and hyperaemic tendon sheath with tenderness consistent with extensor carpal ulnaris tenosynovitis. Ligaments and tendons of the wrist otherwise normal.

[24] On 23 December 2021, Ms Grattan was assessed by Ms Emma Rathbone, Physiotherapist. Ms Rathbone recorded that Ms Grattan's wrist became sore pulling apart recycling that had sat and become wet over lockdown. Ms Rathbone assessed that Ms Grattan had a swollen dorsal wrist and that her diagnosis was a "Sprain Wrist Right Side Diagnosis: ECU tendinopathy".

[25] On 20 January 2022, Ms Lawrence reported that Ms Grattan had been doing the same tasks on the sort line-up to when she was incapacitated due to her injury, and that Ms Grattan had mentioned that she used to work in an orchard doing repetitive tasks 25 years prior.

[26] On 10 February 2022, Enviro Waste provided the Corporation with an ACC122 form, disputing that Ms Grattan's injury was work-related. Enviro Waste's reasons for not accepting that the injury was work-related were:

> The employee admitted there was no injury at the time of advising Manager of pain. Employee advised that she has had pain in the wrist in the past and this could be due to RSI. She has also previously worked in orchards over a number of years which could have contributed to her wrist pain.

[27] On 21 February 2022, Mr Matthew Colvin, Physiotherapist, reported that the GP notes from Ms Grattan's first visit suggested that she had had wrist pain for around a month prior to the claimed injury date (8 September to 11 October). Mr Colvin noted that, if this was correct, it suggested that the claimed accident had aggravated a pre-existing wrist condition. Mr Colvin then reviewed the medical assessments and concluded:

> The findings identified in the ultrasound report of tendon/sheath thickening with hypoechoic/hyperaemic changes are in keeping with ECU tendinopathy and appear unlikely to have been caused by a series of events on a single day (11/10/21) and appear more likely to be gradual onset changes that would have developed over a long period of time.
>
> ACC has covered a RIGHT wrist sprain and it is possible the events on 11/10/21 might have caused a minor RIGHT wrist sprain on the background of a pre-existing condition. Any minor wrist sprain caused by the accident would have healed in the timeframe of over 4 months since the accident. The ultrasound scan report 06/12/21 identified a condition of ECU tendinopathy/ tenosynovitis which correlates with the client's presenting symptoms of RIGHT ulnar wrist symptoms and the physiotherapy notes on file have confirmed this condition as the diagnosis being treated for ongoing symptoms. This condition is not established as being caused by the events on 11/10/21 and instead is in keeping with a longstanding gradual onset condition.

[28] On 5 April 2022, Enviro Waste sent the Corporation a review application in relation to the 15 November 2021 decision. That application stated:

> The employer wishes to lodge a formal review of the allocation of a workplace injury claim for Nichola Grattan. Ms Grattan started working for the employer on 7/05/2021 as a sorter which involves throwing/flicking aluminium and plastic containers forward into cages. …
>
> The claim has been disputed with WIIT - constant contact over the last few months and the claim is still open.

[29] On 5 April 2022, the Corporation acknowledged Enviro Waste's review application, but noting that it was received too late to challenge the 15 November 2021 decision to treat Ms Grattan's injury as a work-related injury. The letter proposed the solution of issuing a decision on the "work injury dispute" urgently, so that this decision could be the subject of a review if Enviro Waste wanted to challenge it.

[30] Again, on 20 April 2022, the Corporation advised Enviro Waste that it considered there was a jurisdictional hurdle regarding Enviro Waste's review application, with again the solution being the withdrawal of the review, and the issuing of a new decision on the work injury dispute which would attract fresh review rights.

[31] On 23 June 2022, the Corporation issued another decision on Ms Grattan's injury which maintained that Ms Grattan's injury was work-related. The Corporation noted that its clinical advisor had considered Ms Grattan's history and

concluded that a sprain could not be excluded, and there was no competing medical evidence that suggested that this sprain was a gradual process injury.

[32] On 25 August and 5 October 2022, the Corporation checked with Ms Grattan's GP about his ongoing issuance of medical certificates certifying that Ms Grattan had a wrist sprain. The GP confirmed that he still considered Ms Grattan's issues were due to a sprain.

[33] On 18 November 2022, Ms Grattan had an ultrasound done on her right wrist. The conclusion of that report was:

> Persistent extensor carpi ulnaris tenosynovitis.
>
> Probable interval development of radiocarpal joint synovitis.

[34] On 6 December 2022, Mr Colvin provided further guidance, having reviewed the more recent ultrasound report and noted:

> Any wrist sprain would have long since resolved.
>
> The ultrasound reports provide a diagnosis of extensor carpi ulnaris tenosynovitis and radiocarpal joint synovitis, with the latter having developed in the period between the two ultrasounds.

[35] On 29 November 2022 and 16 February 2023, review proceedings were held in relation to the Corporation's decision of 15 November 2021. On 28 February 2023, the Reviewer dismissed the review, on the basis that Enviro Waste had not provided any medical evidence to show that cover should not be granted for Ms Grattan's sprain as a work injury.

[36] On 28 March 2023, a Notice of Appeal was lodged.

[37] On 23 August 2023, Dr Andrew Hilliard, Occupational and Environmental Medicine Specialist, reported that the predominant incapacity from the outset of Ms Grattan's symptoms appeared to be that of symptomatic ECU tenosynovitis/tendinopathy. He noted that any sprain in that context was a fairly minor injury. He also noted that any sprain would have healed within three to four weeks of injury.

Deemed decision?

[38] The first issue in this appeal is whether Enviro Waste's 22 November 2021 email to the Corporation constituted a valid application for review under the Act, with the result that, because the application was not set down for a hearing within three months of being received by the Corporation, there is a deemed decision in favour of Enviro Waste.

Relevant law

[39] Section 135 of the Accident Compensation Act 2001 ("the Act') provides:

> (1) A review application is made by giving an application that complies with subsection (2) to the Corporation.
>
> (2) The application must—
>
> (a) be written:
>
> (b) whenever practicable, be made on the form made available by the Corporation for the purpose:
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> (c) identify the decision or decisions in respect of which it is made:
>
> (d) state the grounds on which it is made:
>
> (e) if known by the applicant, state the relief sought:
>
> (f) be made within 3 months of—
>
> (i) the date on which the claimant has a decision under section 58; or
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> (ii) the date on which the Corporation gives notice under section 64; or
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> (iii) in the case of a decision under the Code, the date on which the claimant is notified of the decision:
>
> (g) in the case of a review application relating to a claim for entitlement, not be made less than 21 days after the date the claim for entitlement is made.

[40] Section 146 provides:

> (1) The reviewer is deemed to have made a decision on the review in favour of the applicant if—
>
> (a) the date for the hearing has not been set within 3 months after the review application is received by the Corporation; and

(b) the applicant did not cause, or contribute to, the delay.

(2) The date of the deemed decision is 3 months after the review application is received.

[41] In *Howard*,[1] Ongley DCJ stated:

> [24] If the formal requirements of s135 were not to be observed, it would be difficult to identify whether a deemed decision arises and in what terms. Compliance with s135 is mandatory, but a flexible approach may well be taken where defects in identifying decisions, grounds, or relief can be remedied before a review, much in the way of amendments to pleadings. A flexible application of the section cannot be permitted when ss 135 and 146 combine to produce a deemed decision. In that case the two sections must be read together to avoid uncertainty. The legislature could not have intended that meaningless or ambiguous deemed decisions should arise by operation of the Act.

Discussion

[42] Enviro Waste submits as follows. Enviro Waste's 22 November 2021 email to the Corporation constitutes a valid application for review under the Act. The Corporation failed to set a date for a review within the statutory timeframe of three months after receiving the application for review. The Corporation thus failed to comply with its statutory obligations, which resulted in Enviro Waste being entitled to a deemed decision under section 146 of the Act.

[43] This Court acknowledges that Enviro Waste's email of 22 November 2021 was in response to the Corporation's decision of 15 November 2021 advising that the Corporation had accepted a work-related injury claim for Ms Grattan. However, this Court finds that Enviro Waste's email of 22 November 2021 did not constitute a review application for the purposes of the 2001 Act, for the following reasons.

[44] First, the Corporation's decision of 15 November 2021 gave Enviro Waste two alternative ways of pursuing any disagreement it had with the decision. The first was to contact the Corporation and engage in ways to work together to resolve any concerns of Enviro Waste. The second, if matters could not be resolved easily, was for Enviro Waste to have the decision formally reviewed. Enviro Waste's email of 22 November 2021, disputing the claim as a work injury, asked the Corporation to "please relook at this claim and confirm whether it can be moved away from the

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1 *Howard v Accident Compensation Corporation* [2005] NZACC 250.

employer". This Court interprets this request as taking up the first alternative offered by the Corporation, rather than a formal application for review.

[45] Second, this Court finds that Enviro Waste's request to the Corporation is not in accord with the 2001 Act. A review application is made by providing an application that complies with the requirements of the Act, including, whenever practicable, being made on the form made available by the Corporation for the purpose. Enviro Waste, as an established entity, could reasonably be expected to meet this requirement. Further, a review is required to be independent from the Corporation, and so the Corporation must not engage, as a reviewer, a person who is currently employed by the Corporation, engaged by the Corporation to make decisions on claims in a capacity other than that of reviewer, or employed or engaged by a subsidiary of the Corporation. Enviro Waste's request to *the Corporation* to "please relook at this claim and confirm whether it can be moved away from the employer" is clearly not a reference to an independent review process.

[46] Third, on 5 April 2022, Enviro Waste sent the Corporation a review application in relation to the 15 November 2021 decision, noting that "the employer wishes to lodge a formal review of the allocation of a workplace injury claim". There is no reference by Enviro Waste to having lodged a formal review application before.

[47] This Court notes that Enviro Waste subsequently withdrew its application for review, the Corporation issued a new decision on 23 June 2022, Enviro Waste lodged a new review application on 1 July 2022, and the review hearing was set down for a hearing on 29 November 2022. The requirements of section 146 were thus complied with, and so a deemed decision does not arise under this section.

Whether the Review correctly decided that Ms Grattan suffered a workplace injury

[48] The second issue in this appeal concerns the correctness of the Reviewer's decision of 28 February 2023, dismissing the review on the basis that Enviro Waste had not provided any medical evidence to show that cover should not be granted for Ms Grattan's sprain of her right wrist ligament as a workplace injury.

Relevant law

[49] 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.

[50] In *Johnston*,[2] 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.

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2 *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

Discussion

[51] The Corporation submits as follows. Ms Grattan made a claim to the Corporation for a wrist sprain, suffered at work, and that sprain was diagnosed and certified by Ms Grattan's GP. No medical review of this matter has determined that that the sprain did not occur, or that it did not occur at work. It is accepted that the sprain will not be the ongoing cause of Ms Grattan's wrist pain, which is caused by her ECUT (extensor carpi ulnaris tenosynovitis). However, the claim to the Corporation was not for a work-related gradual process injury relating to her ECUT, but was for the sprain. Accordingly, the question is whether that sprain (not the ECUT) was caused by her work at Enviro Waste. The Corporation's decision to accept Ms Grattan's claim for a sprain, and to accept that this was a work injury, was correct.

[52] This Court acknowledges the above submissions. The Court acknowledges that, on 10 November 2021, Dr McHale, GP, provided a medical certificate in support of an ACC claim, certifying a sprain of Ms Grattan's wrist on 11 October 2021. However, the Court notes the following considerations.

[53] First, Ms Grattan's own account of her injury is to the effect that this was caused by a gradual process:

(a) On 11 October 2021, she told her employer that she had had pain and swelling in her wrist and that her condition was possibly repetitive strain injury (RSI).

(b) On 14 October 2021, she again told her employer that she had problems with what she thought could be RSI, and she referred to repeated fruit picking over the years previously.

(c) On 8 November 2021, she reported to Dr McHale, GP, that she had had a painful right wrist since 8 September 2021.

[54] Second, prior to the lodging of a claim for personal injury on 10 November 2021, there is the following medical evidence which supports that Ms Grattan's injury was caused by a gradual process rather than a personal injury by accident:

(a) Between 12 and 29 October 2021, Mr Ralfe, Physiotherapist, following repeated appointments with Ms Grattan, did not deem her as medically unfit to work and made no claim for cover.

(b) On 13 October 2021, Dr Lufkin, GP, diagnosed Ms Grattan as having tendonitis, did not deem her as medically unfit to work, and made no claim for cover.

(c) On 5 November 2021, Mr Ralfe recorded that Ms Grattan had developed some warmth and swelling over her wrist, and advised her not to return to work that day.

[55] Third, subsequent to the claim for cover on 10 November 2021, there is the following medical evidence which is substantially to the effect that Ms Grattan's injury was caused by a gradual process rather than a personal injury by accident:

(a) On 12 November 2023, Mr Ralfe observed Ms Grattan's irritation at distal end of the ulnar as well as tenosynovitis.

(b) On 6 December 2021, Dr De Bruin, Radiologist, reported that an x-ray of Ms Gratton's wrist showed thickened tendon and sheath, hypoechoic and hyperaemic tendon sheath with tenderness consistent with extensor carpal ulnaris tenosynovitis, and that ligaments and tendons of the wrist were otherwise normal.

(c) On 23 December 2021, Ms Rathbone, Physiotherapist, assessed that Ms Grattan had a swollen dorsal wrist and that the diagnosis was a "sprain wrist diagnosis: ECU tendinopathy".

(d) On 21 February 2022, Mr Colvin, Physiotherapist, assessed that Ms Grattan's condition was not established as being caused by the events

on 11 October 2021, and instead was in keeping with a longstanding gradual onset condition.

(e) On 18 November 2022, an ultrasound done on Ms Grattan's right wrist showed persistent extensor carpi ulnaris tenosynovitis and probable interval development of radiocarpal joint synovitis.

(f) On 23 August 2023, Dr Andrew Hilliard, Occupational and Environmental Medicine Specialist, reported that the predominant incapacity from the outset of Ms Grattan's symptoms appeared to be that of symptomatic ECU tenosynovitis/tendinopathy. He noted that any sprain in that context was a fairly minor injury and would have healed within three to four weeks of injury.

[56] The Court concludes from the above evidence that Ms Grattan's personal injury on 11 October 2021 was caused wholly or substantially by a gradual process, and, in terms of section 26(2) of the Act, should not have been covered as a personal injury caused by accident.[3] The Court further accepts, in light of Dr Hilliard's assessment, that any minor sprain caused on 11 October 2021 would have resolved before the claim for cover was made on 10 November 2021 (over four weeks later).

Conclusion

[57] This Court finds that the Corporation should not have granted cover for Ms Grattan's sprain of her right wrist ligament as a workplace injury. Therefore, this appeal is allowed, and the review decision of 28 February 2023 is set aside.

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3 Cf *Johnston*, above note 2, at [12]-[13].

[58] Enviro Waste is entitled to costs. If these cannot be agreed within one month of the release of this judgment, I shall determine the issue following the filing of memoranda.

P R Spiller
District Court Judge

Solicitors for the Appellant: Buddle Findlay.