IN THE DISTRICT COURT
AT WELLINGTON

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

[2024] NZACC 051 ACR 215/18

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	SHONA FEAVER Applicant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	ALLIANCE GROUP LIMITED Second Respondent

Submissions: P Sara for the Applicant
S Winter for the Second Respondent

Hearing: On the papers

Judgment: 26 March 2024

JUDGMENT OF JUDGE P R SPILLER
[Leave to appeal to the High Court – s 162 Accident Compensation Act 2001]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour, Judge McGuire, delivered on 18 December 2023.[1] At issue in the appeal was the decision of Alliance Group Limited (AGL), dated 15 October 2015, declining cover for a work-related personal injury, namely, subacromial bursitis of Ms Feaver's right shoulder. The Court allowed the appeal, for the reasons outlined below.

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1 *Feaver v Accident Compensation Corporation* [2023] NZACC 210.

[2] The application for leave to appeal is brought by AGL. The Corporation determined not to represent itself or provided submissions, but rather allowed AGL to represent the Corporation's interests, as well as its own as employer.

Background

[3] On 17 March 2013, Ms Feaver injured her right shoulder when she tripped and fell into the bath. She was diagnosed with a rotator cuff sprain injury. The Corporation accepted cover for her diagnosed injury.

[4] On 19 March 2013, Ms Feaver underwent an x-ray and ultrasound. Dr Parker, Radiologist, reported:

> Biceps tendon: There is a small effusion around the biceps tendon. No other abnormalities seen.
>
> Subscapularis tendon: Normal.
>
> Infraspinatus tendon: Normal.
>
> Supraspinatus tendon: No tear seen.
>
> There is sonological evidence of impingement with bursal thickening on abduction of the arm.
>
> There is sclerosis of the greater tuberosity of the humerus. There is irregularity of the AC joint and early degenerative changes seen in the glenohumeral joint. No other abnormality seen.

[5] On 12 December 2013, Ms Feaver injured her right shoulder while lifting a carton of meat at work. She had worked for 17 seasons as a meat packer and in the carton room.

[6] On 9 January 2014, Ms Feaver attended Dr Allen, GP, who filed a claim for cover with the accredited employer. The claim form described the accident as: "Lifting ... box of meat, shoulder pain, right shoulder".

[7] On 23 January 2014, Ms Feaver had her right shoulder x-rayed and scanned by ultrasound. The ultrasound revealed:

> Impingement testing: The bursar is moderately thickened with positive sonographic impingement and clinical impingement, with range of movement of abduction to around 45 degrees.

[8] On 11 April 2014, Mr Veale, Orthopaedic Surgeon, recorded Ms Feaver's history as follows:

> She tells me she injured her shoulder in December 2013 when she was lifting a box at work and had a sudden sharp pain over the antero-lateral aspect of her shoulder, which radiated down to her mid-humerus. Within 30 minutes she reported the injury, she had ice applied and told to return if it was not any better. She returned the following day because it was still sore, she had more ice placed on it and over the following week it got worse and worse. She was then placed on light duties and an x-ray and ultrasound were organised. …
>
> We are reluctant to operate as this creates yet another injury to an already hyper-sensitive shoulder.

[9] On 14 April 2014, AGL advised Ms Feaver that it was cancelling her ongoing entitlements under the Act. Ms Feaver challenged the decision.

[10] On 29 July 2014, Ms Feaver provided a statement of evidence, describing what occurred on the day of her workplace accident on 12 December 2013:

> At 3.45pm I filled a carton and picked it up with both hands. My hands would be underneath the carton at about waist height. The cartons weigh anywhere from 20 to 27 kgs each. ...
>
> I picked up this carton and twisted around, I felt pain in my right shoulder. The pain was from the point of my shoulder right down my upper arm. It was like a wrenching pain. Before that, I hadn't had any pain in my shoulder.
>
> The pain was a burning pain. I would put the pain at 7 or 8 on the same scale as before. Because I was so busy, I just kept working with the pain. The shift ended at 4.25pm.

[11] Following review proceedings concerning AGL's decision to cancel Ms Feaver's entitlements, the Reviewer dismissed the application for review, finding that AGL had met the onus of establishing that it had sufficient information to be "not satisfied" that Ms Feaver was entitled to receive ongoing entitlements. The Reviewer noted that, if Ms Feaver wished to apply for cover for bursitis as a result of work-related gradual process injury, then AGL had to have the details of that claim and be given the opportunity to make a primary decision; but that this matter did not affect the outcome of the present review.

[12] On 20 October 2014, Dr Rod Nicholson, Occupational Medicine Specialist, reviewed Ms Feaver's reports. His opinion was that the work-based accident on 12 December 2013 had not caused her ongoing pain in her right shoulder. He said:

> The ongoing right shoulder pain that she has experienced is more likely to be related to the bursitis that was detected in her right shoulder by ultrasound scan.
>
> It is therefore my opinion that she has had an aggravation to a pre-existing condition in her right shoulder. In other words, the lifting incident in December has resulted in an aggravation of her subacromial bursitis and it is her bursitis known to be a degenerative process, which has persisted and has resulted in her continuing to experience pain.

[13] On 2 February 2015, Dr Nicholson reported again. He noted that Ms Feaver's work involved carrying 90-120 cartons per hour, each weighing 20 to 27 kg. Dr Nicholson referred to NIOSH Musculoskeletal Disorders in Workplace Factors (A Critical Review of Epidemiological Evidence for Work Related Musculoskeletal Disorders of the Neck, Upper Extremity and Lower Back 1993). Dr Nicholson noted:

> In particular, there is a positive association between highly repetitive work and shoulder musculoskeletal disorders. Examples of studies performed includes such things as workers in the fishing industry, with an odds ratio of 3.0, ie. an increased risk of shoulder muscular disorders from performing repetitive activity. …
>
> In Shona's situation, it is likely that her work as a packer which involved constant and repetitive movement of her shoulder, is likely to have contributed to her shoulder pain. There is also an additional component of contribution due to her age as well. Age alone is a significant factor in the development of bursitis of the shoulder. It is my opinion that equal weight should be given to both her age as well as the repetitive nature of her work as being contributing factors of her shoulder pain (bursitis).

[14] On 31 March 2015, Ms Feaver filed a work-related gradual process injury claim with AGL. Dr Stout, GP, diagnosed "shoulder impingement". Dr Stout noted that the impingement was due to "repetitive work involving abduction/flexion of the shoulders to more than 60 degrees".

[15] On 12 October 2015, AGL obtained a report from Dr Scott Newburn, Advanced Registrar in Occupational Medicine. After referring to Dr Nicholson's report, in which reference was made to the fishing industry, Dr Newburn said:

> The level of repetition and force used in that industry can be far greater than that experienced in the meat works, particularly in packing, which has quite a different risk profile in the activity, compared with such high repetition and force activities as boning or filleting. Shona's work simply does not have sufficient exposure to significant abduction and flexion of more than 60 degrees that is required as demonstrated in my literature review to increase risk of the condition of shoulder impingement (bursitis).
>
> I therefore reach the opinion that Shona's work situation was unlikely to have contributed to the cause or caused Shona's right subacromial bursitis. More likely in the course of Shona's work, she is rendered symptomatic a previously asymptomatic degenerative bursitis.

[16] On 15 October 2015, AGL declined Ms Feaver's claim for cover for right shoulder impingements under section 30 of the Act. AGL did not accept that much, if any, of Ms Feaver's work involved abduction/flexion of the shoulders to more than 60 degrees. On 21 December 2015, Ms Feaver filed a review application challenging AGL's decision.

[17] On 25 February 2016, Dr Nicholson made a further report, referring to Dr Newburn's review:

> I have not been able to follow his line of thinking when he subsequently concludes that Shona's work is unlikely to have contributed. He has indicated that Shona's work as a packer is quite a different risk profile when compared to such a high repetitive and forceful activity as boning or filleting. He has stated that the level of repetition and force in the fishing industry is far greater than that experienced in meatworkers. I am uncertain as to where he has gathered this information in order to make this comparison. I would be of the opinion that the level of repetition would be similar and that both occupations require repetitive action when processing meat or fish fillets that would likely require the similar level of repetitive action with packing.
>
> I do agree that bursitis itself is a degenerative condition and is likely to be more common as we age, however, as identified by Dr Newman, certain occupations can increase the risk of developing shoulder conditions, particularly those that are highly repetitive or involve flexion, abduction greater than 60 degrees.
>
> **Conclusion**
>
> At this stage, I am still of the opinion that Shona's work as a packer involves repetition (packing and carrying 90-100 cartons per hour) and this level of repetitive action is likely to have increased the risk of developing a shoulder condition.

[18] In April 2018, an agreed statement of facts was conveyed to Dr Nicholson, who was asked whether Ms Feaver's work tasks, as broadly described in the agreed statement of facts, caused or contributed to the cause of her bursitis.

[19] On 11 May 2018, Dr Nicholson responded that an important factor that was missing was how the tasks, as described, specifically related to Ms Feaver's work, and how often and for how long she performed her various roles. He concluded that it was not possible at that stage to be able to correlate the potential effect of any of these tasks on causing injury to Ms Feaver unless the total exposure to those tasks was known.

[20] On 20 June 2018, the Reviewer dismissed Ms Feaver's application for a review. The Reviewer said:

> Both Dr Newburn and Dr Nicholson noted that age-related degeneration was a relevant factor in the development of Ms Feaver's subachromial bursitis.
>
> I therefore conclude that there is insufficient evidence that Ms Feaver's meat packing contained a particular property or characteristic that caused her subacromial bursitis.

[21] In October 2021, an opinion was sought from Independent Doctor Assessment Services, a medico-legal opinion service managed by Professor Gorman of Auckland. The panel convened by Professor Gorman included himself as Occupational Physician and Mr Stewart Walsh, an Orthopaedic Surgeon. The panel's opinion dated 22 November 2021 concluded:

> The panel opinion is that the subject has shoulder pain and dysfunction contributed to significantly by her 17 seasons of meat packing with repetitive lifting. Points to note: bursitis is a symptom of biomechanical dysfunction rather than a diagnosis. Pain/weakness leads to impingement with bursal inflammation.
>
> This subject has been inadequately assessed both clinically and radiologically. It is likely that her repetitive work exposure could lead to chondral changes in the joint, rotator cuff tendonitis both of which are suggested on her x ray.
>
> Dr SN's review of the literature was misled in that it was solely focussed on "bursitis" as a diagnosis with abduction shoulder range of the shoulder most likely to cause rotator cuff impingement. It is easy to blame age as a cause but in this case it is more likely that her repetitive overload work exposure is the primary cause.

[22] AGL commissioned an opinion from Dr Heydon, Occupational Physician. On 27 January 2023, he reported that Ms Feaver's bursitis was unlikely to have been caused or significantly caused by her work. He said:

> Overall evidence around occupation and specific shoulder conditions is rather uncertain, and inconsistent and the subject of debate. In general, I consider the elevation of the arm, ie. overhead work to be a more significant risk factor that force and repetition.
>
> In my opinion, the risk of developing bursal thickening does not appear to be significantly greater for those who do the tasks that Ms Feaver did compared with those who do not do those tasks. I note that other abnormalities were found on imaging. Specific diagnoses are not clear, but in my opinion, possibly indicate early glenohumeral (shoulder) joint osteoarthritis, early chronic rotator cuff disease and acromioclavicular joint osteoarthritis. In my opinion these conditions also do not appear to be significantly greater for those who do the tasks that Ms Feaver did compared with those who do not do those tasks.

[23] Dr Heydon agreed that there was nothing in Ms Feaver's non-work activities which appeared likely as material contributors to the cause of her right shoulder bursal and other abnormalities. He concluded:

> In my opinion Ms Feaver's work may have aggravated or rendered symptomatic the changes seen on imaging, but it does not appear that her work caused, or significantly contributed to the cause of the right shoulder abnormalities reported on imaging, and in my opinion, those appear more likely due to the aging process.

[24] A final response was provided by Professor Gorman on 8 February 2023. He said:

> The most appropriate approach to take when confronted with a situation where the epidemiological data are weak – and sadly that is the case in almost all occupational injuries and illnesses because of the difficulty in objectively defining exposure in a way that enables comparison – is to undertake an analysis of biomechanical plausibility. As you are aware, both me and Dr Walsh regard your client's work activities and the duration as being entirely consistent with her current musculoskeletal problems. With respect to Dr Heydon's analysis, he appears to be having a bit of it both ways in that he identifies the weaknesses in epidemiology, but still uses it to support a particular argument.

The Court's judgment of 18 December 2023

[25] Judge McGuire noted that what was to be decided in this case was whether or not Ms Feaver suffered a work-related gradual process injury, with the injury date of 12 December 2013. Judge McGuire then referred to the medical opinions presented, and the account provided by Ms Feaver of her workplace "accident" on 12 December 2013.

[26] Judge McGuire then stated:

> [100] It is acknowledged that bursitis is a condition, rather than an injury. However, it is accepted that age alone is a significant factor in the development of bursitis, as Dr Nicholson and the other professionals have said.
>
> [101] The ultimately question though is whether what occurred on that day caused or contributed to her bursitis.
>
> [102] I find that Mr Sara is right to challenge the proposition that because degeneration causes bursitis, that the bursitis condition cannot be caused or contributed to by accidents, whether acute accidents or work related gradual process ones.
>
> [103] Mr Sara posed an example of someone with a tendon tear in the shoulder who falls over in the garden and as a result, the tear is extended from two to five centimetres. He rightly submits that that person is entitled to cover for the new accident caused portion of the tear.
>
> [104] He submits that what is intended by the legislation is to grant cover where it is appropriate. He accordingly submits that the appellant has made out her claim for cover in this case on account of the trauma she suffered when she lifted that carton of meat at approximately 3.45pm on 12 December 2013.
>
> [105] I therefore find on the balance of probabilities that the appellant has proved that her accident that day, evidenced by the immediate pain from lifting the box of meat, caused or contributed to her bursitis.
>
> [106] For the purposes of s 30, I find that she was performing an employment task that had a particular property or characteristic, the lifting and turning with boxes containing 27 kgs of meat and that on this occasion, her work task contributed to the cause of personal injury and that because of the repetitive nature of the work, the risk of suffering personal injury is significantly greater for a person in the appellant's cohort who performs the employment task than for persons who do not perform it.
>
> [107] Accordingly, the appeal is allowed.

Relevant law

[27] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

> A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[28] In *O'Neill*,[2] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:

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2 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

> (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of obiter comment in a judgment …;
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> (ii) The contended point of law must be "capable of bona fide and serious argument" to qualify for the grant of leave …;
>
> (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed …;
>
> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;
>
> (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision …;
>
> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .
>
> [25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law … .

[29] In *Gilmore*,[3] Dunningham J stated:

> [55] I accept that, for the purposes of leave, it is not necessary to show that a decision was wrong, but only that there is an arguable question of law which is of sufficient importance to outweigh the cost and delay of a further appeal. However, in this case I consider no seriously arguable question of law arises, nor can it be said there is any factor which the District Court did not take into account. Instead, I consider the matters sought to be raised are, in substance, questions of fact and where the findings made were open to ACC, and to the District Court Judge, on the materials before them. For that reason, I do not need to go on to consider whether, in the exercise of my discretion, leave should be granted.

[30] In *TR*,[4] Isac J stated:

> [24] … the threshold for an appeal against factual findings on the basis of an error of law is very high. The challenged factual finding must be one that, on the evidence, was not open to the decision-maker. Put another way, TR must establish that the factual conclusion of the District Court was so clearly untenable that application of the law required a different answer.

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3 *Gilmore v Accident Compensation Corporation* [2016] NZHC 1594.

4 *TR v Accident Compensation Corporation* [2023] NZHC 2991.

The applicant's submissions

[31] Mr Winter, for AGL, made the following submissions.

[32] First, Judge McGuire exceeded the Court's jurisdiction, given the scope and nature of the primary decision and the Reviewer's decision (both of which concentrated on cover for work-related gradual process injury), and further complicated by the earlier review decision. Judge McGuire considered and granted cover on an entirely different claim, with a different mechanism of injury and with different legal principles applying, to that considered at primary and review levels. Further, in the earlier review, the Reviewer found that the 12 December 2013 accident had not contributed to the cause of Ms Feaver's bursitis.

[33] Second, Judge McGuire incorrectly found that Ms Feaver's accident on 12 December 2013 caused or contributed to her bursitis. The medical evidence was unequivocal that the bursitis pre-existed the event of 12 December 2013 and therefore was not caused by the accident. Judge McGuire overlooked or ignored the High Court decision in *Johnston*.[5]

[34] Third, Judge McGuire provided inadequate reasoning to support his finding that Ms Feaver satisfied the requirements of section 30 of the Act governing work-related gradual process injury. Judge McGuire failed to apply the law to the available evidence and justify his findings with adequate medico-legal reasoning.

Discussion

[35] AGL is required to show that the decision of Judge McGuire was wrong in law. The contended point of law must be capable of *bona fide* and serious argument to qualify for the grant of leave, and care must be taken to avoid allowing issues of fact to be dressed up as questions of law.[6] This Court finds as follows.

[36] First, Judge McGuire did not exceed the Court's jurisdiction in his decision. In terms of section 149 of the Act, the District Court has jurisdiction to hear and decide upon appeals brought to the Court against review decisions. In the present

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5 *Johnston v Accident Compensation Corporation* [2010] NZHC 1726, at [27].
6 *O'Neill*, above note 2, at [24].

matter, Judge McGuire heard an appeal against a review decision which upheld AGL's decision to decline cover for Ms Feaver's shoulder impingements as a work-related gradual process injury. On appeal, AGL's position was that Ms Feaver was, on the balance of probabilities, likely to be suffering from an age-related degenerative bursitis, rather than a personal injury caused by work-related gradual process. Judge McGuire expressly stated at the outset of his decision that the issue to be decided in this case was whether or not Ms Feaver suffered a work-related gradual process injury. Judge McGuire surveyed the relevant facts and medical evidence, and the arguments presented, and then made his decision on the issue to be decided. Judge McGuire was not prevented from so deciding by the prior comments of a Reviewer who had given a decision on a different issue, that being AGL's decision to cancel Ms Feaver's entitlements. Indeed, the Reviewer in the previous review expressly stated that the issue of cover for work-related gradual process injury did not affect the outcome of that review.

[37] Second, Judge McGuire's finding that Ms Feaver's accident on 12 December 2013 caused or contributed to her bursitis was a factual one which His Honour was entitled to find on the evidence available. The mere pre-existence of a degenerative condition such as bursitis does not necessarily mean that an accident does not cause or contribute to a claimant's present condition. The Court in *Johnson* was clear that "the issue is whether the accident caused a physical injury that is presently causing or contributing to the incapacity".[7] Judge McGuire's finding was supported by the evidence of Ms Feaver, and medical evidence that Ms Feaver's disfunction was contributed to significantly by the work that she did.

[38] Third, Judge McGuire, at paragraph [106] of his decision, specifically addressed the requirements of work-related gradual process injury in terms of section 30 of the Act:

> (a) the person performs an employment task that has a particular property or characteristic: Judge McGuire found that Ms Feaver was performing an employment task that had a particular property or

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7 *Johnson*, above note 5, at [14].

characteristic, being the lifting and turning with boxes containing 27 kgs of meat;

(b) the particular property or characteristic causes, or contributes to the cause of, the personal injury, and may or may not be present throughout the whole of the person's employment: Judge McGuire found that, on this occasion (that is, 12 December 2013), her work task contributed to the cause of personal injury;

(c) the Corporation may decline the claim if the Corporation establishes that the risk of suffering the personal injury is not significantly greater for persons who perform the employment task than it is for persons who do not perform it: Judge McGuire found that, because of the repetitive nature of the work, the risk of suffering personal injury is significantly greater for a person in Ms Feaver's cohort who performs the employment task than for persons who do not perform it.

The Decision

[39] In light of the above considerations, the Court finds that AGL has not established sufficient grounds, as a matter of law, to sustain its application for leave to appeal, which is accordingly dismissed. AGL has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources and the finality of litigation. This Court is not satisfied as to the wider importance of any contended point of law.

[40] Costs are reserved.

Judge P R Spiller,
District Court Judge