

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2023] NZACC 213      ACR 110/21**

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

Hearing:      15 December 2023

Held at:      Rotorua/Rotorua-Nui-a-Kahumatamomoe

Appearances:    K Koloni for the Appellant  
F Becroft for the Accident Compensation Corporation (“the  
Corporation”)

Judgment:      19 December 2023

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**RESERVED JUDGMENT OF JUDGE P R SPILLER**  
**[Claims process – s 54, Accident Compensation Act 2001 (“the Act”)]**

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**Introduction**

[1] This is an appeal from the decision of a Reviewer dated 20 April 2021. The Reviewer dismissed an application for review of the Corporation’s decision dated 24 September 2020 declining the appellant cover for post-traumatic stress disorder (PTSD).

**Background**

[2] On 2 October 1996, the appellant suffered a lower back sprain while employed as a forestry worker. He received a period of entitlements and was seen by various

specialists including Mr Jackson, Orthopaedic Surgeon, who suspected a disc problem.

[3] In July 1997, Mr Allen, Orthopaedic Surgeon, provided a report and thought that the appellant's problem related to the right sacroiliac joint. Mr Allen did not think there was any disc involvement and thought that the appellant was fit for work.

[4] In August 1997, the Corporation ceased the appellant's weekly compensation on the basis that he was fit to return to his previous occupation. In 1999 there was a reassessment for the purposes of the appellant's independence allowance.

[5] The appellant suffered the following further injuries:

- (a) 22 April 2001: lumbar sprain.
- (b) 24 November 2003: lumbar sprain.
- (c) 15 December 2004: back injury. In 2005, the appellant underwent a lumbar discectomy. Following that, he was able to return to work in the forestry industry.
- (d) 15 December 2007: lumbar sprain.

[6] In August 2012, a medical certificate was filed in relation to the 1996 claim because of persisting back pain.

[7] In 2013, there was an application for pain management treatment under the 1996 claim. Dr Stephanie Keel, Pain Specialist, noted that the appellant was not managing physically or emotionally. The Corporation declined the application on the basis that there was insufficient evidence of a link between the appellant's pain at that time and the claim. The appellant subsequently received support through the Corporation for psychological services.

[8] In May 2013, Dr Jeannette Shennan, Consultant Clinical Psychologist, reported that the appellant was negatively affected by pain and would benefit from a pain management programme.

[9] On 16 April 2015, the appellant suffered a lumbar sprain. On 7 June 2017, he suffered a further lumbar sprain.

[10] On 9 April 2018, the appellant suffered a further back injury. He was seen by Mr Martyn Sims, Orthopaedic Surgeon. Mr Sims arranged for an MRI scan, which confirmed pathology at L5/S1 and L4/5 with severe disc degeneration at L5/S1. Mr Sims did not think that surgery was an option at that stage.

[11] On 29 August 2018, the Corporation accepted cover for consequential degeneration. Weekly compensation was paid on the consequential degeneration claim thereafter.

[12] In October 2018, Mr Sims sought surgery funding, which was subsequently approved. On 12 February 2019, surgery proceeded by way of a lumbosacral fusion procedure. Rehabilitation, including a back to work programme, was provided.

[13] On 30 March 2020, Dr Gil Newburn, Neuropsychiatrist, provided a report. Dr Newburn noted the appellant's pain and accident history, and said he had significant re-experiencing of events following the accident in 1996. Dr Newburn's assessment was as follows:

Paul presents with three clear diagnoses consequent on injury. There is a centrally modulated pain disorder. This is shown with a gradual increase in representation of the area of pain reflecting C and S changes. This is added to by the altered capillary return. He also clearly suffers from major depressive disorder and post-traumatic stress disorder, both consequent on the injuring event and associated pain experience. This can be much more easily understood in terms of modern neuroscience however, with changes to the salience network arising from the chronic pain experience and stressor effects that this has had. This results in reduced brain derived neurotrophic factor activity, reduced plasticity in the network, with a much lower threshold for the assumption that things are negative until proven otherwise, a reduced capacity to prevent response without collecting more data, and a gradual reduction in the capacity to have reward experiences. This also leads to significant withdrawal. ...

If he is to proceed with other issues around Review of ACC decisions, then he may need a differently formatted report.

[14] On 29 May 2020, an ACC injury claim form was filed by Dr Michael Grant, GP, for PTSD, said to be as a result of the 2 October 1996 accident. The

Corporation began investigating the claim, and sought further medical records from the appellant's treatment providers.

[15] On 15 June 2020, the appellant completed a mental injury questionnaire, in which he linked his symptoms to the 1996 accident.

[16] On 7 July 2020, the appellant's file was reviewed by Ms Jo Clarkson, Psychology Advisor. She did not put any weight on Dr Newburn's report, questioning its quality and indicating that all medical notes from the time of the injury needed to be reviewed before determining the next steps.

[17] On 8 July 2020, the Corporation advised that it needed more time to consider the claim. Subsequently, the Corporation requested further clinical information dating back to 1991.

[18] In August 2020, the Corporation wrote to Ms Koloni, the appellant's advocate, seeking approval for a further two-month extension to consider the claim. The parties then exchanged emails in regard to when document requests had been made.

[19] On 7 August 2020, Ms Koloni provided an email from Dr Grant dated 4 August 2020, wherein he questioned whether it was worthwhile resending the requested notes. Dr Grant observed that the notes "were only sent in recent times (2 years in my memory) and to go thru that amount of notes seems like a waste of time and money".

[20] On 3 September 2020, the Corporation emailed Ms Koloni:

We have requested the information from Paul's GP, so we can make a decision on cover for PTSD. If this isn't received we can't make a decision. The request made is not out of the ordinary and doctors are aware of the necessity to provide it. Now that Paul's consent to collect information has expired, we are unable to request this again until he agrees to extend it. Unfortunately, the date for us to make the decision is getting close and I feel that we will not be able to have enough time to make the decision.

Please ask Paul to extend the consent on the ACC 6300 so we can contact his doctor to request the required information so we can make a decision on cover.

[21] On 24 September 2020, the appellant's claim was examined by Ms Karin Muir, Psychology Advisor. She noted that there were few documents regarding mental injury issues to review, and concluded:

Overall, PA review of the available information indicates there is insufficient information to support a mental injury caused by physical injury. Although Dr Newburn's report diagnosed PTSD and MDD he did not comment on the underlying causes of these conditions and nor did he have access to the client's pre-injury medical notes.

PA therefore recommends that the client be referred for a mental injury assessment in order to further investigate the existence of a mental injury caused by physical injury. The assessor will need access to Dr Newburn's report, the medical notes on file, and relevant pre-injury medical notes.

Conclusion:

1. There is currently insufficient evidence to approve a mental injury caused by physical injury.
2. However PA recommends this issue is investigated further via a mental injury assessment.
3. The assessor will need access to Dr Newburn's report, the medical notes on the current claim, and relevant pre-injury medical notes.
4. Once the mental injury assessment is received, please re-task to PA for further comment.

[22] On 24 September 2020, the Corporation issued a decision declining the appellant cover for mental injury due to his injury on 2 October 1996, because, based on the information it had, it was unable to accept the claim. The Corporation advised that, at that point, it had not received all the relevant information that would enable it to make a decision. The Corporation noted that the information it required to assess the claim further was relevant medical information on the appellant's mental state or psychological functioning from 2 October 1991 to 2 October 1996. The appellant filed a review application against this decision.

[23] On 5 November 2020, Mr Rodney Gordon, Orthopaedic Surgeon, reported that the appellant's pain and other problems could be related to the surgery performed on his spine in 2019, or on the basis of a chronic regional pain syndrome or mild injury to the nerves in this area.

[24] On 16 November 2020, Ms Sue Whitby, Occupational Therapist, noted strong evidence of depression, anxiety and stress, low pain self-efficacy and high pain catastrophising.

[25] On 17 December 2020, Mr Gordon reported that the appellant's pain was coming from the facet joints at L4/5.

[26] On 27 January 2021, Dr Keith Laubscher, Pain Specialist, diagnosed the appellant with persistent lumbar spinal pain after two surgeries, and with complex psychological factors. Dr Laubscher reported that the appellant had developed symptoms of depression or PTSD, which Dr Laubscher understood had followed the appellant's injury (dating back to 1996). Dr Laubscher advised that the appellant's symptoms of anxiety, depression and PTSD seemed "quite prominent".

[27] On 23 March 2021, review proceedings were held. On 20 April 2021, the Reviewer dismissed the review, on the basis that the Corporation was correct when it declined the appellant's claim for mental injury cover. The Reviewer concluded that the Corporation's request for an extension of time, to investigate the claim further, was reasonable, given the history of the claim and the evidence provided up to that point. The Reviewer confirmed that the Corporation would be required to recommence its assessment of cover once it had authority to obtain further information. On 20 May 2021, a Notice of Appeal was lodged.

[28] For the appeal, and after discussion between the parties, there was an agreement for the appellant to undergo a psychiatric assessment with Dr Andrew Wilkinson, Psychiatrist.

[29] On 7 September 2022, Dr Wilkinson reviewed the documentation from the appellant's file, and interviewed him. Dr Wilkinson diagnosed adjustment disorder with irritable mood, and concluded that that disorder resulted from the persisting pain and disability resulting from the cumulative effects of several back injuries from 1996 to 2018. Dr Wilkinson did not consider that the appellant suffered from PTSD, noting that he did not have intrusive recollections of any life-threatening events and did not show distress on exposure to relevant cues.

[30] On 28 October 2022, Dr Wilkinson clarified that the appellant's adjustment disorder commenced after his April 2018 back injury and was exacerbated and perpetuated by the disappointing results of the 12 February 2019 surgery.

[31] On 21 November 2022, Dr Wilkinson's advice was reviewed by Ms Clarkson, who recommended that the clinical criteria for adjustment disorder as a mental injury were met, and that the mental injury was specific to his physical injury claim and not related to previous claims.

[32] On 24 November 2022, the Corporation approved cover for an adjustment disorder, in addition to the existing cover for lumbar disc degeneration.

[33] On 15 December 2023, Dr Grant provided a letter in which he noted his belief that the appellant suffers from PTSD. Dr Grant noted that the appellant reported that he felt listened to, understood and valued by Dr Newburn, but that otherwise he did not have the trusting relationship to express his health issues with those who had interviewed/assessed him in the past. Dr Grant questioned Dr Wilkinson's diagnosis of an adjustment disorder, as this was, by definition likely to resolve within six months. Dr Grant assessed that the appellant's struggles, both physical and mental, had not resolved within six months, and Dr Grant believed that they related back to the appellant's accident on 2 October 1996, more than 27 years before.

### **Relevant law**

[34] Section 3 of the Act provides:

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—

- (a) establishing as a primary function of the Corporation the promotion of measures to reduce the incidence and severity of personal injury:
- (b) providing for a framework for the collection, co-ordination, and analysis of injury-related information: ...

[35] Section 48(a) of the Act provides that a person who wishes to claim under the Act must lodge a claim with the Corporation for cover for his or her personal injury. Section 55 provides:

- (1) A person who lodges a claim under section 48 must, when reasonably required to do so by the Corporation,—
  - (a) give the Corporation a certificate by a registered health professional that deals with the matters, and contains the information, that the Corporation requires:
  - (b) give the Corporation any other relevant information that the Corporation requires:
  - (c) authorise the Corporation to obtain medical and other records that are or may be relevant to the claim:
  - (d) undergo a medical assessment by a registered health professional specified by the Corporation, at the Corporation's expense:
  - (e) undergo any other assessment at the Corporation's expense.

[36] Section 54 provides:

The Corporation must make every decision on a claim on reasonable grounds, and in a timely manner, having regard to the requirements of this Act, the nature of the decision, and all the circumstances.

[37] In *Ambros*,<sup>1</sup> Glazebrook J, for the Court of Appeal, envisaged the Corporation taking an inquisitorial role, and the Court taking, if necessary, a robust and generous view of the evidence as to causation:

[64] An important factor that favours the Supreme Court of Canada's approach applying in that context is the essentially inquisitorial role of the Corporation, both when an initial claim is made and in the review function. ... The inquisitorial approach should generally mean that, to the extent this is practical, all aspects of the claim (including causation) have been investigated by the Corporation before matters reach the courts. ... In our view, it is in keeping with the non-adversarial nature of the claim and review process that the Corporation should investigate all possible aspects of a claim, at least in a rudimentary fashion and as far as practicable. It would thus be in a position, once the matter comes before a court, to lead evidence on all points that were investigated, whether strictly obliged to or not.

[65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved.

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



They proceed on their general impression of the sufficiency of the lay and scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person of common sense ...

[67] The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the Court to draw robust inferences of causation in some cases of uncertainty -- see para [32] above. However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture ... Judges should ground their assessment of causation on their view of what constitutes the normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witness evidence ...

## **Discussion**

[38] The issue in this case is whether the Corporation, on 24 September 2020, correctly declined the appellant's claim cover for PTSD (arising out of his injury on 2 October 1996), on the basis that, at that point, it had not received all the relevant information that would enable it to make a decision, specifically, relevant medical information on the appellant's mental state or psychological functioning from 2 October 1991 to 2 October 1996.

[39] Ms Becroft, for the Corporation, submits as follows. Its decision of 24 September 2020 has been overtaken by the new decision of 24 November 2022 approving cover for an adjustment disorder. If the appellant disputes that particular diagnosis and mental injury coverage, then that is the decision to challenge. Notwithstanding, it is submitted that Dr Newburn's assessment of March 2020 is not sufficient to result in cover for the mental injuries sought. The Corporation's decision to decline cover for these injuries was correct, as at 24 September 2020, and remains correct now, based on the new evidence from Dr Wilkinson, Psychiatrist.

[40] This Court acknowledges the above submissions, and the report from Dr Wilkinson. However, the Court refers to the following considerations.

[41] First, this Court finds that the Corporation's decision of 24 November 2022, granting the appellant cover for adjustment disorders, does not overtake or render moot the Corporation's decision of 24 September 2020, declining the appellant cover

for PTSD. The earlier decision declining cover for PTSD has not been revoked by the Corporation. PTSD and adjustment disorders are different diagnoses, and it is possible for a claimant to be granted cover for more than one form of mental injury. Further, the decline of cover for PTSD referred to the appellant's injury of 2 October 1996, whereas it is clear from supporting material that the grant of cover for adjustment disorders related to the appellant's injury of 9 April 2018.

[42] Second, the 2001 Act places significant duties upon the Corporation in managing personal injuries such as those suffered by the appellant. Section 3 of the Act provides that a primary function of the Corporation is the promotion of measures to reduce the severity of personal injury, and that the Corporation must provide for a framework for the collection and analysis of injury-related information. Section 54 provides that the Corporation must make every decision on a claim on reasonable grounds, having regard to the requirements of the Act, the nature of the decision, and all the circumstances. Further, the Court of Appeal has stated that the Corporation has an inquisitorial function and must investigate all possible aspects of a claim, as far as practicable.<sup>2</sup>

[43] Third, the Corporation's decision of 24 September 2020 did not follow the written guidance of the Corporation's own Psychology Adviser, Ms Muir, issued on the same day as (and presumably prior to) the decision. Ms Muir noted that there was currently insufficient evidence to approve a mental injury caused by physical injury, but she recommended that this issue be investigated further via a mental injury assessment, including access to Dr Newburn's report and other relevant medical notes. There is no evidence before the Court that the Corporation investigated further via a mental injury assessment before reaching its decision to decline the application for cover for PTSD.

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<sup>2</sup> *Ambros*, above note 1, at [64].

[44] Fourth, prior to the Corporation's decision, the Corporation had available to it the report of Dr Newburn, Neuropsychiatrist, who interviewed the appellant. Dr Newburn found that the appellant clearly suffered from PTSD, consequent on the injuring event and associated pain experience. This report was followed by the filing of an injury claim form by Dr Grant, GP, for PTSD, as a result of the 2 October 1996 accident. In response, Ms Clarkson, the Corporation's Psychology Advisor, noted that Dr Newburn did not hold a Clinical Psychiatric Services contract with the Corporation, and thought that the report was "not fit for purpose and the quality of the report means we would possibly have to repeat the assessment". Later, Ms Muir commented that the report appeared to be based solely on the appellant's self-report, did not comment on the underlying causes of PTSD, and did not have access to the appellant's pre-injury medical notes. However, there is no evidence before this Court that the absence of a Clinical Psychiatric Services contract with the Corporation disqualifies a relevant medical specialist report from consideration; there is no explanation as to why the "quality" of the report was deficient; there is no evidence that another assessment was conducted before the decline decision was issued; and there is no recorded attempt by the Corporation to contact Dr Newburn for further information or clarification. This Court therefore finds that the Corporation did not exercise its responsibility to investigate all possible aspects of the appellant's claim, as far as practicable.

[45] Fifth, the Corporation's insistence, in its decision of 24 September 2020, that the appellant produce relevant medical information on his mental state or psychological functioning from 2 October 1991 to 2 October 1996, appears questionable. In response to the Corporation's earlier request for this information, on 4 August 2020, the appellant's GP, Dr Grant, asked whether it was "really worthwhile resending these notes", and stated that the notes were sent in recent time (two years before in his memory). By 3 September 2023, the Corporation had modified its request to two years of medical information prior to the accident. This Court has not seen any satisfactory response from the Corporation as to whether it held the notes in question (dating back 24-29 years), in exercising its responsibility of the collection of injury-related information.

[46] Sixth, doubt is cast on the Corporation's decision of 24 September 2020 by the later report of Dr Laubscher, Pain Specialist, who diagnosed the appellant with complex psychological factors. On 27 January 2021, Dr Laubscher reported that the appellant had developed symptoms of depression or PTSD, which Dr Laubscher understood had followed the appellant's injury (dating back to 1996). Dr Laubscher advised that the appellant's symptoms of anxiety, depression and PTSD seemed "quite prominent".


[47] This Court finds, in light of the above considerations, that the Corporation did not, on 24 September 2020, make a decision on the appellant's claim on reasonable grounds, having regard to the requirements of the Act, the nature of the decision, and all the circumstances.

### **Conclusion**

[48] For the above reasons, this Court finds that the Corporation, on 24 September 2020, incorrectly declined the appellant's claim for cover for PTSD.

[49] This appeal is therefore allowed, and the review decision dated 20 April 2021 is set aside. The Court requires the Corporation to investigate further the appellant's claim for cover for PTSD via a mental injury assessment, including the opportunity for Dr Newburn to provide a further report relevant to this assessment. The Court notes that the appellant's claim for cover for PTSD was filed over three years ago, his ongoing severe pain condition is well-documented, and the Corporation is therefore required to proceed with its investigation with urgency.

[50] The appellant is entitled to costs. If these cannot be agreed within one month, I shall determine the issue following the filing of memoranda.



P R Spiller  
District Court Judge

Solicitors for the Respondent: Medico Law Limited.