IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 165	**ACR 64/19** **ACR 61/18**

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

Hearing:	16 March 2023
Heard at:	Wellington
Appearances:	Mr M Butler, appellant in person S M Kinsler and M L Clarke-Parker for respondent
Judgment:	11 October 2023

RESERVED JUDGMENT OF JUDGE I C CARTER
[Personal Injury – causation / s 26 Accident Compensation Act 2001]

Table Of Contents

Paragraph

Introduction .... [1]

The Two Review Decisions .... [7]

First Review Decision 29 December 2017 of Reviewer Davinnia Tan (Appeal ACR 61/18) .... [8]

Second Review Decision of 21 February 2019 of Reviewer Rex Woodhouse (Appeal ACR 64/19) .... [18]

Complex Background .... [21]

Separate Consideration of Appeals .... [26]

First Appeal From Reviewer Tan's Decision ACR 61/18

Appellant's Points on Appeal and Submissions .... [27]

Respondent's Points on Appeal and Submissions .... [28]

Issues on First Appeal .... [30]

Analysis .... [32]

Conclusion .... [41]

Result of First Appeal .... [42]

Costs .... [44]

Second Appeal From Reviewer Woodhouse's Decision ACR 64/19

Appellant's Points on Appeal and Submissions (Including Submissions In Reply) .... [45]

Respondent's Points on Appeal and Submissions .... [46]

Issues on Second Appeal .... [47]

Law .... [50]

Analysis of the Evidence .... [62]

Initial Assessment .... [63]

Accident Compensation Claim .... [69]

2008 .... [74]

Corporation Telephone Record .... [80]

Mr Hoffman - 20 February 2008 .... [81]

Ms Abdat - 10 March 2008 .... [87]

Dr Harman - 6 July 2008 .... [91]

Mr Hoffman – 1 October 2008 .... [92]

Dr Harrison - 9 February 2009 .... [99]

Comprehensive Pain Assessment - 5 August 2009 .... [100]

Dr Harman - 11 January 2010 .... [104]

Vocational Independence Assessment - General Practitioner Questionnaire .... [106]
Vocational Independence - Claimant Questionnaire .... [108]
Neurology Outpatients - 7 July 2010 .... [110]
Vocational Independence Medical Assessment .... [111]
Dr Hardy – 28 July and 24 December 2010 .... [113]
Dr Berry - 15 February 2011 .... [116]
Dr Kanji - 12 March 2012 .... [121]
Work and Income Medical Certificates .... [125]
Dr Kanji – February and April 2013 .... [127]
Dr Rajapakse - 11 April 2013 .... [132]
Mr Oakley - 6 January 2015 .... [134]
Mr Hunn - 29 July 2015 .... [135]
Comprehensive Pain Assessment .... [138]
Dr Kanji - 30 August 2016 .... [139]
Right Hip MRI - 14 September 2016 .... [141]
Dr Kanji - 12 October 2016 to 30 January 2017 .... [142]
Dr Ames - 31 January 2017 .... [146]
Cover Accepted and Revoked .... [147]
Mr Phillips' Report - 31 August 2017 .... [148]
Ms Tan's Review Decision .... [149]
Mr Phillips' Further Report .... [151]
Dr Kanji's Further Report .... [152]
Dr Wilson - 5 March 2018 .... [153]
The Corporation's Decision .... [163]
Causation Analysis of the Medical Evidence .... [164]
Conclusion .... [190]
Result of Second Appeal .... [192]
Costs .... [194]
Summary of Outcome of Both Appeals .... [195]

Introduction

[1] Mr Butler brings two separate appeals against two separate Review Decisions by different Reviewers, both relating to the question of whether he should have cover for a right hip labral tear.

[2] The appeals were lodged by Mr Butler on 26 February 2018 and 19 March 2019 respectively. Both appeals relate to Mr Butler's claim for accident compensation cover for a right hip labral tear diagnosed in 2016, which Mr Butler says was caused by injury from a work accident fall that occurred nine years earlier on 7 September 2007. On 12 September 2007, Mr Butler saw his physiotherapist. The physiotherapy notes describe the accident as involving slipping and falling through an unsecured piece of decking, twisting the back, and hurting the lower back, with pain radiating out, including to the hip and glute.

[3] On 13 September 2007, the Corporation accepted cover for "pain in lumbar spine, lumbar disc prolapse with radiculopathy".

[4] On 12 October 2016, Dr Kanji, musculoskeletal pain medicine practitioner, indicated that Mr Butler's ongoing hip symptoms might have been caused by the 7 September 2007 accident.

[5] The appeals turn on whether the Corporation can provide cover for a labral tear of Mr Butler's right hip, sustained in a workplace accident on 7 September 2007. Mr Butler's position is that he sustained a right hip injury that day and seeks to have cover confirmed of the labral tear in his right hip. The Corporation's position is that there is insufficient evidence to establish that Mr Butler's labral hip tear was caused by his accident of 7 September 2007.

[6] There is a complex procedural history to the two appeals, but ultimately the question for the Court is whether the Corporation's decision declining to provide cover for the right hip labral tear is correct.

The Two Review Decisions

[7] To understand what must be decided on each of the two appeals to the District Court, it is necessary to accurately describe what was concluded in each of the two Review Decisions.

First Review Decision 29 December 2017 of Reviewer Davinnia Tan (Appeal ACR 61/18)

[8] Mr Butler had come under the care of a musculoskeletal pain medicine [general] practitioner, Dr Kanji from about early 2012. On 30 August 2016 Dr Kanji reviewed Mr Butler and expressed the opinion that the source of Mr Butler's pain since his accident in 2007 may have been Mr Butler's right hip rather than the lumbar spine.[1]

[9] The question then arose whether there was accident compensation cover, including for weekly compensation, for the right hip labral tear injury. On 1 February 2017, the Corporation notified to Mr Butler two decisions on the claim:

(a) The first decision was that cover for a right hip labral tear was provided as a deemed decision, as the Corporation had not met its statutory time limits for issuing a cover decision following Dr Kanji's 12 October 2016 report.

(b) The second letter immediately revoked cover on the basis there was insufficient evidence suggesting the labral tear was caused by the 7 September 2007 accident.

[10] Mr Butler applied for review of the decision in the second letter of 1 February 2017. The review was heard by Reviewer Tan. On 29 December 2017, the reviewer quashed the Corporation's decision and directed the Corporation to obtain further medical comment and then issue a fresh decision. That review decision is appealed in appeal ACR 61/18.

[11] In her Review Decision of 29 December 2017, Reviewer Tan considered whether the Corporation's decision of 1 February 2017 revoking cover for a right hip labral tear from a work accident was correct. She surveyed the numerous medical reports and noted there were some differences between the description of the accident and injury mechanism in the earliest injury claim form in September 2007 and that used by various medical professionals. In particular Mr Phillips, an orthopaedic surgeon who the Corporation arranged to carry out a medical case review of Mr Butler's case, used a slightly different description.

[12] Reviewer Tan expressly stated that she accepted that there was a twisting injury in 2007 and that that the original injury description in the injury claim form completed by KCP

---

[1] The doctor unhelpfully refers in his notes to the *left hip* but it is common ground that this was an error and the doctor meant to refer to the right hip.

Physiotherapy dated 12 September 2007 was accepted as the most detailed description of Mr Butler's 7 July 2007 accident. That description was:

> At work slipped and fall [sic] on decking (stood on piece of unsecured wood that didn't reach other bearer) average fall, twisted back hurting lower back – central Lx, radiating out to hip, and glut [sic].

[13] The diagnoses on the injury claim form were noted as:

1. Pain in lumbar spine.
2. Lumbar disc prolapse with right radiculopathy.

[14] She was also concerned that the material sourced from Dr Kanji did not express a clear opinion of the most likely cause of Mr Butler's right hip labral tear and did not provide a clear report of the outcome of giving an injection to Mr Butler on 9 May 2017. The injection was used as a diagnostic tool to determine the likelihood of the right hip being the source of Mr Butler's pain.

[15] She concluded that the Corporation's decision to revoke was incorrect on the basis that clarification was needed of the basis for the opinions of Mr Phillips and Dr Kanji and further inquiry and investigation was required. She accordingly quashed the decision to revoke. She gave directions to the Corporation to obtain further reports from:

(a) Mr Phillips, orthopaedic surgeon, as to the likely cause of Mr Butler's right hip labral tear, taking into account the description of the mechanism of injury as set out below:

At work slipped and fall [sic] on decking (stood on piece of unscrewed wood that didn't reach other bearer) average fall, twisted back hurting lower back – central Lx, radiating out to the hip, and glut [sic].

and

(b) Dr Kanji as to his opinion on the most likely cause of Mr Butler's right hip labral tear following his report of 9 May 2017, in which he hypothesised that if Mr Butler's pain goes away following the injection received that day, then 'there

is a greater likelihood of right hip pain'. A clear report following this injection given to Mr Butler on 9 May 2017 has not been produced.

[16] Reviewer Tan also noted some procedural complaints raised by Mr Butler. The in-person hearing before the Reviewer was on 26 October 2017. Mr Butler understandably protested that the Corporation had filed their submissions later than timetabled. Reviewer Tan adjourned the hearing part-heard for three weeks until 16 November 2017 to allow Mr Butler time to respond to the Corporation's submissions and consider whether to obtain further evidence to support his case. Mr Butler, on 14 September 2017, contacted the Reviewer's administrative office[2] requesting a three-week extension until 5 December 2017 on the basis that Dr Kanji was away and he was waiting for a response from him. The Reviewer's administrative office on 14 September 2017 inquired of the Corporation's position and at the same time advised Mr Butler that he would be notified in due course of whether the extension was granted. Mr Butler then, on 17 November 2017, emailed his final comments, including a statement to the effect that because he had now provided his submissions, he would expect a decision in 28 calendar days.

[17] The Reviewer's administrative office then notified the parties that the review hearing would close once all evidence was received and reviewed. This was based on Mr Butler's original email of 14 November 2017 seeking a three-week extension, stating that he was awaiting Dr Kanji's response. Mr Butler emailed Fairway on 1 December 2017 complaining about the extension being granted on those terms, noting that he had complied with all directions made by the Reviewer and the effect was to extend the date when the hearing was "closed" and the date for decision 28 days later. It was clear from Mr Butler's communication that he did not require further time to file submissions or evidence and that he wished the decision to be made within 28 days, Reviewer Tan closed the hearing on 1 December 2017. Reviewer Tan's decision was given on 29 December 2017.

Second Review Decision of 21 February 2019 of Reviewer Rex Woodhouse (Appeal ACR 64/19)

[18] The further reports from Mr Phillips and Dr Kanji were obtained and the Corporation also obtained a further opinion from one of its internal medical advisors, Dr Wilson. On

---

[2] Fairway, one of the dispute resolution services contracted by the Corporation to provide for conciliation and review of Corporation decisions.

10 April 2018 the Corporation notified to Mr Butler its decision that there was no accident compensation cover for the right hip labral tear, as the Corporation did not consider that this injury was caused by the 7 September 2007 work accident. Mr Butler applied to review that decision as well.

[19] That second review application was heard by Reviewer Woodhouse, who dismissed the application in a decision of 20 February 2019. The appeal against that decision is appealed in ACR 64/19.

[20] In his Review Decision of 20 February 2019, Reviewer Woodhouse conducted a comprehensive review of the voluminous medical history and determined that there was insufficient evidence to support a conclusion that Mr Butler's right hip labral tear was caused by the 7 September 2007 work accident. He concluded that the Corporation was correct to decline cover for that condition. A key basis of Reviewer Woodhouse's conclusion was that despite numerous medical consultations between 2007 and 2016, none of the numerous treating clinicians diagnosed a labral tear or questioned whether such a tear was present. Mr Phillips' opinion was accepted that there was little in the medical records to suggest that there had been an acute injury to the hip caused by the 2007 accident. Dr Kanji's opinion was considered but not preferred because he had not adequately explained the basis for it and had not addressed relevant considerations taken into account by other clinicians.

Complex Background

[21] The background to Mr Butler's current appeals spans several years' medical history, dealings with the Corporation, Reviewer decisions and four previous appeals to the District Court.

[22] Mr Butler was successful in two of the District Court appeals, unsuccessful in one and one was withdrawn. I briefly summarise in date order the outcomes in each of the District Court appeals:

(a) Mr Butler made a claim in respect of a 1996 motor vehicle accident. This was investigated by the Corporation and on 20 January 2012, the Corporation declined the claim on the basis that it was unable to establish that Mr Butler had injured his back in the 1996 motor vehicle accident. The Corporation's decision was

unsuccessfully challenged by Mr Butler on review and although appealed, the appeal was withdrawn on 15 May 2012.[3]

(b) In a judgment of Judge Beattie dated 31 July 2013[4] the issue was whether the Corporation had correctly determined that Mr Butler had obtained vocational independence in respect of six work types based on vocational and medical assessments. The background facts were summarised in terms that on 7 September 2007 Mr Butler, then aged 31 years and employed as an electrician, suffered an injury to his back in the course of his employment. The nature of the injury event was described as Mr Butler falling through an unfinished part of decking on a work site while carrying a heavy load, and in the course of the fall he twisted his back and experienced significant pain in his back and down his right leg. Mr Butler returned to his employment in 2007 after receiving treatment but was made redundant in January 2008. It was accepted that he was incapacitated and he received weekly compensation from that point. He had part-time employment as an Animal Control Officer at the SPCA for five months from December 2008. A Comprehensive Pain Assessment in August 2009 identified that Mr Butler was experiencing constant pain affecting his lower back. He made significant gains in his medical and physical condition after undertaking a Pain Disability Prevention Programme and was then assessed for vocational independence. The vocational assessments determined that he had attained vocational independence in respect of six work-types. On the medical and vocational evidence before it, the District Court concluded that it was not established to the necessary degree of probability that Mr Butler had the ability and capacity to undertake any of the six work types for 35 hours per week. Mr Butler had not attained vocational independence. The appeal was allowed and Mr Butler's entitlement to weekly compensation was reinstated.

In a judgment of Judge J H Walker dated 17 May 2018[5] the District Court dismissed Mr Butler's appeal from a Review Decision dated 5 August 2016 of a Corporation decision declining cover for spinal degeneration. The Reviewer

---

[3] As summarised in *Butler v Accident Compensation Corporation* [2018] NZACC 74 at [5], [14], [15].
[4] *Butler v Accident Compensation Corporation* [2013] NZACC 228.
[5] *Butler v Accident Compensation Corporation* [2018] NZACC 74.

quashed the Corporation's decline decision and required the Corporation to undertake further investigations in terms of three specific directions made by the Reviewer. Mr Butler did not seek to disturb on appeal the Reviewer's decision, but complained that the Corporation had not complied with the Reviewer's directions and resulting delay. Judge Walker found that there was no error in substance by the Corporation in complying with the Reviewer's three directions. A new decision by the Corporation dated 3 August 2017 had been issued in terms of the Reviewer's third direction and Mr Butler had sought review of that. This rendered the appeal before Judge Walker "effectively a nullity" and the appeal was dismissed.

(c) In a judgment of Judge McGuire dated 16 November 2021,[6] the District Court determined Mr Butler's appeal from a Review Decision maintaining the Corporation's 3 August 2017 decision.[7] The 3 August 2017 decision declined cover for cervical spondylosis (neck injury) claimed to have been caused by:

(i) Mr Butler's 1996 motor vehicle accident.

(ii) A 3 March 2005 accident in which Mr Butler was working on a hot water cylinder, suddenly twisted his upper body, and felt a crack or pop in his neck. He sought and received cover for a neck sprain and lumbar sprain.

After the 1996 motor vehicle accident, Mr Butler had not immediately sought medical treatment and did not do so until several months later. There was an absence of decisive medical evidence immediately after the 1996 and the 2005 accidents, such as an x-ray or scan. On review of the medical opinion evidence, Judge McGuire found there was cogent evidence that the force of the 1996 accident and/or the force of the 2005 accident was sufficient to cause Mr Butler's cervical injury. In addition, if the cause was a degenerative one, the question of why there was effectively no further degeneration during five years between 2011 and 2016 MRI scans, remained unanswered.

---

6 *Butler v Accident Compensation Corporation* [2021] NZACC 183.

7 This was the decision directed to be made by a Reviewer on 5 August 2016, as referred to in the previous subparagraph

On that basis, Judge McGuire found on the balance of probabilities that Mr Butler's cervical spondylosis was caused by injury from the 1996 accident and/or the 2005 accident, holding that it is not necessary that an act of trauma which is found to be the probable cause be able to be identified, or even pinpointed by date (the notional date of injury can be the date when the injury is first identified as an injury). The appeal was allowed and the Corporation's 3 August 2017 decision was quashed. The result was to confirm Mr Butler's accident compensation cover for cervical spondylosis.

[23] The procedural history of the two current appeals to be determined in this judgment also requires brief mention. The two current appeals were lodged on 26 February 2018 and 19 March 2019 and have been the subject of a number of case management directions.

[24] Mr Butler had lodged a third appeal in August 2018 (ACR 244/18) which Mr Butler wished to be heard separately. This third appeal was heard first by Judge McGuire and allowed in his judgment of 16 November 2021 and summarised in paragraph [22](d) above.

[25] The two current appeals were directed to be consolidated with timetable directions to be made after judgment being given in the third appeal (ACR 244/18). After Judge McGuire's judgment was given in the third appeal, Mr Butler indicated that he wished to assess the effect of treatment for his newly covered injury following the successful appeal. If the treatment improved his condition, he felt it may not be necessary to pursue these two appeals. Mr Butler sought to defer further steps for nine months and this was not opposed by the Corporation. The Court directed deferral of further timetabling for nine months on that basis. In Case Management Conference Minutes dated 29 September and 7 October 2022, further timetable directions were made by the Court leading to the hearing of these two appeals being set down for hearing on 16 March 2023.

Separate Consideration of Appeals

[26] Although the two current appeals are consolidated to be heard and determined together, it is necessary to separately consider and determine each of them.

First Appeal From Reviewer Tan's Decision ACR 61/18

Appellant's Points on Appeal and Submissions

[27] I summarise the grounds of appeal of the first appeal advanced by Mr Butler in his Notice of Appeal and in submissions at the hearing as follows:

(a) The Corporation provided submissions on the morning of the Review hearing, rather than earlier as timetabled, and Mr Butler was forced to respond to them without adequate opportunity.

(b) There was sufficient evidence before Reviewer Tan at the Review hearing on 26 October 2017. She should have made a decision in Mr Butler's favour based on Dr Kanji's clinical notes and having regard to the flaws in Mr Phillips' report. The Corporation's decision should have been quashed at that point rather than deferred and cover confirmed on the basis that Mr Butler's labral hip tear was caused by his accident of 7 September 2007.

(c) Some of the medical reports on which the Corporation's decision was based omitted reference to hip pain from the injury description following the 2007 accident, with the effect that incomplete information was provided to the Reviewer.

(d) The Corporation ignored the directions made in Reviewer Tan's decision

(e) The effect of Reviewer Tan's decision was to give the Corporation an opportunity to strengthen its position.

Respondent's Points on Appeal and Submissions

[28] Reviewer Tan's decision was not explicit as to whether the Corporation's new decision should have been on the question of whether to revoke Mr Butler's deemed cover, or whether to accept or decline cover. The two alternative approaches do not ultimately have any bearing on determining the key issue on appeal of whether Mr Butler should now have cover for the right labral hip tear. While ordinarily a higher standard of evidence is required to revoke

cover than to make an ordinary decision to decline a claim for cover,[8] that higher threshold is not applicable to revocation of deemed cover decisions.[9]

[29] Accordingly, the question for the Corporation on considering cover for the labral tear was the orthodox causation question under the principles in *Ambros v Accident Compensation Corporation*.[10] Substance should prevail over form in the Corporation's decision,[11] and therefore the question of whether the new decision should have been framed as declining cover or revoking deemed cover is immaterial. The question for the Court on appeal is whether there is sufficient evidence for the Court to draw a robust inference of causation between the accident event and Mr Butler's right hip labral tear.

Issues on First Appeal

[30] Although not argued directly by either Mr Butler or the Corporation, there is a preliminary issue as to whether Mr Butler can appeal Reviewer Tan's decision at all given that he was successful on review. In any event the first appeal may now be moot as the Corporation made a new decision that is the subject of the second appeal from Reviewer Woodhouse's decision with exactly the same issue, namely, whether the Corporation's decision to decline cover for Mr Butler's right hip labral tear was correct.

[31] Mr Butler's issues summarised in paragraph [27] (a) to (e) above.

Analysis

[32] It is fundamental that an appeal must be against the result to which a decision-maker has come, namely the order or declaration made or other relief given, not directly against the reasons and conclusions given by the decision-maker which led to that result. A litigant cannot therefore, other than in very exceptional circumstances, bring an appeal when they have been entirely successful and do not wish to alter the result.[12] Exceptional circumstances

---

8 *Accident Compensation Corporation v Bartels* (2006] NZAR 680 (HC).
9 *Atapattu-Weerasinghe v ACC* (2017] NZHC 142, at (16]-(23].
10 *Accident Compensation Corporation v Ambros* (2008] 1 NZLR 340.
11 For example where a letter confirms a previous decision on cover, and is not itself a fresh decision, the fact that the letter states it is reviewable is not determinative: *Accident Compensation Corporation v Hawea* (2004] NZAR 673.
12 *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55 at [25]. A successful party may not appeal against adverse findings made by the decision maker, which are steps in the reasoning: *GEH v AJH* (Protection order) [2009] NZFLR 721.

may be present where some aspect of a favourable determination may lead to an adverse result for the litigant.[13]

[33] The result reached by Reviewer Tan was to determine the Review in Mr Butler's favour and to order the quashing of the Corporation's decision revoking cover for a right hip labral tear from a work accident. Reviewer Tan also gave directions to the Corporation requiring further investigation and inquiry to be made of Mr Phillips and Dr Kanji. Mr Butler was the successful party on Review. The outcome was favourable to him in that the directions to the Corporation were intended to ensure that all aspects of his claim were investigated as far as practicable to properly inform a decision on causation. This is not an adverse result for Mr Butler. The fact that additional time was required to complete the further investigations was a necessary consequence of completing proper investigations and does not change a favourable outcome into an unfavourable one. In these circumstances, Mr Butler cannot appeal from the favourable result that he obtained on review.

[34] The courts will not generally hear appeals where the issues to be argued on appeal have become moot.[14] An appeal is moot where the result of the appeal will have no practical effect on the rights and liabilities of the parties. There is a discretion to hear a moot appeal, to be exercised with caution, where there is an issue of public importance for the development of the law and there is good reason to do so.[15]

[35] In Mr Butler's case, the Corporation made a new decision regarding his cover after completing the further investigations directed by Reviewer Tan and that decision is the subject of Mr Butler's second appeal. The issue of cover is the same, but the second appeal is brought with the benefit of additional information obtained by the Corporation and is the better vehicle to determine cover. As submitted for the Corporation, whether the challenged decision is one of revocation of cover or decline of cover, the central issue remains the same - whether there is sufficient evidence for the Court to draw a robust inference of causation between the accident event and Mr Butler's right hip labral tear.

[36] The issues raised by the first appeal are moot and as those issues turn on the application of established principles of causation to Mr Butler's particular facts, there is no issue of public

---

[13] *Cameron v R* [2021] NZSC 110 at [30], [31], [32].
[14] *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721.
[15] *Hutchinson v A* [2015] NZCA 214, [2015] NZAR 1273; *Attorney General v Smith* [2018] NZCA 24

importance raised. The first appeal should not be heard because it is moot, but I nevertheless go on to consider the substance of Mr Butler's grounds of appeal.

[37] Any prejudice to Mr Butler from the Corporation providing submissions on the morning of the Review hearing was remedied by Reviewer Tan adjourning the matter part-heard and timetabling an opportunity for Mr Butler to file further material.

[38] Mr Butler's argument that Reviewer Tan should have decided to confirm cover is largely based on his position that Dr Kanji's evidence clearly establishes that his right hip labral tear was caused by the 2007 accident and that the evidence of all other clinicians before 2016 should be given less weight. I do not accept that Dr Kanji's evidence, as it was at the time of Reviewer Tan's decision established causation, or that Mr Phillips' report was flawed, or that some variation in descriptions of the 2007 injury mechanism diminished the weight of the pre-2016 clinical opinions. These points raised by Mr Butler did not require Reviewer Tan to confirm cover.

[39] Neither the purpose nor the effect of Reviewer Tan's decision was to give the Corporation an opportunity to strengthen its position. The purpose and effect was to enable the Corporation to make further inquiry of Mr Phillips and Dr Kanji to clarify aspects of their evidence with potential to benefit the position of either party.

[40] The Corporation did not ignore Reviewer Tan's directions. It promptly sought further comment from Mr Phillips and Dr Kanji and received their additional evidence in time to make a decision by 29 December 2017.

Conclusion

[41] The first Review Decision is correct in quashing the Corporation's decision to revoke Mr Butler's cover for a right hip labral tear and directing the Corporation to obtain further reports.

Result of First Appeal

[42] The first Review Decision is maintained.

[43] The first appeal is dismissed.

Costs

[44] Although Mr Butler is unsuccessful on the first appeal, I make no order for costs.

Second Appeal From Reviewer Woodhouse's Decision ACR 64/19

Appellant's Points on Appeal and Submissions (Including Submissions In Reply)

[45] I distil Mr Butlers grounds of appeal and submissions into the following broad propositions:

(a) Dr Kanji's evidence is to be preferred over that of all the other health professionals with a different opinion. Mr Butler naturally highlights and relies on the evidence of Dr Kanji, to establish that the 2016 right hip labral tear injury was caused by the 7 September 2007 accident. Mr Butler submits that Dr Kanji:

(i) Provided well-reasoned medical explanations.

(ii) Reported multiple therapeutic/diagnostic injections into Mr Butler's right hip starting in August 2011 and his notes documented that all injections showed an improvement to his right hip and leg pain.

(iii) Concluded that the damage to Mr Butler's right hip was overlooked.

(b) All the health professionals except Dr Kanji focussed primarily on a possible lower lumbar sprain and did not focus on or diagnose a secondary injury of a right hip labral tear. There were two documented sites of pain in September 2007 – the lower back and the right hip, with a report in November 2007 that there was the possibility of a hip sprain.

(c) Some of the health professionals used a variant of the original accident description/injury mechanism in the injury claim form dated 12 July 2007 including omission of reference to a twisting fall or hip pain, contributing to their failure to diagnose a right hip labral tear.

(d) Mr Hoffman's assessment and opinion in 2008 was that Mr Butler had no major structural injury. This was incorrect as Mr Butler was later diagnosed to have a

cervical injury which the District Court held in 2021 was caused by a 1996 car accident or a 2005 accident involving a hot water cylinder falling on Mr Butler (under a different claim). Mr Hoffman's incorrect opinion influenced and clouded the impartial assessment by other clinicians.

(e) The opinions of all the health professionals who assessed Mr Butler prior to 2016 should be given less weight than Dr Kanji's opinion and should not be relied on because the District Court in 2021 took a different view to a large number of health professionals when it confirmed on appeal that Mr Butler's cervical injury was caused by a 1996 car accident or a 2005 accident involving a hot water cylinder falling on Mr Butler.

Respondent's Points on Appeal and Submissions

[46] The Corporation's position is that the evidence does not support Mr Butler's claim that his labral tear was caused by the 2007 accident because:

(a) Mr Butler was seen by numerous specialists following his 2007 accident, and some hip pain was initially investigated, but no labral tear was diagnosed until 2016.

(b) The medical evidence shows the mechanism of injury is unlikely to have caused a labral hip tear.

(c) Imaging and other investigations have not shown indications of a traumatic injury.

Issues on Second Appeal

[47] The issue on the second appeal is whether the Corporation's decision to decline cover for Mr Butler's right hip labral tear was correct.

[48] This issue turns on whether, on the balance of probabilities, Mr Butler's right hip labral tear was caused by his accident of 7 September 2007.

[49] To be clear, there is no dispute that Mr Butler suffered injury resulting from the 7 September 2007 accident. There is no dispute that in 2016 Mr Butler was diagnosed with a

right hip labral tear. The issue in dispute is whether the right hip labral tear was an injury caused by the 7 September 2007 accident.

Law

[50] In general, for a person to have accident compensation cover,[16] the evidence must establish that the person suffered personal injury caused by an accident.[17]

[51] The words "personal injury" are defined in the Act to include physical injuries suffered by a person.[18]

[52] The Act excludes cover for personal injuries that arise wholly or substantially, from non-accident-related gradual process.[19]

[53] The onus is on the claimant to establish on the balance of probabilities that the claimed personal injury was caused by the accident event.

[54] Since *Accident Compensation Corporation v Ambros*,[20] the question of causation is answered by determining whether there is sufficient basis that points to proof of causation on the balance of probabilities for a Court to draw a robust inference of causation between the accident event and Mr Butler's labral hip tear.

[55] The legal burden is on the claimant to demonstrate that the requirements of the Act are satisfied, including to prove causation on the balance of probabilities.[21] That means showing that the probability of causation is more probable than not and higher than 50 per cent. However the courts do not engage in mathematical calculations, but rather form a general impression of the sufficiency of the law and scientific evidence and the presumptive inference which a sequence of events inspires in a person with common sense.[22]

---

[16] Accident Compensation Act 2001, s 8.
[17] Accident Compensation Act 2001, s 20 (1) and (2).
[18] Accident Compensation Act 2001, s 26.
[19] Accident Compensation Act 2001, s 26 (1B), (2), (4).
[20] *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40.
[21] *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40 at [63].
[22] *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40 at [65].

[56] A proximate temporal connection between an event and a subsequent medical condition may be relevant, but its significance in any particular case will depend on the circumstances.[23]

[57] The claimant must establish on the balance of probabilities, based on all the evidence, that there is a causal nexus between the medical condition and a personal injury by accident.[24] The Court should not place too much emphasis on the onus, as the question is whether the evidence as a whole justifies a conclusion that the necessary causal nexus between injury and medical condition exists.[25] At the end of the day, causation is a question for the Court that cannot be delegated to the experts.[26]

[58] The claimant must show that his or her medical condition was caused in some degree by the covered injury.[27] If that is established, cover is not necessarily displaced on the basis that the condition was caused wholly or substantially by factors such as age or uncovered degenerative condition.[28]

[59] A treating medical specialist's opinion is often preferred, but the Court does not simply rubberstamp it. The specialist must provide proper reasoning for their opinion and the Court will be influenced by the extent to which the medical opinion proceeds logically from as clear and settled a basis of fact as is possible.[29]

[60] In *Ambros* the Court of Appeal held:[30]

> The legal approach to causation is different from the medical or scientific approach. In *March v Stramare*, Mason CJ at 509 in the High Court explained that the scientific concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences whereas in law problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence. At law the cause is not the sum of the conditions which are jointly sufficient to produce the occurrence. …
>
> 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

---

23 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR3 40 at [77], [78].
24 *Wakenshaw v Accident Compensation Corporation* [2003] NZAR 590 at [24].
25 *Wakenshaw v Accident Compensation Corporation* [2003] NZAR 590.
26 *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 at [26].
27 *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 at [24].
28 *Cochrane v Accident Compensation Corporation* [2005] NZAR 193 at [24] and exclusions from the definition of "personal injury in s 26 (2), (4)(a) and s 20(2)(e) to (h).
29 *Lucas v Accident Compensation Corporation* [2015] NZACC 216.
30 *Accident Compensation Corporation v Ambros* (2008] 1 NZLR 340 at [65]-(68].

> draw robust inferences of causation in some cases of uncertainty. 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 a normal course of events, which should be based on the whole of the lay, medical, and statistical evidence, and not be limited to expert witnesses' evidence ...
>
> ... The generous and unniggardly approach referred to in *Harrild v Director of Proceedings* may, however, support the drawing of "robust" inferences in individual cases. It must, however, always be borne in mind that there must be sufficient material pointing to proof of causation on the balance of probabilities for a Court to draw even a robust inference on causation. Risk of causation does not suffice.

[61] Close analysis of all the voluminous and complex evidence from 2007 to 2019 is required to determine the causation issue.

Analysis of the Evidence

[62] I have reviewed the extensive documentary medical evidence from 2007 to March 2018, which was canvassed at length in Reviewer Woodhouse's decision. Reviewer Woodhouse's comprehensive narrative accurately reflects the documentary evidence, which is not in substance challenged by Mr Butler. What Mr Butler does challenge strongly is Reviewer Woodhouse's conclusion that the evidence does not establish on the balance of probabilities that Mr Butler's labral hip tear was caused by his accident of 7 September 2007. Mr Butler's relevant medical history as established by the extensive documentary evidence is described below.

Initial Assessment

[63] On 12 September 2007, Mr Butler attended the Kapiti Coast Physiotherapy Clinic, where he was assessed by physiotherapist Mr Yurri Hynson. The most detailed description of the accident and injury mechanism is contained in the ACC Injury Claim Form dated 12 July 2007 which was completed by the physiotherapist:

> At work slipped and fall on decking (stood on piece of unsecured wood that didn't reach other bearer) average fall, twisted back hurting lower back - central lx [lumbar], radiating out to hip, and glut.

[64] The physiotherapist's examination notes recorded:

> P1 – Central Lower Back and TL, Junction Point (L) L ½.
>
> P2 – R Side of Hip Near constant. 7.5/10, just achy, like a throb.

[65] That is, the second site of pain was recorded as being to the right side of the hip.

[66] In answer to a pre-formatted question regarding fitness, the note recorded is:

> bruce lee fighting

[67] In November 2007, Mr Hynson requested approval from the Corporation for eight additional treatments and noted in section "why has the condition not resolved":

> Symptoms consistent with disc prolapse, possible hip sprain.

[68] The physiotherapist's examination notes record that the physiotherapist undertook assessments involving both the right and left hip, which included a straight leg raise, and no abnormalities are described. Pain was noted to the side of the right hip. The physiotherapist diagnosed a lumbar sprain, and to a preformatted question on the treatment record of "Is it radiculopathy or somatic", the physiotherapist records "To hip".

Accident Compensation Claim

[69] The physiotherapist lodged a claim with the Corporation for two specified injuries, being pain in lumbar spine, and lumbar disc prolapse with right radiculopathy.

[70] The accident event is described as set out above, with the date of accident recorded as 7 September 2007.

[71] The Corporation accepted cover for the claimed injury.[31] The Corporation's decision letter sent to the employer dated 13 September 2007, expressly records that the covered injuries were of "Pain in lumbar spine, Lumbar disc prolapse with radiculopath" [sic].

[72] Mr Butler attended general practitioner Dr Ramoo on 20 September 2007. Dr Ramoo notes an "injury to lower back" on 7 July 2007, that was no better despite physiotherapy. Dr Ramoo notes the accident occurred when "falling through decking platform at work" and that the pain was located at the L1/2 level. Dr Ramoo notes that the physiotherapy assessment suggested a disc injury, and that while there was pain over the spine, there was no deformity. A good range of motion was described but with pain on extremes, that is, on the extreme

[31] Claim 10001574787.

range of motion of the back. Dr Ramoo considered the symptoms were "not muscular" but diagnosed a lumbar back strain.

[73] The ACC18 medical certificate gave a reference to another claim number relating to a different accident (lifted trailer at work and hurt lower back) rather than the correct claim number. Dr Ramoo did not address the possibility of a hip sprain.

2008

[74] Mr Butler was further assessed by physiotherapist Jean-ann Johnson on 10 January 2008, recording "lower back pain - since July - landed forwards - never fully settled, but can vary in intensity". The notes indicate that the discomfort was mainly in the thoracic and lumbar area of the back, being a burning sensation with pins and needles, and "some numbness into top of buttocks, but no leg [pain]".

[75] The physiotherapist notes that an X-ray had discounted any bony injury, and notes also that Mr Butler would undertake "some kick-boxing". The physiotherapist set out the relevant examination findings.

[76] A second assessment occurred on 10 January 2008 with another General Practitioner in the same practice as Dr Ramoo, Dr van Riessen. Dr van Riessen matched the injury to the correct claim and a medical certificate was issued under the correct claim. Dr van Riessen records the history of a "lower/back injury after falling through decking platform at work" that had never completely resolved. A continued burning ache in the lower spine was noted to be present constantly.

[77] An ACC18 medical certificate dated 10 January 2008 recorded the original and presenting diagnosis as a lumbar sprain. The medical certificate records "ongoing local lower back pain every day despite exercises". The form was co-signed by Mr Butler.

[78] On 11 January 2008 physiotherapist Ms Johnson referred Mr Butler to orthopaedic surgeon Mr Hoffman. The referral letter records that:

> [Mr Butler] was injured when he slipped and fell at work in July. He has had ongoing central thoraco-lumbar junction area pain since, which has never fully settled.

[79] Mr Butler was reviewed by Dr van Riessen on 17 January 2008. Dr van Riessen records "back pain getting very bad: unable to work anymore". A further medical certificate given on 17 January 2008 recorded similar difficulties of "worsening local lower back pain every day", again co-signed by Mr Butler.

Corporation Telephone Record

[80] On 11 February 2008 a Corporation officer telephoned Mr Butler for the purposes of a telephone interview. The officer's records are on the review file, and to the question of "what is your injury", is recorded "burning sensation in the centre of back".

Mr Hoffman - 20 February 2008

[81] Orthopaedic and spinal surgeon Mr Hoffman assessed Mr Butler on 20 February 2008. Mr Hoffman notes that Mr Butler "continues to struggle with low back pain". The specialist records:

> Martin worked as an electrician and he injured his back when he slipped and fell at work in July of 2007. His symptoms were manageable initially although he had a couple of weeks off because of that pain and he attended KCP physiotherapy in Kapiti. His injury was registered with ACC. His symptoms continued to trouble him but he was able to return to work and manage reasonably well. ... His symptoms were felt initially in the thoraco-lumbar spine and then tended to gravitate and he felt more across the lumbar sacral spine. His back pain was back dominant. There was never any severe leg referral. No neuritic features and no cauda equina symptoms.
>
> ... Now that he has been made redundant he is finding it very difficult to get new work because of his back pain.
>
> His back pain is back dominant. It doesn't radiate. It is worse with flexion and extension.
>
> On examination today he stands erect with normal alignment. There are no tension signs and his hip and knee range of motion is normal. Neurology is normal.

[82] Mr Hoffman provided a medical certificate, again referring to a back injury. That certificate was also countersigned by Mr Butler.

[83] Mr Hoffman reviewed Mr Butler on 4 March 2008, noting that:

> Martin had a jarring injury when he fell a couple of feet back in May of last year. He is troubled by ongoing mechanical back pain and unable to work at present.

[84] Mr Hoffman states than an MRI scan of the lumbar spine was normal, without any evidence of an annular tear. However, he states:

> I still suspect an injury to the facets and have organised a bone scan today.

[85] The diagnosis recorded was thoraco-lumbar mechanical back pain? facet injury.

[86] Again Mr Hoffman certified Mr Butler unfit for full duties, due to "mechanical back pain".

Ms Abdat - 10 March 2008

[87] Physiotherapist Ms Abdat assessed Mr Butler, within the context of an 'abilities assessment'.

[88] The physiotherapist records the current complaint as "central thoraco-lumbar back pain" and notes the following medical examination findings:

> On assessment Martin has full active range of motion in his lumbar spine with some end of range discomfort in both flexion and extension. Neurological testing is all normal and reflex testing is normal. Martin is weak through his trunk and has poor core stability.

[89] No reference is made to hip symptoms.

[90] Further medical certificates from 19 March 2008, 4 April 2008 and 17 June 2008 from Mr Hoffman, again co-signed by Mr Butler, refer to ongoing low back, and mechanical pain.

Dr Harman - 6 July 2008

[91] The Corporation referred Mr Butler for an Initial Medical Assessment, that was performed by vocationally registered general practitioner Dr Harman. Dr Harman records under the heading of 'Current Status':

> Currently Mr Butler says that he has a burning pain running from the thoraco-lumbar junction down to the base of the lumbar spine. This is present most of the time and ranges between 3-7/10 in severity (10 being worst). He says that the back pain is worse if he holds his back in a fixed position for more than 20 minutes. It is also worse when bending forwards or arching his back. The pain worsens if he sits or stands for prolonged periods.

> Mr Butler says that he rarely gets pain in the lateral right thigh and calf. He has no sensory disturbance apart from occasional tingling in the fingers at night which dates from before the injury. He has no weakness. He has no bowel or bladder symptoms and his saddle sensation is normal.

Mr Hoffman – 1 October 2008

[92] On 1 October 2008 Mr Hoffman reviewed Mr Butler, reporting "disabling back pain" and that the pain was "back dominant".

[93] On 24 October 2008, Mr Hoffman wrote to the case manager, advising that he had reviewed the report from Dr Harman. Mr Hoffman advised that he was comfortable with Dr Harman's assessment that Mr Butler would be able to undertake medium physical demand work. Mr Hoffman did not dispute any aspect of Dr Harman's assessment or conclusions.

[94] Further medical certificates were provided on 11 September 2008, 30 September 2008, 17 November 2008. Those were countersigned by Mr Butler and refer only to lumbar injuries.

[95] A discogram was performed on 25 November 2008. In the indication for the procedure, the radiologist reports and MRI bone scan in February was 'normal'. The discogram of L3/4, L4/5 and L5/S1 showed no definite source of Mr Butler's pain.

[96] Mr Hoffman provided an updated letter to the Corporation on 17 December 2008 stating:

> His discogram shows he has not suffered a disc injury in the lumbar sacral spine. This along with a normal MRI scan I think reinforces the view that Martin has no major structural injury.

[97] A further medical certificate on 17 December 2008 certified that Mr Butler was able to return to work, in particular a work trial, and records the diagnosis as mechanical back pain.

[98] A Functional Reactivation Programme Assessment Report was provided by Mr Andrews and Ms Norton (their qualifications are not recorded) and dated 19 December 2008. The report states that:

> Current Complaint:
>
> Martin presented to physiotherapy with an 18-month history of consistent low back pain with intermittent right posterior buttock, thigh, and lower leg pins and needles. He has an average scale of 3-4/10 ... symptoms are best eased when laying on his back supine.

Dr Harrison - 9 February 2009

[99] Mr Butler was assessed by rheumatologist Dr Harrison, who provided a report on 9 February 2009. At the head of his report, the 'problem' is recorded as "gross traumatic chronic low back pain". Dr Harrison describes the accident event when Mr Butler fell through decking when carrying heavy objects, injuring the lower back, and developing pain across the lumbosacral region. Dr Harrison sets out the examination findings, noting that a straight leg raise was normal, and that there was no abnormality in the peripheral joints. Dr Harrison states that no cause for Mr Butler's pain has been found, with the assessor considering the pain to be arising through ‘central’ mechanisms, rather than peripheral pathology.

Comprehensive Pain Assessment - 5 August 2009

[100] A comprehensive pain assessment was undertaken by pain medicine specialist (anaesthetist) Dr Thomas, and psychologist Ms Kaehmzow-Ferguson. The assessments occurred on 5 August 2009.

[101] The accident is described as occurring when Mr Butler fell through decking that was not nailed down, from which back pain immediately developed. After a few days the pain involved his back and radiated down the right leg to the foot. Examination findings are set out.

[102] Dr Thomas considered the back to have been well investigated, without any structural cause for the symptoms identified. Various options for treatment were presented, involving medication.

[103] Co-signed medical certificates were provided through 2009, referring to a lower back injury.

Dr Harman - 11 January 2010

[104] Dr Harman (now recording qualifications as a specialist occupational physician) reassessed Mr Butler on 11 January 2010. The purpose of that assessment was for an initial medical assessment. The relevant history with updated assessments are summarised. Under the heading of 'Current Status', Dr Harman describes:

> A constant dull pain across his low back. He also describes crampy pain behind his right knee and in the right calf and a constant tenderness over the dorsum of the right foot. He feels pins and needles and electric shock like sensations with pressure over the foot. He says that his right foot feels 'cold'. The low back pain is worsened by bending, prolonged sitting and overhead tasks.
>
> He also described intermittent pain over the lower thoracic spine which is increased by repetitive bending.
>
> He described constant pain and tightness in the left neck radiating to the left shoulder and down the left arm as far as the hand. This is aggravated by prolonged keyboarding.
>
> He today also mentioned that he can get cramps in the right hand when he is using this repetitively.
>
> …

[105] Examination findings are described. In discussion the assessor notes:

> It is now almost 2½ years since Mr Butler's back injury. This has involved constant low back and some right leg pain. All investigations of the lumbar spine have been normal and no surgery is indicated. He has also had intermittent lower thoracic pain and he has more recently developed left leg and upper limb pain which is not injury related. He has been diagnosed as having pain sensitisation and has undergone a comprehensive pain management programme.
>
> Despite the pain management programme, Mr Butler continues to disagree with the diagnosis and has a belief there is underlying diagnosis still to be identified. He has a relatively negative outlook as far as recovery from his symptoms go.

Vocational Independence Assessment - General Practitioner Questionnaire

[106] The Corporation determined that Mr Butler's vocational independence should be assessed. As a part of that process, the Corporation obtained completed questionnaires from both Mr Butler’s general practitioner and from Mr Butler himself.

[107] The general practitioner's questionnaire is dated 3 February 2010. The original injury diagnosis was recorded solely as "low back injury" and the current diagnosis is recorded as "chronic low back pain". The general practitioner does not refer to hip injury or symptoms.

Vocational Independence - Claimant Questionnaire

[108] Mr Butler also completed a questionnaire dated 23 February 2010, prior to the Vocational Independence Assessment. To the question of description of injuries, Mr Butler states:

> Back problems right leg problems left arm L hand problems.

[109] The second page of the questionnaire requests specific information with respect to various potential problems. Under the heading of 'Bone, joint or muscle problems', Mr Butler states "Back". Under the heading of 'Numbness or tingling', Mr Butler states "Right leg plus left arm hand".

Neurology Outpatients - 7 July 2010

[110] An assessment occurred in the Neurology Outpatients Department. In a clinic letter from 7 July 2010, the assessor records:

> His current lower limb symptoms involve the right leg only. He is unable to walk for any prolonged distance without getting pain. The pain can vary from anywhere in his buttock down the posterior aspect of his leg, particularly with the most pain in the calf muscle and his heels. It can be painful to touch and it can also have occasional tingling down the leg.

Vocational Independence Medical Assessment

[111] On 7 August 2010, a vocational independence medical assessment was performed by occupational physician Dr Waite. Dr Waite records a "locomotor examination", involving the neck, shoulders, elbows, wrists and hands, thoracic spine, lumbar spine, hips, knees and ankles. Examination of the hips was described as "normal". The specialist concludes:

> Essential findings on examination today indicate some tenderness over the lower thoracic region. There is nothing to suggest a neuropathic type pain disorder. He has a restricted range of movement in the left shoulder and sensory changes in the left forearm over the distribution of the ulnar nerve.

[112] Based on Dr Waite's report, Mr Butler was found to be vocationally independent. That conclusion was overturned by the District Court Judge Beattie's judgment dated 31 July 2013.[32]

Dr Hardy – 28 July and 24 December 2010

[113] Mr Butler was assessed by Dr Hardy, pain medicine consultant, at Wellington Hospital on 28 July 2010. The accident event is noted, and also that Mr Butler "complains of pain in his back radiating down to his leg and also pain in his left shoulder".

[114] Dr Hardy recommended that Mr Butler undergo a comprehensive assessment within the Pain Clinic Service. He did not refer to any hip pathology as a likely cause of Mr Butler's symptoms.

[115] Dr Hardy provided an updated clinic letter of 24 December 2010, referring to ongoing chronic pain in the back and leg and shoulders.

Dr Berry - 15 February 2011

[116] In preparation for an appeal from the Corporation's vocational independence decision, Mr Butler obtained a private assessment and report dated 15 February 2011 from occupational physician Dr Berry. The accident is described in the following terms:

> The incident occurred toward the end of the day when he was carrying a load of cable and equipment and he fell striking his legs and tail bone with sudden pain in his lower back. He finished work immediately and rested overnight and despite ongoing pain he returned to work the following day.
>
> He remained working but because of ongoing symptoms he sought physiotherapy treatment without first seeking medical advice. After having physiotherapy he remained at work he started to get symptoms down his right leg and took some time off work ...

[117] Dr Berry discusses the 'current symptoms' noting that:

> Mr Butler's symptoms have not changed much over the past few years although his pain levels - especially the radiating pain in his leg - have worsened to some extent since stopping medication late last year. He has two sites of pain:

---

[32] *Butler v Accident Compensation Corporation* [2013] NZACC 228.

1. Left arm, cervical spine and occiput and

2. Lower back that radiates into his right leg

…

> The lower back pain he describes as a constant ache at an average of about 5/10 but can increase up to 9/10 as a burning sensation with cramping in· his leg and extreme hypersensitivity in the top of his right foot. It is aggravated by prolonged sitting, bending, jarring and walking on uneven surfaces and once aggravated the increased pain levels can last for weeks. The right foot seems to swell when the pain is aggravated and it also feels colder and the colour is a bit lighter than usual at these times also, but no other changes to the appearance to the right limb as compared to the left. There is no weakness in the right leg although he finds that he limps to avoid weight on his right foot due to discomfort. ...

[118] The examination findings are set out and in relation to the diagnosis "in relation to any ongoing effects of his covered injuries?", Dr Berry states:

> Mr Butler has a central pain syndrome affecting his lumbar spine and right lower leg. Investigations have failed to show any structural pathology but history and examination indicate functional pathology in the neurological system affecting his right leg and lumbar spine.
>
> He may have a similar problem affecting his left upper limb but it seems that ACC is not accepting any cover for this problem. Firm diagnosis of the problem affecting his left upper limb requires further investigation to exclude or confirm some form of structural pathology.

[119] Dr Berry does not present any diagnosis or question pathology involving the hip.

[120] Mr Butler was reviewed by neurologist Dr Mossman, who provided a letter to Mr Butler on 20 June 2011 noting that a recent MRI scan did not show any abnormality to accompany the pain symptoms in his upper body.

Dr Kanji - 12 March 2012

[121] Mr Butler came under the care of musculoskeletal pain medicine practitioner, Dr Kanji. In a clinic letter of 12 March 2012, Dr Kanji states that the right leg "neuropathic symptoms" had become "less intense with the steroid injection performed around the sciatic nerve on the last visit".

[122] A comprehensive general practitioner note from 25 October 2011 records Mr Butler presenting with "nerve problem in right leg".

[123] Dr Baker referred Mr Butler on 10 December 2011 for a neurosurgical review, primarily in relation to the neck and shoulder pain symptoms. Mr Butler underwent assessments with neurosurgeons Mr Wickremesekera, and Mr Hunn, in 2012. The reports are directed only to potential neck pathology on which the District Court on appeal found was caused by 1996 or 2005 accidents and confirmed cover.[33]

[124] On 9 March 2012 Dr Kanji records that following a review, the right sided lumbar spine and leg symptoms had improved significantly, and that the discomfort and paraesthesia are gone most days.

Work and Income Medical Certificates

[125] The review file also includes a number of medical certificates provided for Work and Income purposes. The medical certificates record various ongoing difficulties for Mr Butler, including an intervertebral disc injury, depression, and a central pain condition of organic cause. The certificates did not refer to hip symptoms.

[126] Later in 2012, Mr Butler was reviewed by orthopaedic and spinal surgeon Mr Rietveld, who presents a report again directed toward the neck only.

Dr Kanji – February and April 2013

[127] On 13 February 2013 Dr Kanji records continued right leg symptoms, and states:

> I suspect its compression of the sciatic nerve within the piriformis region. We've performed one nerve block in the past which did give him some relief and I've suggested today that we perform a series of injections in this region to try and see if we can alleviate his right leg symptoms for the longer term.

[128] On 22 February 2013, Dr Kanji reviewed Mr Butler, who presented for a review with neck and back symptoms. Dr Kanji notes:

> He notices that the pain is usually in his right buttock but spreads into his right leg to the level of the calf at times.

[33] Judgment of Judge McGuire dated 16 November 2021 in *Butler v Accident Compensation Corporation* [2021] NZACC 183.

[129] Dr Kanji states that he had reviewed the MRI scan from 2008, and considered that it showed an annular tear at L5/S1, stating that:

> I am almost certain that the L5/S1 disc is the cause of pain for Martin and as I have discussed with Martin the mechanisms of pain generation require a slightly damaged structure, usually pressure and then also depending on the pain sensitivity of an individual.

[130] On 3 April 2013, Dr Kanji records assessing Mr Butler, with a second doctor, 'sports doctor' Dr Thomson:

> We both had a look at it with Stu doing a full examination of the lumbar spine and buttock region and not really finding any reason for the pain and paraesthesia down the right leg. **Examination also reveals no impingement tests positive for the hip.**
>
> [Emphasis added]

[131] As Dr Kanji found no hip impingement signs, he did not think it was necessary in April 2013 to investigate the right hip.

Dr Rajapakse - 11 April 2013

[132] Mr Butler obtained a further private medical assessment, with specialist rheumatologist Dr Rajapakse. Dr Rajapakse states that the:

> Current symptoms are pain down the right leg, exacerbated with activity and pain down the neck and left arm, exacerbated with activity.

[133] Dr Rajapakse concluded that the pain down the right leg was consistent with chronic pain syndrome. Dr Rajapakse did not propose a hip injury or pathology.

Mr Oakley - 6 January 2015

[134] A Comprehensive Orthopaedic Assessment Report was provided by Mr Oakley dated 6 January 2015. Mr Oakley considered Mr Butler's case relatively widely including events prior to the 2007 accident. Mr Oakley concluded that Mr Butler presented with chronic pain syndrome and that:

> His pain is predominantly neck, left arm, lumbar spine and right leg.

Mr Hunn - 29 July 2015

[135] Mr Hunn, neurosurgeon assessed Mr Butler, noting ongoing symptoms including low back and right leg pain since the 2007 fall. The pain was described as cramping pain radiating down the back of the leg to the foot. The right foot was described as feeling swollen as if standing in a puddle of water, with the right leg being in constant and at times excruciating pain. Mr Hunn states that "he attributes his right leg pain to his neck problems".

[136] The examination findings are noted, with Mr Hunn also reviewing the lumbar spine MRI from 2008, which "showed no abnormality (this scan was done when his right leg pain was present)".

[137] Mr Hunn discounted Mr Butler's right leg pain as being attributed to any cervical spine pathology. Mr Hunn offered an MRI scan of the lumbar spine, but that was declined by Mr Butler.

Comprehensive Pain Assessment

[138] Mr Butler underwent a comprehensive pain assessment. Reports were provided from various assessors dated 19 August 2015, and that included Dr Berry (who had provided the earlier report for Mr Butler in the vocational independence challenge). The assessors concluded that:

> Mr Butler had symptoms and signs consistent with central sensitising of the pain affecting his right leg and probably also his left arm... .-

Dr Kanji - 30 August 2016

[139] Dr Kanji reviewed Mr Butler on 30 August 2016. His assessment on that date is the first specific reference to the hip as a symptom generator, although the notes incorrectly refer to the left hip. Dr Kanji states:

> Examination today reveals impingement testing of the left hip and external rotation of the left hip aggravate pain and I do wonder if the left hip is the source of Mr Butler's symptoms in the lumbosacral leg region.

[140] Dr Kanji records referring Mr Butler for an MRI of the 'left hip', noting also that:

> We have injected this hip before with anaesthetic and steroid with 2 to 3 weeks relief; hence I suspect his left hip is a source of pain and this certainly needs to be excluded as hips can refer to the buttock and lumbar spine region and all along we may in fact have been dealing with a left hip problem after his accident in 2007...

Right Hip MRI - 14 September 2016

[141] A right hip MRI was reported as showing a range of changes including:

(a) Early articular cartilage loss;

(b) Small longitudinal tear of the base of the mid anterior acetabular labrum, with labrum fraying;

(c) “Although alpha angle is normal there is loss of anterosuperior femoral head sphericity as seen on radiographs".

Dr Kanji - 12 October 2016 to 30 January 2017

[142] In a letter to the physiotherapist, Dr Kanji states that:

> Martin was carrying 40 kgs when he fell off his deck in 2007 and I wouldn't be surprised that the pain he's been experiencing in his right leg since this time is from his hip joint. Subsequently over the years he's developed some arthritis in the hip.
>
> Indeed when he had his accident he did have a site of pain in both his hip and gluteal muscles, so this is consistent with what happened with his fall.

[143] Dr Kanji considered that the MRI scans were in fact "100 per cent normal" and that:

> Mr Butler's symptoms are more likely due to his right hip, rather than his lumbar spine. It really is a case of no-one looking at the hip and instead diagnosing degenerative and mechanical back pain.
>
> People with hip pain can have referred pain into the lumbar spine on the basis of myofascial trigger points and conversant referred pain.

[144] In an email from Dr Kanji to Dr Ames of 23 November 2016 Dr Kanji stated:

> ACC are happy to accept that Martin has a disc prolapse on the advice of Mr Hoffman, however the MRI scan that I have included below shows pristine discs in the lumbar spine. The hip can also cause pain in the buttock and refer down the leg. I am currently performing a randomised control trial of traction for chronic low back pain

> over six months duration and over half the patients referred for chronic low back pain have been excluded due to hip pain. Hip and back pain co-exist in many lumbosacral pain patients. It is obvious he does not have disc prolapse and more likely he sustained hip damage during the fall that is biomechanically consistent with his injury. It does not really matter if a twisting or jarring incident. The objective verifiable data (MRI scans) show hip damage but no lumbar spine damage. When Martin presented there was no objective data but clinical opinion that was probably wrong in hindsight. Now that we have some objective data it may be prudent to update the diagnosis from lumbar spine to left hip. [It is undisputed that the reference to left hip should be to right hip.]

[145] On 30 January 2017, Dr Kanji provided a report at the request of the Corporation which requested that Dr Kanji review the original physiotherapy records. Dr Kanji states:

> There is nothing in the physio notes that is contrary to him having sustained an injury to the right hip such as the labral tear seen on the MRI scan 14/9/2016. He has had ongoing symptoms since this time and the pain from the hip/buttock has referred into the posterior lumbosacral region.

Dr Ames - 31 January 2017

[146] The Corporation received advice from one of its internal medical advisors, Dr Ames, noting earlier advice he had provided, and stating:

> Again, as noted there are reports that indicate the hips were examined and no abnormal findings were found. I think that Dr Kanji's link to the 2007 is one of speculation rather than fact. Labral tears of the hip are said to be quite common. The cause of the tears is unknown in some 75 per cent of cases. Tears are said to be related to osteoarthritis (OA) although it is not clear if the OA develops first and then the tear.
>
> All in all I can find nothing that suggests he sustained a labral tear in 2007 and I would still have to decline adding right hip labral tear to the diagnosis list.

Cover Accepted and Revoked

[147] On 1 February 2017, the Corporation issued two decisions to Mr Butler. The first decision advised that cover for a right hip labral tear was provided as a deemed decision, as the Corporation had not met its statutory time limits for issuing a cover decision. The second decision from 1 February 2017 advised that cover for the labral tear was revoked. That was on the basis that cover for that injury could not be approved as a work injury.

Mr Phillips' Report - 31 August 2017

[148] Orthopaedic surgeon, Mr Phillips, provided a report to the Corporation noting that his review of the records did not identify any specific reference to loss of control of the hip, or a sudden rotatory motion affecting the right hip:

> Having reviewed the notes of the physiotherapist, Mr Hoffman and then subsequently Dr Harman between 2007 and 2010, the predominant documentation suggests a lower back sprain. This is a result of falling through or slipping on an unstable deck and jarring the patient's trunk and/or body. I cannot find any specific reference to loss of control of the hip or a sudden rotatory motion affecting the right hip, although during the sudden and unexpected nature of such an injury, a hip injury could occur. It is on this basis that I offered the possible supposition that the state of Mr Butler's hip in 2007 could be a result of an injury in 2010.
>
> Having subsequently had the opportunity to review the notes and correspondence at the time, it does appear that a hip injury is probably unlikely.
>
> There is initially a description at the time of the injury of pain radiating to the hip on the right side. Subsequent documentation from Mr Hoffman in February 2008 though states that the pain was 'initially thoracolumbar'. It is now lumbar and does not radiate. Certainly the documentation from Kapiti Coast Physiotherapists and his doctor Dr Krivan at that time emphasised pain in the lumbar spine.
>
> There are several examples in the first two years after the injury where clinicians and physiotherapists have examined the right hip and had not found any issue.
>
> One then has to look at the context of Mr Butler's MRI scan in 2017. This scan essentially shows early osteoarthritis of the hip. The aetiology of this could be post-traumatic from a single event or could be degenerative in nature.
>
> It is more likely that if a hip is to become post-traumatically osteoarthritic at the age of 51,[34] then a singular event that initiates this physiological change in the joint should be clearly manifest upon history and examination at the time. It does appear on review of the available documentation that such circumstances were not evident.
>
> I therefore think it is more likely that the changes in the MRI scan are related to degenerative change. I do note that there is a past history of kickboxing or martial arts and this may have contributed to this with the association with some degree of femoroacetabular impingement.
>
> In summary, from my review of the notes there is little evidence to suggest there was a primary injury to the hip joint, although this could not be completely excluded, although all documentation points to the lumbar spine being sprained. The history at the time and in the subsequent several years having been reviewed by several clinicians, once more, tends to comprehensively point to the lumbar spine, with some reference to radiation into the right leg, but at the same time examination of the right hip appears to be normal.

[34] It is undisputed that the reference to age 51 is an error and that Mr Butler was aged 41 at the time referred to by Mr Phillips.

> Whilst there is no doubt that Mr Butler has an early degree of osteoarthritis in his hip, which now appears to be symptomatic with regard to his history and examination, it is difficult to find a consistent and convincing link to the injury in 2007.

Ms Tan's Review Decision

[149] Mr Butler sought a review of the Corporation's 1 February 2017 decisions. Reviewer Tan gave a decision dated 29 December 2017 determining that the Corporation's decision revoking cover was wrong, as further inquiry was required. Ms Tan quashed ACC's decision with directions that ACC obtain further reports as follows:

> 1. Mr Phillips as to the likely cause of Mr Butler's right hip labral tear, taking into account the description of the mechanism of injury as set out below:
>
> > At work slipped and fall [sic] on decking (stood on piece of unscrewed wood that didn't reach other bearer) average fall, twisted back hurting lower back - central Lx, radiating out to the hip, and glut [sic].
>
> and
>
> 2. Dr Kanji as to his opinion on the most likely cause of Mr Butler's right hip labral tear following his report of 9 May 2017 in which he hypothesised that if Mr Butler's pain goes away following the injection received that day, then 'there is a greater likelihood of right hip pain'. A clear report following this injection given to Mr Butler on 9 May 2017 has not been produced.

[150] Reviewer Tan also stated:

> At the hearing, I stated that I accepted that there was a twisting injury, and made reference to the original injury description provided on the Injury Claim Form which I have accepted is the most detailed description of the accident that occurred on 7 July 2007.

Mr Phillips' Further Report

[151] On 11 January 2018 the Corporation wrote to Mr Phillips seeking an updated report in the light of Reviewer Tan's first direction specifying the description of the mechanism of injury. Mr Phillips responded on 16 February 2018, stating in full:

> Thank you for your letter with regard to Martin Butler. I am unable to provide a firm opinion as to the likely cause of Martin's right hip labral tear. It appears that there are varying reports with regard to the injury and how he presented at the time. The notes that I reviewed as per August indicated to me that upon repeated review by physicians and physiotherapists there was little to suggest that there has been an acute injury to the hip. I would therefore think it is most likely that any changes seen on MRI scan

> with regard to the labrum (which are very common in this age group) are either the result of normal aging processes or of a repetitive type injury.
>
> I cannot completely exclude that the described injury did not cause damage to the acetabular labrum, but the lack of supporting documentation from physicians and physiotherapists at the time suggests to me that this is less likely.

Dr Kanji's Further Report

[152] The Corporation also wrote to Dr Kanji requesting, in terms of Reviewer Tan's second direction, a clear report of the outcome following Dr Kanji giving Mr Butler an injection given on 9 May 2017 and Dr Kanji's opinion on the most likely cause of Mr Butler's right hip labral tear. Dr Kanji responded on 24 January 2018:

> Martin has had low back and leg pain since this incident. With the MRI scan of the lumbar spine showing little to cause his pain I suspect he has had referred pain from the hip into the leg and this has been misdiagnosed as a lumbar problem. The fall that he describes is a likely way to tear a labrum and injure the hip joint.

Dr Wilson - 5 March 2018

[153] The Corporation requested advice from one of its internal medical advisors, Dr Wilson.

[154] In an opinion dated 5 March 2018 Dr Wilson noted that there was no evidence to support a hip injury occurring in 2007 causing a labral tear with subsequent osteoarthritis. From her review of the medical notes Dr Wilson noted that the claim was lodged by a physiotherapist on 12 September 2007. Hip tests were unremarkable. There was no catching or locking. Mr Butler had no groin pain. He had pain radiating to the right. Dr Wilson acknowledged that pain from other body sites can overshadow concurrently injured sites but that this is short term phenomenon. Five months after the accident Mr Hoffman had reported that the pain did not radiate and the hip and knee were normal. Dr Harrison, Rheumatologist, on 9 February 2009 diagnosed back pain only and reported straight leg raising as normal, tendon reflexes as normal and there was no abnormality in the peripheral joints.

[155] Dr Wilson considered that positive examination findings were not recorded until 2016 and that:

> I think it would be difficult for so many specialists to miss the signs of a hip labral tear. All reported hip examinations prior to 2016 were normal. It is also noted that even if there was evidence of a twist of the hip this would not be sufficient to cause a labral tear.

[156] Dr Wilson noted that some medical evidence was missing from the file including an MRI scan of the spine, the bone scan, and plain hip x-rays. Dr Wilson requested that those be obtained for her review. The costs of carrying out the imaging had been met under Mr Butler's accident compensation cover.

[157] On 6 March 2018 the Corporation wrote to Mr Butler, seeking his consent to obtain that imaging from Pacific Radiology and asking for a reply by 16 March 2018. Mr Butler responded but did not address this question. On 15 March 2018 the Corporation wrote to Mr Butler again on this question. Mr Butler replied on the same day, stating that he considered the Corporation was required to issue a decision that same day. The Corporation made its decision declining cover on 10 April 2018.

[158] However at the same time, the Corporation continued to provide Mr Butler with the opportunity to consent to provision of the further medical evidence, so that a further comment from Dr Wilson could be obtained. Dr Wilson notes that further comment could be sought from Mr Phillips, in particular on some of the imaging. It appears Mr Phillips would have had that imaging available to him, following Dr Kanji's referral to him. There is no evidence to indicate that this imaging information was ever provided by Mr Butler or Mr Phillips.

[159] In an updated report dated 28 March 2018 Dr Wilson noted:

> Unfortunately the client has refused consent for the additional relevant information to be obtained.

[160] She when on to state:

> The client has hip CAM morphology. CAM morphology is a common radiological finding and developmental abnormality that arises in adolescence and would have been present at the time of the event in 2007. Patients with CAM morphology even in the presence of a labral tear can remain asymptomatic (85 to 95 per cent) It is clear that the client was not symptomatic in his right hip until many years after the event.
>
> CAM morphology causes impingement (a type of femoro-acetabular impingement) where there is repetitive shearing and compressive forces on the labrum and the articular cartilage at the same location. Over time this impingement can lead to chondral damage, labral pathology and eventually osteoarthritis. This process occurs due to the fact that the aspherical femoral head is in effect too large for the acetabulum in at least one plane.
>
> The mechanism for a traumatic labral tear involves a significant force (not a low speed twist).

[161] As a general observation, CAM morphology of the proximal femur is an abnormal contour of the femoral head-neck junction of the hip present in approximately 15% to 25% of the asymptomatic population, predominantly in males.

[162] Dr Wilson concluded with three references to medical journal articles and recommended:

> I recommend that Mr Phillips be asked to provide a summary of the imaging findings we are missing as well as an opinion as to whether it is more likely than not that the mechanism as described by the client in 2007 caused a labral tear.

The Corporation's Decision

[163] On 10 April 2018 the Corporation made its a decision declining cover for Mr Butler's right hip labral tear after considering the medical information. The Corporation decided that Mr Butler's right hip labral tear was not caused by the workplace accident of 7 September 2007.

Causation Analysis of the Medical Evidence

[164] In weighing the medical evidence from several clinicians between 2007 and March 2018, two significant features emerge:

(a) Right hip symptoms were observed, among a number of other persistent symptoms (pain in the back, neck, left arm, and, latterly, the left leg).

(b) When comment was made about Mr Butler's right hip symptoms, and when his hip was examined, there was no indication or suggestion raised that this may have been due to an injury such as a labral hip tear, with the exception of one very brief comment in a physiotherapist note in November 2007 which records "possible hip sprain".[35] Although that possibility was identified, no hip sprain was then diagnosed and it appears that further investigation of that possibility was not considered a priority.

[35] Request for Prior-approval of Treatment, Kapiti Coast Physiotherapy, 5 November 2007.

[165] The key medical evidence relied on by Mr Butler begins with Dr Kanji's 30 August 2016 comment, which put the question of whether the 2007 accident may have caused an injury to Mr Butler's right hip in issue. On that occasion, Dr Kanji noted that Mr Butler had impingement of the hip and external rotation of the hip aggravated his pain. Dr Kanji arranged for an MRI of the hip.[36]

[166] The 14 September 2016 MRI scan identified the presence of a small right hip labral tear. In his subsequent comment of 12 October 2016, Dr Kanji raised the possibility that the labral tear may have been caused by the 2007 accident. He states that it is likely that the hip is the cause of his symptoms. In a further comment of 30 January 2017, Dr Kanji states there is nothing in the physiotherapy notes contrary to having sustained an injury to the right hip such as the labral tear.

[167] In a brief further comment by email on 24 January 2018, Dr Kanji added:

> Martin has had low back and leg pain since this incident. With the MRI scan of the lumbar spine showing little to cause his pain I suspect he has had referred pain from the hip into leg and this has been misdiagnosed as a lumbar problem. The fall that he describes is a likely way to tear a labrum and injure the hip joint.

[168] This does not directly satisfy Reviewer Tan's direction for a clearer explanation report/opinion on causation in the light of the outcome of the injection given to Mr Butler on 9 May 2017.

[169] I am not persuaded that Dr Kanji's evidence provides a well-reasoned explanation or otherwise establishes on the balance of probabilities that the right hip labral tear injury identified in 2016 was caused by the 7 September 2007 accident.

[170] Of those who examined his hip symptoms over the years, the only one to suggest that any injury to the hip was caused by the 2007 accident was Dr Kanji, in 2016. Dr Kanji had previously consulted with Mr Butler a very large number of numerous occasions dating back to 2011.

---

[36] See footnote 1 above. The 30 August 2016 comment makes several references to the left hip. It is common ground that Dr Kanji's references to the left hip were an error and he intended to refer to the right hip.

[171] Dr Kanji hypothesised that the 2007 accident could have caused the injury but provides little in the way of explanation or rationalisation of that hypothesis. He variously expresses the likelihood that the 2007 accident having caused the injury as something that he "wouldn't be surprised" by, or that the physiotherapy notes did not contradict Mr Butler having sustained a hip injury in 2007, or, at its strongest, that Mr Butler's fall is "a likely way to tear a labrum and injure the hip joint."

[172] Dr Kanji does not address or explain why his initial assessment in 2013 of the right hip found no impingement sign, but that symptom was present on 30 August 2016 (which in part triggered Dr Kanji's further inquiry leading to the labral tear hypothesis). He does not explain why other possible causes of Mr Butler's right labral hip tear are less likely to apply. Mr Butler's right hip was physically examined by several health professionals over several years following the 2007 accident and took into account the descriptions of symptoms given by Mr Butler. The view was consistently taken that there was no physical injury in the right hip.

[173] Medical comment in response to Dr Kanji's suggestion, that the labral tear may have been caused by the 2007 accident, was received from:

(a) Branch Medical Advisor Dr Ames, on 21 November 2016 and 31 January 2017;

(b) Orthopaedic surgeon Mr Phillips, on 31 August 2017 and 16 February 2018;

(c) Internal medical advisor Dr Wilson, on 5 March 2018, with further comments added to that report on 28 March 2018.

[174] On 21 November 2016, Dr Ames discussed Dr Kanji's suggestion that the labral tear was caused by the 2007 accident. Dr Ames noted that no suggestion of a tear was picked up in the earlier medical examinations, and that Mr Butler's hips had been recorded as normal in a VIMA[37] carried out on 7 August 2010.

---

[37] Vocational Independence Medical Assessment

[175] On 31 January 2017, Dr Ames adds to his earlier comment, noting that:

(a) Nothing on the medical record suggests he sustained a labral tear in 2007;

(b) Mr Butler's hips were examined following the 2007 accident, and no abnormal findings were noted; and

(c) Labral tears are common, particularly in males in Mr Butler's age group, are understood to be related to osteoarthritis, and in many cases the cause is often unknown.

[176] Mr Phillips' reports set out why he does not consider it likely that the 2007 accident caused the labral hip tear.

[177] In his 31 August 2017 report, Mr Phillips notes that Mr Butler was originally referred to him by Dr Kanji. He explains that, having reviewed Mr Butler's extensive medical notes, it appears that a hip injury is probably unlikely for several reasons:

(a) Medical notes between 2007 and 2010 predominantly focus on lower back pain;

(b) Most significantly, in the two years after the injury clinicians and physiotherapists examined Mr Butler's hip - during a period in which he was experiencing hip symptoms - and no injury was identified. When the MRI showing early osteoarthritis is considered in that light, Mr Phillips considers it is more likely that the injury is not post-traumatic.

[178] Mr Phillips' description of the accident event uses the phrase "jarring the patient's trunk and/or body" and does not refer to the words in the accident description confirmed by Reviewer Tan "… average fall, twisted back hurting lower back …". Mr Phillips states that he could not find any specific reference to loss of control of the hip or a sudden rotatory motion affecting the right hip. However Mr Phillips frankly acknowledges that given the sudden and unexpected nature of an accident of this sort, a hip injury could occur. This is consistent with Dr Kanji's acknowledgment on 23 November 2016 that "It does not really matter if a twisting or jarring incident".

[179] In his short comment of 16 February 2018, Mr Phillips frankly acknowledges that while he cannot completely exclude that the described injury did not cause damage to the labrum, the lack of supporting documentation suggests that it is less likely. He notes:

> It appears that there are varying reports with regard to the injury and how he presented at the time. … Upon repeated review by physicians and physiotherapists there was little to suggest that there had been an acute injury to the hip. I would therefore think it is most likely that any changes seen on MRI scan with regard to the labrum (which are very common in this age group) are either the result of the normal aging process or of a repetitive injury.

[180] A final assessment of the medical evidence was carried out by internal medical advisor, Dr Wilson. Dr Wilson agrees with the tenor of Mr Phillips' report, stating:

> In my opinion there is no evidence to support that a hip injury occurred on 07/09/2007 and caused a labral tear and subsequent [osteoarthritis]. Positive examination findings were not recorded until 2016. I think it would be difficult for so many specialists to miss the signs of a hip labral tear. All reported hip examinations prior to 2016 were normal. It is also noted that even if there was evidence of a twist of the hip this would not be sufficient to cause a labral tear.

[181] Dr Wilson sought further examination of some imaging. Mr Butler declined to consent to the Corporation seeking those images. I do not see any reasonable basis for Mr Butler's decline to consent to disclosure of imaging records to assist the Corporation to properly assess his claim for cover. It is unknown whether those imaging records are favourable or unfavourable to Mr Butler's case for causation.

[182] In her comments of 28 March 2018, Dr Wilson noted that Mr Butler has CAM morphology, which increases the likelihood of hip pathology and osteoarthritis, further supporting the suggestion that Mr Butler's hip pathology was not traumatically caused.

[183] Dr Kanji's evidence can be summarised as confirming that the accident event could have caused the injury, and that it is possible that in Mr Butler's case it did so. Mr Phillips' assessment is not inconsistent in that he acknowledges that an accident of the kind suffered by Mr Butler in 2007 could potentially cause a right hip labral tear. But Mr Phillips' opinion was that it was unlikely in this case. The possibility that the 2007 accident caused the labral tear is speculative and is not supported by the evidence.

[184] As a matter of common sense, just because it is possible for an accident event and injury mechanism to cause a particular kind of physical injury, does not mean that it actually did so. Here, there are many factors that weigh against that inference.

[185] A very large number of health professionals[38] examined and assessed Mr Butler. Dr Ames, Dr Wilson, and Mr Phillips provide a clear explanation for the conclusion that while a traumatic cause cannot be excluded, it is more likely that the right labral hip tear is not traumatic. I consider this to be more likely than not on the evidence for several reasons:

(a) The diagnosis was lower lumbar sprain but hip symptoms were not overlooked and were investigated.

(b) Other medical opinions diagnosed a pain syndrome as the cause of Mr Butler's symptoms[39] or nerve related pain.[40]

(c) Mr Butler was examined by numerous health professionals on many occasions between 2007 and 2016 and was assessed based on symptoms described by Mr Butler at each consultation. None of them diagnosed a labral tear or suggested that one may be present.

(d) Although pain in the right hip of variable nature and degree was reported at the time of the 2007 accident and subsequently, the large number of examinations of Mr Butler's hips in the years immediately following the 2007 accident found the hips to be normal and did not positively identify a physical injury to the right hip in the form of a labral tear. This was not a case, as submitted by Mr Butler,[41] of the majority of health professionals focussing on a primary diagnosis of lower lumbar sprain and overlooking a secondary injury of a right hip labral tear.

---

38 Including physiotherapists, orthopaedic surgeons, neurosurgeons, neurologists, rheumatologists, an anaesthetist, occupational physicians, general practitioners, a sports medicine practitioner and a musculoskeletal medicine practitioner.

39 Dr Berry, Dr Rajapakse, Mr Oakley.

40 Dr Kanji trialled injections to the sciatic nerve which provided some relief in pain symptoms.

41 Relying on *Anderson v Accident Compensation Coporation* [2013] NZACC 80 where a claimant seeking cover for an injury to his ankle had initially been overshadowed by more significant physical injuries of fractured ribs.

(e) The right hip labral tear was not identified until nine years after the accident event.

(f) The impingement in Mr Butler's hip developed sometime between 2013 and 2016, several years after the accident.

(g) A labral hip tear is a relatively common non-traumatic injury for a male of Mr Butler's age to sustain, particularly in light of his CAM morphology.

(h) It is common to not be able to identify the cause of a labral hip tear.

[186] It is true that some of the health professionals used a variant of the original accident description/injury mechanism in the injury claim form dated 12 July 2007, but I do not think these led to failure to diagnose a right hip labral tear.

(a) Some (but by no means all) records do not refer to hip pain, but Mr Butler's right hip was examined and assessed as normal on many occasions.

(b) Mr Butler was critical of Mr Phillips' note "that there is a past history of kickboxing or martial arts and this may have contributed to this [degenerative change] with an association with some degree of femoroacetablular impingement".[42] The *possibility* referred to by Mr Phillips was reasonably based on references in the medical notes to Mr Butler having participated in the sport of "bruce lee fighting"[43] or "kick-boxing",[44] which reflect what Mr Butler told the relevant health professional.

(c) It is not in dispute that Mr Butler was carrying work materials and equipment of significant weight at the time of the 2007 accident and that this is not always specifically referred to in some of the medical notes. I do not consider that this has any bearing on the likelihood of the 2007 accident causing Mr Butler's right hip labral tear.

---

42 Mr Phillips' 31 August 2017 report.
43 Paragraph [66] above.
44 Paragraph [75] above.

(d) Omission of reference to a twisting fall as distinct from jarring is unlikely to have made any difference. Dr Kanji himself acknowledged on 23 November 2016 that both a jarring or twisting fall were capable of causing a labral hip tear. Mr Phillips acknowledged that a hip injury could occur following an accident to the kind that happened in 2007. However the many other factors identified by most of the health professionals make it less likely that the 2007 accident caused the right hip labral tear in Mr Butler's particular case.

[187] Mr Butler submitted that the District Court in 2021 took a different view to a large number of health professionals when it held on appeal that Mr Butler's cervical injury was caused by a 1996 car accident or a 2005 accident involving a hot water cylinder falling on Mr Butler.[45] Mr Butler argued that Mr Hoffman's 2008 assessment and opinion was that Mr Butler had no major structural injury, but Mr Butler was later diagnosed to have a cervical injury which the District Court held in 2021 was caused by accidents in either 1996 or 2005. Mr Butler argued that Mr Hoffman's incorrect opinion influenced and clouded the impartial assessment by other clinicians and that the opinions of all the health professionals except Dr Kanji should be given less weight.

[188] The District Court's 2021 decision relating to the cause of Mr Butler's cervical injury is not relevant to the current appeal. The cervical injury diagnosis was not in dispute and the issue was whether that injury was caused by one or other of 2 accidents. The 2021 decision records that Mr Butler's claim for cervical injury was not made until 2011, three years after Mr Hoffman's examination in 2008, and that Mr Butler's cervical symptoms had developed over several years after either of the accidents relied on in 1996 and 2005. In these circumstances it is by no means certain that Mr Hoffman's 2008 opinion was incorrect on the information then available to him.

[189] There were no radiological records available from the time of either the 1996 or 2005 accidents but the consensus of medical opinion (including from a Clinical Advisory Panel of the Corporation) was that Mr Butler's cervical injury was more likely post-traumatic than related to non-injury factors. In marked contrast, in the current appeal there is considerable medical evidence available from the time of the 2007 accident and the years immediately

following and there is far from any consensus that the cause of the right hip labral tear was post-traumatic. The evidence relating to the right hip labral tear weighs more toward a likely non-traumatic cause.

Conclusion

[190] After considering all the evidence, I am satisfied on the balance of probabilities that Mr Butler's right hip labral tear injury was not caused by the 2007 accident. The necessary causal nexus between the accident and the right hip labral tear injury has not been established. There is insufficient evidence to show that the Corporation's decision and the second Review Decision were incorrect.

[191] The second Review Decision is correct in concluding that Mr Butler is not covered for a right hip labral tear.

Result of Second Appeal

[192] The second Review Decision is maintained.

[193] The second appeal is dismissed.

Costs

[194] Although Mr Butler is unsuccessful on the second appeal, I make no order for costs.

Summary of Outcome of Both Appeals

[195] The first appeal ACR 61/18 is dismissed.

[196] The Review Decision dated 29 December 2017 of Reviewer Tan is maintained.

[197] There is no order for costs.

[198] The second appeal ACR 64/19 is dismissed.

---

[45] *Butler v Accident Compensation Corporation* [2021] NZACC 183.

[199] The Review Decision dated 21 February 2019 of Reviewer Woodhouse is maintained.

[200] There is no order for costs.

I C Carter
District Court Judge

Solicitors/Representatives: Appellant in person
Meredith Connell, Wellington for respondent