

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 166 ACR 124/21

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPEAL UNDER SECTION 162(1) OF
THE ACT

BETWEEN SOUTHERN TRANSPORT COMPANY
LIMITED
Applicant

AND NICOLA EMTAGE
First Respondent

AND ACCIDENT COMPENSATION
CORPORATION
Second Respondent

Submissions: N McAllister for the Applicant
P O'Sullivan for the First Respondent
I Hunt for the Second Respondent (abiding the Court's decision)

Hearing: On the papers

Judgment: 16 October 2023

JUDGMENT OF JUDGE P R SPILLER

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge McGuire, delivered on 24 May 2023.¹ The central issue in the appeal was whether a Reviewer correctly dismissed Ms Emtage's application for review against

¹ *Emtage v Accident Compensation Corporation* [2023] NZACC 84.

the decision of Gallagher Bassett, dated 22 December 2020, revoking cover previously granted by the Corporation for contusion of Ms Emtage's lower back. The Court allowed the appeal, for the reasons outlined below.

Background

[2] From February 2016, Ms Emtage was employed as a driver by Southern Transport Limited (an accredited employer with the Corporation). Her role involved driving and operating waste collection trucks.

[3] According to Ms Emtage, on 11 March 2019, she sustained an injury when she was operating a truck and collecting green waste on Racecourse Road, Invercargill. Ms Emtage states that she then worked a full day, and worked for the remainder of the month with no apparent issues or visible injury or impediment. She continued to perform the full range of duties for her position until 6 May 2019.

[4] On 6 May 2019, Ms Emtage attended her GP, Dr Wali Kamali, following an incident at her home, which she described as occurring when she was getting dressed. She said that she had one foot in her pants when she became locked in that position and could not move, and that she had to call her ex-husband for help. She referred to texts sent to Mr Chris Smyth, her Operations Manager, which stated:

Was great til I got up ... now pretty much crippled. Can't walk. Drs. Chiropractic or fucken ane ... I don't care. Whatever I can get in to see ... will keep you updated ...

Docs at 12.15. ...

2 weeks...got cert. Booked in for xrays and physio ... ffs"

[5] On 6 May 2019, Dr Kamali completed an ACC injury claim form, giving the description of injury as: "Got hit by a heavy bar of the truck while emptying bin – paid work – impact with a sharp object." Dr Kamali recorded the accident date as 3 April 2019. Dr Kamali's diagnosis was contusion of Ms Emtage's lower back. Dr Kamali also lodged a medical certificate with the diagnosis being a back and right hip injury.

[6] On 7 May 2019, Ms Emtage's lumbar spine and right hip were x-rayed. The following findings were recorded by Dr James Letts, Radiologist:

Lumbar spine: Mild broad based lower lumbar scoliosis convex to the left.

Disc height preserved

No fracture identified.

Mild osteoarthritic change involving the right side facet joints at the L4 and S1 levels.

Pelvis and right hip

SI joints normal.

Mild osteo arthritic change involving the right hip joint with early marginal osteo phytosis, but preservation of joint space.

The left hip joint is normal.

[7] On 7 May 2019, the Corporation accepted Ms Emtage's claim for cover for a lower back contusion.

[8] On 16 May 2019, Ms Emtage texted Mr Smyth as follows:

I have a labrum tear in my hip. Physio and docs have me off for another 2 months ... need MRI and a waiting app with ACC doc Im honestly in shock. Was expecting work Monday got paperwork here for you. Me deliver or Katy.

[9] On 17 May 2019, Mr Mitchell Van Schalk, Physiotherapist, reported to Dr Kamali:

I reviewed your client on 16.5.2019 after she was working, with a heavy steel plate landed on her right thigh and she stepped back, twisting her hip joint. She is struggling walking, sleeping, sitting and lying for a period of time. She complains of a moderate achy/burning pain in her quad and a strong sharp popping click in her right hip JT. Once the hip pops, it is very painful, she struggles to walk and must rotate it a certain way to unlock it as the x ray was clear, I suspect that she has a relatively large labral tear of her right hip and associated femoral neuropraxia. She is very sensitive, so I have given her some hydrotherapy exercise s to do in the pool to try and strengthen and desensitise the region. I would appreciate your opinion on her condition and whether you think an MRI is appropriate.

[10] On 20 May 2019, the Corporation wrote to Gallagher Bassett ("GB") advising that, under the Corporation's partnership programme, it had transferred Ms Emtage's claim to GB for management. (GB provides Ms Emtage's employer,

Southern Transport, with management services in respect of personal injury claims). On 23 May 2019, GB wrote to Ms Emtage advising of its management of her claim and intended to obtain additional information prior to making a decision about her entitlements.

[11] On 21 May 2019, Ms Emtage completed an incident reporting record referring to an accident happening in Racecourse Road, Invercargill on 5 April 2019. Her description was as follows:

Heavy G/W (green waste) bin would not empty properly. Lifted and shook out more, offset clasp for drum holder spun around during this time when I went to remove bin, drum holder part dropped down, throwing W/B back and plate corner caught my right leg running down length of thigh, throwing me back and tipping on curb.

[12] On 21 May 2019, an initial needs assessment was completed, again with the date of injury as 5 April 2019. This document included the following as to how the injury happened in "Racecourse Road area":

Unloading bin off truck grabbing system lifts up green waste plate attached to lifter offset hook shake the bin for it to come out. Plate hit her on leg once released 10mm plate sliced right down thigh. Will stop muscle damage.

[13] In answer to the question "Did you report it at work?", Ms Emtage responded: "5/4/19 advise Chris (supervisor) of injury". In answer to the question "Did you complete an incident report?", she recorded: "No incident form filled in to date". In answer to the question "Did you stop work straight away and seek medical attention?" she recorded:

Completed shift. Carried on working thinking it will get better.

Getting dressed, turned the wrong way, hip gave way while getting dressed felt like hip was dislocated. 6/5 9.10am.

[14] In response to the question "Do you have any ongoing symptoms?", Ms Emtage recorded: "Range of movement minimal painful. Not strong, no twisting". The report noted that she had had physiotherapy treatment, an x-ray, and an MRI requested by her physiotherapist. The assessment noted that she was taking pain killers. In answer to the question "Do you feel you will be able to return to full

normal capacities at the end of your latest incapacity?”, it is recorded: “Recovering slowly. She is hopefully trying really hard”.

[15] On 30 May 2019, Ms Emtage again saw Mr Van Schalk, who reported:

No change, still sore, moving the hip slightly easier to move the hip now. Heavy plate came unlocked from truck and landed on her R thigh 6/52 ago. It all happened pretty quickly and she stepped back and twisted his R hip. Main pain is in the ant hip and into the thigh, over the six weeks, thigh pain slightly better. Feeling R hip popping very often, which is very sore. Feels like the hip freezes and can't put heel down. Had xrays – nil bony damage, aggs – walking, getting up, no PNN or red flags meds – 50 mm diclofenac. ...

...

Still antalgic gait yesterday, so given crutch to take load off R hip. Needs to cont hydrotherapy. Needs to get a referral.

[16] On 19 June 2019, Ms Emtage emailed Ms Megan Lane, who was employed by GB. The email included the following:

1. Date of injury was 5 April 2019.
2. A 10mm plate attached to the rear of my truck on the bin lifter came loose while I was emptying a heavy greenwaste wheelie bin. As I went to remove the wheelie bin once it was empty, the plate pushed the bin backwards and proceeded to drop and land on the upper part of my right thigh, sliding down the middle of my thigh to just above my knee ... the leg had been bent when the impact began ... also threw me back and I tripped on the curb but managed to stay upright. The weight of the plate stretched the jeans material of my trousers but did not cut through. Managed to complete job and climb back in truck, but pain was so intense I sat in truck crying for a while. Have had increasing problems with right thigh and hip joint since the incident occurred to the point that on 6 May I was no longer capable of working.
3. I reported incident to Chris Smyth, Operations Manager, Waste Division, when I returned to base on 5/4/19. He has a “she will be right” attitude and that was exactly his response when I told him and asked if I should do an incident report.
4. Incident report done as requested by Lochie before he left and was handed in to work ... you should have a copy of this I hope.

[17] On 5 July 2019, Mr Charles Luecker, Orthopaedic Surgeon, reported:

The presence of the osteophyte at the lateral margin of the hip is consistent with mild arthritis of the hip. No further interventions would be indicated and certainly more advanced diagnostic imaging, such as an MRI is not needed in this instance. Symptomatic treatment would be all I would recommend for her

current conditions, but it is likely that if she is begun to have real trouble from her arthritis, it may be some months before things settle to the point where she is able to manage her day to day affairs without undue discomfort.

[18] On 8 July 2019, Dr Kamali noted Ms Emtage's "injury to back and right hip".

[19] On 7 August 2019, Ms Emtage acknowledged in a letter to Southern Transport that she was "unsure precisely what day" the injury occurred. After eliminating the possible dates of injury, Ms Emtage concluded that the injury occurred on 11 March 2019, and the GPS record has her truck in Racecourse Road, Invercargill on that date between 15:14 hours and 15:18 hours. It was this date that Ms Emtage eventually concluded was the date of the accident, when she says the bin lifter plate of truck 204 dropped on her right leg.

[20] On 27 August 2019, Mr John Scanelli, Orthopaedic Surgeon, saw Ms Emtage and noted:

No bruising and no palpable areas of fluid over right thigh. Morei-Lavallee lesion. No evidence of fracture. Recommended an MRI scan and nerve conduction studies to evaluate symptoms.

[21] On 27 August 2019, Ms Emtage advised Mr Smyth as follows:

The date regarding the injury to my right leg did have some confusion behind it, as I was aware I had done it at the beginning of a month and as I was unsure of precisely what day I believed it was April. This is what I told my doctor. He put the 3rd and realising that I was on leave at this time, I requested it be changed to the 5th. Obviously this is also incorrect as it comes down to being in truck 204, on Racecourse Road and doing greenwaste. As the IBright indicates, on 19 March I was in this location and in truck 204 doing greenwaste. However, Chris, you are not at work this week due to it being St Paddy's weekend, a yearly tradition for you. I also did G/W on 11 March. This is the day I believe the incident occurred with truck 204's drum lifter plate dropping onto my right leg. At this time, you were at work and I told you when I returned to base and reported the incident to you. I also asked if I should fill out an incident form at this time and you replied "you'll be right". Now things are obviously not right, if only I could turn back time. Health and safety protocol was not followed by either of us.

Yes, this is nearly a month prior to the 5th of April. I know I have struggled with this right thigh and hip for a long period of time. As you are also aware, I have been dealing with a long line of personal issues, the dog attack on my husband, next the separation, my mother being seriously ill, my daughter leaving the country, my niece being diagnosed with a brain tumour and my

closest friend being diagnosed with a tumour, which she only had a 40% chance of surviving.

Although this has been successful, because it has not affected my work, in fact work has been a godsend in helping me through this time, suddenly finding myself single made work my number one priority, as I could no longer depend or rely on anyone else for income. I felt I needed to keep working even though the injury was deteriorating from week to week. I could just handle the days but found myself in a lot of pain at night. This only escalated to the point I could no longer move on the 6th of May and stayed home. I did not foresee the consequences of this injury, honestly believing that two weeks under medical care would have me, if not fully recovered, then on my way to recovery ...

[22] On 17 August 2019, Mr Lionel Wood, Manager, Vehicle Waste Operations for Southern Transport, acknowledged receipt of Ms Emtage's letter. Mr Wood noted the date that Ms Emtage had confirmed that she had walked into a trailer at home in early April 2019, "but it was a superficial injury to your left leg". Mr Wood further stated:

You have confirmed that you believe your right leg injury was sustained early in a month and initially believe it to be April 2019. You now believe the injury to your right leg was sustained on 11 March 2019, when you were in truck 204 doing the greenwaste. You also provided a photo dated 16 March 2019 showing a cut and a bruise.

We are investigating this to understand the details as to how and when the injury occurred and whether it was sustained at work. There has been conflicting information provided and we are concerned we may not have the full picture.

[23] On 21 August 2019, Ms Emtage signed an authority for her employer to obtain from Mr Scanelli full details of her medical condition.

[24] On 27 August 2019, Mr Scanelli reported:

I discussed with Nicci that I think an MRI scan of her hip and her thigh would be reasonable to rule out anything untoward. I would also like to get some nerve conduction studies to evaluate the nerve type symptoms she has in her lower leg. I discussed if these were both negative, then a referral to pain management for physiotherapy and regional pain syndrome would be the next best way forward.

[25] On 4 September 2019, Dr Kamali recorded "right hip injury".

[26] On 13 September 2019, Mr Smyth wrote to Ms Emtage as follows:

On the 11th of March 2019 I do not recall you telling me that the lifter hit your leg. I would have thought after all the toolbox meetings and being a health and safety rep, you would have known the importance of filling out an incident report as you have done in the past for other things. I was unaware that there was a problem as you had previously complained about a sore hip well before 11 March 2019. It did not come to my attention the lifter had hit your thigh until you went off on sick leave after thinking it was because you had walked into a trailer while you were off on annual leave, in the first week of April 2019. After I was notified that there could be a problem with the plate on truck 204, I got the engineer, Paul, to look at the truck on the 21st of May 2019. Paul, who has built the truck, had a look and could see no reason that this could happen if proper procedures were followed by the operator.

[27] On 13 September 2019, Ms Katy English stated:

Can't remember what day it was, but I do remember Nicci coming in after greenwaste and saying the dump plate had fallen and got her on her right thigh as she hobbled into Chris' office. Also recall Chris saying not to worry about an incident report as she would be right. Also recall all the bitching about the drum plate constantly falling when dealing with the heavier bins.

[28] On 2 October 2019, an MRI was undertaken on Ms Emtage's right hip. Dr Grant Meikle, Radiologist, found that there was moderate hip joint effusion and a degree of hip joint synovitis. There was also a degree of labral tearing. There was also some low-grade bone oedema, with regard to the femoral head. Dr Meikle also noted:

Chondral loss in hip as described likely on the basis of osteoarthritis and the presence of osteoarthritis with labral change and a significant hip joint effusion with a degree of synovitis.

Markers have been placed in areas of concern. Marrow signal is normal. No bony injury is identified. Muscle signal is normal and all muscle groups with no focal muscle or soft tissue injuries seen.

[29] On 3 October 2019, Dr Bill Short, the Corporation's medical advisor advised:

Right hip osteoarthritis associated with labral tearing. Right hip contusion, no lower back contusion as stated on ACC45 form by Dr Kamali. Pain in right hip caused by pre-existing degenerative disease. Right hip osteoarthritis is temporally but not causally linked with the alleged accident at work. The accident won't have caused her right hip osteoarthritis but may have aggravated it.

[30] On 28 November 2019, Dr P K Taylor, Clinical Neurophysiologist, advised that all electromyographic parameters were normal, except motor unit recruitment, which was impaired by pain during any loading of the leg/hip. Dr Taylor added that Ms Emtage's sensory symptoms indicated that she had had some nerve involvement, possibly at L3 level.

[31] On 4 February 2020, Mr Scanelli, reported:

I have been working up Nicola Emtage's right leg pain now for the last few months. In summary, I don't have a clear explanation for her ongoing symptoms. My sense is that she may have some early hip arthritis that is causing the ongoing nature of her musculoskeletal deterioration.

[32] On 1 March 2020, Ms Emtage's new GP, Dr Steiner, wrote to Mr Scanelli:

In her last hip MRI report, there was mention of an ill-defined labral segment and possible labral tear. Based on her story and functional limitation of her right hip, I am suspicious that osteoarthritis would cause such an acute change in her hip function and pain, when a labral tear is in keeping with her story to me.

[33] On 3 March 2020, Dr Scaelli confirmed that Ms Emtage had arthritis.

[34] On 13 July 2020, Ms Emtage's pelvis and right hip were x-rayed. The findings recorded:

There is mild osteoarthritic change seen most marked on the right with subchondral sclerosis and small rim osteophytes. ... No acute bony injury.

[35] On 30 September 2020, Dr Short advised:

Moderate right hip osteoarthritis that may have been aggravated but not caused by the alleged incident at work and it is clear that it would have predated this event. There is no causal link between her diagnosis and the alleged incident at work. Contusion of lower back and right thigh would have resolved. MRI scanning has confirmed no ongoing sign of symptoms. The medical evidence no longer supports ongoing entitlements under the claim.

[36] On 1 December 2020, an ultrasound of Ms Emtage's right thigh found:

There is fluid at the aponeurosis between the sartorius and rectus femoris in the proximal thigh suggesting a tear involving the muscle adjacent to the aponeurosis. There is also fluid along the deep/medial aspect of the sartorius muscle.

There is fluid surrounding the rectus femoris distally, with extension towards the vastus lateralis aponeurosis, again suggesting a (?) of the muscle adjacent to the aponeurosis. There is a change to the normal architecture of the rectus femoris distally. Although there is no evidence of retraction of fibres. The area of altered echotexture involving the central muscle belly likely reflecting oedema or haematoma.

Conclusion

Two probable low grade muscle tears with associated fluid on the adjacent aponeurosis.

[37] On 22 December 2020, Ms Emtage's claim for cover was revoked in accordance with section 65 of the Act:

Cover for your claim has recently been reviewed following a recent review of all the medical information in relation to your claim along with confirmation from the Richardson Group (Holding).

We now advise that the decision of (sic) to accept your claim has been revoked in accordance with Section 65 of the Accident Compensation Act 2001 and your claim is now declined for cover.

Your claim is now declined because there is no supporting evidence that you had an accident as per ACC 45; LZ76532 which resulted in a physical injury.

[38] On 3 January 2021, Ms Emtage applied for a review of the above decision.

[39] On 26 March 2021, Dr Steiner provided an expanded explanation of the ultrasound findings. These included a diagram of the musculature of the thigh, showing the two areas where the ultrasound had indicated injury. The first was on the front of the thigh, just below the hip, and the second was also on the front of the thigh, just above the knee. Dr Steiner said in this report:

The ultrasound findings are consistent with the reported mechanism of injury – a large steel plate falling onto Nicola's leg. The mechanism of injury and the ultrasound findings are consistent with Nicola's physical exam findings. ...

I therefore conclude that the steel plate falling onto her leg has caused the ultrasound findings and physical exam findings, which have severely affected her capacity to perform activities of daily living and job duties.

[40] On 29 April 2021, a review hearing took place in respect of the Corporation's decision of 22 December 2020. On 27 May 2021, the Reviewer dismissed the review. The Reviewer found that there was sufficient evidence that Ms Emtage's injury did not occur in the workplace. In view of this finding, the Reviewer accepted that there were new facts as a result of GB's investigations from which it could be

concluded that the earlier decision accepting cover was wrong. Ms Emtage filed an appeal in the District Court.

[41] On 11 November 2021, Ms Emtage underwent a further ultrasound, which found:

In the mid-thigh, there is an inhomogeneous region, involving the rectus femoris aponeurosis, in the region of the previously seen tear. This likely represents interval healing.

In the distal thigh, a similar inhomogeneous area is identified between the rectus femoris and the sartorius, in the region of the previously seen tear. This also likely represents interval healing.

Conclusion

There appears to be interval improvement, but not resolution of the injured regions, corresponding with the patient's regions of tenderness and symptoms.

[42] On 4 December 2021, Dr Steiner advised:

We have two xrays of the right hip. The first is from 7 May 2019. The second is from 14 July 2020. These studies are separated by 434 days. There are small, non-significant changes in the hip when comparing the two xrays.

The imaging findings are consistent with the documented injury. There are no other documented injuries for Nicola that would explain the imaging findings. In my opinion, it is unreasonable to assume that Nicola's incapacity and her imaging findings were present prior to the injury given that there is a documented injury with sufficient force energy and mechanism that explains her imaging findings and her incapacity.

Given that Nicola has sustained an injury with a mechanism of action and sufficient force energy to cause soft tissue damage consistent with the imaging findings, it should be considered that the injury caused the damage found on imaging findings.

[43] On 26 April 2022, Dr Steve Bentley, Musculoskeletal Physician, having seen Ms Emtage, reported:

In my opinion, the contusion injury by the heavy steel plate onto Nicola's right anterior thigh has caused the following injury:

1. Impaction injury posterior right hip joint, there is evidence of bone bruise, osteochondral injury posterior acetabulum and femoral head, possible small anterior superior labral tear and synovitis. There was mild early osteoarthritis right hip present but a-symptomatic prior to the injury, the xray right hip 7/5/2019 four weeks after the injury shows mild joint space

narrowing and acetabular sclerosis, these changes don't develop in four weeks, but Nicola had no hip joint pain or symptoms prior to the injury. The pre-existing mild osteoarthritis right hip is not the cause of her pain and ongoing problems.

2. Sprain right sacroiliac joint and symphysis pubis, resulting in a right anterior innominate rotation of the pelvis. (Right groin and buttock pain.)
3. Sprain abductors right hip, rectus femoris obturator internus and quadratus femoris associated with pelvis SIJ sprain and innominate rotation. Three years old clinically she has tendinopathy adductors right hip and ? iliopsoas which is weak and dysfunctional, secondary myofascial pain right iliopsoas, rectus femoris, adductor longus, quadratus lumborum and gluteus medius. There was no muscle tear or haematoma quadriceps, adductors or sartorius on MRI scan 20/9/2019 five months post injury.
4. Right gluteus medius tendinopathy evident on MRI scan 2019.
5. Nicola has a weak dysfunctional diaphragm and impaired dynamic neuromuscular spinal stability which perpetuates iliopsoas dysfunction and pelvic dysfunction.
6. Nicola does not have lumbar pathology. She has not injured her lumbar spine. The history and clinical cause is not that of a lumbar sprain or contusion. I have no idea why the doctor who made out the original ACC M45 form diagnosed a lumbar contusion. There is nothing in the history or any reports available to me that indicates lumbar contusion. This diagnosis is incorrect and should be amended to "Right hip and pelvis sprain, contusion right thigh".
7. Nicola has not been assessed and investigated adequately, consequently a decision to reject her injury claim is based on inadequate information, inadequate investigation and incorrect conclusions. Nicola needs further investigation to clarify pathology, sources of pain and specific treatment, including radiologically guided joint injections, including:
 - Repeat MRI scan right hip and pelvis;
 - SPECTNM bone scan;
 - Radiologically guided right hip joint injection with local anaesthetic and corticosteroid;
 - ? right SIJ diagnostic block.

[44] On 19 May 2022, Dr Bentley reported after seeing Ms Emtage again:

I arranged an ultrasound guided right hip joint local anaesthetic injection with ropivacaine and kenacort performed on 1/5/2022 Pacific Radiology. This did not relieve the right groin pain, reduced hip pain a little. She felt more heavy, dead feeling right leg. There was no improvement on right medial thigh pain. Right buttock lateral hip pain or right posterior ilium. This confirms that Nicola's pain arises from other structures outside the right hip joint. ...

Nicola has been quite disabled by her injury, couldn't stand on her right leg, had trouble getting dressed and all ADL, she couldn't actively lift her right leg (flex hip) off the examination couch, let alone climb into a truck. Nicola's employment as refuse collector, waste division, Southern Transport, involves driving a truck, getting in and out of her truck up to 160 x day, drag heavy bins to and from the truck 160 x day ...This is a very physically demanding job, extremely hard, heavy work and Nicola, as discussed, could not and currently cannot possibly do this, she couldn't lift the right leg off the bed. However, she is responding to treatment and rehabilitation. Nicola's rehabilitation is going to take months, but I expect her to recover to her pre-injury level of function or not far from that. Whether she will be able to do the same job remains to be seen.

[45] On 7 July 2022, Dr Bentley reported after seeing Ms Emtage again:

Nicola is making steady progress, she has no groin pain, less medial thigh pain, she has good diaphragm breathing and dynamic neuromuscular spinal stability, the pelvis is level, leg length equal ...Iliopsoas function much improved, there is minimal tenderness, greater trochanter gluteal insertion and she has much better functional stability, pelvis and left leg. She has benefitted from a corticosteroid local anaesthetic injection right SIJ iliolumbar ligament. The right SIJ now not as tender, the right buttock iliosacral pain has pretty much resolved. Nicola is now able to start regular short walks.

[46] On 12 February 2023, Dr Bentley provided a further report:

Nicola gives a very good consistent account of her injury when the heavy steel plate on the back of the rubbish truck fell down and landed, impacted on her right thigh, with immediate pain, right antromedial thigh. ...

She did not want to go off work because she had recently divorced and needed income. Carrying on working, getting up and down into the truck became increasingly difficult, and she would use the left leg to support and climb up into the cab.

[47] On 9-10 March and 19 April 2023, Ms Emtage's appeal was heard by Judge McGuire. At the hearing, Dr Bentley gave evidence in support of Ms Emtage's appeal. Mr Lionel Wood, Manager of Southern Transport, also gave evidence. On 24 May 2023, Judge McGuire delivered judgment on the appeal.

[48] On 12 June 2023, Southern Transport sought leave to appeal the Court's decision. Submissions were subsequently provided by Southern Transport, Ms Emtage and the Corporation. Mr Hunt, for the Corporation, advised that it would abide the decision of the Court, and clarified that Southern Transport sought leave to appeal as an accredited employer, not as an agent for the Corporation.

[49] On 12 September 2023, the appeal was forwarded to this Court for a decision.

Relevant law

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

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

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

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

- (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment ...;
- (ii) The contended point of law must be "*capable of bona fide and serious argument*" to qualify for the grant of leave ...;
- (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed ...;
- (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law ...;
- (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision ...;
- (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law

[25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law

The Court's judgment of 24 May 2023

[52] Judge McGuire analysed the medical and other evidence presented. His Honour stated that he had considered the medical evidence in a more painstaking

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

way than was normal in a case like this. That was because, first, there was and continued to be denial on the part of Southern Transport that there was a work-place injury. Second, because the initial medical focus centred on Ms Emtage's mild osteoarthritis, it seemed to have been an assumption on the part of both respondents that any pain or disability presentation by Ms Emtage derived from her osteoarthritis, or even possibly from an inferentially degenerative spine.

[53] Judge McGuire noted that, although it took until 1 December 2020 before ultrasound of Ms Emtage's right thigh identified two tears, these were verified again by the ultrasound that occurred on 11 November 2021. These two scans quintessentially supported what Ms Emtage had consistently described from the outset as the mechanism of her injury. The scans also supported what Ms Emtage's physiotherapist had recorded as early as 17 May 2019 as a "moderate achy/burning pain in her quad"; and again, on 30 May 2019, as "main pain is in the ant hip and into the thigh".

[54] Judge McGuire noted that the respondents' position was that there was no injury by accident. However, the twice verified ultrasound conclusions in the last paragraph were not challenged by either counsel. Respondents' counsel were left in the position where they had to concede that Ms Emtage's description of her injury event had been consistent throughout. The fall of the steel plate onto her upper thigh, down her upper leg towards the knee, supported the site of the two injuries found on ultrasound. Furthermore, the two injuries lay on the track of the femoral nerve and its branches after it entered the thigh from L3 of the lumbar spine, as shown on the diagram produced to the Court by consent of the parties.

[55] Judge McGuire acknowledged that Ms Emtage's employer initially had justification to be sceptical of her injury claim, given that, from their perspective, it was not raised officially until 6 May 2019. Ms Emtage's response to that was that she was told not to worry about putting an injury claim in at the time.

[56] Judge McGuire noted that experience in this jurisdiction with workplace accidents and their proper reporting showed that, unless there was constant follow-up by diligent employers and safety officers, some would be missed, overlooked or

simply ignored. His Honour was satisfied that, in this case, at least until 6 May 2019, Ms Emtage's accident was overlooked or ignored by her employer, although she reported it on the day that it happened.

[57] Judge McGuire further noted that, in this jurisdiction, there was often a second reality, namely that, when the overlooked or ignored injury did not heal, there was often confusion over when exactly the accident occurred. This was often because where, as here, there was a daily routine, in this case of driving and collecting the bins, the pinpointing of dates and times was more difficult because of the general sameness of daily activities. In this case, on account of GPS and "run sheets", the date of Ms Emtage driving her truck to Racecourse Road, where she was injured, could be confirmed as 11 March 2019.

[58] Judge McGuire acknowledged that the Corporation's scepticism was bolstered by the fact that, on 11 March 2019, Ms Emtage, newly injured, completed her bin collection circuit in good time. It was not until some seven weeks later, on 6 May 2019, that she again reported her injury to her employer, to be met ultimately by disbelief. However, what was not challenged about that was that, on 6 May 2019, Ms Emtage had to call her ex-husband when the effect of her injury meant that she was unable to dress herself.

[59] Judge McGuire noted that he had, at times, been astonished at how some claimants are able to continue to function in a "normal" fashion for weeks after a quite serious injury accident. His Honour found that that occurred here, until 6 May 2019. Ms Emtage had every incentive to keep working. She had separated from her husband and financially she had only herself to rely upon.

[60] Judge McGuire noted that he had taken the time to record in his judgment, in more detail than would ordinarily be the case, the sequence of medical consultations had by Ms Emtage and where those consultations led. This again derived from the stance on behalf of the respondents that there was "no supporting evidence" that she had an accident, as stated in the decision revoking cover, on 22 December 2020.

[61] Judge McGuire observed that the medical records showed that the path to an accurate diagnosis was long. Diagnosis did not become clear until the soft tissue injuries to the thigh revealed by the ultrasound of 1 December 2020 and 11 November 2021 put the matter beyond doubt. The two ultrasounds carried out, showing the two sites of injury high on Ms Emtage's right thigh and also above her knee, comprehensively supported what she said was the mechanism of injury with a steel plate falling high on her thigh, and then down her leg towards the knee.

[62] Judge McGuire noted that, therefore, even if, as the Corporation's counsel asks it to, the Court were to rule that Dr Bentley's evidence was inadmissible in whole or in part, the ultrasound reports, supported by the physiotherapist's record and Ms Emtage's consistent description of her accident, remained as primary proof of her injury by accident.

[63] Judge McGuire acknowledged that it was fair to say that Dr Bentley, as the treating physician, did to some extent advocate on Ms Emtage's behalf and he was critical of the care, or the lack of it, that Ms Emtage received. However, Judge McGuire noted that section 156 of the Act gave the Court a wide discretion to hear and receive all evidence "that it thinks fit", so that justice arising out of the social contract that was the essence of Accident Compensation can be seen to be done.

[64] Judge McGuire added that, in this case, the issue of causation was initially less than obvious and there had been the complicating factors of not only the disbelief on the part of Ms Emtage's employer that an accident causing injury occurred, but also the rather superficial approach taken initially by some of medical professionals and adopted by the respondents, that attributed her problems to the "mild" arthritis that she had. Counsel had not pointed to any prior relevant case where evidence of a medical professional had been excluded as inadmissible. His Honour was in no doubt that Dr Bentley's evidence was substantially helpful for the purposes of section 25(1) of the Evidence Act, even though on occasion his criticism of the evidence of others was clear. Judge McGuire noted that Dr Bentley's words in this case were direct, even blunt, but His Honour found that they were justified by what occurred in this case. Ultimately, therefore, all of the evidence submitted on

this appeal, of which Dr Bentley's evidence was a part, was considered. His Honour found that there were no grounds for Dr Bentley's evidence to be excluded in whole or in part, and it was there to be weighed along with all the other evidence.

[65] Judge McGuire turned to the insistence by Southern Transport that the accident could not have been caused as described by Ms Emtage. His Honour found that this was laid to rest, not only by the other reports on the file of other occasions where the back plate on the truck prematurely dislodged and fell, but also by Ms Emtage's demonstration using the truck, on the second morning of the appeal hearing. In that manoeuvre it was plainly obvious that, had the back plate become loose and dislodged, it would have fallen onto the front of Ms Emtage's right upper thigh and leg above the knee. That demonstration removed all doubt in the Court's mind as to whether such injury by accident was possible.

[66] Judge McGuire found, in summary, that on, 11 March 2019, Ms Emtage suffered the accident that she reported to her doctor on 6 May 2019, which, after erratic medical examinations, proved to be a labral tear and two sites of soft tissue damage on her upper and lower thigh affecting the femoral nerve. Accordingly, in respect of ACR 124/21, His Honour found that the decision of 22 December 2020 revoking cover was wrong and was reversed. Judge McGuire added that it needed to be noted, as Dr Bentley pointed out, that the originally covered injury was misdescribed as a contusion of the lower back when it related to her right hip and thigh.

The applicant's submissions

[67] The applicant submits as follows. It is seriously arguable that Judge McGuire erred in law by making a primary finding of cover for a labral tear and two sites of soft tissue damage on Ms Emtage's thigh affecting the femoral nerve. The Court exceeded its jurisdiction by making a primary finding on cover.

[68] Reversing the decision of 20 December 2020 to revoke cover has the effect of reinstating cover for a contusion to Ms Emtage's lower back. There is no evidence to support this decision, as the medical evidence does not support her suffering a contusion to the lower back.

[69] Ms Emtage has made no claim for cover for an injury to her thigh. There has therefore never been a decision to decline cover for this injury, nor has there been the required first-level appeal through the review process to explicitly deal with this injury. The learned Judge's decision to grant cover is against the Act and a consistent line of authority.

Discussion

[70] In terms of section 161(2) of the Act, where the District Court determines an appeal against a Reviewer's decision by quashing the decision, the Court must indicate the effect clearly. Section 162(2)(b) provides, by way of example, that the Court may "require the Corporation to take the action the court specifies in relation to the Corporation's decision".

[71] In the present appeal, Judge McGuire found that the Corporation's decision to revoke Ms Emtage's cover for her injury (a decision upheld by the Reviewer) was wrong and thus reversed. His Honour thus effectively quashed the Reviewer's decision. Judge McGuire's decision was essentially based on his finding that Ms Emtage's injury was the result of her accident while at work, and so she was entitled to cover for her injury. Judge McGuire then noted that the originally covered injury was misdescribed as a contusion of the lower back when it related to her right hip and thigh. Judge McGuire's finding in this regard was based on:

- (a) The consistent evidence of Ms Emtage, before and at the appeal hearing, as to the nature of her injury;
- (b) The reports of Mr Van Schalk, the treating physiotherapist, of 17 and 30 May 2019;
- (c) The ultrasound reports of 1 December 2020 and 11 November 2021;
and
- (d) The reports of Dr Bentley, the treating Musculoskeletal Physician, and his supporting evidence given at the hearing.

[72] This Court accepts that the cover granted by the Corporation on 7 May 2019 was in respect of a lower back contusion. This description of Ms Emtage’s injury arose out of the diagnosis of Dr Kamali in the ACC claim form that he lodged for Ms Emtage’s injury. However, even prior to the Corporation’s decision, Dr Kamali had submitted a medical certificate with a diagnosis that also referred to Ms Emtage’s right hip injury. Then followed the evidence of Ms Emtage and her physiotherapist referring to her right hip and thigh injury. An MRI report of 2 October 2019 found labral tearing and other conditions relating to Ms Emtage’s hip. On 3 October 2019, Dr Short, the Corporation’s own medical advisor noted that Ms Emtage had “right hip contusion, no lower back contusion as stated on ACC form by Dr Kamali”. Then followed the ultrasound reports and the reports of Dr Bentley, referred to by Judge McGuire. Dr Bentley specifically stated, in his report of 26 April 2022, that the diagnosis in the original ACC form of a lumbar contusion was incorrect and should be amended to “Right hip and pelvis sprain, contusion right thigh”.

[73] This Court finds, in light of the above evidence, that Judge McGuire appropriately used his discretion, under section 162(2)(b) of the Act, to direct the Corporation to restore cover for Ms Emtage’s injury but with an amended description. This Court observes that it would be artificial, inaccurate and unfair at this stage for the restoration of Ms Emtage’s cover to carry the label “lower back contusion”. As noted above, the Corporation’s own medical advisor accepted, some four years ago, that this was the wrong description of Ms Emtage’s injury. The clear medical evidence is that Ms Emtage’s injury is, instead, related to her right hip and thigh. In concurring with Judge McGuire’s decision, this Court has had regard to the case-law cited by counsel for the applicant, but the Court considers that this case-law relates to facts and considerations different from those of Ms Emtage’s appeal.

The Decision

[74] In light of the above considerations, the Court finds that the applicant has not established sufficient grounds, as a matter of law, to sustain the application for leave to appeal, which is accordingly dismissed. The applicant has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument.

[75] Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources and the finality of litigation. This Court notes that Ms Emtage's injury was sustained some four-and-a-half years ago, and has been the subject of numerous medical reports and other processes. Judge McGuire correctly concluded his judgment with the observation that "this saga must be brought to an end".

[76] Costs are reserved.

A handwritten signature in black ink, appearing to read "P R Spiller". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Judge P R Spiller,
District Court Judge