

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 52

ACR 023/22

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

Hearing: 27 March 2023
Held at: Auckland/Tāmaki Makaurau

Appearances: B Hinchcliff for the Appellant
J Sumner for the Respondent

Judgment: 29 March 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for personal injury - s 26, claim for weekly compensation, - s 100,
Accident Compensation Act 2001 (“the Act”)]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 16 February 2022. The Reviewer dismissed an application for review of the Corporation’s decision dated 16 August 2021 declining additional cover for a rotator cuff tear and entitlement to weekly compensation.

Background

[2] Mr McLachlan was born in 1975, and he worked as a stuntman.

[3] On 29 December 2013, Ms Deanne Christie of Sports & Spinal Physiotherapy lodged a claim with the Corporation on behalf of Mr McLachlan for an injury that had occurred on 29 October 2013. The injury was described as: “[D]ead lifting at gym lifting 100kg, dropped weights + felt immediate pain in neck/shoulder and hand as it dropped jarring”.

[4] On 18 September 2014, Mr McLachlan consulted Dr Craig Panther, Sports and Exercise Physician. Dr Panther diagnosed costovertebral joint/costotransverse joint sprain right T8 level and possible dermatitis.

[5] On 20 January 2021, Mr McLachlan sustained an injury when he fell onto his right shoulder while working as a stuntman rehearsing a scene for a television series.

[6] On 13 February 2021, Dr Ilya Chemeris, Osteopath, lodged a claim with the Corporation for injuries sustained by Mr McLachlan to his right shoulder.

[7] On 17 February 2021, the Corporation accepted the claim and provided cover for a right sprain supraspinatus tendon.

[8] On 15 April 2021, Mr McLachlan had his first detailed physical assessment with Ms Anna Butterworth, Physiotherapist. Ms Butterworth diagnosed “subscapularis tear + impingement + median + ulnar nerve involvement”.

[9] On 12 May 2021, Mr McLachlan had an ultrasound scan of his right shoulder. Dr Sunderarajan Jayaramen, Radiologist, reported:

Low-grade partial articular surface tear anterior supraspinatus, 7mm length.

Full-thickness tear superior subscapularis, 8mm length.

There were some features of subacromial bursitis/pain syndrome, however in view of subscapularis tear please consider orthopaedic prior to any steroid injection.

[10] On 18 May 2021, Mr McLachlan sought a further opinion on his right shoulder pain. He consulted Mr Daniel Harvey, Physiotherapist, who referred Mr McLachlan to Dr Panther for entry to a Careway Programme. In the referral to Dr Panther, Mr Harvey provided an account of Mr McLachlan’s accident:

Tim is a stuntman and in January he fell a significant distance (with a harness on) from a wire and landed on a right (and left) outstretched arm and felt an immediate pain in his right shoulder ...Tim's main problem is intermittent right shoulder pain 6/10 VAS (sharp in nature) and weakness. He rates his strength at only 50-60% of normal.

[11] On 18 May 2021, an x-ray was done on Mr McLachlan's right shoulder. Dr Mark Osborne, Radiologist, reported "superior migration of humeral head consistent with rotator cuff tear", and also "early OA change seen at the glenohumeral joint".

[12] On 25 May 2021, Dr Amanda Mitchell, GP, applied on Mr McLachlan's behalf for cover for a rotator cuff injury to his right shoulder suffered on 20 January 2021. Dr Mitchell certified that Mr McLachlan was incapacitated for work from 26 April 2021 to 6 June 2021.

[13] On 14 June 2021, Dr Chemeris reported as follows:

Mr McLachlan came to see me at our clinic on 13 February 2021 complaining of right shoulder pain that started 3 weeks prior after falling down and landing on elbows and knees. On examination he had full shoulder movements with positive "empty can" test, indicating a rotator cuff involvement, in particular, tendon of m.supraspinatus. There was also some tension and mobility restriction in his lower neck. He received osteopathic treatment and was getting better until another fall in April, landing on right elbow which significantly aggravated his pain.

On examination he had painful movements in his right acromio-clavicular joint and tension in m.supraspinatus. I referred him for the ultrasound of right rotator cuff which revealed m.supraspinatus and m.subscapularis tears (see report attached).

[14] On 8 July 2021, Dr Craig Panther, Sport and Exercise Physician, reported:

In the past Tim has had prior injuries. He recalls having shoulder pain (an overuse injury secondary to tennis), which caused him to give up sport for a number of years. ...

Clinically Tim is making an excellent recovery. I have reassured him that the injuries described are certainly recoverable as is evidenced by his good clinical progress.

[15] On 22 July 2021, Mr Cam Shaw, Physiotherapist, the Corporation's clinical adviser, stated:

When symptoms following a sprain persist beyond a normal healing time frames, there is usually an underlying cause. In this case a diagnosis has not clearly been confirmed by the specialist. ... On review of the information I have been unable to establish a causal link between the rotator cuff tears and the accident event. This is based on the following rationale:

Mr McLachlan reported a history of shoulder pain. As reported, this stopped him playing sport for several years. There is no previous injury lodged with ACC. ...

The mechanism of injury is accepted to be a fall on the right arm. This is a plausible mechanism of injury for an acute rotator cuff tear, however as discussed below, the presentation that followed is not consistent with acute traumatic cause for the tears.

Mr McLachlan did not seek immediate medical attention ... He remained at work as a stuntman, which I assume would have required him to perform significant physical activities during this time. ...

The examination details show a consistent record of full shoulder range of motion ... this is not typical of an acute rotator cuff tear.

On ultrasound imaging ... there is absence of significant joint or bursal fluid which indicates these tears are more than likely degenerative and more long standing than acute in nature. This would be supported by the underlying tendinosis in the tendons.

Tendinopathy/Tendinosis is commonly accepted to be a progressive condition ...

The generalised degenerative picture is also supported on plain film x-ray... Osteoarthritis is a term used to describe degenerative joint disease and these changes are long standing.

On a clinical review of the medical information available, I could not find a causal link between accident event and the ongoing shoulder problems. This would suggest the injury sustained would have simply been rendered symptomatic, rather than it being causally linked to the covered injury.

[16] On 13 August 2021, Mr Philip Clayton, the Corporation's technical specialist, advised:

The GP, in completing the ACC18, referenced a non-specific rotator cuff tendon injury as the injury diagnosis but confirmed the cause of incapacity as the rotator cuff tear, evident on ultrasound in May 2021. The corresponding ultrasound report describes not only a full-thickness tear of the subscapularis with 8mm retraction, but additionally calcific tendinosis, partial [tear] of the supraspinatus, and subacromial bursal thickening with impingement. The Clinical Advisor has confirmed that the right shoulder pathology evident radiologically cannot be considered to have been caused by the described accident.

[17] On 16 August 2021, the Corporation wrote to Mr McLachlan declining additional cover for a rotator cuff tear and entitlement to weekly compensation, on the basis that his current symptoms and incapacity were due to pre-existing degeneration that was not related to an injury caused by an accident.

[18] On 17 August 2021, Mr Harvey provided a further report for Mr McLachlan:

Tim injured his right shoulder in an accident on January 20th 2021 where he fell to the ground on his outstretched arms at a 45-degree head-down angle while rehearsing a stunt in a harness. He felt immediate pain and weakness. This mechanism is sufficient to cause a tear to the rotator cuff. Due to work commitments, he was unable to seek medical assessment for a period of time. In April he came forward to physiotherapy and a rotator cuff tear was suspected (see notes). Soon after he had an US scan which confirmed this tear. Due to the degree of the rotator cuff tear (full thickness) he was started with rehabilitation and referred to AXIS Sports Medicine (as is best practice).

The degree of degenerative tissue in the shoulder joint is irrelevant, as the client did not have any symptoms prior to his fall. He is only 40 years old – so to tear his tendon at this age you will need significant force.

I attach below the ACC guidelines for accepting ACC cover as well as best practice rehab guideline. As you will see Tim satisfies the majority of this factors for coverage and best practice rehab was followed. ...

I believe Tim's injury is due to his described and covered ACC accident on 20/01/2021. Please see x-ray, US scan and Physio notes as evidence.

[19] On 18 August 2021, Mr McLachlan lodged an application for review of the Corporation's decision.

[20] On 19 August 2021, Mr McLachlan provided the Corporation with a written account of his accident and injury in which he drew a picture of the direction and angle of his fall. This showed that he fell at a 45-degree angle with his head down. Mr McLachlan described having immediate pain in his right shoulder which had previously been asymptomatic. He described remaining at work to keep his job and being unable to work at full capacity. Mr McLachlan stated that he worked six days a week and that it was difficult to take time off for treatment until April 2021, but his workload also increased at this point. He decided to leave his job on 23 April 2021 to focus on his recovery. After this he had no income. Mr McLachlan added:

From initial injury on January 20th to release from physio at 95% healed on August 3rd was a total of 6 months. This clearly shows that this was not a

minor sprain or an arthritic-type overuse injury as ACC seem to be claiming, but was in fact an acute injury caused by the initial fall as documented here.

[21] On 13 September 2021, Mr Shaw confirmed his view that the contemporaneous notes following the accident were not indicative of a rotator cuff tear.

[22] On 22 November 2021, Mr Harvey provided a further report as to why he believed that Mr McLachlan's accident had caused the rotator cuff tear:

1) Younger age - (as the prevalence of rotator cuff pathology in <60 year olds is 20% and increases in prevalence from age 50 onwards). The client was 45 years of age at the time of the accident.

2) ACC cover - The client has an ACC shoulder and neck sprain, and the initial treatment provider (Osteopath) documents the shoulder is painful with the empty can test.

3) Past history - The client has no previous ACC shoulder claims or sought previous ACC physiotherapy or Osteopath treatment for shoulder pain ... Client was working full time in a very physical and active job (stuntman) and had no prior shoulder pain or symptoms hindering his work.

4) Initial presentation - Due to work commitments Mr McLachlan's first presentation to a health professional (the osteopath) and registration of the ACC claim was three weeks after the accident date and he reported immediately he had hurt his shoulder. ... The claimant had immediate pain and limitation after the initial injury ...

5) Mechanism of injury - ... an unexpected and high energy torsional force and correlates with the radiological findings.

6) Examination – The claimant had his first detailed physical assessment on the 15/4/2021 with physiotherapist Ms Butterworth. The claimant had weakness of testing of the Subscapularis tendon (weakness with resisted internal rotation, positive bear hug test and positive lift off test) which is indicative of a subscapularis muscle/tendon tear.

7) General imaging - The claimant had on his US scan a full-thickness tear of the superior subscapularis with 8mm retraction. The claimant had mild subacromial bursal thickening.

8) Ultrasound- (the presence of significant joint or bursal fluid may represent acuity of tearing). The claimant did not have their US scan until nearly four months post-accident at which stage the claimant had mild subacromial bursal thickening. The claimant has not had an MRI of the shoulder. It is well known that US scans are operator dependent and are not as accurate for detecting pathology and tears in the rotator cuff compared to MRI.

On the balance of probabilities and considering all the evidence provided, the claimant likely suffered a right shoulder rotator cuff tear, and this is causally related to the accident event.

[23] On 2 December 2021, Mr Shaw responded to Mr Harvey's report noting:

It is appreciated that Mr McLachlan may be a relatively young, fit, highly motivated to work and sustained a right shoulder injury seeking clinical assessment in normal timeframes that is covered by the ACC. There is some inconsistency in the reporting of the mechanism of injury, however the key point here is the clinical presentation that followed.

It is generally accepted that an acute rotator cuff tear produces significant pain, loss of strength and disability, which is not the case at lodgement, or at any point after in the clinical records. This would appear to be supported by Mr Harvey, who notes even at 3-4 months post injury, the good range of motion is atypical.

I have taken report into consideration, I could still not establish a causal link between the accident event and an acute rotator cuff tear. An acute rotator cuff tear is unlikely due to the clinical presentation that followed the accident event. It is more supportive of gradual process changes rendered symptomatic by the accident event but not caused by it.

[24] On 11 January 2022, Ms Catherine Noventa, Musculoskeletal Physiotherapist, provided a report based on a file review:

Mr McLachlan would appear to have a mixture of acute and chronic pathology evident on imaging ... clinically he appears to function well and was discharged from physiotherapy in August of 2021 at what the physiotherapist considered to be 95% of full function ... Following the injury Mr McLachlan reports struggling to continue working and not being 100%.

There is no doubt that Mr McLachlan has had some shoulder problems with his dominant arm in the past.

However, he has sustained a significant fall in the course of his work and developed more acute signs and symptoms indicative of new pathology. At least some of the changes noted in the ultrasound are therefore likely to be attributable to the covered event of 20.01.2021, and this is very likely the cause of his incapacity to work.

[25] On 20 January 2022, review proceedings were held. On 16 February 2022, the Reviewer dismissed the review, on the basis that the evidence and medical comments as a whole, did not persuade her that Mr McLachlan's full-thickness tendon tear was, on the balance of probabilities, caused by his accident on 21 January 2021. It followed that Mr McLachlan was not entitled to weekly compensation.

[26] On 22 February 2022, a Notice of Appeal was lodged.

[27] On 10 November 2022, the Corporation's Clinical Advisory Panel ("CAP") reported as follows:

The CAP noted that Mr McLachlan's right shoulder currently has the following diagnoses:

- Chronic symptomatic impingement with rotator cuff deterioration (tendinosis) and gradual onset tendon tearing.
- Early shoulder (glenohumeral) joint osteoarthritis.

These are chronic conditions which pre-dated Mr McLachlan's accident on 20/01/2021.

The CAP noted that the causes of these diagnoses are complex genetic, metabolic, and other factors. There is no causal relationship between Mr McLachlan's ACC claims, any combination or cumulation of these, or any other single episodes of trauma. ...

The CAP concluded that none of the extensive, longstanding, previously asymptomatic features on Mr McLachlan's imaging were caused by the mechanism described. There was no new tendon tearing.

The pain and discomfort associated with this accident was consistent with the covered sprain injury, which resolved, and Mr McLachlan was noted to be making an excellent recovery. His work incapacity was not related to the covered sprains.

There is every chance that Mr McLachlan will have intermittent, unpredictable flare ups of his right shoulder pain again and those will not be related to the accident on 20/01/2021. ...

The CAP concluded that the Mr McLachlan's X-ray imaging of his right shoulder confirmed chronic, longstanding gradual onset changes and there was no evidence of acute injuries (other than a soft tissue sprain, which does not show up on bony X-rays) or any other shoulder damage with the ACC-covered injuries. ...

Mr McLachlan's rotator cuff tendon tearing was caused by a natural progression of complex genetic, biochemical, mechanical, and other changes in the tendon structure, with shearing and eventual tearing, often without any trauma or accidents. Mr McLachlan's shoulder was functional and had a normal range of motion when he presented because he had already adapted to the chronic changes over time.

Mr McLachlan's initial presentation documented in multiple contemporary records was most consistent with his covered right shoulder soft tissue sprain injury which made an excellent recovery over a few months.

Relevant law

[28] Section 20(2)(a) of the Act provides that a person has cover for a personal injury which is caused by an accident. Section 26(2) states that “personal injury” does not include personal injury caused wholly or substantially by a gradual process, disease, or infection (unless it is personal injury of a kind specifically described in section 20(2)(e) to (h)). Section 25(1)(a)(i) provides that “accident” means a specific event or a series of events, other than a gradual process, that involves the application of a force (including gravity), or resistance, external to the human body. Section 25(3) notes that the fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident.

[29] In *Johnston*,¹ France J stated:

[11] It is common ground that, but for the accident, there is no reason to consider that Mr Johnston’s underlying disc degeneration would have manifested itself. Or at least not for many years.

[12] However, in a passage that has been cited and applied on numerous occasions, Panckhurst J in *McDonald v ARCIC* held:

“If medical evidence establishes there are pre-existing degenerative changes which are brought to light or which become symptomatic as a consequence of an event which constitutes an accident, it can only be the injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered. The fact that it is the event of an accident which renders symptomatic that which previously was asymptomatic does not alter that basic principle. The accident did not cause the degenerative changes, it just caused the effects of those changes to become apparent ...”

[13] It is this passage which has governed the outcome of this case to date. Although properly other authorities have been referred to, the reality is that the preceding decision makers have concluded that Mr Johnston’s incapacity through back pain is due to his pre-existing degeneration and not to any injury caused by the accident.

[14] ... I consider it important to note the careful wording in the *McDonald* passage. The issue is not whether an accident caused the incapacity. The issue is whether the accident caused a physical injury that is presently causing or contributing to the incapacity.

[30] In *Ambros*,² the Court of Appeal envisaged the Court taking, if necessary, a robust and generous view of the evidence as to causation:

¹ *Johnston v Accident Compensation Corporation* [2010] NZAR 673.

² *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

[65] The requirement for a plaintiff to prove causation on the balance of probabilities means that the plaintiff must show that the probability of causation is higher than 50 per cent. However, courts do not usually undertake accurate probabilistic calculations when evaluating whether causation has been proved. They proceed on their general impression of the sufficiency of the lay and scientific evidence to meet the required standard of proof ... The legal method looks to the presumptive inference which a sequence of events inspires in a person of common sense ...

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

[31] In *J*,³ Kos P stated:

[52] In *Accident Compensation Corporation v Mitchell* Richardson J observed that the proper approach to construing the Act was that it be given a “generous and uniggardly” construction. We endorsed that approach in *Harrild v Director of Proceedings*. The importance of this principle lies where more than one available interpretation exists. If the Act is unavoidably niggardly or ungenerous, that is that. But if a reasonable choice presents, the more generous path should be taken.

[32] Section 48 of the Act provides:

A person who wishes to claim under this Act must lodge a claim with the Corporation for—

- a) cover for his or her personal injury; or
- b) cover, and a specified entitlement, for his or her personal injury; or
- c) a specified entitlement for his or her personal injury, once the Corporation has accepted the person has cover for the personal injury.

[33] Section 67 provides:

A claimant who has suffered a personal injury is entitled to 1 or more entitlements if he or she—

- a) has cover for the personal injury; and
- b) is eligible under this Act for the entitlement or entitlements in respect of the personal injury.

³ *J v Accident Compensation Corporation* [2017] NZCA 441, [2017] 3 NZLR 804.

[34] Section 69(1) of the Act provides:

- (1) The entitlements provided under this Act are—
 ...
 (c) weekly compensation: ...

[35] In *Hetaraka*,⁴ Henare DCJ stated:

[50] ... It is well established that a claimant cannot rely on a non-covered injury to support a claim for entitlements, and in the absence of cover, no entitlements can flow.

Discussion

[36] The issue in this case is whether the Corporation’s decision of 16 August 2021 declining additional cover for a rotator cuff tear and entitlement to weekly compensation was correct. In order to obtain cover (and resulting entitlements), Mr McLachlan needs to establish that his condition resulted from a personal injury by accident, which does not, in principle, include personal injury caused wholly or substantially by a gradual process or disease.⁵ If medical evidence establishes that Mr McLachlan had pre-existing degenerative changes which were brought to light or which became symptomatic as a consequence of an accident, it can only be injury caused by the accident and not the injury that is the continuing effects of the pre-existing degenerative condition that can be covered.⁶ The issue is whether the accident caused a physical injury that caused or contributed to Mr McLachlan’s post-accident incapacity.⁷ The Court may draw robust inferences of causation grounded on what constitutes the normal course of events, based on the whole of the lay and medical evidence.⁸ In construing claims brought under the Act, a generous and “unniggardly” construction is the proper approach where more than one available interpretation exists, and, if a reasonable choice presents, the more generous path should be taken.⁹ If cover is established, Mr McLachlan is eligible, in respect of his personal injury, for entitlements, one of which is weekly compensation.¹⁰

⁴ *Hetaraka v Accident Compensation Corporation* [2018] NZACC 163.

⁵ Sections 20(2)(a) and 26(2) of the Act.

⁶ See *Johnston* n1 above, at [12].

⁷ See *Johnston* n1 above, at [14].

⁸ See *Ambros*, n2 above, at [67].

⁹ See *J* n3 above, at [52].

¹⁰ Sections 67 and 69(1).

[37] Mr Sumner, for the Corporation, provided high-quality submissions in support of its position, summarised as follows. The evidence as a whole establishes that there is no sufficient causal connection between Mr McLachlan's accident on 20 January 2021 and the onset of an acute rotator cuff tear. It is noteworthy that Mr McLachlan was able to continue his physically demanding work in the period after his accident, and this indicates the lack of an acute injury. The weight of the medical evidence shows that Mr McLachlan's rotator cuff tear was caused by non-accident causes (chronic deterioration), and that, in particular, the evidence of Mr Shaw and the CAP should be preferred. The respondent was correct to decline weekly compensation as Mr McLachlan did not have cover for an acute rotator cuff tear.

[38] This Court acknowledges the above submissions. The Court notes the opinion of Mr Shaw, Physiotherapist, although the Court observes that he acknowledged that the mechanism of Mr McLachlan's injury was plausible in terms of an acute rotator cuff tear, and that he was young, fit, highly motivated to work and sustained a right shoulder injury seeking clinical assessment in normal timeframes covered by the Corporation. This Court also acknowledges the medical expertise of the CAP, although, as noted by it, it did not have the opportunity to interview or examine Mr McLachlan to obtain a better understanding of the nature of his injury and the period following.

[39] This Court accepts that Mr McLachlan may, at the time of his accident, have had some gradual process changes in his right shoulder. However, the Court points to the following considerations.

[40] First, Mr McLachlan provided a statement as follows as the nature of his injury and what ensued thereafter. On 20 January 2021, he fell at a 45-degree angle with his head down causing immediate pain in his right shoulder which had previously been asymptomatic. He remained at work for fear of losing his job but was unable to work at full capacity. He saw an osteopath on 13 February 2021, without beneficial effect. He worked six days a week and it was difficult to take time off for treatment until April 2021, and then left his job to focus on his recovery. He achieved 95%

recovery only in August 2021, indicating that there was an acute injury caused by the initial fall.

[41] Second, Dr Chemeris, Osteopath, confirmed that Mr McLachlan saw her on 13 February 2021 complaining of right shoulder pain that started three weeks prior after a fall, and that testing indicated a shoulder injury involving a subscapularis tear.

[42] Third, Ms Anna Butterworth, Physiotherapist, who conducted the first detailed physical assessment of Ms McLachlan on 15 April 2021, diagnosed him with “subscapularis tear plus impingement”.

[43] Fourth, Dr Sunderarajan Jayaramen, Radiologist, reported on 12 May 2021 that an ultrasound scan showed that Mr McLachlan had an eight millimetre full-thickness superior subscapularis tear.

[44] Fifth, Mr Harvey, Physiotherapist, confirmed on 18 May 2021 that Mr McLachlan had fallen a significant distance, landed on a right outstretched arm and felt an immediate pain in his right shoulder, and this caused intermittent right shoulder pain and strength at only 50-60% of normal.

[45] Sixth, Dr Mark Osborne, Radiologist, reported that an x-ray taken on 18 May 2021 showed superior migration of humeral head consistent with rotator cuff tear.

[46] Seventh, Dr Mitchell, GP, certified on 25 May 2021 that Mr McLachlan had torn his right rotator cuff and had been unable to work.

[47] Eighth, Mr Harvey expressed his view, in reports provided on 12 August 2021 and 22 November 2021, that, on the balance of probabilities and considering all the evidence provided, Mr McLachlan likely suffered a right shoulder rotator cuff tear causally related to the accident event. Mr Harvey provided cogent reasons for his opinion, *inter alia*, Mr McLachlan’s age at the time of the accident (45 years), his lack of prior shoulder pain or symptoms hindering his work, his report of immediate pain and limitation after the initial injury, the valid reasons why he did not cease work in the immediate period after his accident, the correlation of the mechanism of

the injury with an unexpected and high energy torsional force, and the diagnosis of a subscapularis muscle/tendon tear in his first examination, ultrasound and x-ray.

[48] Ninth, Ms Catherine Noventa, Musculoskeletal Physiotherapist, reported that at least some of the changes noted in the ultrasound were likely to be attributable to the significant fall in January 2021, and that this was very likely the cause of his incapacity to work.

Conclusion

[49] In light of the above considerations, this Court concludes that Ms McLachlan's accident caused an acute physical injury (subscapularis rotator cuff tear) that substantially contributed to his post-accident incapacity.

[50] It follows from the Court's conclusion that Mr McLachlan is entitled to cover for his personal injury and consequent entitlements, one of which is weekly compensation.

[51] This appeal is therefore allowed, and the review decision of 16 February 2022 is set aside.

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



P R Spiller
District Court Judge

Solicitors for the Respondent: Ford Sumner.