IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 80 ACR 178/21

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

Hearing: 4 April 2023
Heard at: Christchurch/Ōtautahi

Appearances: Mr S Macann for the Appellant
Mr J Coats and Ms A Lane for the Respondent

Judgment: 19 May 2023

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Revocation of cover s 65; Suspension of weekly compensation s 117 Accident Compensation Act 2001]

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[1] Three of ACC's decisions are at issue in this case:

(a) Was ACC correct in its decision dated 7 August 2019 to decline cover for a mental injury?

(b) Was ACC correct in its decision dated 22 July 2020 to revoke deemed cover for post-concussion syndrome?

(c) Was ACC correct in its decision dated 23 February 2021 to suspend weekly compensation?

Background

[2] On 17 March 2016, the appellant had an accident at home and was taken to Christchurch Hospital by her parents. The hospital lodged a claim, describing the injury as "ETOH [ethyl alcohol] slipped and hit her head on the bench". The injury comments are "Laceration, L forehead, minor head injury".

[3] On 29 March 2016, the appellant saw her GP, Dr Goh. He recorded loss of consciousness with problems with memory, concentration, and dizziness.

[4] On 30 March 2016, Dr Goh filed a medical certificate which included a claim for cover for post-concussion syndrome.

[5] On 3 June 2016, Dr MacLeod, Psychiatrist at the Brain Injury Rehabilitation Service at Burwood Hospital, assessed Ms Mehrtens at the concussion clinic. He noted that her ongoing symptom was headaches, that she "conceded were slowly improving".

[6] The doctor noted:

> Neurological examination currently is unremarkable.
>
> Her history does suggest post-concussional headaches, although not other prominent post-concussional symptoms. She has a propensity to headaches and I think she is at risk to evolve paradoxical headaches.

[7] On 13 June 2016, Neuropsychologist, Dr Snell, undertook a clinical interview and neurological testing.

[8] Dr Snell concluded:

> In summary, assessments in the concussion clinic indicated Robyn sustained an injury in March this year in a context of substance abuse. She does appear to be improving slowly with time, though still self-reports many post-concussional symptoms that were not necessarily evident on objective assessment (eg. self-reported cognitive difficulties) vs objective assessment findings. Lack of structure and meaningful activity was identified as an issue at the time of assessment and appears to be impacting on her progress and mood. Accordingly, referral for vocational support and graduated return to work will be important to initiate to reinforce return to normal functioning and recovery orientation.

[9] On 22 July 2016, Ms Mehrtens was discharged from the concussion clinic.

[10] On 19 August 2016, the appellant injured herself again. The ACC 45 form dated 23 August 2016 identified concussion and dental injuries and noted:

> Second LOC? cause, last one in March, now last Friday again. Mother says "different person" since first head injury, never had head scan. Recurrent frontal headaches, neuro exam normal, but not feeling "right". No postural drop.

[11] By decision dated 24 August 2016 ACC confirmed cover for dental damage and concussion, as sought on the ACC 45 form, by decision of 24 August 2016.

[12] On 1 September 2016, Dr Phillip Parkin (Neurologist) reviewed Ms Mehrtens. He noted that the appellant had suffered two previous episodes of concussion, both of which involved loss of consciousness, with the first (suffered as a teenager) lasting for ten minutes. Dr Parkin determined to investigate whether the appellant suffered from epilepsy and recommended starting her on anti-epilepsy medication. Dr Parkin explained that loss of consciousness is commonly associated with syncope and seizure, but noted she had "sustained significant trauma on both occasions" in 2016. He also referred her for an MRI scan.

[13] ACC's Branch Psychology Advisor reported on 12 September 2016. He said:

> There is clear evidence that Ms Mehrtens sustained a head injury in the index accident. Minor head injury was diagnosed in hospital, and it would therefore be appropriate to add this as a covered injury in my opinion. The evidence for a diagnosis of concussions/mild traumatic brain injury is limited.
>
> …
>
> In my opinion Ms Mehrtens may benefit from a neurological assessment; this would help to clarify whether or not she is likely to have sustained concussion in the index accident.

[14] On 4 October 2016, ACC confirmed cover for head injury arising from the March 2016 accident, but not concussion.

[15] On 6 November 2016, Dr Parkin wrote to Ms Mehrtens GP noting that the differential diagnoses were epilepsy or alcohol related amnesia, or alcohol triggered epilepsy.

[16] On 8 February 2017, Dr Wright (Neurologist) provided a report to ACC. He said:

> **Impression**
>
> It is unlikely she has suffered epilepsy, nor indeed loss of consciousness, but rather two falls including face trauma, at least the first associated with evidence of post-concussional symptoms.
>
> She has chronic daily headache with migrainous features in a woman with a past history of migraine and indeed an episode in her 30's several years ago where it was very problematic for 18 months.
>
> …
>
> I am concerned by the variations between her report of her health history and that provided in her medical records (past headache history, flu like symptoms on the day, amount of alcohol drunk on the day, degree of amnesia after index event) making it difficult for this assessor to be certain of accuracy of her recollection of details provided today.

[17] In answer to ACC's request for confirmation that concussion was sustained as part of event 17.03.2016 and if so, if there is any ongoing symptoms, Dr Wright said:

> Head trauma occurred on two occasions, both times she was inebriated, the first time was followed by problematic headaches of migrainous nature that continue and have likely contributed to all of her subsequent symptoms, which mimic but are non-specific for post-concussion syndrome. She reported cognitive symptoms, but was assessed as having normal cognition by a neuro psychologist and neuro psychiatrist. The second was in the setting of marked psychological stress, building over months. There is therefore no definite diagnosis of concussion, and whilst a concussion may have in fact occurred on 17.03.2016 (cannot be excluded fully), it is highly a-typical to continue to cause symptoms at this time, 11 months later. It is also possible that a second concussion occurred in August 2016, but the presentation does not suggest this is the case according to symptoms recorded. I conclude, therefore, that the persistence of symptoms is very probably caused by her transformed pre-existing migraine tendency to chronic daily headache, and her psychological symptoms associated with her loss of independence and employment.

[18] On 17 February 2017, Dr Gerard Walker (Occupational Physician) provided an initial medical assessment. His brief was to provide an independent and impartial opinion on the diagnosis, and on causation, fitness for work and clinical management. He found that "mild traumatic brain injury cannot be excluded entirely", but that "her symptoms have been ongoing but cannot be now attributed to any mild traumatic brain injury". Instead, Dr Walker considered that "Robyn's disability no doubt relates to a mood disturbance and the stress associated with loss of employment and independence". He also said:

> In any case, increased socialisation and a return to work focus should provide some appropriate distraction and rehabilitation which should assist in her recovery from her

> mood disturbance and multiple physical symptoms. A work readiness programme and work trial is advised. Psychologist assessment is advised also, as there is a risk of chronicity and there may be some focus for specific therapy.

[19] An MRI scan on 26 April 2017 revealed no abnormality.

[20] On 11 August 2017, Dr Walker provided a further report as a medical case review. He said:

> Given her satisfactory presentation consciousness level, and an absence of significant post-traumatic amnesia, any traumatic brain injury symptoms would have settled within weeks following the presentation in March last year.

[21] He also said:

> There is no good reason why Robyn would not sufficiently tolerate a return to full time work. While she has persistent symptoms, these should moderate with a return to work. It is difficult to confirm her tolerance for work, as there is no medically-objective, verifiable reason for incapacity and her problem is fatigue, which likely predominantly relates to a resolving mood disturbance, long-standing anxiety, and some struggles with recent alcohol dependence.

[22] On 26 July 2019, Dr Juan Garcia completed a mental injury assessment. He acknowledged that "it was quite difficult to get an adequate impression of Ms Mehrtens' personality during the limited time afforded by the interview".

[23] Under the heading "Diagnosis", Dr Garcia said this:

> Ms Mehrtens reported symptoms suggestive of anxiety (agoraphobia), occasional panic attacks, low tolerance to noise and having people around, and mild to moderate depression (lack of prospects, low mood, anhedonia, social isolation). The fact that she is able to work every day is heartening and she should be encouraged and supported to continue doing so.
>
> She also continues to report headaches, severe fatigue and occasional dizziness. It would be extremely unusual and exceptional for these symptoms to be a direct result of a mild concussion suffered three years ago.
>
> …
>
> I don't think her current mental condition is a direct result of the injury itself, but that has been aggravated by the consequences of, particularly the loss of her job.

[24] On 7 August 2019, ACC issued its decision declining cover for a mental injury.

[25] On 10 February 2020, Dr Dowling, Psychologist, provided an opinion on the appellant's request to add cover for post-concussion syndrome. Dr Dowling noted that the GP's request to add post-concussion syndrome was made on 30 March 2016 – only 13 days after the injury – and therefore was likely to be an error in selecting the correct injury as the symptoms at that early stage would be explained by concussion.

[26] On 19 May 2020, Dr Xiong (Rehabilitation Specialist) provided an opinion for Ms Mehrtens. Dr Xiong agreed that Ms Mehrtens suffered from anxiety and depression but found that this was secondary to the trauma and the consequence of the mild head injury.

[27] He said:

> Based on my assessment, the anxiety presentations and mild depression were due to the injury and the related clinical presentations and functional difficulties even though she does have the risk factors including inappropriate use of alcohol and remote past history of depression.

[28] On 30 June 2020, Dr Dowling, Psychologist and Psychology Advisor to ACC, noted there was limited contemporaneous evidence that Ms Mehrtens had suffered concussion, that diagnosis being made by her GP 12 days after the accident. He said:

> Determining whether a concussion occurred retrospectively on the basis of reported symptoms is problematic, as symptoms of a concussion are also seen in numerous other medical and psychiatric conditions. For example, the initial symptoms reported by the client 12 days after the accident (memory, concentration and balance) could be explained by numerous other factors including alcohol misuse.
>
> It is also not plausible that symptoms of a mild brain injury would persist for over five years in the absence of objective evidence of a more severe injury. As noted by Dr Wright (Neurologist) on 8/2/17:
>
> > It is highly a-typical (for a concussion) to continue to cause symptoms at this time 11 months later.
>
> As time passes, such a causal link becomes less likely, as the trajectory of recovery from a concussion involves a gradual resolution of symptoms over time (usually 3-6 months at most).

[29] Also on 30 June 2020, Dr Jones, GP, advised ACC that she supported revoking deemed cover for post-concussion syndrome.

[30] On 21 August 2020, Dr Xiong provided a further report and maintained his opinion that Ms Mehrtens suffered from post-concussion syndrome. He relied heavily on Dr MacLeod and Dr Snell's previous opinions.

[31] On 22 September 2020, Dr Dowling provided a further report on Dr Xiong's conclusions. Dr Dowling agreed with Dr Xiong's definition of concussion but explained that the issue is whether Ms Mehrtens' presentation post-injury was consistent with a diagnosis of concussion. Dr Dowling did not agree that Dr MacLeod's comment about "post-concussional headaches" amounted to a diagnosis of post-concussion syndrome and noted that Dr Snell's opinion was based on Ms Mehrtens self-report. Dr Dowling set out further criticisms of Dr Xiong's report, including his failure to acknowledge differences between his findings and Dr Wright's, his reliance on Ms Mehrtens' self-report and his failure to acknowledge the controversy around post-concussion syndrome.

[32] On 23 February 2021, ACC issued its decision suspending the applicant's weekly compensation. It said her continuing problems were no longer the result of the personal injury of 17 March 2016.

[33] On 14 May 2021, Dr Xiong provided his third report for Ms Mehrtens. He said:

> I noted there are two particular opinions obtained, one from Dr Chris Dowling, Psychology Advisor, on 22.09.20. I noted Dr Dowling has indicated the agreement with my definition in relation to concussion or the early diagnosis. Dr Dowing, however, disputes regarding post-concussive syndrome but did comment that maybe a medical advisor comment may be more appropriate.
>
> Overall, I noted Dr Dowling has not really provided any more evidence, but simply reiterated the opinions regarding the decision made by ACC and the supported evidence that has already been analysed previously.

Appellant's Submissions

[34] Mr Macann refers to a letter from High Street Motors dated July 2020. This was the appellant's employer at the time of her accident on 17 March 2016. It said, in part:

> Robyn returned to work on 21 March 2016, she managed to work full time Monday-Thursday but was struggling, having trouble concentrating, headaches and irritability.
>
> …

> Robyn saw her doctor on Tuesday, 29 March, he advised her to reduce her hours to four hours per day. She worked through until Friday, 1st April, but was not showing any signs of improvement, she was unfit and needing rest. I then made a decision to stand her down from work immediately until her doctor said she was fit to return.

[35] Mr Macann refers to her referral to the Burwood Concussion Clinic. In its report of 3 June 2016, the Clinic noted:

> Her history does suggest post-concussional headaches, though not other prominent post-concussional symptoms …

[36] Mr Macann refers to the further injury that she sustained on 19 August 2016. It is noted in the claim form that it was uncertain whether the appellant had lost consciousness.

[37] Mr Macann refers to *Ellwood*[1] and that where ACC suspends entitlements, the legal onus is on it to show whether there is a sufficient basis on which such entitlements should be suspended. If the matter is unclear, or in balance, then ACC does not have sufficient basis and cannot suspend the claimant's entitlements.

[38] He submits that ACC was wrong to decline to cover mental injury from the March 2016 accident.

[39] He refers to Dr Garcia's report noting his comment that she has always had a tendency to anxiety. He submits that a tendency is not a pre-existing condition capable of being aggravated. This does not act as a bar to cover.

[40] Referring to Dr Xiong, Mr Macann says that he is a long-standing specialist in head injuries and his opinion cannot be lightly set aside. He says:

> His opinion may not be sufficient for the applicant to make a positive case for cover by way of challenge to Dr Garcia's report, but it adds a strong supporting current to the applicant's case that the decision based on that report cannot be left undisturbed.

[41] He said the decision cannot stand because it has been made on unreasonable grounds and Dr Garcia's report is too flawed to provide a foundation.

[42] He refers to *ACC v Ambros*[2].

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1 *Ellwood v Accident Compensation Corporation* [2007] NZAR 205.
2 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

[43] He says the decision declining cover for post-concussion syndrome arising from the March 2016 accident was made after revocation of a cover the applicant enjoyed under the deeming provisions of s 58.

[44] He says the central evidence indicating the applicant suffers from post-concussion syndrome is contained in the reports of Dr Xiong. Dr Xiong made it clear he considers the symptoms indicated the applicant had suffered a traumatic brain injury in her initial accident on 17 March 2016 and continued to suffer its effect at the time of his assessment. He submits that Dr Xiong's opinion matters. As he pointed out, he is a specialist in such injuries and succeeded Professor MacLeod as Director of the Burwood Hospital Brain Injury Rehabilitation Service. He has more than 20 years experience in working in brain and concussion clinics in New Zealand.

[45] Accordingly, he says Dr Xiong is the most appropriate specialist to provide a report and ACC could and should have attached greater weight to his conclusions as a result.

[46] He submits that ACC disregarded Dr Xiong's opinion based on the short advice of Dr Jones, who said it should be "disregarded on the grounds of factual error and unjustified conclusions".

[47] He submits that Dr Jones does not identify the alleged errors in Dr Xiong's report, but it appears she is referring to those contained in Dr Dowling's report with reliance on matters contained in the medical reports, rather than on "contemporaneous notes".

[48] He submits that cover for concussion and post-concussion syndrome is a matter for specialist evidence and Dr Jones is not a specialist and her criticisms of Dr Xiong cannot attract the same weight as a specialist's explanation and opinion.

[49] He submits that Dr Dowling clearly preferred the opinion of Dr Wright, who had advised it was "highly a-typical" for a concussion to continue to be symptomatic 11 months after the injury and did not feel he could confirm a diagnosis of concussion. To that extent then, there is some disagreement between Drs Xiong and Wright.

[50] He submits however that both Drs Wright and Dowling have overlooked the fact that the appellant has cover for a concussion injury suffered in August 2016.

[51] He submits that the weight of evidence is clearly in favour of Ms Mehrtens suffering a concussion in the March 2016 accident. He says that opinion is consistent with Dr MacLeod's advice that 'her history does suggest post-concussional headaches, although not other post-concussional symptoms.'

[52] He submits that it is also consistent with Dr Snell, who indicated the history revealed "acute markers of mild traumatic brain injury".

[53] Mr Macann submits therefore that the weight of evidence, including both the specialist evidence and the lay evidence, is that the appellant was suffering from post-concussion syndrome, which was a result of her 2016 injuries.

[54] As to the suspension decision, after referring to s 117(1) which requires the Corporation to be "not satisfied on the basis of the information in its possession that a claimant is entitled to receive the entitlement", Mr Macann says that s 117(1) is drafted to prevent ACC removing entitlements each time a new diagnosis is made and requiring the claimant to apply for cover afresh.

[55] Mr Macann submits that the only way that ACC can suspend entitlements here would have been to revoke the cover granted on 24 August 2016, but it has not done so. The revocation decision of 22 July 2020 affected only cover arising from the March 2016 accident and therefore that arising from the subsequent accident is undisturbed.

[56] Mr Macann concludes that the decision of 7 August 2019 declining cover for mental injury should be quashed because the opinion of Dr Garcia on which it relied is flawed.

[57] He likewise submits that the decision revoking deemed cover for post-concussion syndrome should be quashed as the most reliable evidence is that of Dr Xiong that the appellant suffered such an injury from her March and August 2016 accidents.

[58] He submits that the decision suspending weekly compensation cannot stand if either of the covered decisions is quashed.

Respondent's Submissions

[59] Ms Lane referred to the summary of the appellant's evidence given at review, which appears at page 12 as follows:

- Before her accident on 17 March 2016, she was working as an office manager. She was working well, running a busy business and working normal hours.
- After the accident, she hit her head on a kitchen top, and went to the emergency department. After that, she tried to carry on, but she could not do so. She had sensitivity to everything. It was a struggle.
- After her second accident on 19 August 2016, she had headaches and fatigue, but not much else had changed from the first accident, and the symptoms continue until today.
- She managed 25 hours a week, but could not do any more work.
- She agreed with the history on the ACC file, which is correct.
- When questioned, she said when she had the first accident, she blacked out. She said that she thinks her drinks may have been spiked.
- The day of her second accident, was also the day her employment was terminated. She went out for a few drinks after work.

[60] Ms Lane submits, therefore, that the appellant's symptoms are tied to her first accident and therefore the August 2016 (second) accident is not a complicating factor.

[61] Ms Lane refers to the appellant's father's letter of 16 October 2019 relating to her accident in March 2016 (the first accident).

[62] In that letter, the appellant's father sets out the effects of the March 2016 accident and says that following the accident, the appellant's life has been significantly different. In the letter, the appellant's father lists the changes as including difficulty with concentration on tasks for an extended period of time; the onset of severe headaches; chronic fatigue requiring rest most afternoons; little social contact outside work; headaches and fatigue with noise and bright lights being distressing.

[63] Ms Lane refers to Dr Xiong's medical specialist independent medical examination report of 19 May 2020. This report relates to the 18 March 2016 injury.

[64] She refers to Dr Walker's initial medical assessment of 17 February 2017, which again relates to the March 2016 injury.

[65] Ms Lane refers to s 65 that allows the Corporation to revise any decision. She submits it is well established that where ACC relies on an error to revoke cover, it bears the onus of proving that error. She refers to *Atapattu Weerasinghe v ACC*[3].

[66] She also refers to the leading case dealing with the suspension of entitlements under s 117, being *Ellwood*[4]. In that decision, Justice Mallon said:

> I therefore consider that s 116 combined with the requirements of s 62 on ACC to make reasonable decisions requires ACC to have a sufficient basis before terminating benefits. If the position is uncertain, then there is not a sufficient basis. The "not satisfied" test is not met in these circumstances.

[67] Ms Lane submits that ACC was correct to decline cover for mental injury because the appellant's anxiety and depression were not caused by the accident. Instead, ACC says that the medical evidence establishes that the appellant's mental health issues were the result of pre-existing anxiety, aggravated by losing her job.

[68] In this case, she says the key evidence is from Drs Wright, Walker and Garcia.

[69] She refers to Dr Wright, Neurologist's report following his review of the appellant's documents and consultation with her on 8 February 2017. Dr Wright's report is detailed, and Ms Lane refers to the fact that he found:

> That the persistence of symptoms is very probably caused by [the appellant's] transformed pre-existing migraine tendency into chronic daily headache, and her psychologic symptoms, associated with her loss of independence and employment.

[70] She next refers to Dr Walker's in-person assessment with the appellant lasting over an hour and a half. He concludes that her symptoms could not be attributed to the accident and said:

> Robyn's disability no doubt relates to a mood disturbance and the stress associated with loss of employment and independence.

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3 *Atapattu Weerasinghe v Accident Compensation Corporation* [2017] NZHC 142.
4 See *Ellwood* n1 at [65].

[71] Ms Lane next refers to the report of psychiatrist, Dr Garcia, who had a 60 minute consultation with the appellant on 26 July 2019. Dr Garcia concluded:

> I don't think her current mental condition is a direct result of the injury itself, but that has been aggravated by the consequences of it, particularly the loss of her job.

[72] Ms Lane says that importantly it appears that the appellant's issues with her employer began prior to the accident. Dr Garcia noted that the appellant did not feel as comfortable at work after the business was taken over and that it was possible that the new owners of the business did not make much effort to help her stay after the accident.

[73] She refers to what Judge Cadenhead said in *Seddon*[5], namely that indirect causation was not sufficient to establish cover for mental injury.

[74] Ms Lane also notes that Dr Garcia, in his report, considered the appellant's father's opinion, that her psychiatric symptoms were secondary to the concussion.

[75] Ms Lane notes, however, that Dr Garcia deals with this issue, saying:

> While it is not unusual for people to exhibit a subdued affect for a couple of months following a minor TBI, it is unusual to develop an anxiety condition as the one described by her with agoraphobia and panic attacks. I think that the more probable explanation is that she has always had a tendency to anxiety and that this has been aggravated by the loss of her job, with everything that the job meant to her.

[76] As to the conclusion by Dr Xiong that the appellant suffers from post-concussion syndrome, Ms Lane submits that Dr Xiong is not a psychiatrist, but a specialist in rehabilitation medicine, whereas Dr Garcia is a psychiatrist.

[77] She also submits that Dr Xiong does not explain why he says the appellant has developed post-concussion syndrome or persistent post-concussion related presentations.

[78] She also notes that post-concussion syndrome is not listed as a mental condition in the DSM5.

[79] She refers to the reports of Dr Dowling, Psychology Advisor and Registered Clinical Psychologist. In his report of 30 June 2020, Dr Dowling notes that Dr Xiong, in reaching a

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5 *Seddon v Accident Compensation Corporation* [2004] NZACC 320

different conclusion to Dr Wright (Neurologist), does not appear to have reviewed Dr Wright's report. Dr Dowling regards this as a significant limitation in Dr Xiong's assessment "as Dr Wright is a Neurologist, is a specialist in brain injuries, and his opinion has not been considered by Dr Xiong".

[80] Accordingly, Mr Lane submits that the weight of the medical evidence supports ACC's decision to decline cover for mental injury and that decision should be upheld.

[81] In respect of the decision of 22 July 2020 revoking deemed cover for post-concussion syndrome, Ms Lane notes that as we are dealing with deemed cover, the onus of establishing that the accident caused the post-concussion syndrome rests with the appellant and she submits that the medical evidence does not establish that the accident caused post-concussion syndrome.

[82] She notes that Dr Xiong's diagnosis is heavily dependent upon the reports of Dr MacLeod and Dr Snell, but she submits that Dr Xiong has isolated comments from Dr MacLeod and Dr Snell's reports, that are not representative of their overall opinions.

[83] Dr Xiong notes that Dr MacLeod supported post-concessional (sic) headaches. In fact, Dr MacLeod stated that the appellant's "history does suggest post-concussional headaches, although not other prominent post-concussional symptoms". She submits therefore that Dr MacLeod plainly did not consider there to be sufficient objective evidence of post-concussion syndrome. Indeed, when Dr MacLeod discharged the appellant from the Concussion Clinic just over a month later, the report prepared with other members of the clinical team noted that self-reported post-concussional symptoms were not seen on objective assessment.

[84] She notes that Dr Snell found no objective evidence of post-concussion syndrome. After assessing the appellant, she concluded:

> She does appear to be improving slowly with time, although still self-reported many post-concussional symptoms that were not necessarily evident on objective assessment (eg. self-reported cognitive difficulties vs objective assessment findings).

[85] Ms Lane notes that Dr Dowling has explained that post-concussion syndrome is a "contentious diagnosis that is not universally accepted" because the research does not support

it being a reliably identifiable condition and that Dr Dowling said that symptoms were usually the result of non-injury factors.

[86] Also, Ms Lane notes that a number of health practitioners have given opinions attributing the appellant's symptoms to causes entirely unrelated to the accident or a concussion. Dr Parkin concluded that the most likely explanation of the appellant's accident was an alcohol induced seizure and Dr Wright found that the ongoing symptoms were aggravation of a pre-existing condition, being "migraine tendency into chronic daily headache".

[87] Ms Lane also notes that in his vestibular assessment of 25/9/16, Physiotherapist Walter Geursen found that the appellant's headaches were caused by her neck, stating "There is high neck disfunction … the headaches could be reproduced at C3".

[88] As to suspension of weekly compensation, the appellant's submission is that if cover is granted for either mental injury or post-concussion syndrome, then weekly compensation will follow. The appellant says she is unable to work because of a mental injury and post-concussion syndrome. Ms Lane submits, however, that entitlements like weekly compensation do not automatically flow from cover. ACC's position is that there was sufficient evidence for it to be not satisfied that the appellant is entitled to weekly compensation irrespective of whether this Court grants cover for a mental injury or post-concussion syndrome. ACC's position is that any incapacity is not caused by the accident.

[89] Ms Lane refers to the report of Dr Walker, specialist in occupational medicine, considering the appellant's prognosis for returning to full time work and stated:

> On reviewing Robyn's general practitioner notes, there are a variety of long standing psychological symptoms and physical symptoms which have proved debilitating and at this point in time, I think that her symptoms predominantly relate to a resolving mood disturbance, long standing anxiety, and some struggles with recent alcohol dependence. Robyn assures me that her alcohol consumption has moderated and I have taken her word for that, but there is, of course, no proof. Whilst she reports persisting dizziness, this is a long standing problem (GP notes and neurological assessment in 2010) and is no longer attributable to her head injury. There is no good medical reason why Robyn would not sufficiently tolerate a return to full time work, while she has persistent symptoms, these should moderate with a return to work. It is difficult to confirm her tolerance for work, as there is no medically objective, verifiable reason for incapacity and her problem is fatigue, which likely predominantly

> relates to a resolving mood disturbance, long standing anxiety, and some struggles with recent alcohol dependence.

[90] She submits that Dr Walker's is the only assessment of whether the appellant has incapacity for employment and there is no contrary evidence except the appellant's own self-report that she is unable to work. Ms Lane submits, therefore, that there is no evidence linking any incapacity for work on the part of the appellant to the accident.

[91] Ms Lane submits that ACC's three decisions should be upheld.

Decision

[92] Three decisions by the respondent that arise from an accident that the appellant had on 17 March 2016, namely:

(a) ACC's decision of 7 August 2019 declining cover for mental injury;

(b) ACC's decision of 22 July 2020 revoking the deemed cover for post-concussion syndrome and declining cover for that injury;

(c) ACC's decision of 23 February 2021 suspending the appellant's weekly compensation on the basis that she did not have cover for post-concussion syndrome.

[93] It is noted that the appellant has cover for concussion relating to an accident on 19 August 2016. This cover has not been revoked by ACC.

[94] The focus of this appeal therefore is squarely on the accident of 17 March 2016, and whether the three decisions, the subject of this appeal, are to be upheld.

[95] As was noted by the reviewer in the review hearing of 1 June 2021:

- Before her accident on 17 March 2016, she was working as an office manager. She was working well, running a busy business and working normal hours.
- After the accident, she hit her head on a kitchen top, and went to the emergency department. After that, she tried to carry on, but she could not do it. She had sensitivity to everything. It was a struggle.

- After her second accident on 19 August 2016, she had headaches and fatigue, but not much else had changed from the first accident, and the symptoms continue until today.

[96] Counsel also refers to the letter from the appellant's father dated 16 October 2019 in which he said:

> Following the accident in March 2016, Robyn's life has been significantly different.

[97] The description of her second accident on 19 August 2016, in the ACC claim form was as follows:

> LOC? Cause, hit head and chipped one front tooth.

[98] On that occasion, the health provider also included in the claim form the following:

> Mother says "different person" since first head injury, never had head scan, recurrent frontal headaches, neuro exam normal but not feeling right.

[99] The focus then is squarely on the three decisions made by ACC of 7 August 2019, 22 July 2020 and 23 February 2021 as they relate to the evidence and the medical reports and assessments deriving from the 17 March 2016 accident.

[100] ACC's power to revoke its decisions is set out in s 65 of the Accident Compensation Act 2001, which provides:

> (1).If the Corporation considers it made a decision in error, it may revise the decision at any time, whatever the reason for the error.
>
> (2).The Corporation may revise a decision deemed by s 58 to have been made in respect of any claim for cover, but may not recover from the claimant any payments made by it, in respect of the claim, before the date of the revision unless the claimant has made payments made by it, in respect of the claim, before the date of the revision unless the claimant has made statements or provided information to the Corporation that are, in the opinion of the Corporation, intentionally misleading.

[101] The decision *Atapattu-Weerasinghe*[6] provides that where ACC relies on an error to revoke cover, it bears the onus of proving the error.

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6 *See Atapattu-Weerasinghe* n3.

[102] Section 117(1) of the Accident Compensation Act provides that the Corporation may suspend or cancel an entitlement if it is not satisfied, on the basis of the information in its possession, that a claimant is entitled to continue to receive the entitlement.

[103] *Ellwood*[7] is authority for the proposition that when dealing with suspension of entitlements under s 117, the "not satisfied" test will not be met where the medical evidence is unclear or in the balance.

[104] Mr Macann places considerable reliance on the reports of Dr Xiong, specialist in rehabilitation medicine, who reported on 19 May 2020. In that report, he concluded that the appellant has sustained a mental injury, caused by her physical head injury. He said:

> It is quite clear to me that she has developed persistent post-concussive presentations, including the diagnosis of post-concussion syndrome.
>
> The clinically presented recurrent persistent headache, as well as neurogenic fatigue, in conjunction with neuro-behavioural changes in her case are characteristic of post-concussion syndrome that I believe was based on the physical head injury (mild TBI) she has suffered from.
>
> I note the statement from people who are close to Robyn have stated, and confirmed their observations of the changes, supporting the significant behavioural, cognitive and psychological dysfunctions.
>
> In addition, I believe she has also had the diagnosis of depression and anxiety that are directly secondary to the head injury and subsequent development of post-concussive presentations. From that point of view, I would totally support that Robyn has sustained a mental injury caused by her mild head injury.

[105] Dr Xiong goes on to disagree with Dr Garcia's opinion and says:

> From the medical point of view, the depression and anxiety are secondary to the trauma and the consequence of the mild head injury and mild head injury related clinical presentations …

[106] Dr Xiong also says:

> It is clear to me that Robyn has developed persistent post-concussion syndrome or persistent post-concussion related presentations. This I believe is directly related to the original trauma and the physical head injury she has suffered from. I believe her presentations are consistent and much of my opinions expressed here would be consistent with the opinions already provided by Debbie Snell, who is a very experienced neurophysiologist and Dr Sandy MacLeod, who is the Medical Director of the Brain Injury Rehabilitation Service and he was also working in the capacity as a psychiatrist.

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7 See *Ellwood* n1.

[107] In his second letter dated 21 August 2020, Dr Xiong said:

> The crux of the dispute is at the concept of concussion or the definition of concussion that can be often debateable and in layman's terms means simply "loss of consciousness". In the medical field however, this is not exactly the case as the fundamental diagnosis is based on the fact whether the person has suffered from mild traumatic brain injury (mild TBI). In the definition of mild traumatic brain injury, there are people who have suffered from clear concussion which fulfils the criteria of diagnosis of mild TBI or people who do not necessarily have a specific loss of consciousness episode, but still present with traumatic brain injury related clinical presentations such as memory impairment, disorientation, confusion or specific clinical presentations such as severe headache, dizziness and visual impairment.
>
> …
>
> Finally, I would like to confirm that post-concussion syndrome is widely recognised by the medical fraternity as a genuine condition and this is used quite extensively in New Zealand and the Australian region by the medical community as well as by ACC and other legislation/legal entities.

[108] The report from Dr MacLeod from the Burwood Concussion Clinic is dated 3/06/2016. Dr MacLeod assessed the appellant that same day. Included in Dr MacLeod's report is the following:

> I note that she has a history of headaches, a history of teenage migraine, and a neurological assessment for headaches and funny turns in 2010, though she states that her present headaches are unlike those. She reports no other past or family history of note. Though she minimises her alcohol consumption, I note that it has been a significant issue. She works as an office manager and has done so for the past 14 years. She has not been back to work since this injury.
>
> …
>
> Her history does suggest post-concussional headaches, though not other prominent post-concussional symptoms. She has a propensity to headaches and I think she is at risk to evolve paradoxical headaches. …
>
> At this stage, I think it is important for her to commence a graded return to work programme as soon as possible. It is coming up to three months and it would be advisable for her to be beginning to pick up on her usual life events. I think it also useful to challenge her on her potentially hazardous alcohol consumption.

[109] Also, is report from Dr Deborah Snell, Clinical Neuro Psychologist from the Brain Injury Rehabilitation Service, Burwood Hospital. The report, dated 13 June 2016, is headed "Neurological Assessment – Concussion Screen" and concludes:

> In summary, assessments in the Concussion Clinic indicate Robyn sustained an injury in March this year and in a context of substance abuse. She does appear to be improving slowly with time, although still self-reports many post-concussional symptoms that were not necessarily evident on objective assessment (eg. her self-reported cognitive difficulties vs objective assessment findings). Lack of structure

> and meaningful activity was identified as an issue at time of assessment and appears to be impacting on her progress and mood. Accordingly, referral for vocational support and graduated return to work will be important to initiate to reinforce return to normal functioning and a recovery orientation.

[110] It is noted of course that Dr MacLeod and Dr Snell's reports were written over three years before ACC's decision declining cover for mental injury of 7 August 2019. They also pre-date by more than four years ACC's decision of 22 July 2020 revoking the deemed cover for post-concussion syndrome.

[111] Also, in each case, the report writer noted other factors, Dr MacLeod noting her history "does not suggest … other prominent post-concussional symptoms and that she has a propensity for headaches and that she is at risk to evolve paradoxical headaches."

[112] Likewise, Dr Snell, in the summary paragraph of her report of 13 June 2016, that the appellant "still self-reports many post-concussional symptoms that were not necessarily evidence on objective assessment" and Dr Snell went on to note that "Lack of structure and meaningful activity was identified as an issue at time of assessment and appears to be impacting on her progress and mood."

[113] Ms Lane places reliance on the reports a medical case review of Dr Walker, Specialist in Occupational Medicine, the most recent of which was on 11 August 2017. Dr Walker found:

> There is no good reason why Robyn would not sufficiently tolerate a return to full time work. Whilst she has persistent symptoms, these should moderate with a return to work. It is difficult to confirm her tolerance for work, as there is no medically-objective, verifiable reason for incapacity and her problem is fatigue, which likely predominantly relates to a resolving mood disturbance, long standing anxiety, and some struggles with recent alcohol dependence.

[114] In his earlier report of 17 February 2017, Dr Walker said this:

> Given her satisfactory presentation consciousness level and absence of significant post-traumatic amnesia, any TBI symptoms would have resolved within weeks. Robyn's disability no doubt relates to mood disturbance and the stress associated with loss of employment and independence.

[115] On 26 July 2019, Dr Garcia, Psychiatrist, compiled a mental health assessment. In his summary he said:

> Ms Mehrtens' father was of the opinion that her psychiatric symptoms were secondary to the concussion. While it is not unusual for people to exhibit a subdued affect and even low mood for a couple of months following a minor TBI, it is unusual to develop

> an anxiety condition as the one described by her, with agoraphobia, and apparent panic attacks. I think that the more probable explanation is that she has always had a tendency to anxiety and that this has been exaggerated by the loss of her job and everything that the job meant to her.

[116] Given this review of the medical assessments of the appellant since 2016, the weight of evidence falls in favour of the appellant's concussive injury of 17 March 2016 being spent.

[117] The appellant plainly continues to face real health challenged, but the evidence is that on the balance of probabilities, these are not related to her accident of 17 March 2016.

[118] Accordingly, I find that ACC has satisfied the onus that is on it when, in its decision of 7 August 2019, it declined cover for mental injury.

[119] Likewise, I conclude on the evidence that ACC has proven that the appellant's current presentation is not causally related to the covered injury of 17 March 2016.

[120] I also find that because the evidence put forward by ACC, established that her medical presentation no longer derives from her personal injury of 17 March 2016, ACC has satisfied the Court that its decision of 23 February 2021 suspending the appellant's weekly compensation on the basis that she did not have cover for post-concussion syndrome, was correct.

[121] Accordingly, the appeal is dismissed.

[122] Costs are reserved. Any memoranda in respect of costs are to be filed within one month.

CJ McGuire
District Court Judge

Solicitors: Claro, Wellington