IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 79 ACR 273/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	SAID MOSTAFA Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	CARTER HOLT HARVEY Second Respondent

Hearing:	3 April 2023
Heard at:	Christchurch/Ōtautahi
Appearances:	The Appellant in person Mr C Light for the First Respondent No appearance for the Second Respondent
Judgment:	19 May 2023

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Cover Issues, s 20 Accident Compensation Act 2001]

Background

[1] On 7 December 2020, WorkAon issued a decision to:

1. Suspend entitlements for Mr Mostafa's covered injuries described as "sprain of elbow and forearm – right; lateral epicondylitis of the elbow – right; post-surgical capsulitis of the shoulder – right"; and

2. Not to approve additional cover for a right supraspinatus tear, subacromial and subdeltoid bursitis. These are conditions that were seen on ultrasound.

[2] On 17 August 2021, WorkAon issued a decision to:

1. Revoke the suspension decision of 7 December 2020;

2. Grant cover for a complex regional pain syndrome (CRPS);

3. Because of cover for CRPS, reinstate entitlements with effect 8 April 2021, the date that this new diagnosis was first determined.

[3] The reviewer dismissed the review application against WorkAon's decision of 7 December 2020. This meant that the reviewer found that WorkAon was correct to decline cover for a right supraspinatus tear, subacromial and subdeltoid bursitis.

[4] The reviewer also found that WorkAon should not have revoked the suspension part of the decision of 7 December 2020. The reviewer said that the evidence showed that the symptoms in respect of the covered sprain of elbow and forearm, lateral epicondylitis of the elbow and post-surgical capsulitis of the shoulder had most likely resolved. WorkAon was therefore correct to suspend entitlements for those injuries.

[5] The reviewer modified WorkAon's decision of 17 August 2021 as follows:

> Aon approves cover for a complex regional pain syndrome as a consequential injury, consequent on his covered "sprain of elbow and forearm – right; lateral epicondylitis of the elbow – right" injuries.
>
> Aon confirms that the date of cover is as of 7 December 2020 and such is the date to be applied if any entitlements are retrospectively approved.

[6] In effect, therefore, Mr Mostafa had his entitlements reinstated from 7 December 2020, but only for the complex regional pain syndrome and not the other covered injuries. Because the date when entitlements ended was two weeks after the decision date of 7 December 2020, Mr Mostafa did not suffer a loss of entitlements.

[7] What follows from the above is that the only issue raised by Mr Mostafa that the Court has jurisdiction to consider is the decline of cover for the right supraspinatus tear and the right subacromial and subdeltoid bursitis.

[8] At the time of his injury on 8 February 2018, the Mr Mostafa was a truck driver for Carter Holt Harvey. According to the ACC injury claim form dated 1 March 2018, the description of injury is "Throwing strop over truck and felt pain in arm". The diagnosis was sprained elbow/forearm – right side. The claim form includes a referral to a physiotherapist, with the suggested treatment being "mobilise and relieve pain". He was to avoid heavy lifting, throwing strops etc for two weeks from 1 March 2018.

[9] The medical notes of 1 March 2018 also include the following:

> Painful right upper forearm after throwing heavy strop four weeks ago. Remains painful, with some local tenderness. Diagnosis – sprain? tear. For Ibuprofen.
>
> Refer Merivale Hand Therapy.
>
> Light duties for two weeks – avoid throwing strops etc.
>
> Egyptian and will return there for visit in few weeks.

[10] The appellant duly attended the Merivale Hand Clinic on 5 March 2018. The current symptoms were recorded as:

> Pain in elbow and forearm after throwing tie down up over truck. The elbow and forearm appear swollen.

[11] The physiotherapist referred the appellant for an ultrasound scan and made the following diagnosis:

> Right flexor tendonitis/osis and ? radial tunnel.

[12] The therapist's notes of 5 March also noted:

> End range elbow ext is limited, flexion is limited to 70 degrees … is working reduced hours.

[13] The appellant had further treatment with Hand Therapy Associates on 9 March 2018, 14 March 2018, 19 March 2019, 21 March 2018 and 9 May 2018.

[14] Between the second to last and last physiotherapy treatments, the appellant was away on a pre-planned trip to Egypt. The physiotherapist noted that on 9 May 2018:

> Did not improve when away, heat during the day helped the pain while in Egypt, but sore at night. Had steroid injection and fenistration to the extensor origin tendon on the 8/5. Advised to rest and take pain relief.

[15] On 9 May 2018, the appellant was assessed by Dr Walker, specialist in occupational medicine. He recorded the following under the heading "Current Situation and General Functioning":

> Said described ongoing pain at the lateral elbow and just distally involving proximal extensor aspect of the forearm. Pain is moderate and intermittent. Pain is of variable severity, related to the amount of force expended. With any significant gripping, pain will last for a period of minutes. His gripping ability is impaired and he can only

> comfortably lift a cup of drink. There has been no tingling or numbness in the hand at this stage. He continues to use his wrist splint and elbow splint and does exercises and takes pain killers.

[16] Under the heading "Examination", Dr Walker recorded:

> …
>
> Good range free movement elbow and shoulder.

[17] Aon New Zealand, in a letter dated 25 May 2018, declined cover "because the medical evidence on file has confirmed that you have not suffered a sprain elbow/forearm, but rather you have a non-injury condition of tennis elbow".

[18] This decision was quashed by the reviewer on 17 May 2019 and substituted with a decision that the appellant should have cover for a micro tear and consequential tennis elbow.

[19] WorkAon subsequently approved funding for a common extensor origin release of the right elbow. The appellant underwent this surgery on 20 September 2019.

[20] Mr Chandru, Orthopaedic Surgeon, who performed the surgery, reported on 4 November 2019 that Mr Mostafa had made a good recovery and could return to work. In his report of 4 November 2019, Mr Chandru said:

> The specific tenderness and pain he used to experience at the origin of the ECRB muscle tendon has settled well and Cozen's manoeuvre is negative. He has a full range of movements in his elbow and rehab is progressing well also. He was a bit concerned regarding a dull aching pain around his upper arm, but I cannot see any indications for any nerve entrapment or concerns here on today's assessment.
>
> I have reassured Said today and advised him to commence his normal work activities and he is keen to look for a new job and get on with his life.

[21] In the bundle of documents, there are the clinical notes from Riccarton Clinic and after hours Medical Care in the respect of the appellant. These date from March 2018.

[22] The medical note of 29 November 2019 records:

> Ongoing throbbing hot pain in R arm.
>
> Taking anti-inflammatories.
>
> Main issue is having ongoing weakness in R grip.

[23] However, in a letter to the case manager dated 10 December 2918, Dr Broadbent, from the Riccarton Clinic and Afterhours Medical Care, said in respect of the appellant:

> The medical notes have been reviewed going back to the first date we have them of 7/8/13. There are no references in the notes relating to his right shoulder.

[24] WorkAon sought advice from Dr Burgess, WorkAon Branch Medical Advisor and Occupational Medicine Specialist. On 7 February 2020, Dr Burgess commented:

> There is reasonable evidence of partial incapacity from this covered injury [the elbow injury], there is no evidence to support any shoulder related pathology caused by this covered injury.

[25] On 24 February 2020, Dr Deborah Mason, a neurologist, reported on her assessment of the appellant. She referred to Mr Mostafa's symptoms, noting that he had had some recent right shoulder pain. She said:

> As I have explained to Mr Mostafa, I can find no evidence of neural involvement, which is reassuring and I think that the sharp pains that he is experiencing relate to the musculoskeletal aspects of his injury. There is little doubt that he has ongoing pain from the injury, some of this is quite focal and worsened by flexion, raising the question of either muscle or tendonitis. I would recommend an MRI of his forearm, looking specifically at the mid-forearm region, but I do not think that there are likely to be any further surgical interventions that are likely to be helpful. One recommendation I had was a trial by physiotherapists with some deep tissue friction over these areas that might lead to some resolution of his pain, but I will obviously leave this in the hands of the more experience musculoskeletal physiotherapists.

[26] Dr Mason reported again on 1 May 2020 following an MRI scan of his right arm from elbow to wrist. Again, she thought that a neurogenic cause was unlikely and thought that the changes were inflammatory, although she was uncertain about the cause of this. She suggested review by a musculoskeletal doctor.

[27] Orthopaedic surgeon, Mr Peter Welsh, conducted a file review and reported on 26 June 2020. He noted that the first time that upper right arm symptoms were alerted was during an assessment on 4 November 2019 by Mr Chandru. Mr Welsh noted:

> On 4 November Mr Chandru undertook a further post-operative check with Mr Mostafa, who reported a dull ache around the upper arm (fore saging the evolution of a frozen shoulder.

[28] Mr Welsh considered that Mr Mostafa had post-surgical capsulitis of the right shoulder, also known as frozen shoulder. Mr Welsh said:

> This is not accident caused, it is unrelated to the accident of February 2019. The frozen shoulder has developed as a consequence of immobilisation of the right arm post-elbow surgery.

[29] In a decision dated 8 July 202020, WorkAon confirmed cover for post-surgical capsulitis of the right shoulder and declined cover for right shoulder impingement.

[30] The appellant did not apply for a review of this decision.

[31] An ultrasound of the right shoulder on 28 July 2020 was reported as showing a partial thickness tear of the supraspinatus tendon and overlying subacromial and subdeltoid bursitis. The radiologist, Dr Omar, noted the following under the heading "Conclusion":

> Partial thickness tear of the supraspinatus tendon involving up to 50 per cent tendon thickness.
>
> Overlying subacromial – subdeltoid bursitis.
>
> External rotation is unrestricted and the inferior glenohumeral ligament is not thickened this (sic), findings are not typical of adhesive capsulitis.

[32] Mr Welsh commented on the ultrasound on 16 August 2020 in response to questions posed by WorkAon:

> 1. Do you consider the current diagnoses have been caused by the accident?
>
>   No, the diagnoses of supraspinatus tear, subacromial and subdeltoid bursitis describe the observed changes in the status of the rotator cuff tendons as a result of gradual process wear and tear, age related degeneration.
>
> 2. Do you consider the current diagnoses are wholly or substantially caused by a gradual process, disease, infection or the aging process?
>
>   Yes.
>
> 3. Are the injuries spent, or is there another reasonable injury-related explanation for Said's continuing symptoms?
>
>   Yes, at ultrasound study, the radiologist specifically commented that there was free movement of the shoulder. Any capsulitis effect as I might have supposed is spent.
>
> 4. Are there any other treatment or rehabilitation interventions that you recommend?
>
>   No.

[33] On 1 September 2020, Dr Burgess, Occupational Medicine Specialist, commented:

> Although Mr Welsh has noted the condition as adhesive capsulitis, this was paper based only on a paper review, whereas an ultrasound does not confirm this. As such, we need to rely on the USS as a more objective assessment.
>
> As such, cover to the shoulder is not met and therefore revoking cover for the adhesive capsulitis condition appears appropriate.
>
> The current pathology in the shoulder appears to be one of a degenerative process – tendon tearing – and an aggravation of this due to the arm being immobilised in a sling.

[34] On 7 December 2020, WorkAon declined additional cover for the condition seen on ultrasound, namely a right supraspinatus tear and subacromial and subdeltoid bursitis. In the same letter, WorkAon suspended entitlements for Mr Mostafa's covered injuries described as "sprain of elbow and forearm – right; lateral epicondylitis of the elbow – right; post-surgical capsulitis of the shoulder – right".

[35] WorkAon also declined Mr Mostafa's claims for weekly compensation from 31 August 2020 and home help from 6 September 2020. The reason given for the suspension decision was because the injury related pathology had resolved and the ongoing condition was unrelated to the covered injuries.

[36] On 18 January 2021, Mr Mohammed, Orthopaedic Surgeon, reported:

> I feel that there are some symptoms that are likely related to the partial thickness rotator cuff tear on ultrasound and we would not normally operate on this. He was reassured by this. For the shoulder I have prescribed an image guided cortisone local anaesthetic subacromial injection and physiotherapy at Redwood Physiotherapy with Sean Wilson.

[37] On 8 April 2021, Dr Bell, Musculoskeletal Medicine Physician, reported to Mr Mohammed. Under the heading "Impression", he said:

> I agree Khlid that Said is presenting with dystrophic features and he meets Budapest criteria for CRPS (complex regional pain syndrome) type 1.

[38] Dr Bell reported further on 12 May 2021. His report included this:

> Based on Said's history, it does seem that his CRPS has arisen directly as a result of the injury to his right elbow, and I also note that ACC funded surgery to his elbow, so I am puzzled as to why this situation has arisen.

[39] In a report dated 26 July 2021, Mr Welsh agreed with Dr Bell's conclusion that Mr Mostafa's ongoing complex regional pain syndrome was a result of his original injury to his right arm suffered at work in February 2018.

[40] On 17 August 2021, WorkAon issued a further decision revoking the suspension decision of 7 December 2020. The decision advised that cover had been granted for complex regional pain syndrome. Entitlements were reinstated from 8 April 2021, which was the date that the new diagnosis was first determined. The letter confirmed that cover for the supraspinatus tear and subacromial and subdeltoid bursitis remained declined.

Appellant's Submission

[41] Mr Mostafa presented both written and oral submissions on his own behalf.

[42] He told the Court that in the course of his employment with Carter Holt Harvey, he was a health and safety representative and followed the company procedures. He said, however, there appeared to be pressure coming from his employer for him to continue working, even to the point where pain killers were provided for him.

[43] Mr Mostafa has listed in writing the following issues:

(a) Entitlement was stopped without a letter of intent or a decision in 2019, not in 2020.

(b) The date of cover is not the date of the first diagnosis that was first determined.

(c) One of the bases was that shoulder symptoms only came on within four or five days of 13 November 2019. The cover was declined.

(d) On the record, the reviewer stated:

> Aon's file was presented to me in four parts comprising 1,476 scanned photocopies of documents, in no discernible order, some of which were upside-down and parts of which were not easy to read. I place on record that I have made best efforts to peruse this record as best I could, but given the state of the file, made it particularly hard to verify the accuracy of all the information.

(e) Records show that the shoulder first being (injured?) on it as early as March 2018.

(f) The disadvantages and suffering I have been under because of the treatment I have been given did not allow me to establish a chain of accruing. This was not taken into account.

(g) My income was recalculated on my income in 2020, even so I have all record from my Doctor to show that my forearm septimes (symptoms?) were current.

(h) Records show that my case was misrepresented to health professionals to achieve favourable results. And I do strongly believe that was intently.

(i) Records also show that my case was not being handled within the law of the ACC Act.

[44] The appellant seeks the following:

(a) Shoulder cover should be granted.

(b) Entitlement to be resumed from 17/11/2019 (the date of the last payment) based on what I used to earn before the injury, not what I was earning after the injury.

(c) To get compensated for all the disadvantaged suffering and pain I have been under.

(d) WorkAon to be warned or fined for their handling of my case and misrepresenting my case to achieve favourable results, so that doesn't happen to anyone else.

Respondent's Submissions

[45] Mr Light noted that the appellant has raised a number of issues on this appeal. However, he submits that except for the shoulder injury cover issue, the other issues do not arise from the WorkAon decisions that were the subject of the review applications and in turn the review decision.

[46] Mr Light says, at paragraph 80 of his submissions:

> [80] It follows that the ambit of the appeal is restricted to a WorkAon decision that was reviewed by Mr Mostafa unsuccessfully. Mr Mostafa therefore cannot raise issues on appeal that fall outside the scope of the decisions that he applied to review and that were addressed by the reviewer in his decision.

[81] The effect of WorkAon's decisions, as modified by the review decision, were that:

> (a) Entitlements remain suspended for the elbow and forearm sprain injury, the lateral epicondylitis of the elbow injury and the post-surgical capsulitis of the shoulder injury (all right sided). Mr Mostafa has not contested this issue on appeal.
>
> (b) Cover remains declined for the supraspinatus tear and the subacromial and subdeltoid bursitis (all right sided). Mr Mostafa has contested this issue on appeal.
>
> (c) Mr Mostafa has cover for the complex regional pain syndrome. Entitlements were reinstated because of this injury with effect from 7 December 2020. WorkAon had suspended entitlements with effect from two weeks after the decision of 7 December 2020 and therefore there was no break in the entitlements. Although Mr Mostafa has contested the calculation and payment of weekly compensation, these issues were addressed in different WorkAon decisions that he did not apply to review and that were therefore not addressed in the review decision.

[47] Mr Light then addressed the issue of cover for a right supraspinatus tear, subacromial and subdeltoid bursitis.

[48] He notes that Mr Welsh initially thought in his report of 26 June 2020, that Mr Mostafa had post-surgical capsulitis (frozen shoulder) of his right shoulder. He considered that this condition was not because of the accident, but because of the immobilisation of the right arm after elbow surgery. Because this was an accident related condition, WorkAon granted cover for it.

[49] An ultrasound of the right shoulder on 28 July 2020 showed a partial thickness tear of the supraspinatus tendon and overlying subacromial and subdeltoid bursitis. The radiologist said that the findings were not typical of adhesive capsulitis.

[50] In a further comment on 16 August 2020, Mr Welsh considered that the capsulitis effect was spent because the radiologist, when reporting on the ultrasound on 28 July 2020, said there was free movement of the shoulder. Mr Welsh said that the supraspinatus tear and subacromial and subdeltoid bursitis were the result of a gradual process wear and tear age related degeneration.

[51] Mr Mohammed commented on 18 January 2021. He referred to the right shoulder and said that some symptoms were related to the partial thickness rotator cuff tear, but that he

would not commonly operate on these. Mr Mohammed did not attribute this condition to the accident event.

[52] Mr Light notes that the right shoulder was first referred to as symptomatic in November 2019 during a review by Mr Chandru. This was about 21 months after the accident event.

[53] He submits that there is no expert medical evidence linking the right shoulder conditions to the accident event.

[54] Mr Light refers to the reports of Mr Welsh of 16 August 2020 and Dr Burgess of 1 September 2020 which note that the right shoulder conditions were observed on ultrasound and are consistent with a gradual onset condition, rather than being acutely caused by trauma.

Decision

[55] Mr Mostafa, the appellant, presents as a conscientious and hard working employee.

[56] I accept that, as a person with these admirable qualities, he worked on through the pain and discomfort of his original injury of 8 February 2018 that occurred whilst throwing a strop over a truck. What followed appeared to be medication through his manager and self-medication until he was assessed at the Harwood Medical Centre on 1 March 2018. At that stage, a right side elbow and forearm sprain was diagnosed. He was referred to physiotherapy treatment and this, though interrupted by a trip to Egypt, continued until May 2018.

[57] It needs to be said, however, that the focus of the treatment was on his right forearm and elbow. The physiotherapy notes do not mention any issues with his right shoulder. Likewise, the initial GP notes from 1 March 2018 do not mention any shoulder issues.

[58] This is also borne out in the medical case review dated 9 May 2018, carried out by Dr Walker, specialist in occupational medicine. In fact, Dr Walker mentions, under the heading “Examination”:

> … good range, free movement elbow and shoulder.

[59] It seems that his right shoulder became an issue towards the end of 2019. Dr Chandru, orthopaedic hand/wrist and upper limb surgeon, notes in a report of 4 November 2019:

> He has a full range of movement in his elbow and rehab is progressing well also. He was a bit concerned regarding a dull aching pain around his upper arm, but I cannot see any indications of any nerve entrapment or concerns here on today's assessment.

[60] In his report of 24 February 2020, neurologist, Dr Mason, notes:

> He has also had some recent right shoulder pain.

[61] In his report of 26 June 2020, orthopaedic surgeon, Dr Welsh, diagnoses post-surgical capsulitis of the right shoulder and goes on to say:

> This is not accident caused, it is unrelated to the accident of February 2019. The frozen shoulder has developed as a consequence of immobilisation of the right arm post elbow surgery.

[62] Because it derived from surgery, WorkAon granted cover for it.

[63] An ultrasound was carried out on 28 July 2020, which included the following:

> **Conclusion**
>
> - Partial-thickness tear of the supraspinatus tendon involving up to 50 per cent tendon thickness.
> - Overlying subacromial deltoid bursitis.
> - External rotation is unrestricted and the inferior glenohumeral ligament is not thickened this.

[64] Mr Welsh commented further on 16 August 2020, that when the radiologist reported on 28 July following the ultrasound, there was free movement of the shoulder. Accordingly, he considered the adhesive capsulitis to have been spent.

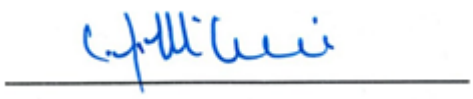
[65] Mr Welsh also said:

> The diagnosis of supraspinatus tear and subacromial and subdeltoid bursitis describe the observe changes in the status of the rotator cuff tendons as a result of gradual process wear and tear age related degeneration.

[66] Given that the appellant bears the burden of proving on the balance of probabilities that, in respect of the matter before the Court, the right supraspinatus tear, and the subacromial and

subdeltoid bursitis was caused by the accident of 8 February 2018, I must conclude that the appellant has not proved his case. The evidence before the Court is that this particular shoulder condition of the appellant is not injury related, but rather age related.

[67] Accordingly, the appeal is dismissed. Costs are reserved. Any memoranda relating to costs must be filed within one month hereof.



CJ McGuire
District Court Judge

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