IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 155 **ACR 273/21**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	SAID MOSTAFA Applicant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	CARTER HOLT HARVEY Second Respondent

Submissions:	The Appellant is self-represented C Light for the Corporation
Hearing:	On the papers
Judgment:	21 September 2023

JUDGMENT OF JUDGE P R SPILLER
[LEAVE TO APPEAL TO THE HIGH COURT]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour, Judge McGuire, delivered on 17 May 2023, with an addendum on 21 August 2023.[1] The Court dismissed Mr Mostafa's appeal, for the reasons outlined below.

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[1] *Mostafa v Accident Compensation Corporation* [2023] NZACC 79.

Background

[2] At the time of his injury on 8 February 2018, Mr Mostafa was a truck driver for Carter Holt Harvey.

[3] According to the ACC injury claim form dated 1 March 2018, the description of Mr Mostafa's injury was "Throwing strop over truck and felt pain in arm". The diagnosis was "sprained elbow/forearm – right side". The claim form included a referral to a physiotherapist, with the suggested treatment being "mobilise and relieve pain". The medical notes of 1 March 2018 also included 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.

[4] On 5 March 2018, Mr Mostafa attended the Merivale Hand Clinic. The current symptoms were recorded as:

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

[5] The physiotherapist referred Mr Mostafa for an ultrasound scan and made the following diagnosis: "Right flex or tendonitis/osis and? radial tunnel". The therapist's notes also recorded: "End range elbow ext is limited, flexion is limited to 70 degrees is working reduced hours".

[6] On 9, 14, 19 and 21 March 2018 and 9 May 2018, Mr Mostafa had further treatment with Hand Therapy Associates.

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

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

[8] On 9 May 2018, Mr Mostafa was assessed by Dr Walker, specialist in occupational medicine. Under the heading "Current Situation and General Functioning", he recorded:

> 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.

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

> Good range free movement elbow and shoulder.

[10] On 25 May 2018, WorkAon New Zealand 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". Mr Mostafa applied to review this decision.

[11] On 17 May 2019, WorkAon's decision was quashed by the Reviewer and substituted with a decision that Mr Mostafa should have cover for a micro tear and consequential tennis elbow.

[12] WorkAon subsequently approved funding for a common extensor origin release of the right elbow. On 20 September 2019, Mr Mostafa underwent this surgery.

[13] On 4 November 2019, Mr Chandru, Orthopaedic Surgeon, who performed the surgery, reported that Mr Mostafa had made a good recovery and could return to work. 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.

[14] On 29 November 2019, the medical note of Mr Mostafa's medical clinic recorded:

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

[15] On 10 December 2019, Dr Broadbent, from the Riccarton Clinic and Afterhours Medical Care, said in respect of Mr Mostafa:

> 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.

[16] On 7 February 2020, Dr Burgess, WorkAon Branch Medical Advisor and Occupational Medicine Specialist, 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.

[17] On 24 February 2020, Dr Deborah Mason, a neurologist, reported on her assessment of Mr Mostafa. She referred to his 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.

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

[19] On 26 June 2020, Mr Peter Welsh, Orthopaedic surgeon, conducted a file review and reported. 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 (foresaging (sic) the evolution of a frozen shoulder.

[20] 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.

[21] On 8 July 2020, WorkAon confirmed cover for post-surgical capsulitis of the right shoulder and declined cover for right shoulder impingement. Mr Mostafa did not apply for a review of this decision.

[22] On 28 July 2020, an ultrasound of Mr Mostafa's right shoulder 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.

[23] On 16 August 2020, Mr Welsh commented on the ultrasound 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.

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.

[24] On 1 September 2020, Dr Burgess commented:

> Although Mr Welsh has noted the condition as adhesive capsulitis this was paper based only on a paper review, where as 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.

[25] On 7 December 2020, WorkAon declined additional cover for 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".

[26] 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.

[27] 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 Red wood Physiotherapy with Sean Wilson.

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

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

[29] On 12 May 2021, Dr Bell reported further:

> 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.

[30] On 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.

[31] 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. Mr Mostafa applied to review this decision.

[32] On 25 August and 6 October 2021, review proceedings were held, in relation to WorkAon's decisions of 7 December 2020 and 17 August 2021.

[33] On 3 November 2021, a Reviewer dismissed Mr Mostafa's review of WorkAon's decision of 7 December 2020. However, the Reviewer modified WorkAon's decision of 17 August 2021, by reinstating Mr Mostafa's entitlements from 7 December 2020, for his complex regional pain syndrome. On 2 December 2021, Mr Mostafa appealed against the Reviewer's decision.

[34] On 17 May 2023, Judge McGuire delivered his judgment, dismissing Mr Mostafa's appeal.

[35] On 13 June 2023, Mr Mostafa applied for leave to appeal to the High Court. In response, on 21 August 2023, Judge McGuire provided an addendum to his judgment.

The Court's judgment of 19 May 2023 and addendum of 21 August 2023

[36] Judge McGuire accepted that Mr Mostafa 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.

[37] Judge McGuire noted that the focus of Mr Mostafa's treatment was on his right forearm and elbow. The physiotherapy notes did not mention any issues with his right shoulder. Likewise, the initial GP notes from 1 March 2018 did not mention any shoulder issues.

[38] Judge McGuire referred to the medical case review dated 9 May 2018, carried out by Dr Walker, specialist in occupational medicine. Dr Walker mentioned, under the heading "Examination": "good range, free movement elbow and shoulder". It seemed that Mr Mostafa's right shoulder became an issue towards the end of 2019. Dr Chandru, orthopaedic hand/wrist and upper limb surgeon, noted in a report of 4 November 2019, that Mr Mostafa had a full range of movement in his elbow and rehabilitation was progressing well also. Dr Chandru could not see any indications of any nerve entrapment or concerns.

[39] Judge McGuire further noted the report of Dr Welsh, orthopaedic surgeon, of 26 June 2020, diagnosing post-surgical capsulitis of the right shoulder. Dr Welsh noted that this was not accident-caused, and was unrelated to the accident of

February 2019. Following an ultrasound carried out on 28 July 2020, Mr Welsh commented further on 16 August 2020. Mr Welsh noted that, when the radiologist reported on the ultrasound, there was free movement of the shoulder. Accordingly, Mr Welsh considered the adhesive capsulitis to have been spent. Mr Welsh also said that the diagnosis of supraspinatus tear and subacromial and subdeltoid bursitis described the changes in the status of the rotator cuff tendons as a result of gradual process wear and tear age-related degeneration.

[40] Judge McGuire noted that Mr Mostafa bore 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 were caused by the accident of 8 February 2018. Judge McGuire concluded that Mr Mostafa had not proved his case, and that the evidence before the Court was that this particular shoulder condition of Mr Mostafa was not injury-related, but rather age-related.

[41] In Judge McGuire's addendum, His Honour noted that Mr Mostafa has raised a number of issues in his appeal that the Court had no jurisdiction to deal with. Except for his shoulder injury cover issue, the issues he raised did not arise from the decisions that were the subject of review applications and in turn, review decisions.

[42] Judge McGuire noted that, pursuant to section 134(1) of the Accident Compensation Act, a claimant may only apply for a review of a decision on a claim; a delay in processing a claim for entitlement; and any decision under the Code on a complaint by the claimant. The claimant then, under section 149, has the right of appeal to the District Court against any review decision or any decision relating to the review. Judge McGuire stated that the Court had no jurisdiction, therefore, to consider issues on appeal that fall outside the scope of the decisions that Mr Mostafa applied to review and that were addressed by the reviewer in his decision. His Honour added that, if Mr Mostafa believed he had other claims for cover relating to his accident on 8 February 2018, he needed to lodge those claims with the Corporation in the usual way so that it (or WorkAon) could make decisions on them that give rise to review and appeal rights.

The appellant's submissions

[43] Mr Mostafa submits that an entitlement was stopped without a decision in 2019 and his income was recalculated on his income in 2020. Mr Mostafa asks that his entitlement be resumed from 17 November 2019, which was the last payment based on what he used to earn before the injury, not he what he was earning after the injury. Mr Mostafa also seeks compensation for the "disadvantaged" suffering and pain that he has experienced, and that WorkAon be warned or fined for its handling and misrepresentation of his case.

Discussion

[44] This Court notes that the Reviewer's decision which Mr Mostafa appealed was made up of two parts:

(a) The Reviewer dismissed the appeal against WorkAon's decision of 7 December 2020: WorkAon declined additional cover for a right supraspinatus tear and subacromial and subdeltoid bursitis; and 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".

(b) The Reviewer modified WorkAon's decision of 17 August 2021: the Reviewer modified the decision to read that WorkAon "approves cover for a complex regional pain syndrome as a consequential injury, consequent to his covered 'sprain of elbow and forearm – right; lateral epicondylitis of the elbow – right' injuries"; and WorkAon "confirms that the date of cover is as of 7 December 2020, and such is the date to be applied any entitlements are retrospectively approved".

[45] It is readily apparent that the issues raised by Mr Mostafa in his application for leave to appeal (see paragraph [43] above) were not those dealt with by the Reviewer in the decision taken on appeal to the District Court. Under section 149(1) of the Accident Compensation Act, Mr Mostafa has the right to appeal to the District Court against a review decision or a decision as to an award of costs and expenses.

Judge McGuire had no jurisdiction to consider issues on appeal that fell outside the scope of those addressed in the review decision that Mr Mostafa has appealed.

The Decision

[46] In light of the above considerations, the Court finds that Mr Mostafa has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. The appellant has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources and the finality of litigation. This Court is not satisfied as to the wider importance of any contended point of law.

[47] Costs are reserved.

Judge P R Spiller,
District Court Judge