

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2023] NZACC 139**

**ACR 172/22**

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

Hearing: 14 March 2023  
Heard at: Wellington/Te Whanganui-a-Tara  
Appearances: A Brown for appellant  
B Marten with T Lynskey for respondent  
Judgment: 23 August 2023

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**RESERVED JUDGMENT OF JUDGE I C CARTER  
(Weekly Compensation s 103, cl 32,  
retrospective capacity to work and later incapacity)**

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### **Introduction**

[1] An agreed statement of facts was filed spanning 18 pages describing Mr Robinson’s extensive medical and employment history, together with an agreed set of underlying documents. By way of introduction, I distil from those the key facts so far as relevant to the issues on appeal.

#### *2003 injury*

[2] Mr Robinson suffered an injury to his left knee in 2003 during an assault. In relation to that left knee injury, Mr Robinson has, since 2003, made several accident compensation

claims and completed several accident compensation funded programmes, including for pain management and return to work, and obtained many x-rays, ultrasounds and MRIs. Accident compensation cover funded four separate surgeries for Mr Robinson's knee injuries, including ACL reconstruction and meniscectomy. During some of the periods when Mr Robinson has been unable to work he has received weekly compensation and other accident compensation entitlements and in other periods he has obtained WINZ assistance.

[3] Over the years since 2003, although symptoms relating to the left knee improved following surgeries, he continued to have intermittent left knee symptoms, including pain, clicking and giving way. It was eventually accepted by the Corporation that Mr Robinson had osteoarthritis of the left knee as a consequential injury flowing from the 2003 injury.

[4] A Workplace Assessment undertaken on 24 October 2007 records Mr Robinson's early work history. From 1984 to 2000 he had been a forestry worker, from 2000 to 24 April 2006 he was employed as an orchard worker, and from July 2006 until a surgery in 2007 he was employed as a farm worker. He stopped working in March/April 2007 due to the worsening condition of his left knee.

[5] A medical case review by surgeon, Mr Gavin Farr, on 2 November 2007 assessed Mr Robinson as fit for selected work, including forklift driving, but not orchard or forestry work. Early degenerative joint disease of the left knee was identified as caused by the 2003 injury.

[6] Ever since 2003 when he suffered the left knee injury, Mr Robinson has generally tried to work except for periods when pain and discomfort prevented him from doing so.

- (a) During the 2000s until March/April 2007 he was employed in orchard and farm work.
- (b) Mr Robinson appears not to have been working from April 2007 to early 2010 due to ongoing pain and discomfort in his left knee – in the various medical notes during this period there is no reference to employment.
- (c) On 18 January 2010, Mr Robinson started a three-month contract as a forklift driver. On 10 February 2010 Mr Robinson slipped on the floor at work resulting

in a sore knee. Mr Robinson ceased his employment in April 2010 and went on a sickness benefit.

- (d) On 20 March 2014 Mr Robinson's GP noted his left knee was still sore and swollen. He was working at Watties driving a forklift when he slipped and injured his knee, but he did not report the injury because he was afraid of losing his job.
- (e) A GP note of 6 January 2015 recorded that Mr Robinson had an accident on 31 December 2014 when he slipped off high steps and landed on his knees. An accident compensation claim was lodged for a contusion. Mr Robinson was noted as unemployed at this time.
- (f) As discussed further below, from the medical notes, Mr Robinson was employed as forklift driver by two different employers in early 2016 (it is unclear whether the start date was sometime in 2015) and from March to May 2018.

#### *2016 injury*

[7] On 28 January 2016, when Mr Robinson was working as a forklift driver at Watties, he had an accident at work. Another forklift hit the forklift that Mr Robinson was driving, running over the forks whilst stationary, causing Mr Robinson's forklift to jolt. Mr Robinson's left knee hit the dashboard frame of the forklift and his whole body jolted forward, causing injury to both his left knee and back, diagnosed as a left knee contusion and a lumbar sprain.

[8] He was provided accident compensation cover for a lower back sprain and a contusion of the knee. He was certified unfit for work for most of 2016. He initially received weekly compensation entitlements until these were suspended by Gallagher Bassett, the Accredited Employer (the Corporation later accepted that this suspension was incorrect).

#### *May 2018 injury*

[9] In March 2018, Mr Robinson returned to work with a different employer, as a forklift driver. He worked full time between March to May 2018, for a period of approximately just over six weeks. The hours were 8.00am to 6.00pm, six days a week, Monday to Saturday.

[10] On 2 May 2018, Mr Robinson suffered a non-work injury while lifting firewood at home, resulting in lower back pain. He was initially certified as partially fit for work, and then a short time later, was certified fully unfit for work. Medical notes of the diagnosis and treatment for back pain from 2 May to late November 2018 mostly focussed on Mr Robinson's back.

*Later relevant events*

[11] In late 2021, ACC accepted cover of osteoarthritis of Mr Robinson's left knee, with the accident date of 12 February 2016.

[12] Entitlement to weekly compensation was confirmed, but on calculating the amount, it was found that it would be less than Mr Robinson's then current WINZ benefit. Weekly compensation from that period was abandoned as not beneficial to Mr Robinson.

[13] Mr Robinson's lawyer then asked the Corporation to consider a subsequent period of incapacity by reference to a later date of 16 June 2018 for the injury that occurred on 2 May 2018. That was because Mr Robinson had returned to employment with a different employer for approximately just over six weeks prior to the 2 May 2018 injury. His income during the period up to 16 June 2018 and the calculation of weekly compensation would be higher.

[14] On 9 February 2022 the Corporation declined Mr Robinson's application for weekly compensation assessed as at 16 June 2018. In a Review Decision dated 15 September 2022 the Reviewer concluded there was no break in 2018 in Mr Robinson's incapacity and that the Corporation had correctly declined weekly compensation. Mr Robinson's application for review was dismissed. The present appeal is from that Review decision.

*Matters of common ground*

[15] It is common ground that:

- (a) Mr Robinson was incapacitated in 2016 due to post-traumatic left knee osteoarthritis as a consequential injury caused by the (covered) 2003 injury. He is currently incapacitated by that condition.

- (b) Mr Robinson's back injury in 2018 was caused by a degenerative condition, spondyloarthropathy (a kind of arthritis) rather than by an accident, and there is no accident compensation cover for the back injury.<sup>1</sup>
- (c) For Mr Robinson's entitlement to weekly compensation to be properly and lawfully assessed as at 16 June 2018, it must be established on the evidence that Mr Robinson had regained capacity to work when he started his new forklift job in March 2018 (a break in the chain of incapacity), despite the previous problems with his left knee, *and* that he became incapacitated again by mid-June 2018 because of his left knee osteoarthritis following the injury suffered on 2 May 2018.

### **Agreed issues on appeal**

[16] The issues on appeal are agreed:

- (a) Did Mr Robinson regain capacity to engage in employment as a forklift driver when he returned to that work in March 2018, or was he "soldiering on"?

*If you find that he regained capacity, move on to Question 2. If you find that he was "soldiering on", the appeal should be dismissed.*

- (b) As at 16 June 2018, was Mr Robinson unable, because of his left knee osteoarthritis, to engage in his pre-injury employment as a forklift driver? (s 103, cl. 32).

*If you find YES, the appeal should be allowed. If you find NO, the appeal should be dismissed.*

### **Law**

[17] The relevant legal principles that apply are not in dispute. The issues turn on the application of those principles to Mr Robinson's case.

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<sup>1</sup> Mr Robinson was in receipt of weekly compensation from 14 May 2018 to 25 April 2019. On 11 April 2019 the Corporation suspended Mr Robinson's entitlement to weekly compensation for the 2018 back injury on the basis that the cause of his ongoing incapacity was spondyloarthropathy, a review of the suspension decision was dismissed on 27 November 2019 and was not successfully appealed.

[18] Section 67 of the Accident Compensation Act 2001 (“the Act”) states:

**67 Who is entitled to entitlements**

A claimant who has suffered a personal injury is entitled to one 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.

[19] Section 100(1)(a) confirms that a claimant who has cover and who lodges a claim for weekly compensation is entitled to receive it if incapacitated within the meaning of s 103(2) and is eligible for weekly compensation under clause 32 of Schedule 1.

[20] Determination of a claimant’s incapacity for employment in Mr Robinson’s case must be done under s 103.<sup>2</sup> Section 103(2) then states:

- (2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

[21] Clause 32 confirms that weekly compensation can be paid to a claimant who has an incapacity resulting from a personal injury for which he or she has cover and was an earner immediately before his or her incapacity commenced.

[22] A claimant is not incapacitated if he or she is substantially able to undertake his or her pre-injury employment.<sup>3</sup>

[23] Although in this appeal Mr Robinson seeks to retrospectively establish *capacity* to work in March 2018, many of the relevant principles come from cases about retrospective *incapacity*. The principles apply equally in both situations.

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<sup>2</sup> Section 101(1).

<sup>3</sup> *Sitarz v ACC* [2016] NZACC 22 at [4], [5] and [52] (Judge MacLean). In *Sitarz*, Judge MacLean found the evidence supported that the appellant had been capable of returning to his pre-injury role, if not in terms of all work tasks, then on a substantial basis (or to the extent constituting a “plausible generic match”), such that his incapacity had not been continuous during the relevant period.

[24] The correct approach to considering a claim for retrospective incapacity, was summarised in *Jamieson v ACC*<sup>4</sup>. In *Jamieson*, the claimant had suffered an injury to his back on 15 November 1996 for which he required surgery. He gave up work on 7 September 2001 but did not apply for weekly compensation until 26 June 2002. The key principles governing assessment of such a claim to retrospective incapacity are:

- (a) The onus is on the appellant to show on the balance of probabilities that at the date of the alleged incapacity, because of the injury for which he had cover, he was incapacitated within the meaning of the statute.
- (b) Retrospective certification of incapacity will be acceptable in certain circumstances. However, the onus is on the claimant to produce evidence establishing a clear picture, or strong and supporting evidence other than contemporary medical certificates, of a continuing incapacity over the period in question.
- (c) Retrospective medical certificates are viewed with caution. But the weight to be given to them depends on the whole circumstantial matrix before the Court.
- (d) Where retrospective certification is in issue, there is a need to establish a clear picture of incapacity which has continued throughout the period in question.
- (e) The Court, in *Jamieson* stated:

[33] Where there have been breaks in the chain of causation between the original incapacitating event causing an injury for which entitlements are given, proof is then required that the present incapacity for which entitlements are sought, are directly related. If that chain of causation is broken, for example, by leaving employment for other reasons than incapacity, or whether the injury is healed, or the person no longer suffers the symptoms from the original injury, and a period of time develops between the cessation of employment and the subsequent further claim for an entitlement, then medical evidence is needed to show that the chain of causation has not been broken. In some cases where there has been a serious injury, such as paraplegia, it is a relatively simple matter on a retrospective basis to see that the claim for incapacity relates back.

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<sup>4</sup> *Jamieson v ACC* [2004] NZACC 80 at [30]-[35]; applied in *Tonner v ACC* [2018] NZACC 25 and *Tonner v ACC* [2018] NZACC 166 (leave to appeal), and approved by the High Court in *Tonner v ACC* [2019] NZHC 1400 (leave to appeal).



[34] However, in many cases, and particularly where there has been a long period of delay between the receipt of an entitlement arising from the original incapacity to a further assertion that entitlements should re-ignite, satisfactory proof showing the causal link is required. What is required is an overall examination of all the circumstantial evidence, which in many cases includes a consideration of retrospective medical certificates.

[25] The extent to which a covered injury must contribute to a claimant's incapacity is that it must be a substantial and effective cause, in the sense of a cause of substance rather than the main cause. The incapacity need not be caused wholly or substantially by the injury. In circumstances where a claimant suffers from a combination of accident-related damage and other degenerative causes, where both together appear to be substantial and effective causes of the claimant's condition, that is sufficient.<sup>5</sup> If injury by accident continues to be a real and substantial cause of the condition warranting compensation entitlements, entitlement will not be barred by another substantial contribution from a disease or aging cause.<sup>6</sup>

[26] When considering whether a claimant's ongoing incapacity is attributed to a degenerative change or a covered injury, the test is that the injury need only be a material cause and not the sole cause of incapacity. A combination of underlying degenerative change and the ongoing effects of a covered injury may together cause the incapacity.<sup>7</sup>

[27] A combination of symptoms from multiple covered injuries, when considered cumulatively may substantially contribute to incapacity for employment, even though none would have been sufficient individually to establish incapacity.<sup>8</sup>

[28] In many of the cases where there is an issue of retrospective incapacity, it is the claimant for compensation who asserts continuous incapacity and the Corporation asserts that there was not.

[29] This appeal involves the less common situation where the reverse applies and the claimant is asserting regained capacity in early 2018 and the Corporation asserts continuous incapacity throughout 2018 due to Mr Robinson's left knee condition. In that context, the

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<sup>5</sup> *Hanmore v ACC* [2008] NZACC 148 (Judge Ongley).

<sup>6</sup> *Coleman v ACC* [2009] NZACC 52.

<sup>7</sup> *Dobbs v ACC* [2017] NZACC 9 at [49].

<sup>8</sup> *CD v ACC* [2021] NZACC 189 at [123] and [129].

issue is whether on stepping back and looking at the totality of the evidence now available and approaching the matter afresh, a break in the chain of incapacity has been made out.<sup>9</sup>

[30] When considering whether there has been a break in the chain of incapacity, the courts have recognised that there can be capacity to engage in pre-injury employment even though there may be pain and discomfort. For example, in *Caruthers v Accident Compensation Corporation*, Judge Ongley observed:<sup>10</sup>

Capacity is concerned with the realistic ability to engage in pre-injury employment despite inconvenience and in many cases a degree of tolerable pain.

[31] In some cases where a claimant continued to work in their pre-injury employment, despite suffering pain or disability or other ongoing consequences of injury, the practice has been referred to as “soldiering on”. That may be evidence to support a factual finding that the claimant was incapacitated when he/she continued to work. However, there is no general principle of law that a person who continues in employment despite pain or disability necessarily means that the person is incapacitated.<sup>11</sup>

[32] Continuing to work after injury is an evidential matter to be weighed by the court when considering all the evidence. In the circumstances of a particular case after considering all the evidence, the fact that a person continues to work after injury may in some circumstances support a factual finding that the person was not incapacitated.

### **Appellant’s submissions**

[33] It is submitted for Mr Robinson that his return to pre-injury employment constituted a break in the chain of incapacity, in that the incapacity he suffered after his May 2018 injury (which affected his back and led to a deterioration in his knee condition that contributed to the incapacity) was a subsequent period of incapacity.

[34] The contemporaneous *and* retrospective medical evidence supports the conclusion that Mr Robinson’s return to his pre-injury employment on 19 March 2018 constituted a break in the chain of his incapacity from the 2016 injury and that by March 2018 he had regained capacity.

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<sup>9</sup> *Sitarz v ACC* [2016] NZACC 22 at [4], [5] and [52] (Judge MacLean).

<sup>10</sup> *Caruthers v Accident Compensation Corporation* [2015] NZACC 385.

<sup>11</sup> *Jones v ACC* [2013] NZHC 2458 at [18], [19] (Courtney J).

[35] The totality of the evidence supports a finding that Mr Robinson:

- (a) Regained capacity for his pre-injury employment when he returned to work as a forklift driver in March 2018; and
- (b) Suffered a subsequent period of incapacity from May/June 2018, to which the 2016 knee injury materially contributed.

[36] On that basis, Mr Robinson should be provided with an increased rate of weekly compensation based on his earnings immediately prior to the 2018 injury, for the effects of his 2016 knee injury.

### **Respondent's submissions**

[37] The Corporation accepts that Mr Robinson was incapacitated as a result of his 2016 covered left knee osteoarthritis and also accepts that he is currently incapacitated as a result of the 2016 knee injury. However, the submission for the Corporation is that Mr Robinson's return to his pre-injury employment was a case of him "soldiering on" and that his incapacity since the 2016 injury was continuous from 2016 through to the present time.

[38] The result is an entitlement to a lesser rate of weekly compensation, calculated as at 2016, rather than being calculated as at 2018.

[39] The preponderance of all the evidence relating to the 2017/2018 period suggests that it was Mr Robinson's back that kept him from working and there is nothing to suggest that there was recovery of the knee injury to enable re-employment.

[40] On the totality of the evidence, there was no knee related issue in 2018. Rather, there was a back related issue in 2018 and it is common ground that the back problems were not caused by injury and there is no cover for them.

[41] The Corporation's case, in a nutshell, was that:

- (a) Nothing here breaks the chain of causation of incapacity stemming from injury to the knee.

(b) The back problems were the cause of injury and incapacity in 2018.

### **Analysis of the evidence**

*Did Mr Robinson regain capacity to engage in employment as a forklift driver when he returned to that work in March 2018, or was he "soldiering on"?*

[42] In this appeal there is contemporaneous evidence and retrospective medical opinion relating to the issue of whether Mr Robinson regained capacity. I deal with these two categories of evidence separately.

#### *Contemporaneous evidence*

[43] When determining backdated *incapacity*, it is relevant to consider whether there were contemporaneous visits to health professionals indicative of a potentially incapacitating condition requiring medical attention.<sup>12</sup> That consideration is equally relevant to determining backdated *capacity*.

[44] Prior to starting his new forklift driving job in March 2018, there were no contemporaneous medical notes suggesting presentation to health professionals for consultation or treatment relating to Mr Robinson's left knee in early 2018 and throughout all of 2017. On the documentary evidence provided, prior to 2017 the last presentation for medical consultation and treatment relating to the left knee was on 17 November 2016. As noted by Dr Douglas, in this case, no such presentations occurred either leading up to or during Mr Robinson's return to his pre-injury work in early 2018.

[45] That is consistent with Mr Robinson being no longer incapacitated by his left knee condition and is also consistent with his decision to re-attempt employment as a forklift driver in March 2018. It is not necessary to establish that the underlying injury to Mr Robinson's left knee was "cured" or that there was no pain or discomfort. There can be capacity to engage in pre-injury employment even if there is some (tolerable) pain and discomfort. The inquiry is whether Mr Robinson regained capacity and whether there was a break in the chain of incapacity by March 2018.

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<sup>12</sup> *Cullen v ACC* [2011] NZACC 292.

[46] The potential to regain capacity was identified by a health professional in early 2016. Dr Hartshorn, Occupational Physician, was asked to assess Mr Robinson following his 28 January 2016 accident. On 2 February 2016 Mr Robinson, then working as a forklift driver, had completed a Watties Incident Report for an accident that had occurred on 28 January 2016. His left knee hit the dashboard frame of the forklift and his whole body jolted forward. Another forklift had struck his, running over the forks whilst stationary, causing his forklift to jolt. had injured both his left knee and back. He was of the opinion that Mr Robinson likely had post-traumatic degenerative change in the left knee resulting in incapacity related to the injury suffered in the 2003 accident. Dr Hartshorn expressed the opinion in his 19 April 2016 letter that Mr Robinson's ability to pursue forklift driving activity prior to the 2016 accidents indicated that Mr Robinson should in future be able to return to a level of function compatible with a return to that kind of work activity.

[47] The strongest evidence suggesting that Mr Robinson regained capacity from his knee injury by March 2018, is the fact that he returned to his pre-injury employment as a forklift driver. He did so on a full-time basis, working six days per week for eight to ten hours per day. This is more than the usual benchmark for full time hours of 30 hours per week.

[48] Mr Robinson was employed by a new employer and there is nothing to suggest that the employment was modified or adapted in such a way as to allow him to do the job in a limited or sheltered manner. That is consistent with Mr Robinson working at full capacity in his pre-injury work of forklift driving.

[49] Mr Robinson engaged in the employment for approximately six weeks from 19 March 2018 until his 2 May 2018 injury. The length of employment of approximately six weeks, rather than a period of a few days, is consistent with regained capacity. There were no issues with Mr Robinson's performance during his approximately six weeks on the job. Significantly, Mr Robinson did not present for medical consultation or treatment relating to the knee injury during the six-week period when he returned to work. There is nothing to suggest that Mr Robinson was struggling with the forklift driving work tasks. Further, the trigger for Mr Robinson to seek medical treatment was not his left knee but a non-work condition manifested by back pain after lifting firewood.

[50] There are references in a Stay at Work Programme (“SAW”) report of 28 November 2018 suggesting that prior to 2 May 2018 Mr Robinson did not perceive himself to be incapacitated due to his underlying left knee condition. The report records Mr Robinson’s indication that he had initially felt capable of forklift driving despite his “bad knees”. It was only after the 2 May 2018 firewood incident (manifested by back pain and a deterioration of the knee condition) that resulted in Mr Robinson ceasing employment. There are no indications that the employer prior to 2 May 2018 had any reservations about Mr Robinson’s ability to do the job of forklift driver.

[51] The contemporaneous evidence establishes that Mr Robinson successfully returned to full time employment forklift driving in March 2018, which he sustained for a not insignificant period of approximately six weeks. For at least 14 months prior to that Mr Robinson had not presented to any health professional for consultation or treatment relating to his left knee. Before starting the new employment, he himself felt capable of forklift driving despite his “bad knees”. Dr Hartshorn’s medical opinion of April 2016 was that Mr Robinson should in future be able to return to forklift driving. The event that prevented Mr Robinson from continuing in his forklift driving employment was lifting firewood outside the employment environment and did not initially lead to any knee related symptoms.

#### *Retrospective medical opinion*

[52] Retrospective medical opinions of incapacity from the time of injury are generally approached with caution and may be given less weight than medical assessments made in real time. The weight to be given to them depends on the whole circumstantial matrix before the Court.

[53] The medical opinions relating to the issue of regained capacity are set out in the reports of Dr Douglas dated 16 March 2022 and Dr Ryder-Lewis dated 2 August 2022. Both doctors are occupational physicians who were asked to assess Mr Robinson for slightly different purposes.

[54] The opinions of both Dr Ryder-Lewis and Dr Douglas were provided retrospectively and in hindsight, four years after the material time in the first half of 2018. They are to be

considered in the context of all the available evidence including relevant contemporaneous evidence.

[55] The Corporation referred Mr Robinson's case to Dr Douglas for review to see if a way could be found to resolve Mr Robinson's accident compensation entitlements. The purpose of Dr Douglas's assessment was recorded by Dr Douglas in terms that he was to determine if Mr Robinson was incapacitated for his pre-injury role of forklift driver as at 16 June 2018 due to his covered knee condition or a back condition. Dr Douglas concluded that Mr Robinson's incapacity to work as a forklift operator did not commence until after the firewood accident on 2 May 2018 and that the resulting lower back injury and back pain was the cause of that incapacity.

[56] Dr Douglas interviewed and examined Mr Robinson in person. Mr Robinson told Dr Douglas that he had had left knee problems dating back to a 2003 injury suffered during an assault. While symptoms had improved following several surgeries and other interventions, Mr Robinson continued to have intermittent left knee symptoms including pain, clicking and giving way. Mr Robinson returned to his pre-injury role of forklift driver from 19 March 2018 to early May 2018. Dr Douglas records that prior to that time the knee pain aggravation appeared to have gradually settled to background levels during 2017 and the knee was generally coping with forklift operating activities well. It was Mr Robinson's firewood lifting accident on 2 May 2018 which resulted in back pain and also aggravated his left knee again. GP notes from May 2018 onwards largely relate to back pain although by September 2018 Mr Robinson was reporting bilateral knee pain.

[57] Mr Robinson's lawyer subsequently referred his case to Dr Simon Ryder-Lewis who provided a report on Mr Robinson's incapacity. Dr Ryder-Lewis did not see Mr Robinson in person but spoke with him by video call and in subsequent phone discussions. Dr Ryder-Lewis was also provided a large volume of documents comprising Mr Robinson's medical and accident compensation records from October 2003 to 16 March 2022 (including Dr Douglas's report). Dr Ryder-Lewis was asked by Mr Robinson's lawyer to answer several specific questions. Dr Ryder-Lewis's opinions in response to those questions were in summary that:

- (a) Mr Robinson did not have capacity to return to forklift driving from 19 March to 2 May 2018 due to his left knee problems.
- (b) A material cause Mr Robinson's incapacity from his pre-injury employment as a forklift driver from May/June 2018 was his left knee osteoarthritis while acknowledging that the back injury from the 2 May 2018 accident also contributed to his incapacity.

[58] Dr Douglas had noted that the knee pain aggravation from the 2016 accident injury had gradually settled to background levels over the remainder of 2017 and that Mr Robinson did not require any medical attention for the knee in 2017, leading up to the period of employment in 2018. Dr Douglas therefore expressed the opinion that the knee was "generally coping with forklift operating activities well". He noted that Mr Robinson was working eight-to-ten-hour shifts, six days per week, during the return to work, until the May 2018 injury. Dr Douglas' retrospective evidence is consistent with Mr Robinson's knee injury not actually being incapacitating during his return to pre-injury employment in 2018.

[59] Against that, Dr Ryder-Lewis expressed the retrospective opinion, that the knee injury was likely to be incapacitating during the return to work in 2018. This is partly based<sup>13</sup> on Mr Robinson's self-reporting, which contrasts with what he is recorded to have told Dr Douglas (to the effect that he managed the forklift driver role well/his knee coped well). Mr Robinson is recorded as reporting to Dr Ryder-Lewis that from 19 March to 2 May 2018 his left knee was the primary cause of incapacity. Further, that his left knee was very sore and tended to lock up and was frequently giving way. Mr Robinson said that if he was active this would occur up to five times per week and that he could not get comfortable in bed. While Mr Robinson acknowledged the presence of back symptoms, he commented that the knee pain was worse than the back pain.

[60] However, it is unclear whether the left knee symptoms described by Mr Robinson occurred while at work driving a forklift or outside of work. Some of the descriptions given by Mr Robinson are more likely to be referring to activity outside work (giving way five

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<sup>13</sup> In the context of Dr Ryder-Lewis's detailed description of Mr Robinson's knee problems from 2003 through to 2022 including left knee replacement surgery in 2022.



times a week if active, uncomfortable in bed). If so, it was likely that Mr Robinson was able to engage in forklift driving despite some inconvenience and a degree of tolerable pain. It was not until the 2 May 2018 accident that there was intolerable back pain and aggravated left knee symptoms. Dr Ryder-Lewis mentions but does not address the absence of any medical records relating to the left knee during the whole of 2017 through to early May 2018.

[61] Dr Ryder-Lewis went further and said and that if he had been asked then to provide an opinion on work fitness prior to March 2018, he would have advised against forklift driving. The overall opinion was that the generic employment of forklift driving was unsuitable for Mr Robinson. This was with the benefit of a comprehensive review Mr Robinson's extensive medical history from 2003 to 2022. A degree of hindsight was a factor.

[62] Mr Robinson sustained full time employment forklift driving for approximately 6 weeks from March 2018, without left knee issues. For at least 14 months prior to that Mr Robinson had not presented to any health professional for consultation or treatment relating to his left knee. Before starting the new employment, he himself felt capable of forklift driving despite his "bad knees". Dr Hartshorn's medical opinion of April 2016 foreshadowed the potential for Mr Robinson to regain capacity to undertake forklift driving. The event that prevented Mr Robinson from continuing in employment in 2018 was not forklift driving. Rather, it was lifting firewood outside of work. Dr Douglas noted some of these factors when forming the opinion that Mr Robinson had capacity to undertake forklift driving until the injury suffered on 2 May 2018.

[63] These factors are not sufficiently considered in Dr Ryder-Lewis's opinion that Mr Robinson did not have capacity prior to 2 May 2018. Although Dr Ryder-Lewis's opinion was partly based on Mr Robinson's own recorded statements, aspects of those do not align with the absence of left knee issues for approximately 16 months prior to 2 May 2018.

[64] Stepping back and looking overall at the totality of the evidence now available and approaching the matter afresh, I am satisfied on the balance of probabilities that by March 2018 Mr Robinson was substantially able to undertake his pre-injury employment as a forklift driver, despite his left knee condition. His ability to work from 19 March to 2 May 2018 demonstrates a break in the chain of incapacity. Mr Robinson regained capacity for his pre-injury employment.

[65] My conclusion on the first issue on appeal is yes, Mr Robinson regained capacity to engage in employment as a forklift driver when he returned to that work in March 2018.

*As at 16 June 2018, was Mr Robinson unable, because of his left knee osteoarthritis, to engage in his pre-injury employment as a forklift driver? (s 103, cl. 32)*

[66] It is useful to recap the principles governing determination of incapacity to engage in pre-injury employment. The extent to which a covered injury must contribute to a claimant's incapacity is that it must be a substantial and effective cause. That is, the incapacity need only be a material cause and need not be caused solely by the injury. Compensation entitlements are not barred by another substantial contribution from a degenerative change, disease or aging cause.<sup>14</sup> In summary, the left knee injury need not be the sole, primary, overriding or dominant, cause of Mr Robinson's incapacity and there may be other contributing causes from other injury, age or degenerative condition. The legal test is whether Mr Robinson's 2016 knee injury was a substantial, effective and material cause of his incapacity from June 2018.<sup>15</sup>

[67] It is important to remember that the Corporation accepts that following Mr Robinson's 28 January 2016 accident, there was consequential injury leading to incapacity caused by left knee osteoarthritis from the 2003 accident. The Corporation considered that weekly compensation could continue to be paid from 22 June 2016 on the basis that there was incapacity caused by left knee osteoarthritis.

[68] The contemporaneous and subsequent evidence establishing Mr Robinson's incapacity due to his left knee osteoarthritis after the May 2018 injury is:

- (a) Mr Robinson's 2 May 2018 injury occurred when he slipped whilst lifting heavy firewood, injuring his back. Mr Robinson reported (as detailed in Dr Ryder-Lewis' report) that his knee gave way and contributed to the cause of the accident. That is consistent with the many reports by Mr Robinson over the years that since 2003 his left knee never fully came right and he regularly experienced pain and swelling, locking, giving way and activity limitation.

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<sup>14</sup> *Coleman v ACC* [2009] NZACC 52.

<sup>15</sup> *Hanmore v ACC* [2008] NZACC 148 (Judge Ongley), *Dobbs v ACC* [2017] NZACC 9 at [49], *Pearce v ACC* [2014] NZACC 190, *CD v ACC* [2021] NZACC 189 (a combination of symptoms from multiple covered injuries, when considered cumulatively, had made a substantial contribution to incapacity for employment (at [129])).

- (b) On 30 July 2018 Mr Robinson's GP reported Mr Robinson's complaint of knee pain, with a prior history of arthritis.
- (c) On 20 September 2018 Mr Robinson's GP recorded that he was now talking about pain in his left knee and that it was known to be arthritic.
- (d) On 26 November 2018 Dr Gerard Walker, Occupational and Environmental Medicine Specialist, was asked by the Corporation to assess and provide an opinion on diagnosis, causation, fitness for work and clinical management. Dr Walker noted that Mr Robinson was keen to work but not confident with the jolting and jarring of driving a forklift. He had limited activity tolerances and was unable to kneel or squat due to his knee problems. He described frequent anterior left knee discomfort associated with walking and some clicking and giving way.
- (e) A Stay at Work (SAW) Programme Completion Report of 28 November 2018 recorded:
  - [i] In the Part D Progress Report dated 2 August 2018, Mr Robinson reported a throbbing, pinching pain in the back which stayed for a long time and that he felt was affecting his left knee.
  - [ii] Mr Robinson also reported that pain increased with prolonged sitting and standing - more because of the knees.
  - [iii] He reported walking, but on days he did walk, he needed to rest thereafter due to increased back and knee pain.
  - [iv] By the 12 September 2018 Progress Report, Mr Robinson was reporting ongoing back pain, bilateral knee pain and right shoulder pain as limiting.
- (f) On 20 January 2019 Dr Sew Hoy noted Mr Robinson's pain arising from the left knee, which was scarred and sensitive to flexion.

- (g) On 24 February 2019 Mr Robinson presented to ED complaining of increasing knee pain. His GP noted the ED presentation on 2 March 2019.
- (h) On 15 October 2019 Mr Robinson's GP noted his complaint that his left knee had been playing up with his GP commenting they had "been through that before".
- (i) On 18 January 2020 Mr Robinson suffered an injury when he tripped forward and landed on both knees. The impression was of a contusion, which likely exacerbated his long-standing knee pain.
- (j) On 18 January 2021 Mr Robinson's GP noted his worsening left knee pain.
- (k) Dr Smidt commented on 23 April 2021 that while most of the records since 2016 referred to back pain, there had also been reference to the left knee causing problems.

[69] The retrospective medical evidence of Dr Ryder-Lewis, Mr Poutawera and Mr Robinson's GP, tends to establish that Mr Robinson suffered a deterioration of his knee condition as a result of the injury in May 2018, such that it, along with the back injury, was a material cause of Mr Robinson's subsequent incapacity from May 2018.

[70] Mr Vaughan Poutawera, Orthopaedic Surgeon, assessed Mr Robinson on 10 March 2022. Mr Robinson's long and complex orthopaedic history relating to his left knee was noted. Mr Robinson had had persistent knee problems since the 2003 assault, and he felt the three surgeries that had been undertaken were not wholly successful. Left knee tricompartmental osteoarthritis of the left knee was confirmed. Knee joint replacement surgery was recommended and was carried out on 30 August 2022. Mr Robinson's biggest concern at the time of assessment was his left knee. Mr Poutawera noted in his 10 March 2022 report that Mr Robinson had worked as a forklift driver until 2018, when the pain and instability symptoms in his knee worsened, such that he had to give up work, and had not worked since.

[71] Dr Ryder-Lewis described Mr Robinson's left knee symptoms as including a history of pain and swelling, locking, giving way and activity limitation. Dr Ryder-Lewis opinion was that the 2018 accident worsened Mr Robinson's symptoms associated with his left knee and

caused a deterioration in function<sup>16</sup>, describing the 2018 injury as a "setback." Dr Ryder-Lewis referenced the available medical notes and imaging in support of his opinion and noted that Mr Robinson's left knee condition had been deteriorating and now required a knee replacement.

[72] In terms of the work tasks at issue, Dr Ryder-Lewis noted they included jolting and jarring from the machine, climbing to enter and exit the vehicle cab, and frequent leg and foot movements to operate the controls of the vehicle. Forklift drivers might also have to move products, stock, or obstacles, many of which can be heavy, from the path of the forklift. Mr Robinson's symptoms not only rendered it unlikely he would be able to cope with those tasks, but also introduced an element of risk. In his opinion the knee condition, as well as the back condition, were material to Mr Robinson's inability to work from May 2018.

[73] It is necessary to reconcile the differences between the assessments and opinions of Dr Douglas and of Dr Ryder-Lewis. Dr Douglas recorded that Mr Robinson described the 2 May 2018 accident when he slipped while carrying firewood causing him to twist his lower back and fall to the ground on his left knee. Mr Robinson said this "also aggravated his left knee again" while also resulting in persistent back pain. Dr Douglas determined that Mr Robinson's incapacity in 2018 was due solely to his back condition rather than his knee condition. He suggested that he would not have expected the knee to be causing incapacity, given the tasks of a forklift driver.

[74] Dr Douglas did accept however that Mr Robinson's knee condition may now (ie. as at 16 March 2022) also be contributing to his incapacity to operate a forklift. He was of the opinion that the left knee tricompartment arthritis was attributable to the 2003 injury and subsequent surgeries.

[75] Dr Douglas's conclusion was that after the firewood accident on 2 May 2018 and that the resulting lower back injury and back pain was the cause of his incapacity, rather than the left knee. Dr Douglas's conclusion on this point appears to have been influenced by several factors:

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<sup>16</sup> In *Hamilton v ACC* [2006] NZACC 318, Judge Ongley commented that consideration had to be given to the effects of the injury on a claimant's function. His Honour said a 'reasonable assessment of causation should involve both the structural and functional aspects of the injury'.

- (a) The absence of medical notes of a need for medical attention:
- [i] for the whole of 2017 - suggesting that the knee issues had gradually settled to background levels;
  - [ii] from 1 January to 2 May 2018 (including the approximately six weeks when Mr Robinson was working as a forklift driver) - suggesting that Mr Robinson's left knee was generally coping with forklift operating activities well and was not a significant problem.
- (b) There was no suggestion from Mr Robinson of specific knee issues in the first half of 2018.
- (c) Although there is some mention of left knee issues in GP and other notes after 10 May 2018, the medical notes from 2 May 2018 until late November 2018 mostly focussed on back pain rather than left knee issues. However, it is common practice for busy medical staff to concentrate on the most acute presenting problem at hand and to put less importance on conditions they see as being "secondary". The phenomenon is recognised by the courts.<sup>17</sup> For a time from May 2018, the back condition was the "acute" problem, and thus the primary focus.
- (d) Dr Douglas's opinion was mainly based on medical information from 2016 onwards - especially May to November 2018 when much of the focus was on the back condition. In contrast, Dr Ryder-Lewis's document index numbers five pages and lists a large volume of documents dating from 2003 to 2022. Dr Douglas recorded in general terms Mr Robinson's left knee problems since 2003 including three surgeries. But Dr Douglas took from the absence of medical notes referencing knee issues for approximately 18 months from 2017 to mid-2018 that the left knee was not a significant problem contributing to incapacity to work as a forklift operator from May 2018 onwards.

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<sup>17</sup> *Oliver v ACC* [2013] NZACC 36 at [34] footnote 4 "In the Court's experience this is an unsurprising commonplace. When the focus, particularly in acute cases, is on remedial medicine, causative circumstances regularly receive scant attention"; *Anderson v ACC* (2013) NZACC 80 at [14].

- (e) However, perhaps because of the more limited and recent documentation he had access to, Dr Douglas does not appear to have fully appreciated the significance of the knee condition. The evidence overall, suggests that Mr Robinson's knee condition had gradually deteriorated over time. While Dr Douglas had concluded the available notes suggested the back condition was of more importance from May 2018, there were several reasons why the underlying knee condition was still material to Mr Robinson's incapacity, although not recorded in the notes to the same extent until it assumed more prominence from late 2018.

[76] The legal test is whether Mr Robinson's 2016 knee injury was a substantial, effective, and material cause of his incapacity from June 2018. It need not be the sole, primary, overriding, or dominant, cause of Mr Robinson's incapacity. There may be other contributing causes such as the spondyloarthropathy in Mr Robinson's back. It is irrelevant whether one or other was the primary cause.

[77] Dr Douglas had available to him generally more limited medical information. There was also an absence of references to the left knee condition for approximately 16 months prior to 2 May 2018. After 2 May 2018 the focus in medical notes was on the back condition until late 2018. The result was that insufficient weight was given to the significance of Mr Robinson's underlying knee condition.

[78] The knee condition, together with the back condition, were substantial, effective and material causes of Mr Robinson's incapacity after the 2 May 2018 accident. The two are not mutually exclusive as there is a combination of causes of incapacity – the knee condition (covered) and the back condition (not covered). The knee condition was a material cause. Following the 2 May 2018 accident, the knee condition and the back condition resulted in incapacity.

[79] There is no necessary inconsistency in the left knee condition not preventing Mr Robinson working during the approximately six-week period prior to the 2 May 2018 event but preventing him from working after that. The weight of the evidence establishes that before 2 May 2018 Mr Robinson had regained functional capacity to work full time as a forklift driver and then the firewood lifting accident aggravated the underlying back and knee

conditions resulting in incapacity. He suffered a subsequent period of incapacity from May/June 2018, which was when he was forced to cease work as a result of his injuries.

[80] My conclusion on the second issue on appeal is yes, as at 16 June 2018, Mr Robinson was unable, because of his left knee osteoarthritis, to engage in his pre-injury employment as a forklift driver.

### **Conclusion**

[81] On the totality of the evidence, Mr Robinson's return to work in March 2018 constituted a break in the chain of incapacity, he suffered a subsequent incapacity from May 2018 onwards, to which his left knee injury was a material cause. Mr Robinson is eligible for weekly compensation determined on his 2018 earnings.

### **Result**

[82] The Review Decision is incorrect in concluding that there was no break in 2018 in Mr Robinson's incapacity. There was a break in Mr Robinson's incapacity.

[83] Mr Robinson regained capacity to engage in his pre-injury employment as a forklift driver from 19 March to 2 May 2018.

[84] As at 16 June 2018, Mr Robinson was incapacitated and unable, because of his post-traumatic left knee osteoarthritis as a consequential injury caused by his (covered) 2003 injury, to engage in his pre-injury employment as a forklift driver.

[85] The Review Decision is quashed.

[86] The appeal is allowed and Mr Robinson is entitled to weekly compensation to be assessed as at 16 June 2018.



## Costs

[87] Mr Robinson has been successful and may seek to apply for costs. If calculated on a category 2B basis,<sup>18</sup> allowing for one judicial conference appearance, half a day for the appeal hearing and one counsel, the costs would be \$6,303.00 plus disbursements. If counsel are unable to agree on costs, memoranda on costs are to be filed by Friday 1 September 2023.



I C Carter  
District Court Judge

Solicitors: John Miller Law, Wellington for appellant  
Izard Weston, Wellington for respondent

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<sup>18</sup> District Court Rules 2014, Schedule 4, Schedule 5.