

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 154

ACR 22/21

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

Hearing: 23 August 2023
Heard at: Wellington
Appearances: Mr A Crabb for the Appellant (via AVL)
Ms F Becroft for the Respondent
Judgment: 19 September 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
(Suspension of Entitlements – Section 117)**

[1] At issue in this appeal is a decision by WorkAon dated 5 August 2019 suspending the appellant's entitlements.

[2] The respondent submits that the decision of WorkAon was sufficiently supported by the medical evidence before it at the time to determine that a ganglion that the appellant had was not injury related and that ongoing symptoms were a result of the ganglion rather than a personal injury by accident.

[3] The appellant submits that the suspension decision was wrong because there was insufficient basis to suspend entitlements. The appellant's position is that part of the covered personal injury by accident was an aggravation of the ganglion "compressing on the radial artery" and that the aggravation persists.

Background

[4] On 2 April 2019 an ACC injury claim form was filed for a left wrist or hand sprain sustained on 29 March 2019, when according to the claim form the appellant "lifted wine boxes – hurt left wrist".

[5] The appellant was employed as a warehouse packer for Woolworths NZ Limited, an accredited employer and therefore the claim was sent to the employer's third party administrator WorkAon for management.

[6] Following the accident, the appellant was sent for hand therapy, for bracing and was certified as fit for light duties only.

[7] WorkAon sought a left wrist injury history from the Corporation. It included two accepted claims dating back to 1 August 2018 and 11 December 2017 for sprain injuries.

[8] The appellant provided a statement on 29 April setting out further details in relation to the accident mechanism:

I was pick in the wine, and I pick up a box of wine with my left hand. That when I felt it.

[9] On 29 April 2019, the appellant's claim for cover was accepted. Weekly compensation was subsequently calculated and payments commenced.

[10] In a further statutory declaration of 1 May 2019, the appellant advised that he had the injury on 29 March and then returned to light duties at work, but on 2 April suffered another injury to his right shoulder. Evidently from then on, he took time off work because of his shoulder. It appears that the appellant returned to work in May 2019, but his wrist symptoms worsened and he saw Dr Andreas, the company doctor, who sent him for an x-ray and scan.

[11] The x-ray of the left wrist was undertaken on 8 May 2019 and did not show any focal bone or joint abnormalities. The ultrasound undertaken the same day showed a thickened region of soft tissue, suspicious for either dorsal capsular thickening/injury or mild synovitis. No definite dorsal ganglion was identified, but there was a volar ganglion present.

[12] From then on, reports indicate that the shoulder was better, but that the wrist pain was continuing.

[13] An MRI of the left wrist was undertaken on 4 June 2019. It confirmed a prominent ganglion abutting and partly surrounding the radial artery, extending over a length of 2.2 cm, potentially related to a small ganglion arising from the volar recess of the radial carpal joint. There was also a ganglion arising from the volar aspect of the second CMC joint, extending close to the FCR tendon. The radiologist noted some oedema of the lunate, potentially representative of a resolving contusion.

[14] An appointment was then arranged for the appellant to be seen by Mr Faraj, orthopaedic surgeon. Mr Faraj reported on 3 July 2019. He noted that the pain was in the volar radial aspect (where later on it had been noticed that there was a lump) and there was synovitis, based on the ultrasound scan. He recorded that the recent MRI revealed a ganglion, compressing on the radial artery.

[15] The file was then reviewed by Dr Burgess, Branch Medical Adviser, on 30 July 2019. In his view, ongoing symptoms were related to the ganglion (not the covered sprain), which had likely been activated by the lifting event. However, the ganglion itself, was not injury related.

[16] On 5 August 2019, WorkAon issued a decision suspending the appellant's entitlements. The letter reads:

Your original injury was diagnosed as sprain tendon wrist or hand, and this was the injury that was covered under this claim. You are currently receiving the following entitlements for this claim:

- Treatment
- Vocational rehabilitation
- Weekly compensation

The medical evidence indicates that the effects of your injury have resolved, and that your symptoms are not due to your covered injury.

[17] On 5 November 2019, Mr Darke, on behalf of the appellant, applied for a review of WorkAon's decision.

[18] The review commenced on 10 February 2020 before Ms Cheesman. Ms Cheesman issued a decision on 8 March 2020 dismissing the review application. She emphasised that the eligibility for entitlements flowed from covered injuries only and that the ganglion was not a covered injury. She considered an argument by the appellant that the injury could be compression of the ganglion which occurred because of the accident. She said:

Mr Darke submits that this is a new injury. The problem with this argument, is that compression of an artery does not meet the definition of 'personal injury' in the Act. It is not a discreet physical injury, rather it is a symptom of the aggravation and swelling of the existing ganglion. It is well established law that aggravation and acceleration of a pre-existing non-accident related condition does not attract cover.

The ganglion would meet the definition of being a personal injury. If Mr Taufa considers that condition was caused by the accident event, then he is able to lodge a claim for that condition, and that could be done via his GP.

...

I consider that the evidence clearly shows that the current pathology is the result of the aggravation of the non-covered existing ganglion. Accordingly, the credited employer has discharged the onus to show it had sufficient evidence to be 'not satisfied' that Mr Taufa remained eligible for entitlements.

[19] A notice of appeal was filed against the reviewer's decision on 14 February 2021. For the appeal, the clinical advisory panel has provided a report dated 15 June 2021.

Appellant's Submissions

[20] Mr Crabb referred to *Knight v ACC*.¹ The court noted that s 117(1) provides that the Corporation may suspend or cancel an entitlement if it is not satisfied, on the basis of the information in its possession, that the claimant is entitled to receive the entitlement.

¹ *Knight v ACC* [2014] NZACC 338

[21] At paragraph 59, the court said:

The corporation must have a sufficient basis before it is not satisfied that the claimant is entitled to receive the entitlement. If the position is uncertain, there is not a sufficient basis.

[22] At paragraph 60, the court said:

The case law is clear that the removal of existing entitlements from the claimant is a significant step not to be taken lightly. For the Corporation to 'not be satisfied' requires clear evidence, arising above conflicting specialist opinion.

[23] Before the reviewer was the radiologist's analysis of the MRI report of 4 June 2019; which described:

A prominent ganglion abutting and partly surrounding the radial artery extending over a length of 2.2 cm.

... there is some oedema in the lunate of uncertain significance that could represent a resolving contusion.

...

[24] ACC also had the report of Mr Faraj, orthopaedic and hand surgeon, dated 3 July 2019. In that report Mr Faraj said this:

MRI scan with SRG radiology I reviewed the MRI scan. I agree that there is a ganglion at the volar aspect surrounding the radial artery. There is another one at the radial border of the wrist which can be interconnecting to this one.

Impression

A ganglion at the wrist there is a TFC tear at the ulna side of the wrist which is not causing him problems.

Recommendation

It is up to WorkAon if they are keen to arrange surgery for him as the lump is very painful and is compressing his artery. It might affect his ability to work in a cold environment. He does tell me that the lump gets much better when he uses his hand as he is a manual worker. ...

[25] Mr Faraj noted that the appellant was otherwise fit and healthy.

[26] WorkAon Branch Medical Adviser, Dr Burgess, remotely reviewed the medical notes on 30 July 2019 and proposed that the covered wrist injury was spent, the ganglion pre-existed the accident and was simply present at the site of the injury, and was aggravated

by the action causing injury. He stated that the ganglion “at the site of discomfort” is likely being irritated with flexion of the wrist.

[27] Mr Crabb submits that therefore the evidence relied upon by ACC is limited and brief, with Dr Burgess not having met the appellant.

[28] He adds that Dr Burgess’ report lacks any evidential basis.

[29] Consequently, he submits the decision falls short of meeting the criteria outlined in s 117 of the Act, as judicially interpreted. Based on these grounds, he submits the decision must be quashed and entitlements reinstated.

[30] As to the clinical advisory panel report, he submits that, as it was obtained after the decision date, any arguments predicated upon the panel’s findings must be approached with caution, as they cannot retroactively support WorkAon’s decision.

[31] He also submits that the panel is out of line with current medical thinking, namely that ganglions are not formed by injury.

[32] He submits that it is accepted in medical literature that ganglions can develop as a response to joint or tendon irritation, mechanical stress or injury.

[33] He refers to *Elwood v ACC*² which established that the Corporation must establish on the balance of probabilities that the appellant no longer had a right to entitlements under the Act, meaning the incapacitating medical condition has been established as not being caused by, or as a consequence of, the covered personal injuries.

[34] In his written submissions, Mr Crabb refers to medical literature, including from the Mayo Clinic in 2023 – “Ganglion Cyst – Symptoms and Causes” where the Mayo Clinic presented the elevated risk of ganglion cyst development in individuals with joint or tendon injury, thus reinforcing the association between trauma and cyst formation. He refers to similar conclusions by the American Society for Surgery of the Hand – “Hand Care –

² *Elwood v ACC* [2007] NZAR 205

Ganglion Cyst” in 2020 and recognition by the American Academy of Orthopaedic Surgeons of the link of ganglion cyst formation to joint or tendon injury.

[35] Mr Crabb acknowledges that it is difficult medically to exactly pinpoint a cause like in many other situations. However, he reminds the court that it should make a robust inference based on all the evidence and as *Ambros* requires, approach it in a generous and un-niggardly way.

[36] He submits that there is no evidence of the ganglion pre-dating the injury and that therefore on the balance of probabilities it was more likely than not formed by the injury.

Respondent’s Submissions

[37] Ms Becroft submits that in this case, the cover was for a soft tissue injury (sprain tendon wrist or hand – left). She says that no other injury has been identified either clinically or radiologically.

[38] She notes that s 67 provides that entitlements flow from cover.

[39] She notes that there was cover for a left wrist sprain from accidents on 11 December 2017 and 1 August 2018 and then there was the present claim of a left wrist sprain from 29 March 2019.

[40] She notes it was a month after the accident that an ultrasound of the left wrist revealed the ganglion.

[41] An MRI scan of the left wrist on 4 June 2019 concluded:

There is a prominent ganglion abutting and partly surrounding the radial artery extending over the length of 2.2 cm.

This may be related to a small ganglion arising from the volar recess of the radial carpal joint.

There is also ganglion arising from the volar aspect of the second CMC joint extending to the FCR tendon.

[42] She notes that following this, on 3 July 2019 Mr Faraj, orthopaedic and hand surgeon, does not link the ganglion to the wrist sprain injury.

[43] She refers to Dr Burgess' report and notes that as the evidence considered by Dr Burgess was the ultrasound scan, x-ray and MRI, he was not disadvantaged by not having met the appellant. Accordingly, his evidence should be accepted.

[44] She notes that the clinical advisory panel report of 30 June 2021 says that ganglions take months or years to slowly develop. Also that ACC and the New Zealand Orthopaedic Society agree that there is no clear, evidence-based explanation for what causes ganglions.

[45] She submits that the literature studies referred to by Mr Crabb are not good evidence and that we must rely on evidence specific to Mr Taufa's case. She submits that that evidence establishes that the ganglions were not caused by the accident in March 2019.

Appellant's Reply

[46] Mr Crabb submits that the wrist injury was a serious injury that prevented the appellant continuing with the work that he had been doing.

[47] Mr Crabb also notes that over two months elapsed between the accident on 29 March 2019 and the MRI of 4 June 2019.

[48] He notes that Justice Whata in *YZ v ACC*³ acknowledged that reference may be made to scientific publications.

Decision

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

[50] In its letter of suspension dated 5 August 2019, WorkAon said:

Your entitlement to treatment arising from this claim will be suspended in four weeks' time from the date of this letter because the effect of your injury related pathology has now resolved and your ongoing condition is unrelated to the injury for which you were granted cover.

³ *YZ v ACC* [2021] NZHC 1060

[51] As Barber DCJ said in *Furst v ACC*:⁴

ACC must have a 'sufficient basis before it is not satisfied that a claimant is entitled to continue to receive the entitlement'. If the position is uncertain, 'then there is not a sufficient basis'. The 'not satisfied' test is not met in these circumstances.

[52] In *Ellwood v ACC*,⁵ the 'not satisfied' test requires a positive decision equivalent to being satisfied that there is no right to entitlements. The test would not be met where the evidence was in balance or unclear: *Milner v ACC*.⁶

[53] In our case following the accident of 29 March 2019, he was placed on light duties.

[54] He obtained a further medical certificate on 11 April 2019, again restricting him to light duties. A further similar medical certificate was obtained on 18 April 2019.

[55] The appellant underwent an ultrasound of his left wrist on 8 May 2019 which revealed 'relatively prominent radial volar ganglion'.

[56] An MRI was conducted on 4 June 2019, which revealed:

... a prominent ganglion abutting and partly surrounding the radial artery extending over a length of 2.2 cm.

This may be related to a small ganglion arising from the volar recess of the radial carpal joint.

There is also a ganglion arising from the volar aspect of the second CMC joint extending close to the FCR tendon.

[57] The appellant saw orthopaedic and hand surgeon, Mr Faraj, on 3 July 2019. Mr Faraj noted:

Thanks for asking me to review Sione who is a 38 year old, works at Countdown Warehouse, presented to me with a history of left wrist injury when he lifted a box of beer.

The pain is in the volar radial aspect and later on he was noticed to have a lump and synovitis based on ultrasound scan.

A recent MRI arranged by a work doctor revealed a ganglion compressing on the radial artery.

⁴ *Furst v ACC* [2011] NZACC 379 at para 13

⁵ *Ellwood v ACC* [2007] NZAR 205

⁶ *Milner v ACC* (187/2007).

He is otherwise fit and healthy.

...

Recommendation

It is up to WorkAon if they are keen to arrange surgery for him as the lump is very painful and is compressing his artery. It might affect his ability to work in a cold environment.

[58] Mr Faraj otherwise did not comment on causation.

[59] Branch Medical Adviser Dr Burgess said in his opinion of 30 July 2019:

Although a wrist sprain cannot be excluded, the ongoing symptoms here are related to a ganglion which is present at the site of discomfort and likely to have been aggravated with the lifting event.

He likely would benefit from excision of the ganglion. However this is not an injury condition.

[60] Following Dr Burgess' advice, WorkAon wrote to the appellant on 5 August 2019 advising that his entitlement to treatment arising from this claim would be suspended in four weeks' time from the date of the letter "because the effect of injury related pathology has now resolved and your ongoing condition is unrelated to the injury for which you were granted cover".

[61] Following an unsuccessful review dated 8 March 2020, this appeal was filed.

[62] ACC obtained a report from the clinical advisory panel dated 30 June 2021. Amongst other things, the panel said:

ACC and the New Zealand Orthopaedic Society agree that there is no clear evidence based explanation for what causes ganglions. We know they take months or years to slowly develop.

...

In summary, the CAP explained that, in Mr Taufu's case his wrenching, lifting and pushing movement at work may have served to move the fluid around in his left wrist, but the underlying condition that caused the ganglion formation was pre-existing. There is no evidence that the ACC covered accidents described on 11/12/2017 (pushing a barbeque), 1/08/2018 (lifting a box) and 29/03/2019 (lifting wine boxes) were anything more than coincidental.

[63] Mr Crabb, on the appellant's behalf, refers to very recent medical literature on the association between trauma or injury and ganglion formation from the Mayo Clinic in 2023; the American Society for Surgery of the Hand in 2020. He also refers to the American Academy of Orthopaedic Surgeons recognition of the link of ganglion cyst formation to joint or tendon injury. He also refers to a study by Nazmi Bulent ALP and Gokhan Akdag in 2020 entitled "Surgical Treatment of Dorsal Carpal Ganglions: a Retrospective Clinical Trial". The study accentuates the link between dorsal carpal ganglia and joint capsul tears resulting from trauma.

[64] The clinical advisory panel concludes:

There is no evidence that Mr Taufa's left wrist ganglion surrounding his radial artery is causing any physical consequences for him. There is no evidence of 'blockage' or any other problems of the artery. He is noted to have normal forearm and hand perfusion.

[65] It is noted that the appellant has been with the same employer at least since December 2017 when the first ACC claim, included in the documents before me, was made. The diagnosis in respect of that accident was "sprain tendon wrist or hand – left".

[66] The claim forms that are on the file dating from 2017 note that the appellant is a "packer, freight handler" and that his usual work type is described as "heavy work".

[67] Against that background, and accepting that ganglion cysts may be associated with trauma, the issue then is whether the ganglion was caused or contributed to by the injuries to the appellant's left wrist as a result of the recorded injuries to his left wrist since 2017.

[68] It is somewhat artificial in the circumstances for focus to simply be on just the most recent injury of 29 March 2019 when considering what caused the ganglion.

[69] It may well be that given the appellant's heavy work tasks and the injuries that he has suffered to his left wrist since 2017 places him within the parameters of s 30 of the Act dealing with work related gradual process injury.

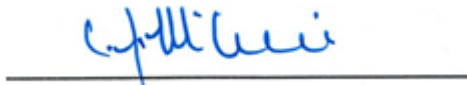
[70] In any event the totality of the evidence satisfies me that the formation and growth of the appellant's ganglion in his left wrist which, on MRI scan in June 2019, surrounded the

radial artery was on the balance of probabilities caused or contributed to by his accident of 29 March 2019.

[71] It follows therefore that I conclude that when ACC made its decision of 5 August 2019 to suspend entitlements, that the position ACC was in was that the “not satisfied test” was not met in the circumstances, that is to say that for the purposes of s 117, I find on the balance of probabilities that it was not in a position where it could not be satisfied that the claimant was entitled to continue to receive entitlements.

[72] Accordingly, the appeal is allowed and ACC’s decision of 5 August 2019 suspending entitlements is reversed.

[73] Costs are reserved.



C J McGuire
District Court Judge

Solicitors: Aaron Crabb, Barrister
Medico Law, Grey Lynn