

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 104

ACR 88/22

UNDER THE ACCIDENT COMPENSATION ACT 2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF THE
ACCIDENT COMPENSATION ACT

BETWEEN FLORA YANDALL
Appellant

AND ACCIDENT COMPENSATION CORPORATION
Respondent

Hearing: 19 June 2023

Appearances: Appellant in person
Ms B Squires and Ms S Shaw for Respondent

Judgment: 29 June 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Personal Injury s 20 and Suspension of entitlements s 117;
Accident Compensation Act 2001]**

[28] The appellant appeals against two decisions of WellNZ, both dated 31 March 2021, relating to her shoulder. She suffered an injury while at work in late 2020 and has got cover for injury for her ongoing symptoms. The first decision suspended ongoing entitlements for the appellant's shoulder injury. The second decision declined cover for a rotator cuff injury.

Background

[29] The appellant worked as a care giver in a BUPA residential home for elderly residents. As the appellant explained, at the facility there was a rest home hospital and a dementia unit and she was required to cover each of these as required.

[30] In 2020, she suffered an injury to her shoulder while at work.

[31] She told the Court that she commenced work at the facility on 14 April 2020 and the ACC injury claim form completed by her GP on 23 October 2020 gave an accident date of 6 September 2020.

[32] The description of accident was as follows:

Caregiver in dementia and stroke unit was trying to do cares for male patient. PT (patient) became aggressive and felt strain to R arm. Her usual work type is described in the form as “very heavy”.

[33] As the appellant explained to the Court, the accident occurred during the Covid period when the facility was already short staffed, and she found herself working 14 hours a day.

[34] She said there was a lot of pressure on her and she was asked to come in when she was feeling unwell.

[35] The appellant presents as robust, and it is not difficult to accept that her services were often needed when it came to lifting or moving patients.

[36] She said that when she needed help and support from other workers, “they were all gone”. She said, “I was always in demand because I was the only casual person there”.

[37] She told the Court that the man she lifted when she was injured weighed about 200 pounds. She said that staff was supposed to use a hoist, but these aids seemed never to be available.

[38] She told the Court that she worked the extra hours and did this hard work for the patients.

[39] It appears that on 23 October 2020 when she was first examined, she was referred to a physiotherapist.

[40] The record next shows that she had a telephone consultation with Dr Fuller on 30 October 2020. He notes:

Very hostile and aggressive. Not allowing me to speak or respond for the first ten minutes.

I apologised there was delay in ACC receiving the paperwork. Flora states that she has been in contact with ACC and feels she needs carers to look after her as her arm and shoulder pains are severe. Her boyfriend is at home with her caring for her currently. Flora explains the arm is now feeling numb and the pain is worse.

[41] The doctor concluded his report:

IMP (impression): severe pain, very hard to assess over the phone as very aggressive throughout whole consult but ended phone call amicably “thank you I appreciate your help”.

[42] Dr Fuller was kind enough to make way for the appellant that same day and he saw her in person in the afternoon.

[43] The doctor noted on examination:

...

Left shoulder girdle tender and hypertonic ++

Left ant shoulder JT (joint) line mild tenderness – points to ant shoulder as site of maximal pain

Tender biceps/triceps

Sensation intact both UL’s possible mild reduction left upper arm and wrists/elbow power 5/5 both arms

Shoulder – pain on active abduction above 30 degrees

...

IMP: ongoing shoulder pain? A rotator cuff injury? Subac Bursitis? Would benefit from steroid injection.

[44] Apart from analgesia and physiotherapy, Dr Fuller re-requested an urgent ultrasound of the shoulder. He also noted:

Requests assessment for personal cares support – action – struggles to dress/change clothes – explained I am unsure what support will/can be provided – that is dependent on ACC.

[45] The ultrasound report on her left shoulder of 16 November 2020 revealed the following:

Supraspinatus: difficult examination but appears to be a low-grade partial thickness bursal surface tear of supraspinatus. 9 mm by 5 mm AP.

...

Dynamic study: limited abduction to 30 degrees; pain. Positive Hawkins test. Limited external rotation to 20 degrees; limited by pain.

...

Conclusion: probable partial thickness tear of supraspinatus tendon at the bursal surface with no other significant focal tear or tendinosis of the rotator cuff demonstrated on ultrasound left shoulder.

[46] On 5 November 2020, WellNZ made a decision declining to award weekly compensation to the appellant.

[47] This matter went to review on 8 March 2021, the reviewer quashed ACC's decision substituting his own decision that Ms Yandall was entitled to weekly compensation based on incapacity from her covered personal injury of 6 September 2020.

[48] An occupational medical assessment by Dr Antoniadis, Specialist Occupational Physician was carried on 23 February 2021. She told Dr Antoniadis that her role was "very physical", and she stated she was able to manage agitated patients and manage any attempts they have made previously to throw punches.

[49] Dr Antoniadis recorded that the appellant indicated that prior to the events of 2020, she had no known history of injury or disease of affecting her neck or shoulders.

[50] She provided the following description of the injury to Dr Antoniadis:

She indicated that while in his room she had identified the individual as having fallen over. She indicated that she was attempting to elevate the male resident of the floor. She stated that she was with the registered nurse and another caregiver.

She indicated she was in a process getting this individual off the floor when she experienced a sense of "numbness" associated with the left shoulder. She pointed to the area of the upper border of trapezius and to the posterior left shoulder area. ...

She indicated that at the time she didn't advise anyone in particular adding "I thought I could handle it".

[51] Dr Antoniadis also noted a record completed by the GP's practise nurse on 23 October:

In September, I was doing a care for male patient. I tried to roll him, and he got aggressive and felt his left pain since then. Which is getting worse – unable to do up bra and painful swing arms when walking bilateral CWMS have part ACC form.

[52] Dr Antoniadis also notes a report from the Johnsonville Medical Centre dated 11 December 2020 where Dr Wang states:

Left shoulder pain since an injury on 6 September 2020 at work. Trying to lift a heavy patient who fell on the floor on 6 September 2020. No hoisting facility was provided at work. Felt strong pain in left shoulder during the process but unable to let go the patient. The pain was worse with shoulder movement and lifting. There was no previous history of left shoulder pain before the injury.

[53] There is a further report from the Johnsonville Medical Centre dated 10 February 2021. Dr Jones records:

Patient very distressed and frustrated because of left shoulder injury and awaiting assessment by WellNZ. Having difficulty sleeping, especially on left side. Having physio still. Also had an appointment for shoulder injection but says WellNZ advised her not to have it until seen by them.

[54] Dr Antoniadis recorded her diagnosis as follows:

Left rotator cuff syndrome, with clinical support for impingement.

There is ultrasound evidence associated with bursal surface partial thickness tear supraspinatus but this, in my opinion, cannot be confirmed as a source of her pain symptoms.

[55] Under the heading: Relationship between the incident described in the current condition? Dr Antoniadis said this:

At this time, I am unable to establish any plausible link between her described incident in August or September 2020 and her current rotator cuff syndrome noting the pattern of symptoms, delayed presentation and lack of any recovery. I note that these significant psychosocial factors already outlined in the body of the report.

...

I am not able to confirm that the findings of bursal surface partial thickness tear of supraspinatus (deemed probable) are related to the incident described.

Appellant submissions

[56] In her written submissions, the appellant said:

Started from the beginning of my injury, I felt that I did not get any support from ACC. I felt like I did not get a chance to my own rights. I felt that my injury was treated so unfairly under a political perspective. In the middle of the injury, there were a lot of doubts and lack of evidence based on ACC reaction to a hire a specialist to decline my injury. In the end of my injury diagram, I can understand that my case was handled in a very careless way. In a low class perspective, my case was never heard by anyone

who should be responsible for my injury. My injury was also ignored by the employer that I gave all my strength, my time to look after their patients. In return, of all that love and support was nothing but ignorance. But they didn't know I sacrifice my health and safety to respond to the need of those vulnerable people, by helping them with their care and nurture them when they cried out for help, I was there with them when they needed my help. I was there when they were hungry, I was there to feed them when they needed their shower. I was there 8 and 14 hours a week to be on their side. Because their families gave up on them and they brought them forward for me and other caregiver to look after them until end of their life. My service was let down by politician. In the reviewer's decision, I still don't believe that my review was handled in a fair manner. My injury caused me to resign from work. Since my injury, I was unable to go back to work. Since my injury, I lost my income. I lost everything. I can't work any more because of my shoulder injury. My shoulder injury is a lifetime injury. Last but not the least, I hope my statement will be reconsidered by the Court.

[57] In oral submissions in Court, the appellant provided more detail of the scope of her work and the pressures she was under during this period in 2020 affected by Covid. She said she was always in demand because she was the only casual person there.

[58] She twice mentioned that the hoist for lifting patients was never available and that she was ignored when she raised the issue. She said:

When I needed help, the full time workers ran away.

[59] She said that when she complained of a patient was too heavy, they said "don't tell everybody". She said that the decisions suspending entitlements and declining cover for rotator cuff injury left her hurt and painful and angry and "that is why I appealed a second time".

[60] The appellant wept at times during her submissions.

[61] She confirmed that she worked for "a month" before she went and saw the doctor. She said she had no injury to her shoulder prior to this.

Respondent submissions

[62] Ms Squire notes the two decisions under appeal and said that ACC's position is that any sprain would have resolved by now.

[63] She notes that ACC initially accepted the claim and that the ultrasound scan of 16 November 2020 concluded there was a probable partial thickness tear of the supraspinatus

tendon. She said that the claim was transferred to WellNZ from management and an opinion was sought from Dr Antoniadis who noted:

Any simple left shoulder sprain associated with an incident as described, in my opinion, would have already resolved over a period of 4 to 6 weeks from the time of event. As such I would have expected it to have resolved prior to her initial presentation to her general practitioner several more weeks later (23 October 2020).

[64] Dr Antoniadis went on to say:

At this time, I am unable to establish any plausible link between her described incident in August or September 2020 and her current rotator cuff syndrome noting the pattern of symptoms, delayed presentation and lack of any recovery. I note the significant psychosocial factors already outlined in the body of the report.

[65] In this regard, Dr Antoniadis had earlier quoted from Dr Fuller who said:

Flora explained has had so many physical and emotional traumas including abusive relationship and responsibility for her five children that she gets very angry when she feels people don't care for her which has been her experience of work life and home life for many years.

[66] He also said:

There is no associated bursal effusion associated with any traumatic event that could be expected associated with her worsening symptoms. This is not evident.

I am not able to confirm that the findings of bursal surface partial thickness tear of supraspinatus (deemed probable by the radiologist) are related to the incident described.

Decision

[67] When considering the issue of whether an accident-causing injury has occurred for the purposes of an ACC claim, it is most helpful to have as much evidence as possible as to the circumstances of the injury and what occurred in the aftermath.

[68] In this case, the accident is recorded as having occurred on 9 September 2020. The appellant has given details of the circumstances of the accident, and she repeated to the Court that her employer was in effect wanting to cut corners when it came to lifting patients and that the appropriate hoists were never available.

[69] The appellant emphasised more than once that when there was lifting to be done, other staff were not there to assist.

[70] Her evidence relating to her work conditions and situation was repeated by her and I accept it. This was at a time when the effects of Covid were very much present in the workplace and there was a natural disinclination generally for people to get “up close and personal” with others.

[71] The fact that the appellant “soldiered on” for some 6 weeks before she sought medical help is not uncommon in this jurisdiction.

[72] It is notable that when she first had medical consultation, she was referred to a physiotherapist. Regrettably, there is no evidence or information before me as to the outcome of that referral. Suffice to say that referral to physiotherapy is often a first step in cases similar to this and the clinical notes from such referral often shed significant light on the nature and the extent of the injury. Such is not available to the Court in this case.

[73] What is clear is that she presented as “hostile and aggressive” when she had a telephone appointment with Dr Fuller on 30 October 2020. She recounted that her boyfriend was at home and caring for her and that her arm is now feeling numb, and the pain is worse.

[74] When Dr Fuller examined her later the same day, he noted:

Ongoing shoulder pain? Rotator cuff injury? Subac bursitis? Would benefit from steroid injection.

[75] Dr Fuller re-requested USS (ultrasound scan) of her shoulder urgently.

[76] When she obtained her scan on 16 November, Dr McCaul concluded:

probable partial thickness tear of supraspinatus tendon at the bursal surface with no other significant focal tear or tendinosis of the rotator cuff demonstrated on ultrasound left shoulder.

[77] Dr McCaul also noted under the heading Dynamic Study:

Limited abduction to 30 degrees; pain. Positive Hawkins test. Limited external rotation to 20 degrees; limited by pain.

[78] The report of Dr McCaul concludes that there is a probable partial thickness tear of the supraspinatus measuring 9 millimetres by 5 millimetres. For the purposes of this jurisdiction, that is a finding that on the balance of probabilities, there is a supraspinatus tear. It is

supported by Dr Fuller's report and the appellant's own detailed evidence. It may also have been supported by a physiotherapist's report, but such is not on the file.

[79] I acknowledge Dr Antoniadis' scepticism. He notes that individuals in the 5th and 6th decade of life have bursal tears associated with supraspinatus that are age related and degenerative and not traumatic in origin.

[80] This is a case though where on the totality of the evidence, I am satisfied that the appellant was injured at her place of work not only because on the balance of probabilities, the radiologist's report identifies a probable supraspinatus tear, but also because of the other evidence supportive of injury including her GP's notes, the referral to physiotherapy, the appellant's partner having to care for her and indeed the pain and the anger on the part of the appellant when she believes she is not receiving the care and attention she believes she is due.

[81] Accordingly, the appeal is allowed and the two decisions of WellNZ dated 30 March 2021 suspending entitlements and declining cover for rotator cuff injury are reversed.

[82] Costs are reserved.



CJ McGuire
District Court Judge

Solicitors for the respondent: Susannah Shaw and Victoria Squires, Wellington