IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 200 ACR 111/19

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	PETER DOUGLAS FRANKPITT Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Submissions: The Appellant is self-represented
I Hunt for the Respondent

Hearing: On the papers

Judgment: 17 October 2022

JUDGMENT OF JUDGE P R SPILLER
[Leave to Appeal]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge McGuire, delivered on 24 May 2022.[1] At issue in the appeal was whether the Reviewer's decision of 11 April 2019 was correct. The Reviewer concluded that with no primary decision having been made by the Corporation as to whether Mr Frankpitt had deemed cover, that was the extent of the Reviewer's jurisdiction; and there was no unreasonable delay by the Corporation in processing claims by Mr Frankpitt for entitlements. The Court dismissed the appeal against the Reviewer's decision, for the reasons outlined below.

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1 *Frankpitt v Accident Compensation Corporation (Deemed* [2022] NZACC 98.

Background

[2] On 9 January 2015, Mr Frankpitt injured his right shoulder while manually cleaning laminating plates at his workplace.

[3] On 28 January 2015, Mr Frankpitt sought physiotherapy treatment and a claim was lodged for a diagnosed right shoulder sprain. The ACC injury claim form, lodged by the treatment provider, Sports Med Canterbury Limited, noted a diagnosis of "sprain shoulder/upper arm right".

[4] On 30 January 2015, the Corporation wrote to Mr Frankpitt, accepting his claim for cover for his injury. He was granted weekly compensation and funded physiotherapy treatment. However, he continued to suffer shoulder pain. About a month after the injury, his employer noted that as well as pain, Mr Frankpitt could not lift his right arm above shoulder height.

[5] On 9 April 2015, an x-ray and ultrasound were undertaken, with the ultrasound showing a low-grade partial thickness infraspinatus tear with mild overlying subacromial bursal thickening.

[6] On 6 May 2015, Mr Mohammed, Orthopaedic Surgeon, provided an assessment report and treatment plan, and this was reviewed by the Corporation's medical advisor, Dr Nazmi.

[7] On 11 August 2015, an MRI scan of Mr Frankpitt's shoulder was undertaken and on 13 August 2015, Mr Mohammed provided a further report.

[8] On 1 September 2015, after a specialist medical case review of Mr Frankpitt's right shoulder incapacity, Dr Hilliard reported:

> In my view the cause of Mr Frankpitt's ongoing right shoulder pain is that of nonspecific right shoulder pain of unknown origin, there being no good evidence on examination to support the view that any current right shoulder incapacity is due to a rotator cuff tear/problem or due to shoulder impingement.
>
> ... There is also no good indication on file that any of Mr Frankpitt's current incapacity is due to mild AC joint arthropathy found on imaging, this being an incidental finding.

[9] On 14 October 2015, Mr Mohammed noted: "We do not define a causal link unless surgery is recommended".

[10] On 30 October 2015, the Corporation wrote to Mr Frankpitt saying:

> The medical information available at this time suggests that your right shoulder symptoms do not relate to the described event at work on Friday 9 January 2015, but instead represent slow onset problems of the right shoulder.
>
> ACC can no longer support you with your symptoms as they do not relate to the injury you sustained in the accident on 9 January 2015. Your entitlements to weekly compensation, treatment and rehabilitation on this claim will cease from Sunday 6 December 2015.
>
> A copy of the decision rationale has been enclosed for your information. Should any new medical information become available, ACC will be happy to review it. Should it prove that your right shoulder symptoms relate to the event described on Friday 9 January 2015, we may reconsider this decision.

[11] Mr Frankpitt applied to review this decision. On 5 June 2016, the Reviewer found that the Corporation had sufficient basis, both to conclude that Mr Frankpitt's symptoms/incapacity were not caused by an injury suffered in the accident of 9 January 2015, and to suspend his entitlements. An appeal was filed in relation to this decision, but the appeal was later withdrawn.

[12] On 15 December 2016, Mr Foster, counsel for Mr Frankpitt, wrote to the Corporation as follows:

> This letter is important as it notifies you of the need for a cover decision or deemed cover, and lodges claims for cover and entitlements to surgery and weekly compensation pursuant to s 48 ...
>
> The reason given for declining entitlements on the 10030014299 claim is that the need for entitlements is not caused by the covered sprain/strain in my client's shoulder for which cover has granted. Instead, it is obvious that the surgery is required to treat a tendon tear, which I now ask you to consider in terms of cover and entitlements.
>
> I lodge claims on Mr Frankpitt's behalf pursuant to s 48 in accordance with the specifics in this letter. Please process these new claims in accordance with the timeframes at ss 56-58 of the Accident Compensation Act 2001.
>
> If you believe that this claim does not specify the nature in the central characteristics of what Mr Frankpitt is seeking, please advise me of what additional information you require as soon as possible so that I can provide further information with a view to promptly completing the process of lodging a claim.

> As there seems to be no dispute that Mr Frankpitt suffers from tendon tears in his shoulder, there is no dispute that the appropriate treatment for tendon tears is as set out by Mr Mohammed and Mr Walker.
>
> It appears to me that the question is simply one of causation in relation to the tendon injuries, i.e., whether the injury is covered under the Accident Compensation Act 2001, s 20(b).
>
> I consider that the criteria for a claim for cover for tendon tears was met when an ARTP was lodged on 6 May 2015 ...
>
> Can you please advise ACC's position on whether or not these claims have met the legal criteria for a claim and if ACC does not accept that they do, please advise why and provide full reasons.
>
> If ACC accepts that claim(s) was/were lodged, I believe that Mr Frankpitt is deemed to have cover for those injuries by operation of s 58.

[13] On 29 December 2016, the Corporation responded as follows:

> ACC cannot accept reported findings in medical imaging to be accepted as a request to lodge a new diagnosis. Any consideration of a new diagnosis or additional diagnosis must be provided by a medical expert qualified to diagnose. To date Mr Mohammed, being the treating specialist, has not made any such request. Nor has Mr Mohammed made any requests for funding of further treatment, diagnostic or otherwise.

[14] On 9 February 2017, the Corporation emailed Mr Frankpitt's counsel:

> I can confirm that ACC's position is that neither the medical information on the claim to date, or the letter you sent ACC on 15 December 2016 constitute an application for additional cover. In order to make an application for cover, please can you either:
>
> 1. Arrange for Mr Frankpitt's treatment provider to lodge ACC 45s appropriately; or
>
> 2. Provide information to ACC from a treatment provider (similar to that on ACC forms) which addresses relationship between the accident and any additional injuries being claimed.

[15] On 9 June 2017, Mr Foster emailed as follows:

> [1] The investigative onus sits with ACC pursuant to *Ambros* and ss 56 – 58. The fact that ACC has failed to investigate to the extent necessary to make a decision within the statutory timeframes is one of the grounds for failure to comply with ss 56 and 57 which leads to deeming pursuant to s 58.
>
> [2] The applicant's case proceeds on the basis that ACC failed to investigate to the extent reasonably necessary to make a decision and therefore s 58 applies.

> [3] Whether or not further investigation is required is a matter for any reviewer exercising discretion under the Act to make the decision again for ACC in accordance with the guidelines. ...
>
> [5] The applicant would be open to conciliating this matter.

[16] The suggestion of conciliation was taken up by both parties and the following agreements and understandings were reached:

> [1] ACC agrees to arrange a fresh orthopaedic assessment with a Christchurch based specialist of Mr Frankpitt's choice. The specialist will be provided with the available medical notes/records. The specialist will be asked, amongst other things, to undertake a physical examination of Mr Frankpitt and to comment on the injury(ies) in Mr Frankpitt's right shoulder and the likely cause(s) of those injuries. Mr Hunt and Mr Foster will liaise over the appropriate questions to be put to the specialist. ACC agrees to fund the costs of this assessment and any radiological investigation specialist deems necessary.
>
> [2] On receipt of those specialist's report, ACC will issue a fresh decision(s) confirming any injury(ies) it accepts cover for and any injury(ies) it does not accept cover for. The decision(s) will carry review rights.
>
> [3] The parties agree to return to conciliation either before or after ACC issues the fresh decision(s) to determine whether any outstanding issues in the dispute can be resolved.
>
> [4] The parties agree and request that, until further notice, the reviewer grant an adjournment of the current review applications 5122586 and 5122588 in order that the matters outlined in [1] – [3] above can be completed. Either party will advise Fairway Resolution if they consider it is appropriate for the review(s) to proceed to a hearing.
>
> [5] The parties agree to file joint memorandum of counsel to the District Court to advise the Court of the current conciliation process in the terms of this agreement.
>
> [6] ACC agrees to pay Mr Foster's representation costs for return travel to the conciliation, lodgement of the review applications, preparation and attendance at the conciliation (three hours attendance) at the regulated amounts. Mr Foster will provide ACC with an invoice for these costs.

[17] On 12 September 2017, consistent with the terms of this agreement, counsel for the Corporation provided Mr Foster a draft letter of instruction to Mr Mohammed, the specialist nominated by Mr Frankpitt. On 1 November 2017, in the absence of a response from Mr Foster, further enquiry was made.

[18] On 2 November 2017, Mr Foster said he would provide Mr Frankpitt's response shortly and apologised for the delay. In the absence of a response from Mr Foster, there was further follow up on 5 December 2017.

[19] In March 2018, Mr Frankpitt advised that Mr Foster was no longer acting on his behalf, and Mr Frankpitt provided a revision of the proposed letter to Mr Mohammed. On 14 March 2018, attempts were made by Mr Clayton (of Fairway) to advance matters. There was also a direction by a Reviewer that a review hearing be scheduled, with the suggested date as 15 June 2018.

[20] Eventually, agreement was reached on the terms of the letter to Mr Mohammed which was finally settled and sent to him on 3 August 2018, along with various annexures.

[21] On 19 August 2018, Mr Mohammed responded, declining to provide a further report. He said:

> I don't feel it would be appropriate for me to see Mr Frankpitt for this medical legal assessment. I agree with the comprehensive and detailed report of Dr Hilliard. It is appropriate that an occupational physician like Dr Hilliard has performed a medical legal report and you will see from this that this is a very detailed, long and specialised assessment. My practice as an orthopaedic surgeon is focused on patient care rather than specialised medical legal assessments.

[22] Following that response, further engagement with Mr Frankpitt was sought regarding obtaining an independent assessment. No progress was made and there was no response from Mr Frankpitt.

[23] On 22 March 2019, review proceedings took place. On 11 April 2019, the Reviewer issued a decision noting that Mr Frankpitt was alleging "delay and processing the claim for entitlement that the claimant believes is an unnecessary delay". The Reviewer found that there had been no unreasonable delay by the Corporation in processing a claim by Mr Frankpitt for entitlement. The Reviewer also found that Mr Frankpitt did not have cover or deemed cover for additional injuries. Mr Frankpitt lodged an appeal against the Reviewer's decision.

[24] A minute of this Court, dated 19 March 2021, noted that there had been a joint request for a further report from Mr Beadel, an Orthopaedic Oncology, Arthroplasty Upper Limb and Trauma Surgeon.

[25] On 9 September2020, Mr Beadel reported:

> I think the repetitive axial loading and impingement type position with activity that Douglas undertook for the day may well have been contributory in the development of bursitis and potentially intra substance tendon tearing due to overload type phenomena. There was also synovitis within the rotator interval which can be due to adhesive capsulitis and adhesive capsulitis could also be secondary to a repetitive shoulder injury such as this described. Douglas does have mild restriction of shoulder motion mainly external rotation on review today and this would also be consistent with a previous episode of adhesive capsulitis. Therefore it is my belief that the repetitive strain injury may have contributed to Douglas's rotated cuff partial tears, bursitis and an element of adhesive capsulitis in his right shoulder.
>
> In view of Douglas's ongoing right shoulder symptoms and signs, I think it is appropriate to get up to date imaging by way of plain X rays and MRI scan of the shoulder to reassess.

[26] On 18 November 2020 an MRI of the appellant's right shoulder was undertaken. This revealed:

> Severe supraspinatus tendinosis with near full width longitudinal intra substance tear. Slight increase in size compared with 2015. No tendon retraction. ... Moderate AC joint arthropathy with periarticular bone marrow oedema and mild to moderate bursitis. Mild glenohumeral joint changes.

[27] On 2 December 2020, Mr Beadel saw Mr Frankpitt again and reported:

> The MRI scan in addition to the rotator cuff and bursal changes has also highlighted significant bone marrow oedema around the acromioclavicular joint and clinically some of his discomfort certainly relates to the superior aspect of his shoulder/acromioclavicular joint and he is tender in this region with a positive AC joint compression test although there is always a lot of cross over between these tests.
>
> With regards his rotated cuff, although there has been a slight increase in size of the intra substance tear since 2015, it is good news that there has been no progression to a full thickness tear. Therefore hopefully we can continue to manage Doug's shoulder overall non-operatively.

[28] On 24 March 2021, in response to a further email from the Corporation relating to causation, Mr Beadel said:

> I believe I have already answered this to the best of my ability and confidence in defining exactly the cause of this man's right shoulder injury in my summary in my clinical letter of 09.09.2020.

[29] The Corporation requested its clinical advisory panel (the CAP) comment on Mr Beadel's reports. On 8 June 2021, the CAP reported that Mr Frankpitt's bursitis

was not consistent with an acute injury, nor was his capsulitis related to a single episode of trauma, and concluded that his other imaging changes were chronic and not related to a single episode of trauma. The CAP's report stated:

> The CAP acknowledged that Mr Frankpitt's hard work when cleaning the plates and cassettes on 09/01/2015 was painful and strenuous. However, a causal link with the common, age related changes in his right shoulder imaging cannot be established.
>
> The CAP explained that rotator cuff tendinopathy and tendon tearing is a chronic insidious process that occurs slowly overtime. It is a common cause of shoulder symptoms in the general population. Our body slowly changes our tendons over time, and it starts with slow "intra substance" sharing of the tendon fibres within the tendon as seen in Mr Frankpitt's imaging. His bursal thickening, chondrolabral tearing, shoulder joint arthritis, acromioclavicular joint osteoarthritis, biconcave glenoid and other imaging features also developed slowly over time.
>
> We could find no clinical evidence to support the impression of an acute cause suggested by Mr Beadel. We consider that the most likely cause of Mr Frankpitt's supraspinatus and infraspinatus tendon tearing and other imaging features were slow changes common in his demographic. A causal link to the 09/01/2015 event has not been established and is most unlikely.

[30] On 22 April 2022, the Corporation issued a decision declining Mr Frankpitt cover for claims for tendon tears and gradual process injuries.

[31] On 26 April 2022, Mr Franpitt's appeal was heard. On 22 May 2022, Judge McGuire dismissed the appeal.

[32] On 3 June 2022, Mr Frankpitt sought leave to appeal Judge McGuire's decision.

Relevant law

[33] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

> A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[34] In *O'Neill*,[2] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
>
> (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment …;
>
> (ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;
>
> (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed …;
>
> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;
>
> (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision …;
>
> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .
>
> [25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law … .

The Court's judgment of 24 May 2022

[35] Judge McGuire rejected the submission that Mr Frankpitt was deemed to have cover for his injuries (tendon tears, chondrolabral separation, bursitis and atrophy) by operation of s 58. His Honour noted that the claim form in this case had the diagnosis "sprain shoulder/upper arm right", and that such diagnosis by a physiotherapist was normal in cases like this. Judge McGuire stated that it was the initial step that triggered the Corporation's responsibilities under s 56 to investigate the claim at its own expense and to give notice of its decision on the claim to the claimant, and in this case these actions were done within the statutory timeframe.

[36] Judge McGuire noted that s 65 allowed the Corporation to revise its decisions and, in its letter to Mr Frankpitt of 30 October 2015, it had done so by advising the appellant that "the medical information available at this time suggests that your right

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2 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

shoulder symptoms do not relate to the described event at work on Friday 9 January 2015 but instead represent slow onset problems of the right shoulder". His Honour observed that this revised decision was plainly based on the detailed report of 1 September 2015 from Dr Hilliard.

[37] Judge McGuire noted that Mr Frankpitt sought and obtained cover for shoulder sprain. His Honour observed that this loose terminology, while seemingly vague and unhelpful, was no doubt designed, at least in part, to ensure that its statutory obligation under s 56 to investigate the claim was not inhibited by a narrow description of the injury in the claim form at a time when the extent of the injury was very often not known. His Honour noted that here the investigations that had followed included CT and MRI scans as well as the detailed assessment by Dr Hilliard. His Honour found that the issues raised by Mr Frankpitt, as being the subject of deemed cover, namely, the tendon tear, chondrolabral separation, bursitis, and atrophy, were covered by the "umbrella" claim for "sprain shoulder" entered in the injury claim form of 28 January 2015.

[38] Judge McGuire noted that it followed that the "late" letter from the Corporation dated 22 April 2022, declining claims for tendon tears and gradual process injuries, simply formalised the position. Judge McGuire had no criticism for the Corporation for the lateness of this decision letter. His Honour found that the Corporation had throughout this case endeavoured to act fairly, as exemplified in its willingness to have recourse to conciliation and its significant endeavours to obtain further information from Mr Mohammed to clarify matters, as well as obtaining reports from Mr Beadel and finally by referring the matter to the CAP.

[39] In terms of causation, Judge McGuire found the CAP's report decisive. His Honour noted that it found: the mechanism of injury was not consistent with acute rotator cuff tendon tearing; Mr Frankpitt's bursitis was not consistent with an acute injury; his capsulitis was not related to a single episode of trauma; his other imaging changes were chronic and not related to a single episode of trauma; rotated cuff tendinopathy and tendon tearing was a chronic insidious process that occurred slowly over time and it was a common cause of shoulder symptoms in the general population; the most likely cause of Mr Frankpitt's supraspinatus and infraspinatus

tendon tearing and other imaging features were slow changes common in his demographic; and, on the balance of probabilities therefore, this presentation was not caused by an accident event on 9 January 2015.

[40] Judge McGuire found that the history of what occurred in this case following Mr Frankpitt's injury on 9 January 2015 by and large described appropriate steps taken by the Corporation in a timely fashion, albeit constrained in this case by the availability and willingness of medical professionals to provide reports. His Honour noted that the Corporation's willingness to engage in a conciliation process contraindicated the allegation of delay.

[41] Judge McGuire added that, so far as Mr Frankpitt's claim for entitlement to surgery was concerned, that required proper consideration of whether he had an entitlement to surgery as a result of an accident causing injury. His Honour noted that, in this regard, the Corporation's position was justified following the report of Dr Hilliard. As to delay in making a decision on Mr Frankpitt's claim for entitlement to weekly compensation, as the Reviewer said in her decision of 11 April 2019, Mr Frankpitt had options, including proceeding with his appeal and lodging a claim to cover for additional injuries.

[42] Judge McGuire found that, in this case, the Corporation's responses to the issues that this case presented were, in general, timely and appropriate, and this included its willingness to enter conciliation. Accordingly, Judge McGuire dismissed the appeal.

Mr Frankpitt's submissions

[43] Mr Frankpitt submits that in his written submissions and verbal presentation at his hearing, he referred to previous relevant decisions,[3] and Judge McGuire made no reference to these decisions in his judgment. In particular, the judgment in *Dickson-Johansen* debunked the concept of an "umbrella" claim referred to by Judge McGuire. Mr Frankpitt further submits that, during the hearing, Judge McGuire did

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[3] *Sinclair v Accident Compensation* (2012) NZHC 406; *Dickson-Johansen v Accident Compensation* [2016] NZACC 314; and *Leuthard v Accident Compensation* [2014] NZACC 73.

not ask a single question of him except to confirm his name, and he found this lack of participation to be somewhat deprecating. Mr Frankpitt also takes issue with the references in Judge McGuire's judgment to the assessment of Dr Hilliard, pointing to various paragraphs which contain errors or typographical mistakes.

[44] Mr Frankpitt submits that the email that the Corporation received on 15 December 2016 is a claim as defined by the legislation and as recognized in previous cases in this jurisdiction. He submits that it is wrong of the Corporation, the review system, the Corporation's legal counsel and the decision of Judge McGuire to treat it as anything else.

Discussion

[45] This Court acknowledges the submissions of Mr Frankpitt. However, this Court notes that the submissions regarding the absence of questions at the hearing and minor errors in quotations from medical reports do not appear to be relevant to the question of whether Judge McGuire made an error of law in his judgment.

[46] In relation to the absence of reference to decisions cited by Mr Frankpitt, he has (with one exception) not explained how Judge McGuire's understanding and application of the law was in error in light of these decisions. In relation to Judge McGuire's use of the term "umbrella" claim, His Honour used this term in relation to the issues raised by Mr Frankpitt, as being the subject of deemed cover, namely, the tendon tear, chondrolabral separation, bursitis, and atrophy. Judge McGuire noted that these were covered by the "umbrella" claim for "sprain shoulder" entered in the injury claim form of 28 January 2015. Judge McGuire made this finding of fact in the context of the evidence provided in the case at hand, and with reference to the extensive, ongoing efforts by the Corporation to investigate the ramifications of Mr Frankpitt's injury. The reference by Judge Powell in *Dickson-Johansen* was to the quite distinct situation of whether the fact of cover, having been granted for an injury arising from a particular accident, *absolved* the Corporation of responsibility to investigate claims for other injuries claimed to have been suffered in the same accident which are subsequently identified by the claimant.[4]

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[4] Above note 3, at [32]

[47] In relation to Mr Frankpitt's claims for cover, Judge McGuire conducted an examination of the facts in light of the relevant law, and made findings of fact which he was entitled to make. Mr Frankpitt has not identified whether or how Judge McGuire has made an error of law in so doing.

The Decision

[48] In light of the above considerations, the Court finds that Mr Frankpitt has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. Mr Frankpitt 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. This Court is not satisfied as to the wider importance of any contended point of law.

[49] There are no issues as to costs.

Judge P R Spiller,
District Court Judge