

IN THE DISTRICT COURT
AT WELLINGTON

Decision No. **57** /2010

AI 098/02

UNDER

The Injury Prevention,
Rehabilitation, and Compensation
Act 2001

AND

IN THE MATTER

of an appeal pursuant to s.149 of
the Act

BETWEEN

MS MAREE HENNESSEY

Appellant

AND

QBE INSURANCE
(INTERNATIONAL) LTD

Respondent

HEARING at TAURANGA on 19 August 2004

DATE OF MY INTERIM DECISION NO. 358/2004 17 November 2004

DATE OF THIS FINAL DECISION 16 April 2010

COUNSEL

Mr P Sara for appellant
Mr P Jegatheeson for respondent

FINAL DECISION OF JUDGE P F BARBER

The Issue

[1] As I put it in my interim decision of 17 November 2004, this Court is asked to decide whether the respondent insurer has a continuing liability to the appellant for any incapacity arising out of a work injury she suffered on 2 March 2000 but, particularly, with regard to rehabilitative treatment. On that day, the appellant had injured her back while working at a Warehouse store in Papamoa, Tauranga, having suddenly turned and collided with a barbecue unit. The respondent granted her cover for that injury on 21 March 2000.

[2] In paragraph [7] of that interim decision, I said:

"The Act

[7] *The relevant legislation is the Accident Insurance Act 1998 and, in particular, Clause 2, Schedule 1 of that Act. Broadly, that Clause 2 requires the insurer to pay the cost of the insured's treatment if the treatment is for the purpose of enabling the insured to lead as normal a life as possible, having regard to the consequences of the injury, and the treatment is necessary, appropriate and normal in terms of the nature and severity of the injury."*

[3] In my decision of 17 November 2004 I covered the evidence in some detail. I referred to the reasoning of the Reviewer who dismissed the appellant's review application of the decision made by The Warehouse Ltd (acting as agent for the respondent insurer) declining to cover further medical treatment (other than to contribute towards the costs of a pain management programme), or any further investigation of the appellant's condition "*because there is no evidence to suggest that this is necessary as a result of your accident on 2 March 2000*". I also recorded that it is accepted that the appellant had suffered a previous injury to her back in a 1995 accident for which she has cover from ACC. There was also reference to the appellant having, in February 2001, caused significant impact to her condition by catching her foot on furniture at her home and twisting her back.

[4] I also recorded that there is no dispute that the onus is on the appellant to establish, on the balance of probabilities, that at the material time she required further treatment and rehabilitation (other than what had already been provided by the insurer) for covered injuries. Then, in some detail, I set out my reasoning to conclude that the available evidence did not clarify whether the appellant still experiences covered injury-pain and incapacity i.e. was her current injury still causally connected to either or both the covered accidents? I stated at paragraph [60] "*Frankly, there is a certain vagueness about the medical evidence in this case; possibly, because relevant questions have not been put to the medical specialists*". I concluded that interim decision as follows:

"[65] A problem is that the appellant has yet to apply for weekly compensation since she lost her job in June 2002. There needs to be more focussed evidence about whether, on the balance of probability, her current symptoms (particularly as at 27 August 2001) are related to either of the covered injuries (i.e. either that of 1995 or that of March 2000). Also, there needs to be more focussed medical evidence as to just what rehabilitative treatment is now appropriate for the appellant. The available medical evidence seems out of date to me.

[66] Much as I would like to now be able to make a definite finding on this case one way or the other, and much as I am reluctant to obtain more medical evidence and create further delay, I presently refrain from making a decision on this appeal and direct that there be a conference between both counsel and me in the very near future to discuss an appropriate process in terms of the views I have expressed. In particular, I would like to know if the appellant has applied for weekly compensation as seemed to be contemplated at the hearing. ..."

My 25 January 2008 Memorandum to the Parties

[5] In a memorandum to the parties of 25 January 2008, I expressed shock that there had been little constructive progress in this matter despite the elapse of

3¼ years since my decision of 17 November 2004. Eventually, that memorandum led to the following questions being put to Mr Bryan J Thorn, an orthopaedic surgeon in Tauranga, on 16 July 2008:

- [a] What is the current diagnosis of Ms Hennessey's condition?
- [b] Does Ms Hennessey still experience ongoing problems from either of the earlier injuries of March 2000 or 1995?
- [c] If your answer to question 2 is "yes", please comment as to what extent her current suffering relates to either or both of the above accidents or to any other cause. If not all of Ms Hennessey's current incapacity is attributable to the above injuries, then what percentage is attributable?
- [d] What rehabilitative treatment is required for the current condition?

The Further Evidence of Mr B J Thorn (orthopaedic surgeon)

[6] Those questions led to a thoughtful and helpful 7 November 2008 report from Mr Thorn opining as follows:

"As well documented, Maree sustained an injury in March 2000 when she struck her left thigh on the edge of a desk while working for the Warehouse and apparently twisted and flexed her low back as she did so. Maree however did have a history of prodromal low back pain with well documented problems extending back as far as 1995, for which she had earlier received Chiropractic treatment. In 1995 she had apparently tripped over a low chain fence and injured her left should and arm, but seemed to have had low back pain following that. She also had a further injury to her low back when she tripped on some furniture in early 2001.

Her symptoms as explained to me were of ongoing low back pain which she said varied from minimal up to approximately 7/10 on the Visual Analogue Scale, suggesting a reasonable degree of severity of pain. There was associated pain across the left side of the low back into the left groin, and she also complained of intermittent tingling and numbness down back of the legs. She also reported some ongoing bladder and bowel urgency. At no time has she had surgery on her spine, but she had some abdominal surgery by Mr Robert Cable, the details of which I am not privy to.

The examination findings on the 10 October, were of approximately 75% expected range of motion of the lumbar spine, with none being reported on both flexion and resuming the erect posture. She commented on minimal pain on lumber spinal extension. There was peripheral neurological abnormality in the lower limbs, and her straight leg raising test was normal. Examination of the hips and peripheral circulation likewise normal.

Past x-rays have shown no particular abnormality around the lumbar spine, or in the pelvis. However, MRI scan obtained at my request on 13 November 2001, showed evidence of mild degeneration of L4/5 and L5/S disc spaces. These findings were discussed with the patient at her follow up visit in November 2001.

To answer your questions:

It appears that Ms Hennessey has ongoing difficulties related to her low back, and I would rate this as a mechanical type of low back pain, with a discogenic component as pain seems to be aggravated by forward flexion, but not by extension.

The second question relates to whether she is still experiencing problems from either of the injuries in March 2000 or 1995. I suspect the pain relates more to the later injury i.e. March 2000 as the 1995 incident appeared to have involved more left shoulder and arm problems, although this is relying on historical data only. Clearly however, there were reports of back pain which preceded the March 2000, and that incident may be regarded as having aggravated a pre-existing problem. Her current suffering as you call it,, relates I think mainly to the March 2000 incident, further exacerbated by the jarring injury she sustained when tripping on some furniture in early 2001.

In terms of whether all her symptoms are attributable to injury, one can not accurately define that, as MRI scan did suggest some degenerative changes as far back as 2001, and it is well recognised that people with degenerative change in particular are perhaps more susceptible to worsening of symptoms with injury, whereas those without pre-existing degenerative change may cope better, although this is not a 100% true finding in some patients with previously normal scans may still have ongoing symptoms such as the nature of low back pain.

It is frankly impossible to determine whether the degenerative changes seen on her imaging in November 2001 were purely degenerative or purely accident related, I think it would be fair to assume both may be contributing, but I am unable to offer an accurate percentage as to the contribution of which.

At this stage, I would recommend ongoing conservative treatment, as I don't feel surgical management would have much to offer her. At this point I don't see a clear indication that Ms Hennessey needs a further MRI scan, as this sort of imaging would be recommended for people who may have a condition possibly suitable to be treated surgically, and I don't believe from a clinical point of view she has. There is clearly no evidence of nerve root compression, the MRI scan would normally be done to seek a cause for that. Should the patient decide her symptoms were severe enough, and be prepared to undergo fusion or similar surgery, an MRI scan would be recommended as a pre-operative planning tool, but at this stage I can not recommend it to her."

[7] Mr Thorn had reported about the appellant in 2001, as I mentioned in my interim decision.

A Summary of the Final Submissions for the Insurer

[8] Mr Jegatheeson referred to the appellant having had a longstanding back problem and receiving chiropractic treatment for it since at least early 1996 until mid 1999, and to Mr Thorn having confirmed that. Mr Jegatheeson also noted that the cover provided for the work injury of March 2000 was for "sprain lumbar spine". He also referred to the specialists' opinions, as early as May 2000, being that she suffered from chronic mechanical back pain. He noted that Mr Thorn's 7 November 2008 opinion is consistent with that.

[9] However, Mr Jegatheeson submits that the chronic mechanical back pain, reported by specialists since May 2000, was not caused by the March 2000 injury accident but is a longstanding problem aggravated by it. He puts it that Mr Thorn's comments confirm this when he opined "*clearly however, there were reports of back pain which preceded the March 2000, and that incident may be regarded as having aggravated a pre-existing problem*". Mr Thorn then went on to say: "*Her current suffering as you call it, relates I think mainly to the March 2000 incident, further exacerbated by the jarring injury she sustained when tripping on some furniture in early 2001*".

[10] Mr Jegatheeson then submits that Mr Thorn's comments do not mean that the ongoing problems are due to the injury suffered in March 2000; and that attribution of the ongoing problem to the March 2000 accident appears to be on the basis that it aggravated the longstanding mechanical pain, which was further aggravated by the non work incident in February 2001.

[11] Mr Jegatheeson then submits that Mr Thorn's comments also suggest that the ongoing symptoms are attributable to the degenerative changes at L4/5 and L5/S1, which were shown on the MRI scan taken on 13 November 2001; and further suggest that the changes could have become symptomatic after the March 2000 accident but it is unclear whether these changes were, in fact, the cause of the mechanical back pain which had been experienced by the appellant since 1995/1996. Mr Jegatheeson also put it that Mr Thorn is unable to comment on whether the degenerative changes at L4/5 and L5/S1 are purely degenerative changes or purely accident/injury related. Mr Jegatheeson submits that I should note Dr Hartshorn's comments of 29 November 2001 that the degenerative changes shown on the MRI scan could not plausibly be linked to the injury event in March 2000.

[12] Accordingly, Mr Jegatheeson submits for the insurer:

- [a] The ongoing symptoms as at 27 August 2001 were due to the pre-existing problems (i.e. mechanical back pain and degenerative changes), and not to the March 2000 injury; and
- [b] The pre-existing problems were aggravated by the March 2000 accident; and
- [c] Mr Thorn's opinion is unclear as to whether or not the pre-existing problems were caused by the injury suffered in 1995.

Final Submissions for the Appellant

[13] Mr Sara particularly referred to that part of Mr Thorn's 7 November 2008 report stating "*I suspect the pain relates more to the latter injury i.e. March 2000 as the 1995 incident appeared to have involved more left shoulder and arm problems, although this is relying in historical data only*".

[14] Mr Sara submits that, clearly, Mr Thorn is saying that the appellant did suffer an injury in March 2000.

[15] Mr Sara also submitted that Mr Thorn does not suggest that the appellant's ongoing symptoms were wholly or substantially attributable to degenerative changes; and that it is significant that Mr Thorn thought that the degenerative changes shown in the November 2001 imaging were both degenerative (i.e. age related and not ACC covered) and accident related.

My Reasons for Final Decision

[16] It seems that the delay between Mr Thorn's 7 November 2008 report and final submissions being made was due to the appellant changing her counsel in 2009.

[17] The issue is the insurer's liability for any continuing incapacity of the appellant caused by covered personal injury following an accident at work on 9 March 2000.

[18] In my preliminary decision of 17 November 2004, in which I directed the parties to seek further medical evidence at the expense of the insurer, I expressed the provisional view that a significant part of the appellant's current incapacity seemed to flow from either or both the covered accidents which the appellant suffered in 1995 and 2000. More simply put, I noted that the then current issue of the insurer's liability for treatment costs related to what was described as a chronic pain syndrome, but the issue was the cause of that. I wanted more medical evidence as to whether the appellant still experienced pain/incapacity from either of her covered injuries of 1995 and 2000 and, if so, to what extent did that then current suffering relate to either or both of those accidents or to any other cause; and also, what rehabilitative treatment was needed?

[19] Mr Thorn's opinion seems to be that the appellant's ongoing problems are likely more due to her injury of March 2000 rather than the 1995 incident. He does not say that those ongoing symptoms are wholly or substantially attributable to degeneration. Indeed, he opines that the degeneration is both age related (and so not covered by an insurer) and accident related. He candidly says it is impossible to apportion those causes. It seems to me to follow that the appellant's incapacity is very substantially caused by her March 2000 accident on the balance of probabilities. In any case, the insurer declined cover on 22 March 2002 for lack of evidence of ongoing incapacity being sufficiently linked to the accident of 2 March 2000. In the light of Mr Thorn's opinion of 7 November 2008, there is sufficient evidence to warrant cover continuing. In my interim decision I detail my concerns that could be so.

[20] For the above reasons I allow this appeal. I award \$2,500.00 on account of the appellant's costs but I reserve leave to apply with regard to any consequential matters (including costs if either party wishes to contest same).



Judge P F Barber
District Court Judge
WELLINGTON