IN THE DISTRICT COURT
HELD AT WELLINGTON

Decision No. [2010] NZACC 198

IN THE MATTER of the Accident Compensation Act 2001

AND

IN THE MATTER of an appeal pursuant to Section 149 of the Act

BETWEEN **ALAN LYTH**

(AI 381/09)

Appellant

AND **ACCIDENT COMPENSATION CORPORATION**

Respondent

HEARD at WELLINGTON on 25 August 2010

APPEARANCES
Ms R Radich, Counsel for Appellant.
Mr A D Barnett, Counsel for Respondent.

RESERVED JUDGEMENT OF JUDGE M J BEATTIE

[1] The issue in this appeal arises from the respondent's decision of 20 January 2009, whereby it declined to approve funding for elective surgery sought by the appellant, on the grounds that such surgery was required to treat a pre-existing degenerative condition rendered symptomatic by the accident in question.

[2] It is Counsel for the Appellant's contention that despite the fact of the appellant having pre-existing degeneration in his cervical spine, nevertheless the anterior cervical discectomy at C6/7 was surgery to treat a condition that had arisen in the accident of a fall on 21 June 2008.

[3] The background facts relevant to the issue in this appeal may be stated as follows:

- On 21 June 2008 the appellant, then aged 59 years, fell some three metres to the ground from a ladder whilst he was climbing down from the roof of his house.
- The appellant injured his right buttock region, his neck and right shoulder.
- The appellant began experiencing pain in his right shoulder, arm and leg.
- Initially, the claim for cover was only for the shoulder and elbow injuries, but subsequently the respondent extended cover to include a neck sprain injury.
- The issue in this appeal is only concerned with the neck sprain injury as the surgery in question sought only to treat a medical condition in the appellant's cervical spine.
- An X-ray and an MRI Scan of the appellant's cervical spine were obtained in July 2008 at the request of the appellant's GP, and his GP thereafter referred him to Mr Rodney Gordon, Orthopaedic Surgeon, for examination and assessment.
- In terms of the pain experienced in the cervical spine, the appellant initially opted for conservative management and this was approved of by Mr Gordon.
- In November 2008 the appellant was again seen by Mr Gordon who noted that he was still experiencing pain on his right side at C6/7.
- In a letter dated 21 November 2008 to the appellant's GP, Mr Gordon recommended that the appellant have a right C6/7 discectomy and instrumented fusion.
- On 24 November 2008 Mr Gordon lodged a Specialist Assessment Report and Treatment Plan with the respondent seeking approval for funding for the surgery of an anterior cervical discectomy at C6/7 with instrumented fusion.
- Mr Gordon's application was referred to the respondent's Clinical Advisory Panel for consideration.

- In a report dated 15 January 2009 the Panel, under the signature of Mr R Fong, Orthopaedic Surgeon, opined as follows:

  > Alan is suffering from his multilevel cervical disc disease with neural central joint degeneration & bony encroachment of the foramen. In particular at C6/7 level where a large paracentral osteophyte producing cannal stenosis & a R sided C6/7 disc – osteophyte narrowing the R foramen with impingement of the R C7 nerve root – this is a degenerative condition rendered symptomatic following an accident.

- Consequent upon that advice the respondent issued its decision of 20 January 2009, declining to approve funding for the proposed surgery.

- The appellant underwent the surgery in any event on 19 March 2009, such surgery performed by Mr Gordon.

- The appellant sought a review of that decision and a hearing took place on 4 August 2009, at which a further and expanded report from Mr Gordon was introduced on behalf of the appellant.

- In a decision dated 6 August 2009 the Reviewer, Mr H Sanderson, determined that the appellant was suffering from a degenerative condition at the time of the accident and that the accident simply rendered that degenerative condition symptomatic. He determined that the need for surgery had not been caused by injury from the accident. The respondent's primary decision was therefore confirmed.

- For the purposes of the appeal to this Court a further report by way of file review has been introduced from the respondent's Clinical Advisory Panel.

[4] The relevant medical evidence which has been presented to the Court in this appeal is as follows:

1. MRI Scan of appellant's cervical spine taken on 11 July 2008.

The original report from Dr Quentin Reeves, Radiologist, of that scan was subsequently amended by Dr Reeves, and the amended report stated as follows:

> There is disc dessication at C4/5 with right neural central joint degeneration, this is causing moderate foraminal narrowing. The left foramen is patent. The spinal canal is patent. Facet joints are unremarkable.
>
> At C5/6 there is a bilateral neurocentral joint degeneration mild on both sides, this is causing moderate bilateral foraminal narrowing. The spinal canal is widely patent.

> Act C6/7 there is mild neurocentral joint sclerosis and a large posterior osteophyte is seen in a left paracental location this is narrowing the spinal canal and indenting the left anterolateral spinal cord. No high signal is seen within the cord to suggest myelopathy. This is causing mild foraminal narrowing. No associated disc protrusion is seen. Facet joints are unremarkable.
>
> Addendum : There is prominent disc and osteophyte encroachment on the right C6/7 foramen which would appear to be impinging on the exiting right C7 nerve root.

2. Specialist Assessment Report and Treatment Plan from Mr Gordon dated 24 November 2008.

Mr Gordon sought approval for funding for surgery stated as being *anterior cervical discectomy at C6/7 with instrumented fusion using iliac crest bone graft and an anterior plate.*

Mr Gordon gave the diagnosis as being "right C6/7 disc herniation causing C7 radiculopathy.

Mr Gordon certified that the treatment was for personal injury caused by accident.

3. Clinical Advisory Panel Report dated 15 January 2009.

I have earlier set out the advice given by Mr Fong. It is to be noted that he had details of the X-ray and MRI scan for reference, and in his report he notes that that scan disclosed as follows:

> MRI 23/7/2008 c4/5 & c6/7 disc dessication neural central joint degeneration & foraminal narrowing at C6/7 large L paracentral osteophyte with stenosis & indentation of spinal cord, & there is prominent disc & osteophyte encroachment on the R foramen impingement of R C7 nerve root.

4. Report from Mr Gordon dated 22 April 2009 to appellant's counsel.

Mr Gordon provided an expanded report and opinion on his examination and treatment of the appellant.

When reviewing the history and radiological reports, Mr Gordon identified that when the appellant presented to him in November 2008 he was still suffering from pain in his right arm and it was at this point that he elected to perform a C6/7 discectomy and fusion, with removal of the disc herniation on the right side. He then stated:

> At the time of surgery a full discectomy was performed at the C6/7 level. Some osteophytes were also resected from this area to make sure that there was no remaining compression on any nerves. After the decompression and discectomy was performed the cervical spine was stabilised with the use of a Venture Plate and a Cornerstone cage.

Mr Gordon then gave his opinion on the causative nexus as follows:

> It is my opinion based on the history which I obtained the examination that I performed and the radiographs and MRI scan that I reviewed that this man's C7 radiculopathy on the right hand side was directly related to the injury which occurred on 21 June 2008. There is no evidence of this man having any problem with the C7 nerve root prior to that injury. It is clear that this man sustained three significant injuries at the time of the fall and these were a disc herniation on the right at the C6/7 level causing a C7 radiculopathy, a shoulder injury, and an injury to the buttock. He was somewhat predisposed to developing problems at the C6/7 of his spine due to degenerative change but degenerative change in this area would have been associated with neck pain and stiffness. This man did not have neck pain or stiffness prior to the accident and the main reason for him needing surgery was the C7 radiculopathy and not the neck pain and stiffness that he experienced.
>
> ...
>
> It is my opinion that the degenerative change in Mr Lyth's cervical spien did contribute towards his subsequent problem but it is my opinion that the majority of the problem was caused by a disc herniation at this level on the right hand side which impinged on the C7 nerve root and caused this man to have a malfunctioning C7 nerve root. This was the prime problem for which surgery was indicated.
>
> ...
>
> On the balance of probabilities it is my opinion that the injury certainly caused more than 25% of the problem for which surgery was required.

5. File review from Clinical Advisory Panel dated 29 September 2009.

In addition to the medical information which the Panel had for the purposes of its decision, it now also had Mr Gordon's report of 22 April 2009.

The Panel then commented as follows:

> It is generally accepted that there is degenerative disease of the cervical spine affecting the target level as well as the neighbouring cephalad levels in the spine. This degenerative disease involves the discs and neurocentral joints producing foraminal narrowing and the potential for nerve root entrapment.
>
> At the site of interest there is evidence of both disc degeneration and osteophyte formation which have combined to involve the right C7 nerve root – the disc/osteophyte complex.
>
> It seems reasonable to accept the temporal relationship of the symptoms to the fall off the ladder.
>
> However, the pathology that has produced the nerve impingement, and the symptoms, and is to be treated, existed prior to the incident and is most likely to be substantially degenerative with little, if any, contribution from the fall.
>
> It would be pure speculation to try to attribute a percentage contribution from the disc and the osteophyte, and since both represent degenerative disease such an attempt is probably irrelevant.

[5] Ms Radich, Counsel for the Appellant, submitted that whilst it is acknowledged that the appellant did have degenerative changes in his cervical spine, nevertheless it is the clear opinion of Mr Gordon that the accident caused radiculopathy at C7 and that

it was surgery to treat that radiculopathy by fusion which was the surgery for which approval was sought. Counsel further submitted that the appellant had not been experiencing any problem with pain from his cervical spine prior to the incident of the fall off the ladder.

[6] Mr Barnett, Counsel for the Respondent, noted that the MRI scan identified widespread degeneration in the appellant's cervical spine, including prominent disc herniation at C6/7. Counsel submitted that the pathology which produced the nerve impingement was in existence prior to the accident of the fall.

[7] Counsel submitted that it was disease which had caused the nerve root impingement and that the accident simply aggravated that disease, and that the condition for which surgery was sought was wholly or substantially due to disease and therefore could not be subject to cover under the Act.

DECISION

[8] For a claimant to be entitled to funding for elective surgery as a treatment entitlement under the Act, it must be established that the need for surgery is to treat a medical condition caused by the accident for which the claimant has cover under the Act.

[9] Whilst it is the case that the wording of the injury for the purposes of cover was simply that of neck sprain, that was merely a generalisation of the perceived state of affairs prior to any in-depth examination and assessment, and I state that it is open to the Court to identify, based on the medical evidence, precisely what the nature and extent of the covered injury suffered may be.

[10] In the case of this appellant there is no doubt that his cervical spine was showing the effects of degeneration at at least three levels, namely C4/5, 5/6, and 6/7, and it was the case that that degeneration, as noted on the MRI Scan, was the state of the appellant's cervical spine at the time he suffered the fall in June 2008.

[11] It therefore is self-evident that the degenerative condition at C6/7 cannot of itself be the subject of ACC funded surgical treatment, but that state of affairs, I find, is not the end of the matter.

[12] The evidence identifies that although the appellant did have these degenerative conditions in his cervical spine, those conditions were asymptomatic and therefore can be said of themselves not to have been causing any problems, in particular pain, prior to the appellant suffering trauma in the fall.

[13] The medical evidence from the MRI Scan identifies that the appellant was suffering from C7 radiculopathy, that is, there was nerve root entrapment at C6/7 and it was that entrapped nerve root which was causing the pain. Further, it was to repair that nerve root entrapment by means of fusion that was intended to be carried out by the surgical procedure requested by Mr Gordon.

[14] The particular surgical procedure was clearly identified as cervical discectomy at C6/7 with instrumented fusion using iliac crest bone graft and an anterior plate.

[15] I find that the diagnosis of C7 radiculopathy and the proposed surgery of cervical discectomy and fusion are clearly causally connected to the onset of the C7 radiculopathy, and I find that the onset of that radiculopathy must be taken as having been caused in the trauma of the accident.

[16] I find it to be the case that the appellant had a narrowing of the spinal canal at C6/7 as the MRI scan identified, but I find it equally to be the case that that narrowing had not got to the stage where it was causing nerve root entrapment and that it was the trauma from the fall that caused the further narrowing giving rise to the C7 radiculopathy or nerve root entrapment.

[17] The fact that the appellant was pain-free prior to the accident is a significant factor and this Court can take judicial notice of the fact that nerve root radiculopathy is not a medical condition which can be asymptomatic and that it certainly makes its presence felt from the moment that it happens.

[18] The fact that the appellant was suffering from a degenerative condition in his cervical spine at C6/7 merely rendered it more likely that the trauma of an accident, such as the fall, was likely to tip the nerve system over the edge and bring about entrapment, when a similar fall involving a younger degenerative-free cervical spine might not have any such consequence.

[19] The claimant must be taken as he is found and in the case of this appellant, I find that he was a person who was more likely to suffer the physical injury of nerve entrapment by reason of the condition of his cervical spine at the time.

[20] The medical opinion of the Panel, purporting to be partly legal, I find is incorrect and the fact that the pathology that produced the nerve impingement is pre-existing and degenerative, does not affect the fact that if the impingement is <u>caused</u> by the trauma of the fall, then that impingement is a personal injury for which cover and treatment can be had.

[21] Accordingly I find that the respondent was wrong to decline to approve funding for surgery. The respondent's primary decision is quashed and I direct that the respondent make payment to the appellant of the costs of surgery which he underwent in March 2009.

[22] The appellant being successful I allow costs in the sum of $2,500 together with qualifying disbursements.

DATED this third day of November 2010

M J Beattie
District Court Judge