

IN THE MATTER of the Injury Prevention, Rehabilitation and
Compensation Act 2001

AND

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

BETWEEN **PATRICIA MAULDER**

(AI 57/09)

Appellant

AND

ACCIDENT COMPENSATION
CORPORATION

Respondent

HEARD at ROTORUA on 22 September 2009

APPEARANCES

Mr R Kenyon, Advocate for Appellant.
Ms D Lester, Counsel for Respondent.

RESERVED JUDGMENT OF JUDGE M J BEATTIE

[1] This appeal arises from the respondent's decision of 30 January 2008, whereby it declined to grant the appellant weekly compensation on the grounds that her incapacity from her back condition was not attributable to the back strain injury for which she had been granted cover.

[2] It was the respondent's contention that the appellant's back condition was attributable to pre-existing degeneration which had been rendered symptomatic by the back strain she had suffered in October 2007.

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

- At the material time the appellant was aged 46 years.

- On 17 October 2007, whilst in the course of her employment as a shop assistant, the appellant tripped, fell and jarred her back whilst carrying a sandwich board in each hand.
- The appellant did not seek medical assistance until she consulted her GP, Dr Anne Dibley on 2 November 2007.
- The appellant had, however, consulted Dr Dibley earlier about a foot injury she had suffered in September 2007 and which had resulted in a swollen ankle.
- Dr Dibley did in fact refer the appellant to Mr James Fenton, Orthopaedic Surgeon, for assessment in relation to that foot injury and Dr Fenton's report of 21 November 2007 makes no mention of a back injury.
- The appellant continued in her employment, with some short periods of time off work, and this situation continued until 3 December 2007 when Dr Dibley certified the appellant as being unfit for work consequent upon her lumbar strain injury.
- Dr Dibley referred the appellant to Mr Fenton in respect of her back injury and he saw her on 12 December 2007. Mr Fenton provided a report to Dr Dibley on that day.
- Following the granting of cover and the request for weekly compensation, the appellant's case manager sought further details from Mr Fenton and he provided same in a letter of 21 January 2008, the essence of that advice being that the back injury had stirred up some degeneration in her lower lumbar spine.
- Consequent upon Mr Fenton's report of 21 January 2008 to the appellant's case manager, the respondent issued its decision on 30 January 2008, declining the claim for weekly compensation.
- The appellant sought a review of that decision and to that end Dr Dibley requested Mr Fenton to explain his earlier comments which had caused the decision to be made.
- Further comments were received from Mr Fenton dated 29 May 2008, 3 November 2008, and 25 May 2009.
- A review hearing took place which concluded on 19 November 2008, at which the appellant was represented by Mr Kenyon.

- In a decision dated 15 December 2008, the Reviewer determined that on the basis of Mr Fenton's reports the pre-existing degenerative changes in the appellant's lower back were the cause of her incapacity rather than any injury suffered in October 2007. The respondent's decision to decline to grant weekly compensation was therefore confirmed.
- No further medical evidence has been introduced from that which was presented to the Reviewer.

[4] The medical evidence in this case is that obtained from Mr Fenton and from the appellant's GP, Dr Dibley. That evidence in chronological order is as follows:

1. Report from James Fenton, Orthopaedic Surgeon, dated 12 December 2007, to Dr Dibley.

This was Mr Fenton's report following the appellant's referral to him in respect of her back injury. Mr Fenton had previously seen the appellant on 21 November 2007 in relation to her foot injury and the first paragraph of his report refers to the foot injury before then going on to discuss the back injury. Dr Fenton stated as follows:

"She has also been referred today with low back pain and some radiation into the thigh. This has been present since she slipped over and landed heavily on 17/10/07. Bowel and bladder are satisfactory and no radiation of symptoms below the knee.

Clinically, she has reasonable flexion of the lumbar spine with some restriction of extension and lateral flexion. Straight leg raising is negative and she has good peripheral circulation. There is no weakness or sensory change and reflexes are intact. Her x-rays show some degeneration at L4/5 and even more significantly at L5/S1 and some facet joint degeneration. I explained to Patricia that I think she stirred up some degeneration in her back and she says things are quietly settling and I think she should just continue with extension exercises and exercises in the hot pools and anti-inflammatories. If things aren't settling come the New Year or if she has any symptoms of concern I have asked her to come and see me."

2. ACC 18 Medical Certificate dated 3 December 2007 from Dr Dibley.

This was Dr Dibley's first medical certificate certifying the appellant was unfit for work for two weeks. The certificate described the injury as lumbar sprain and the ongoing problem "continual lumbar pain".

3. Letter from Mr Fenton to appellant's case manager dated 21 January 2008.

This was Mr Fenton's response to ACC's request for further details regarding the appellant's back injury in respect of which the claim for weekly compensation had been made. Mr Fenton stated as follows:

"Thanks for your request for information regarding her back injury. I first saw her regarding this on 12/12/07 and I include a copy of my note. She feels when she fell on 17/10/07 she sustained an injury to her back and stirred up some degeneration of the lower lumbar spine. I think this is the reason for her current incapacity. I think this is also the pathology causing current symptoms. I think the injury has caused a pre-existing condition to become symptomatic. She is currently undergoing pool exercises and I think this is appropriate. I also indicated that I did not think that at present her condition would preclude working in the Lotto Shop."

4. Letter from Dr Dibley to appellant's case manager dated 19 February 2008.

This letter from Dr Dibley asked ACC to reconsider its decision not to grant her weekly compensation. In that letter Dr Dibley advised that the appellant had not previously had any back pain or back injury until her fall in October 2007.

5. Letter from Mr Fenton dated 29 May 2008 to ACC.

This was a letter Mr Fenton wrote in support of the appellant's claim. He stated as follows:

"While it was clear that she does have some degeneration in her lumbar spine, I did indicate in my note of 21/01/08 that having stirred up some degeneration was the cause for her current incapacity. I did not mean by this that the fall itself had not resulted in significant incapacity on its own, which probably could have been the case even if there was not some pre-existing radiological changes in her back."

6. Letter from Mr Fenton to Whom it May Concern dated 3 November 2008.

This is a further letter from Mr Fenton explaining the appellant's medical condition.

"I find it somewhat surprising the ongoing problems with sorting out Mrs Maulder's ACC claim regarding her back. There is no question that she has radiological deterioration in the lumbar spine. There is also no question that she had a fall that could result in a period of incapacity, irrespective of whether or not these radiological changes were present. How long this period of incapacity would be is something for ACC and Mrs Maulder to sort out amongst themselves and I have nothing else to add."

7. Letter from Mr Fenton dated 25 May 2009 to ACC.

Again, Mr Fenton is seeking to explain the appellant's medical condition following the review decision. His letter, in its entirety, stated as follows:

"I understand the saga of Mrs Maulder's ACC compensation for the two months or so she was off work after a fall in 2007 continues. I understand her claim was rejected by the ACC Reviewer. By this one would have to assume that it is ACC's view that if there is any degeneration at all in a spine that any accident that subsequently occurs cannot be the cause of a period of incapacity. I think this would be a difficult argument to sustain. I still feel, as I indicated in my last note of 03/11/08 that the fall she had could have resulted in a period of incapacity from being able to work irrespective of any pre-existing degeneration shown radiologically in her spine."

[5] In his written submissions, Mr Kenyon for the appellant, submitted as follows:

- Work incapacity was caused, regardless of any pre-existing condition, by the back injury suffered at the time of the fall.
- The injury and the degeneration are two different factors. Degeneration was not a primary or important factor of the appellant's inability to work.
- It was the injury from the fall, not the degeneration, which prevented the appellant from working for a comparatively short period of time, namely from 4 December 2007 to 10 February 2008.
- The foregoing submissions are strengthened by the fact that prior to the fall the appellant had had no back pain or problems whatsoever.

[6] Ms Lester, Counsel for the Respondent, submitted that the onus was on a claimant to establish that a medical condition was caused by the covered injury. The evidence of Mr Fenton was that the injury from the fall had caused a pre-existing condition to become symptomatic. The medical evidence establishes that the cause of the appellant's incapacity is wholly or substantially attributable to the degeneration in her lumbar spine.

[7] She further submitted that at best, Mr Fenton suggests that the fall suffered by the appellant could cause incapacity, irrespective of any pre-existing condition. That is insufficient to establish the injury as a cause of incapacity for the purposes of the Act.

DECISION

[8] This is a case where the essence of the dispute is whether the cause of the appellant's incapacity, as certified by her GP from 3 December 2007 to 10 February 2008, was caused by her covered personal injury, namely bilateral sacroiliac joint sprain suffered on 17 October 2007, or by pre-existing degeneration in her lower back.

[9] This case is somewhat unusual in that the respondent has seen fit to reject the proposition that the back pain suffered by the appellant from the time of injury onwards for some four months was attributable to the fall, but rather that it was simply the degenerative condition of her lumbar sacral spine becoming symptomatic.

[10] From this circumstance it must be inferred that the respondent takes the view that the sacroiliac strain did not itself cause any back pain.

[11] The Court has considered countless claims where the decision under appeal is a decision to suspend entitlements where the evidence suggests that the effects of the back strain have resolved and that which is ongoing is wholly related to the pre-existing degeneration. In cases where that has been the scenario it was of course the case that the Corporation accepted short-term incapacity by reason of the sprain/strain injury but not on any long-term basis.

[12] In essence, the respondent has declined to accept that there can be any other reason for the appellant's back pain, in the short term, save for it being symptomatic degeneration. That is not what Mr Fenton was saying, and he considered such a proposition to be "a difficult argument to sustain".

[13] It was Mr Fenton's view that the fall could have resulted in a period of incapacity irrespective of any pre-existing degeneration being shown radiologically in her spine.

[14] It is regrettable that Mr Fenton was not asked what in fact he meant by the words "could result in a period of incapacity", which words have been seized on by Ms Lester as indicating that the necessary standard of proof, namely the balance of probabilities, cannot be met.

[15] I have considered the flavour of Mr Fenton's correspondence and I find that it is likely that if he had been asked the medico-legal question, namely whether it was more probable than not that the appellant's short period of incapacity was attributable to the fall and the injury sustained therein, that he would have answered in the affirmative.

[16] The facts of this case are that the appellant suffered an injury to her back. She attempted to soldier on but the pain became too much. She had a comparatively short period of incapacity while that pain continued, and that incapacity continued only up until the 10th February 2008. I consider that such a factual scenario is entirely in keeping with a finding that the injury from the strain was the cause of the pain and that when the effects of the strain receded, as they did, so did the pain and so did the incapacity; yet the pre-existing degeneration remained.

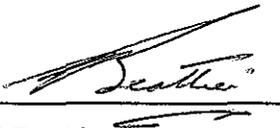
[17] This is not a case where an appellant has lingered on claiming ongoing pain from some nebulous source but with significant degeneration. The Court can take judicial notice of the fact that the presence of degeneration does not of itself necessarily mean that it must be the source of pain. In the present case I find that whilst the injury may

have stirred up the degeneration, nevertheless subsequent events identify that other influences were also at work, they being the physical effects of the sacroiliac sprain.

[18] In those circumstances I find that the appellant was incapacitated consequent upon the effects of her covered personal injury and that she is entitled to receive weekly compensation for the period of that incapacity as so certified by her GP, Dr Dibley.

[19] The appellant being successful, I allow the sum of \$1,000 towards her costs of representation, together with any qualifying disbursements.

DATED this 23rd day of December 2009



M J Beattie
District Court Judge