IN THE DISTRICT COURT
HELD AT DUNEDIN
WELLINGTON REGISTRY

Decision No. 206/2009

AI 250/04

UNDER	The Injury Prevention, Rehabilitation, and Compensation Act 2001
AND IN THE MATTER	of an appeal pursuant to section 149 of the Act
BETWEEN	**EDWARD SIMPSON**
	Appellant
AND	**ACCIDENT COMPENSATION CORPORATION**
	Respondent

HEARD at DUNEDIN on 17 May 2007 (but with subsequent evidence and submissions).

DATE OF INTERIM DECISION 3 October 2007

DATE OF THIS FINAL DECISION 26 November 2009

APPEARANCES/COUNSEL

Mr P Sarah, counsel for appellant
Mr H A Evans, for respondent ACC

FINAL DECISION OF JUDGE P F BARBER

[1] My interim decision of 3 October 2007 (decision number 230/2007) commenced as follows:

*"**The Issue***

Was ACC correct on 22 October 2003 to suspend entitlements to the appellant, Mr Simpson, on the basis that his current condition was no longer the result of personal injury?

Basic Background

The appellant is a 65 year old retired dentist. Initially, he injured his back on 8 May 1987 while lifting wood. ACC accepted cover for that as an L5/S1 disc prolapse. His file was re-opened in 2000 because he suffered an injury to his back while sawing wood at his holiday home in Wanaka on 3 June 2000. On the claim form, he noted: "Sawing wood aggravated the existing L5 back condition. At work on 6.6.00 became

acute which had progressed slightly since the previous scan in 1996." His claim was accepted and entitlements commenced...."

[2] The following paragraphs of my interim decision led to my directing ACC to obtain and pay for a further medical report (from another independent medical specialist to be agreed upon by the parties and approved by the Court) on the cause of the current injury and the effect of degeneration, namely:-

"[33] In final oral submissions each party had a slightly different stance. Mr Sara again reviewed the differing medical opinions and put it that the case simply turns on my preference of those. He emphasised that both the 1987 and 2000 injuries are covered by ACC. Inter alia, he put it that Dr Bentley had identified a problem with the appellant's disc not noted by the others and showing an annular tear as causing the appellant's ongoing back problems and opining that surgery for that would not be a cure. Mr Sara put it that there was an acute back injury to the appellant in May 1987 which has persisted, and that it is not credible for Dr Theis to say that it is the result of some type of disease/degeneration, particularly, since there was no evidence of that in xrays until 2000. He emphasised that one cannot point to xrays showing degeneration and be sure that is causing the current pain. Mr Sara submits, that all in all, the appellant's 1987 injury must have either been a soft tissue injury, which has not shown up on xrays, or been an annular tear which was not so identified and, in any case, that and the 2000 injury are inconsistent with the degenerative scenario put forward by Mr Theis. He submitted that, on the balance of probability, the appellant's current pain is not caused by degeneration in the appellant's bones but by an exacerbation of the 1987 injury which never really healed. He emphasised that the appellant should not lose his 1987 accident injury cover unless the cause of degeneration is "exclusive" rather than "wholly or substantially" as is the current test for age process degeneration.

[34] Mr Evans emphasised that the 1987 accident was not serious enough to have caused a degenerative condition and the medical opinion of Drs Theis and Reekie is that the current suffering of the appellant is due to age degeneration. Mr Evans submits for the ACC that, all in all on the balance of probabilities, the evidence shows the appellant's current problem is solely degeneration-related from the ageing process. As already indicated, Mr Sara countered that by submitting that the 1987 injury was serious and according to Dr Bentley created an annular tear from a trauma.

[35] Frankly, I do not find the medical evidence convincing one way or the other on the balance of probabilities.

[36] It is clear from s.117(1) of the 2001 Act that ACC may suspend a claimant's statutory entitlements if it is not satisfied, on the balance of probability, that the claimant is entitled to continue to receive them. In Shore (17/2000), Judge Beattie took the approach that there is an ongoing requirement that a person who has been granted cover for a particular personal injury must establish that it is for that particular injury he is seeking entitlement. In Wakenshaw v ACC (High Court Auckland) 19 June 2003) [2003] NZAR 590, Priestley J made it clear that a claimant who has cover for an injury for which he or she is receiving entitlements, has an ongoing duty to be able to show that his or her need for entitlements arises out of, or is causally linked to, the covered injury. Where a claimant cannot show that such a link still exists, then he or she is no longer eligible to receive that entitlement.

[37] As Miller J held in Gazzard (CIV 2005-485-2388) when referring to Cochrane "... the correct question is not which party carries the onus but rather whether on the facts and on the balance of probabilities, the necessary causal nexus between accident and injury is established ...". As Judge Cadenhead put it in Narbey (178/05) the question is whether the evidence as a whole justifies the conclusion that the necessary nexus between injury and incapacity exists (my emphasis).

[38] I feel that Mallon J has taken a more refined course in Ellwood by putting it that ACC must have sufficient evidence to show that it is "not satisfied", pursuant to the wording in s.117(1), that a claimant has a right to ongoing entitlement, and ACC cannot rely on the claimant to establish entitlement if there is any ambiguity and ACC must be clear and reasonable in its assessment of the evidence. Mallon J has reiterated to ACC the importance of clarity of evidence and having a sufficient basis to suspend a claimant's entitlements. It must follow that where ACC "is satisfied" from the evidence that entitlements should cease, the onus is then on the claimant to establish continuance of the ongoing entitlement by proving a causal link between symptoms and injury. That is still stating that the onus rests with the appellant to prove, on the balance of probabilities, that there is a causal connection between symptoms and injury to establish an ongoing right to entitlements under the Act, but it is a more refined approach than simply saying that if ACC has made a decision under s.117 in good faith, then that decision stands unless a claimant/appellant can prove it wrong. Initially, the evidence must show that ACC has a reasonable and sufficient basis to suspend the appellant's compensation.

[39] When I stand back and look at the rather varied medical evidence before me I think it likely, on the balance of probabilities, that the appellant is still suffering from the 2000 injury and, possibly, from the 1987 injury, but there is, at the very least, a strong suspicion that such suffering could now be due to degeneration. The medical evidence does not make matters clear to me one way or the other. On the one hand, I am not quite convinced, on the balance of probabilities, that ACC should have been satisfied that the appellant must lose entitlements as at 22 October 2003, but nor can I yet find that there is still a causal connection between the appellant's symptoms and his injury of either 1987 or 2000 to establish an ongoing right to entitlements.

[40] It may well follow from my approach that entitlements should not cease. However, at this point, I order that ACC obtain and pay for a further medical report on the causation issue of current injury, and effect of degeneration, by another independent medical specialist to be agreed upon by the parties and approved by me. Also, I invite both counsel to agree on the precise questions to be put to such specialist in terms of my above reasoning, and tender them to me within 28 days together with suggestions of a suitable specialist."

[3] It was agreed by the parties that Mr John Dunbar, an orthopaedic specialist based in Dunedin, be appointed to provide the further report and he was appropriately briefed. He examined the appellant on 5 March 2009 and produced his comprehensive report of 30 April 2009.

Mr Dunbar began his report by explaining the processes of physical changes in the spine as a result of normal degenerative processes. He went on to discuss the significance of pain and put it that pathology and imaging techniques, such as x-rays or MRI scans, are not always helpful in pointing to the locus of injury producing the symptoms of pain. Mr Dunbar states that the appellant's spine shows typical

features of progressive degeneration of the lower lumbar discs. He then goes on to consider the two injuries in 1987 and 2000.

[4] In respect of the 1987 injury he said:

> *"Thus the evidence suggests that the 1987 event was an injury which occurred at the L5/S1 level. The sudden onset of severe pain in the back is highly suggestive that the pathological event causing the pain at the time was lesion at the L5/S1 disc. In my opinion it's probable Mr Simpson suffered a fairly significant radial fissure in the disc at that time. The fissure did not appear to have been sufficient to cause at most, any more than a bulge of the disc posteriorly, as there never has been any strong evidence for a disc protrusion at the L5/S1 level."*

[5] Regarding the 2000 injury he said:

> *"In 2000 Mr Simpson suffered another acute episode of severe back pain such that he was unable to sit comfortably for about two years following the episode. As with the injury in 1987 the history is very suggestive that another disc lesion occurred. Examination findings around that time were reported by Mr Hodgson when he saw Mr Simpson on 25 July 2000. He noted some non-specific pain and stiffness in the lumbar spine but specifically did find that his ankle reflex on the right was absent compared to that on the left. It was not possible to say whether this clinical finding of altered reflexes had developed following the injury of 2000 or had developed at some time prior to that injury but after the 1987 event."*

[6] In relation to x-rays taken in July 2000 which showed narrowing of the disc spaces he said:

> *"It is possible to conclude from the x-ray at that time that there were changes at two disc levels which in a clinical context suggest that Mr Simpson's back pain at that time could have been arising either from the L4/5 or the L5/S1 disc or both."*

[7] Dr Bentley and Mr Hodgson have both made comment at times in their notes that provocative discography would have been necessary to determine the exact level of the pain.

[8] He then went on to discuss MRI scan findings and by way of drawing the threads together had this to say:

> *"As a summary of the pathological events occurring in Mr Simpson's back, he does certainly show the radiological appearances of degenerative disc disease. These changes appear to have commenced at the L5/S1 disc and subsequently involve the 14/5 disc. It is important to note that naturally occurring degenerative processes in the lumbar spine and discs do not necessarily cause pain, but the evidence suggests to me that Mr Simpson had two significant painful episodes relating to specific pathology occurring in the discs. In 1987 I believe it is more probable than not he suffered from a significant disc failure at the L5/S1 level, probably due to a fissure in the annulus. In 2000 it is more probable than not his acute pain was secondary to a disc prolapsed at the L4/5*

disc. Thus, on top of his relentless disc degeneration he has suffered two acute disc events."

[9] Mr Dunbar went on to discuss the existence of ongoing pain being attributable to these specific events. He said that the natural history is for pain from a disc itself to improve significantly after two years following the injury but ongoing pain was due to secondary effects of the disc lesion. He concluded:

"I believe therefore that Mr Simpson's current pain is arising as a consequence of failure of normal function of both the L5/S1 disc and the L4/5 disc."

[10] Mr Dunbar went on to discount that there was any strong evidence for any pre-existing damage at the L5/S1 disc prior to the injury in 1987.

In respect of the 2000 injury, Mr Dunbar believed that Mr Simpson suffered an acute injury on top of an underlying disc degenerate disease at the L4/5 level and that this contributed to ongoing pain from that level from secondary changes. He concluded that while it was highly likely that Mr Simpson would have had some degree of degenerate disc disease in his spine causing some degree of pain, he believed that the injurious events of 1987 and 2000 and their *"downstream effects"* were likely to be continuing contributors to his current back pain.

[11] I am appreciative of the further submissions from each counsel in relation to that report of Mr Dunbar. Some further extracts from it referred to by Mr Evans are as follows:

"**Opinion**

...

The natural history of degenerate disease in the spine is variable. However, in general as a disc degenerates due to dehydration and fissure formation in the annulus, the level involved becomes increasingly unstable secondary to loss of the mechanical function of the disc. This instability then places abnormal loads on the facet joints and soft tissues around the disc and facet joints and may lead to mechanical pain. In time the disc may become sufficiently fibrotic and the facet joint sufficiently osteoarthritic that there is spontaneous stabilisation of the level involved and some improvement in the mechanical back pain. This process may be modified by sudden and extensive fissures developing in the annulus fibrosus (an annular tear). Such an event might be expected to produce a sudden or severe episode of pain and perhaps a sudden further less instability of the disc. Furthermore a complete annular tear associated with extrusion of nucleus pulposus i.e. disc prolapsed, is often an acutely painful event and may be associated with neurological symptoms and signs if there is irritation of an adjacent nerve root. Such acute events may occur in association with relentless progression of degenerate change but are not necessarily an obligate part of the degenerate process.

.....

In Mr Simpson's case his lumbar spine shows typical features of progressive degeneration of his lower most lumbar discs. However, it is appropriate to consider the evidence available that might indicate some specific pathological event having occurred at the time of the two (2) acute episodes he suffered in

1987 and 2000. I believe it is an over simplification just to assume that these events are part of the overall degenerate process in his spine.

.....

The evidence suggests to me that the 1987 event did cause an injury to the L5/S1 disc and the 2000 event caused an injury to the L4/5 disc. In 1987 there was no strong evidence for any pre-existing damage at the L5/S1 disc. There was a history of a relatively painless even occurring in his back when lifting boulders a number of years prior to 1987 but the first x-ray of the lumbar spine in 1988 looked normal. While it is possible Mr Simpson may have been destined for a degenerate disc disease in his back, the 1987 event does seem to have precipitated the onset of problems at the L5/S1 level which do not seem to have resolved.

With respect to the 2000 injury, we know from the 1996 MRI scan that there were some early signs in 1996 of degenerate disc disease occurring at the L4/5 level, i.e. some mild disc space narrowing, some mild dehydration and a mild disc bulge. This does provide some evidence that Mr Simpson was destined to some degree of degenerate disc disease. On top of this underlying disc degenerate disease at the L4/5 level he appears to have suffered a significant disc protrusion in 2000. This undoubtedly increased his pain for around two (2) years after the event and at least has contributed to ongoing pain from that level from the second changes occurring.

SUMMARY:

I believe that it is impossible to predict how Mr Simpson's lumbar spine would be functioning now if he had not suffered the acute episodes in 1987 and in 2000. It seems highly likely he would have some degree of degenerate disc disease in his spine causing some degree of pain. I am inclined to think that his current symptoms would not be as troublesome as they are if he had not suffered from the 1987 and 2000 events. Whilst these events cannot be considered the sole cause of his current symptoms and while we must assume the direct pain from the disc lesion itself to have resolved by now, the down stream effects of the injuries suffered in 1987 and 2000 are likely to be continuing contributors to his current back pain."

Analysis

[12] Mr Evans puts it for ACC that Mr Dunbar's report is equally supportive of the specialist advice originally relied upon by ACC, namely, the reports from Mr Theis and Dr Reekie to which I have referred in my interim decision. Mr Evans submits that the appellant's symptoms are not the result of a specific injury, but rather are caused by his underlying degenerative disease. He notes that Mr Dunbar accepted that the appellant has got degenerative disc disease in his spine *"causing some degree of pain"* and that with reference to the 1987 and 2000 accident events, Mr Dunbar opines that *"these events cannot be considered the sole cause of his current symptoms"*.

[13] Mr Evans also submits that, while Mr Dunbar postulates that those events of 1987 and 2000 are likely to be contributing factors to the appellant's current back pain, evidence of the degenerative disc disease is clear; and that the best evidence is that of the MRI scans which are consistent with age-related degeneration.

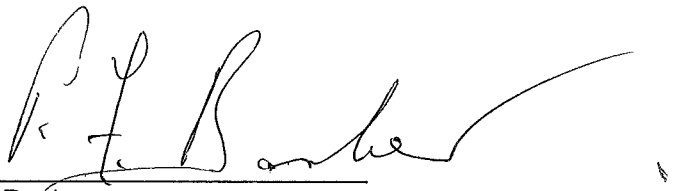
[14] To me Mr Dunbar's report clearly shows that the appellant's ongoing symptoms remain linked to his covered injuries, even though his age-related degeneration causes some of his symtoms. Certainly, that degeneration is not the exclusive cause of those symptoms, as required in this particular case, and Mr Dunbar's report also shows that age-related degeneration is not even substantially the cause. There is still a significant causal connection between the appellant's injury of either 1987 or 2000 and his symptoms at 22 October 2003.

[15] As Mr Sara pointed out, in my interim decision, at para [35], I stated that I did not find the medical evidence convincing one way or the other on the balance of probabilities but, at para [39] of my interim decision, I indicated a strong suspicion that the appellant's current condition was due to (age-related) degeneration. Mr Sara correctly supposed that by using the word *"degeneration"* I mean the kind of degeneration which would not entitle the appellant to ongoing entitlements and, indeed, would disqualify him from cover if the degeneration was of the kind due to the aging process or disease. As Mr Sara then put it, Mr Dunbar has made it clear that the appellant is suffering both the effects of normal natural age-related degeneration and the effects of degeneration which is properly classed as post-traumatic.

[16] Accordingly, Mr Sara submits that, at the very least, Mr Dunbar's opinion makes ACC's reliance upon s.117 even more untenable, i.e. when on 22 October 2003 ACC suspended the appellant's entitlement. In other words, as Mr Sara put it, against the *Elwood* (High Court Wellington, 18 December 2006 per Mallon J) principles referred to by me in my interim decision herein, ACC could not reasonably be satisfied that the appellant was no longer entitled to weekly compensation.

[17] Accordingly, Mr Sara submits that, on balance, the appellant has proved his case with the result that this appeal should succeed. I agree. Mr Dunbar's report confirms to me that there was not a reasonable and sufficient basis on 22 October 2003 for ACC to be satisfied that it should suspend the appellant's entitlement. As covered in this decision and my interim decision of 3 October 2007, this appeal is allowed.

[18] With regard to ACC's contribution to the costs and disbursements of the appellant, I direct that all proper disbursements of the appellant be paid by ACC and that ACC also contribute $2,500 to the appellant's costs; but I reserve leave to apply should any issue arise over the aspect of costs and disbursements.



Judge P F Barber
District Court Judge
WELLINGTON