**IN THE DISTRICT COURT**
**HELD AT WELLINGTON**

Decision No. 19 /2009

**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** **ROBERT BALLAGH**

(AI 493/08)

Appellant

**AND** **ACCIDENT COMPENSATION CORPORATION**

Respondent

**HEARD** at WELLINGTON on 29 January 2009

**APPEARANCES**

Ms K Graham, Counsel for Appellant.
Ms A Douglass, Counsel for Respondent.

## RESERVED JUDGMENT OF JUDGE M J BEATTIE

[1] The issue in this appeal arises from the respondent's decision of 17 March 2008, whereby it declined to grant cover to the appellant for a L3/4 disc protrusion, claimed to have been suffered in a skiing accident on 5 January 2007. The grounds for declinature were stated as being that the skiing accident had not caused the back injury, but rather the disc protrusion had been caused by the appellant's pre-existing degenerative condition.

[2] From the appellant's perspective, he contends that the fall whilst skiing brought about the onset of fresh back pain and mobility restriction which was subsequently identified as being caused by a disc protrusion at L3/4 and which was causing nerve root compromise.

[3] The difficulty in every perspective of the appellant's claim was that whilst the "accident" occurred on 5 January 2007, the appellant did not seek medical treatment until some months later and it was not until February 2008 that a claim for cover was lodged.

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

- At the material time the appellant was aged 55 and is, and was, a Professor of Physics at Otago University.
- In January 2007, the appellant was on a skiing holiday in Utah.
- The consultation notes made by the appellant's GP, Dr Katherine Hall, on 15 February 2008, at the time the claim for cover was lodged, sets out the circumstances:

  > *"Had skiing accident in Utah, America, 5 Jan 2007 whilst on combined holiday and conference leave. Skiing at moderate speed, hit mogul and fell over onto right side. Immediately experienced back pain, hobbled down hill, unable to ski further. Did not see any Dr in America, returned to NZ approx.25 Jan 2007. First consulted Dr about this when he saw me on 2 May 2007. Had previously seen physiotherapist."*

- The appellant has an extensive back history, as far back as 1976 when he had an L5/S1 discectomy and two further operations relating to fusion in 1984 and 1988.
- The appellant first consulted his GP, Dr Hall, about his back problems on 2 May 2007. No mention was made of any skiing accident or injury.
- Dr Hall referred the appellant to Mr Bruce Hodgson, Orthopaedic Surgeon, for assessment and report.
- Mr Hodgson provided his first report on 5 June 2007 and indicated that he would like to consider the matter further following an MRI scan.
- An MRI scan of the appellant's lumbar spine was carried out on 4 July 2007.
- The appellant was seen by Mr Hodgson on a number of occasions over the ensuing months and initially conservative treatment was carried out, including a steroid epidural injection.
- In January 2008, Mr Hodgson referred the appellant to Dr Alan Wright, Neurologist, for his assessment and opinion. It was to Dr Wright that mention was first made of a "jarring episode on the ski field" in early 2007.

- After a further flare-up over Christmas, the appellant consulted Mr Hodgson again on 14 February 2008, at which time a decision was made to carry out a localised discectomy at L3/4.
- It was as a consequence of the appellant's consultation with Mr Hodgson on 14 February 2008 that a claim for cover was lodged in relation to the disc protrusion at L3/4.
- The appellant's claim was considered by the respondent's Medical Advisor, and the appellant's whole history of back problems was considered and the advice provided in a report was that the prolapse at L3/4 was only one aspect of a degenerative pathology present in the appellant's lumbar spine and there was no evidence which would support a claim that the condition had arisen from accident.
- On 17 March 2008, the respondent issued its decision declining to grant cover.
- The appellant sought a review of that decision.
- On 2 April 2008 Mr Hodgson carried out a right and left L3/4 discectomy and decompression and the nerve root compromise was cleared. The operation was regarded as successful and achieved its object.
- A Review Hearing took place on 24 September 2008 at which further reports from Mr Hodgson were introduced.
- In her decision dated 7 October 2008 the Reviewer, Kay Stringleman, concluded that the assessment made by the respondent's Clinical Advisory Panel was to be preferred to the opinion presented by Mr Hodgson and the respondent's decision to decline cover was confirmed.
- For the purposes of the appeal to this Court no further medical evidence has been introduced.

[5] It should be noted that one of the factors emphasised by the respondent's advisors when considering the claim, was that despite the appellant having numerous consultations with both his GP, Dr Hall, and Mr Hodgson, no mention was ever made by him of a suspected cause of his back problems being a fall he suffered whilst skiing and the fact of this incident of 5 January 2007 did not come to light until the appellant mentioned it in the course of being seen and examined by Dr Alan Wright, Neurologist on 18 January 2008.

[6] The appellant gave evidence at the Review Hearing and he stated, inter alia, that he was an expert skier with many years of experience. The salient passage of his evidence was as follows:

> *"Skiing down a quite steep bumpy run and I hit a bump awkwardly and fell over, and when I got up my back was very sore, very stiff, and so I kind of limped down to the bottom and that really was – it was very painful for the rest of the day, so that really – skiing – I tried a few more runs, but it was very unsatisfactory and so I didn't ski for a couple more days. And we were there with ten days skiing so I essentially tried to ski one or two more days after that, and I had some, yes, pretty painful runs."*

Further points made by the appellant in his evidence were as follows:

- His back remained "pretty sore" throughout the remainder of his time in the United States.
- On his return to New Zealand he visited a physiotherapist and after several sessions it was not doing any good and it was then that he decided to see his GP for referral on to a back specialist.
- He has had significant back problems since 1975 and has learned to manage it *"with a stiff upper lip to a large degree"*.
- Significant episodes might occur over weeks and would then resolve. He stated that *"The skiing incident had always been there . . . but maybe I just felt that that was part of the continuing thing; I always had this low back pain."*
- His further explanation about not mentioning the skiing accident further was –

  > *"So I'm really not sure why I hadn't mentioned that earlier, but at some stage we were doing a complete history that came out I guess. And certainly it was a very noticeable and acute incident, but it's not the only time I've had such notable and acute incidents. So when I had the skiing incident I didn't say to myself, 'Oh, no, I'm heading for surgery now.'"*

[7] The medical evidence which has been presented in this appeal is principally that from the appellant's GP, Dr Hall, Mr Hodgson and Dr Wright, and that evidence has been the subject of comment and report by the respondent's Medical Advisor, Mr M Austin, Orthopaedic Surgeon, a member of its Clinical Advisory Panel.

[8] Details of the medical evidence is as follows:

**1. Notes from the appellant's GP, Dr Hall, of 2 May 2007.**

> *"Is developing pain in his lumbar spine again whilst attending Pilates classes at Les Mills. Has extensive back history. In 1984 had a L5/S1 discectomy in USA followed a few years later with a fusion at that level in Dunedin. Was asymptomatic for a while then developed much more severe pain. Eventually diagnosed as having a bony growth occurring between the fused regions which was removed by a USA surgeon in 1991 with excellent pain relief. Has had to be careful with his back but can ski and is quite active.*
>
> *Since developing problems this year has seen Steve Griffin who feels that there is facet joint dysfunction at the L1 level. Robert has been very impressed by Bruce Hodgson's care of his wife Mari and would like an assessment by him as to the cause of the pain and what can be done to manage it."*

In Dr Hall's letter of reference to Mr Hodgson, she referred to the appellant's previous back history, stating as follows:

> *"Percutaneous discectomy – L5/S1 IN usa 1976, spinal fusion L5/S1 1984 Dunedin, calcified spur of L5/S1 disc excised 1988 USA.*

**2. Report from Mr Hodgson dated 5 June 2007 to Dr Hall.**

Mr Hodgson noted the appellant's history of back problems and whilst he notes that the appellant had kept himself fit with swimming, walking and skiing, *"but in the last 3-4 years has had increasing problems with aching discomfort in his low back and more recently electric shock type feeling which goes from his back into his buttocks, inner aspect of both thighs and down his calves."*

Mr Hodgson advised that he would be obtaining an MRI scan but gave as his advice at that point as being:

> *"Robert has mechanical back pain probably coming from the L4/5 level above his previously fused lumbar spine. On top of this he is developing early degenerative changes in his right hip."*

**3. Letter from Mr Hodgson to Dr Hall dated 19 July 2007.**

Mr Hodgson reported following his review of the MRI scan report and which he noted as follows:

> *"This has shown the lumbosacral fusion looks very satisfactory with the canals well preserved at this level. There is a small annular tear of the L4/5 disc (central) and some facet joint hypertrophy at this level but the canal still looks satisfactory and there is no nerve root compression. He does have a foraminal protrusion at L3/4 on the right hand side compressing the L3 nerve root but also a root ganglia. I am quite sure this has caused the symptoms he has experienced around the right hip, anterior thigh towards the knee."*

Mr Hodgson noted that the appellant's condition had improved and he was not considering surgical intervention at the present.

**4. Letter from Mr Hodgson to Dr Hall dated 30 August 2007.**

Mr Hodgson reported that the appellant's condition had slipped quite considerably since he had last seen him and that he was getting a lot more discomfort in his back. Mr Hodgson advised that he was going to arrange a steroid epidural injection.

**5. Letter from Mr Hodgson to Dr Hall dated 12 October 2007.**

Mr Hodgson reported following the carrying out of the steroid epidural injection which he advised had not been successful and had not led to any improvement. Mr Hodgson said it was time to carry out some nerve conduction tests to pinpoint which nerve root was causing the problem.

**6. Letter from Mr Hodgson to Dr Hall dated 22 November 2007.**

Mr Hodgson reported following completion of nerve conduction studies and stated, inter alia, as follows:

> *"I have told Robert that at this stage I think he does have neuropathic pain in his legs and I am really unable to explain the process that has precipitated this event. While I accept he does have an acute protrusion in the foraminal region of L3/4 on the right I do not necessarily think this should be causing all the symptoms he is having in his legs or particularly the changes in L4 on the left."*

Mr Hodgson said that he was going to refer the appellant on to Dr Wright, Neurologist – *"just to make sure that there is nothing else that could be precipitating this onset of symptoms."*

**7. Report from Dr Alan Wright, Neurologist, dated 18 January 2008 to Mr Hodgson.**

Dr Wright had seen and examined the appellant and as earlier noted it was to Dr Wright at this interview that the appellant had first mentioned the skiing accident. Dr Wright noted as follows:

> *"From 2005 onwards he was having more problems and was needing to see Steve Griffin and Linda Mosely for physiotherapy and was also doing Pilates and McKenzie extension exercises and other treatments.*
>
> *From early 2007 he has been getting worse. He recalls being overseas at that time and having to lift suitcases and travel and also having a further jarring episode on the ski field in North America. He has had ongoing deterioration and you saw him for these problems in mid-2007. His symptoms have fluctuated somewhat. Unfortunately at the moment he is having another bad period since Christmas Day."*

Dr Wright's opinion was as follows:

> *"I think Professor Ballagh's problems are all due to his mechanical low back problems. I can't find any evidence to suggest other separate neurological pathology.*
>
> *I explained to him that with the long history of back problems he has had with multiple surgical interventions there can often be ongoing problems which have exacerbations and remissions from time to time, sometimes precipitated by normal activities of daily lifting and turning etc. I will review his x-rays but on the July 2007 MRI there doesn't appear to be definite indication for further surgical intervention. i would agree with you that one would want to avoid further surgical intervention unless there was a very good reason to do it.*
>
> *Professor Ballagh was concerned that with his further problems since Christmas something else may have happened. Given the fact, however, that there has not been a dramatic development of sciatica or focal symptoms and that his examination is normal we will give him a little more time to hopefully settle down from this exacerbation before we consider whether or not further MRI is necessary. I will plan to see him in about six weeks and at that stage if things aren't settling we will see if re-imaging is required."*

**8. Letter from Mr Hodgson to Dr Hall dated 14 February 2008.**

Mr Hodgson reported that he had seen the appellant that day and that he had had quite a significant bout of back pain. Mr Hodgson's advice was that it was time to look at a definitive surgical fusion to his lumbar spine. Mr Hodgson went on to state as follows:

> *"We had a long talk today about the various options and I think we are facing a two level fusion of L3/4 and L4/5. That said I would like to carry out a discogram of L3/4 and L4/5 for two reasons. Firstly, it will help us determine whether the discs are indeed damaged and secondly it may or may not reproduce concordant pain which would be very important. If the L3/4 disc is the only painful disc then we would look at a localised discectomy here. If the L3/4 and L4/5 discs were painful then we would have to look at a two level fusion and everything that that encompasses.*
>
> *Robert is well aware of the aftercare, outcome and complications and downsides of fusions having been through this before in 1988.*
>
> *I will approach Professor Terry Doyle, Radiologist at Dunedin Hospital to proceed with the discogram and in the meantime in view of his injury to the L3/4 disc occurring while skiing in Utah I have suggested he see you to start the process of ACC as I feel that they need to be involved with this process."*

**9. Report from Professor Doyle, Radiologist, dated 6 March 2008.**

Professor Doyle had carried out the lumbar discogram as envisaged by Mr Hodgson, with both the L3/4 disc and then the L4/5 disc being injected. The report in relation to the L3/4 disc stated as follows:

*"The L3/4 disc was injected first. This demonstrated a right lateral and posterolateral disc protrusion. The contrast medium goes from the disc nucleus to lie deep to the annulus on the right side posterolaterally. This abnormality is demonstrated on both the frontal and the oblique images. Injection of this L3/4 disc reduced pain in the right buttock with a pattern that the patient considered usual.*
*. . ."*

There was no unusual result relating to L4/5 and Mr Doyle's conclusion was:

*"The most significant lesion appears to be a right lateral and posterolateral L3/4 disc protrusion."*

**10. Operation Notes dated 2 April 2008 by Mr Hodgson.**

This document notes the right and left L3/4 discectomy and decompression which Mr Hodgson carried out. That note confirms the fact of a herniation of the L3/4 disc extending into the foramen and compressing the nerve up against its pedicle. That compression was relieved.

**11. Letter from Mr Hodgson to appellant's counsel dated 7 May 2008.**

Mr Hodgson reported on the surgery and the events leading up to it, and then stated as follows:

*"His clinical history, the radiologic findings and surgical findings (a foraminal L3/4 disc protrusion) would be quite consistent with the injury he described as having been suffered on 5 January 2007."*

**12. Letter from Mr Hodgson dated 11 July 2008 to appellant's counsel.**

Mr Hodgson answered questions put to him as follows:

*(1) Mr Ballagh did sustain an injury on 5 January 2007. The injury led to the rupture of the L3/4 disc on the right hand side in the foraminal region.*

*(2) I believe the L3/4 disc prolapse was causally linked to the injury sustained.*

*(3) I believe the accident on 5 January 2007 did cause the L3/4 prolapse and indeed this was contributing to a considerable amount of his pain prior to his surgery (75%).*

After reviewing his history of involvement with the appellant, Mr Hodgson stated as follows:

*"Mr Ballagh has sustained a significant lesion to his back (the right L3/4 disc prolapse). This is quite separate to the problems he has suffered in the past. However it is quite understandable that given his past history of multiple surgery to his back that when he developed a further problem he attributed this to the original problem suffered in the 1970's and 80's hence his delay in presentation and also the initial comments about the onset of problems and its relation.*

*Patients who have had multiple surgeries to their lumbar spine manage their backs carefully. They often undertake general fitness activities but are prone to recurrent attacks of discomfort from time to time. This is well known. Patients manage their problems without reference to specialists. They often attend physiotherapists, chiropractors or other like minded paramedical personnel and manage their back pain symptoms very adequately.*

*Mr Ballagh has obviously been experienced in suffering from discomfort in his back from time to time, but has got on with his life. Clearly something significant has happened with the onset of "new" pain in his back and right leg (shooting pains) and I attribute this to the L3/4 disc protrusion that has occurred at a level completely separate from the area of his spine where he suffered in the past."*

[9] Medical advisors for the respondent have on two occasions given advice on the essential question at issue in this appeal from the various medical reports which I have set out above. The first advice on the matter came from the respondent's Branch Medical Advisor, Dr Walker, and whilst it is undated it was given after he had received details of the operation carried out by Mr Hodgson on 2 April 2008. The conclusion stated by Dr Walker was as follows:

*"The claimant has a long history (sic) old low back pain and pain radiating into his legs associated with degenerative disc disease. Contemporaneous medical records from a number of treatment provider's don't support a significant accident in January 2007. It was extremely difficult to establish the source of the claimant's low back and leg pain. Even when the disc prolapse at L3/4 on the right was identified the specialist opinion (Mr Hodgson November 22 2007) was that the claimant had neuropathic pain in his legs and Mr Hodgson was really unable to explain the process that had precipitated this event. While it was accepted he does have an acute protrusion in the foraminal region of L3/4 on the right I do not necessarily think this should be causing all the symptoms he is having in his legs or particularly the changes in L4 on the left. There was no mention of an accident.*

*It was not until the claimant was seen in January 18, 2008 by Dr Alan Wright, a neurologist who noted that from 2005 on what (sic) he was having more problems and from early 2007 had been getting worse. He recalled having to lift suitcases and a further jarring episode on a ski field of North America. This jarring episode was subsequently seen as the cause of the claimant's disc prolapse at L3/4 on the right despite his symptoms predating this event, there being no contemporaneous medical records supporting this accident and the prolapse at L3/4 being only one aspect of the degenerative pathology present."*

[10] Subsequent to Mr Hodgson's letter of 11 July 2008, set out above, Dr Michael Austin, Orthopaedic Surgeon, and a member of the respondent's Clinical Advisory Panel, provided advice and his conclusions and recommendation were stated as follows:

*"At the age of 55 we know that degenerative disc disease at multiple levels is more likely than not seen on MRI scan even when the client is asymptomatic.*

*We know that healthy discs do not protrude and that bulges, protrusions and extrusions only occur in degenerative lumbar discs.*

*We know that the L3/4 disc and L4/5 disc are degenerative (decrease T2 spinal).*

*We know that annulus tear, disc bulge, disc protrusions and disc extrusion are all part of the same spectrum of degenerative disc disease.*

*The distinction between annulus tissue, bulge, protrusion and extrusions one of description and semantic definition as opposed to differentiating traumatic from non-traumatic causes.*

*The MEG shows L5 and L4 denervation.*

*The discogram suggested L3/4 was symptomatic.*

*Mr Hodgson states that all of the findings at L3/4 are consistent with an injury on 5/01/2007.*

*The changes at L3/4 are those of degenerative disc disease. It is impossible for Mr Hodgson to relate a skiing accident in January 2007 to an 'acute' L3/4 prolapse. He states that it is consistent with an acute injury.*

*I think that the medical evidence speaks for itself. Skiing is a strenuous activity with bumping and jerking commonplace.*

*The medical documentation in the Physio record in early 2007 makes no mention of A) any significant change in symptoms and B) any accident a few weeks earlier and C) any evidence of a L3/4 disc prolapse.*

*This client has a degenerative lumbar spine and the changes at L3/4 are part and parcel of that degenerative change.*

*In CAP's view the likelihood that an accident in January 2007 causes a disc prolapse that required surgery in 2008 as opposed to being part and parcel of the degenerative disc disease is of the order of one in a hundred or 1%.*

*That an event in January 2007 has caused a disc prolapse diagnosed on MRI and discogram to (sic) both presumptive and highly unlikely."*

[11] Ms Graham, Counsel for the Appellant, submitted that the evidence and opinion of Mr Hodgson, as the treating and operating surgeon, should be preferred to those of the respondent's medical advisors. Counsel submitted that the nature of the disc prolapse at L3/4 was different from the long-standing problems which the appellant had had in other parts of his lumbar spine, but at the same time she submitted that in view of the appellant's history of back problems, it was not unnatural for him to attribute his ongoing problems to some long-standing condition rather than a new injury which was subsequently identified.

[12] Counsel submitted that Mr Hodgson has given reasons for coming to the opinion that the disc prolapse was causally linked to the ski injury, and where the disc prolapse was causing injury at a level completely separate from the area of his spine which had caused problems in the past.

[13] Ms Douglass, Counsel for the Respondent, submitted that in view of the fact that there was no dispute as to the diagnosis of an L3/4 disc prolapse, Mr Hodgson was in no better position to give expert opinion evidence than that of Dr Walker or Dr Austin.

[14] Counsel submitted that the appellant's long history of back problems and the result of the MRI scan confirmed that the appellant had significant degenerative disc disease present.

[15] Counsel submitted that in the absence of contemporaneous evidence, the Court should be cautious about attributing a discrete injury to the skiing accident, when that circumstance was not made known until over twelve months after the incident itself.

[16] Counsel submitted that the absence of earlier mention of this accident indicates that it was not a significant event.

[17] Counsel submitted that in addition to the opinions of the respondent's medical advisors, the opinion given by Dr Wright is critical, and where Dr Wright considered that the appellant, who was a person with a long history of back problems, and where exacerbation of the ongoing problems could be precipitated by the normal activities of daily living. Counsel refers to Dr Wright describing the incident as a "jarring episode".

**DECISION**

[18] The decision under appeal is the respondent's decision to decline to grant cover to the appellant for a personal injury, stated as being L3/4 disc protrusion, which the appellant claims was caused in a fall whilst skiing in January 2007.

[19] In that context, the claim is no different from consideration of any other claim for cover for a personal injury by accident. The issue in this appeal is not whether the respondent should be responsible for costs of treatment pertaining to the surgery. As was submitted by Ms Douglass, the only issue for consideration is whether there is sufficient evidence of a causal nexus between the skiing accident and the subsequent diagnosis of a lumbar disc prolapse.

[20] In the course of this claim's progress, reference has been made to the appellant's earlier back problems and of the treatment that he received at various times for those

problems. Whilst that state of affairs must be noted, the Court makes the inference that whilst the appellant's lumbar spine seems to have been the object of attention on a number of occasions, there is no evidence, or should I say, no suggestion has been put forward that there was evidence of any L3/4 disc prolapse prior to that condition being identified in the MRI scan taken in July 2007. The Court is entitled to take from that that there is no evidence that the disc prolapse pre-dated the skiing accident.

[21] On two occasions at least Mr Hodgson has stated that in his opinion the nature of the skiing accident is consistent with it having caused the disc protrusion, but further than that, he has advised that the particular disc prolapse was the source of most of the appellant's back pain which he began to experience from the time of that skiing accident onwards.

[22] Although it seems to have taken some time, I find it to be a fact that the source of the appellant's ongoing back pain was the nerve root compromise at L3/4 and that following the successful surgery by Mr Hodgson in April 2008 that problem has resolved. Whilst the appellant may continue to have some problems with his back, at least the pain associated with the disc prolapse has now stopped.

[23] As earlier noted, the respondent sets significant store by the fact that no mention was made of a skii accident, despite a number of opportunities for it to be mentioned during various examinations and discussions with both his GP and Mr Hodgson. The appellant was given the opportunity of explaining that at the review hearing, and I consider that the explanation he gave was quite understandable. Here was a man who had a long history of back problems and who began experiencing further back pain from the time of this skii incident onwards, but nevertheless thought that it was simply a continuation of that which he had experienced, to various degrees, over the preceding 30 years.

[24] I find that the continuation of that pain and of the identification of a disc prolapse, indicates on a reasonable probability basis that the disc prolapse, which was ultimately identified as being the source of the pain, was the particular injury which started this particular bout of pain off and that this occurred from the time of the skiing accident onwards.

[25] The appellant's evidence of what he actually experienced and what measures he took are not in dispute, and indeed, it was not until the MRI scan in July 2007, that a potential cause of his ongoing problems was identified.

[26] I note that the specialists were loath to consider surgery if other more conservative treatments would serve the purpose, and it was not until those various treatments, which included epidural injections and specific pain killing medicines, were not having the desired result that Mr Hodgson made the decision that the only course open was relief by surgery.

[27] I find that some significance can be given to the surgical notes of Mr Hodgson, where he noted that the disc looked normal. Nowhere in Mr Hodgson's reports or discussions is there a suggestion that the L3/4 disc was in a degenerative state and there was no mention of degeneration at L3/4 in the MRI scan report.

[28] The respondent's case rests principally on the contention that the disc prolapse has occurred naturally, consequent upon degeneration, such as may have been the cause of the appellant's earlier back problems.

[29] I consider it also worth noting that the lumbar discogram carried out by Professor Doyle, whilst demonstrating a small central annular tear at L4/5, nevertheless also identified that this particular disc was not producing any pain. Thus it cannot be said that the appellant was suffering from widespread degeneration in his lumbar spine.

[30] I find that the conclusion reached by Dr Austin, as set out above, is far too simplistic as he does not seem to recognise that disc protrusion can be caused as a consequence of trauma, and I reject the suggestion that such injuries can only arise from non-traumatic causes. His statement that the discogram suggested L3/4 as symptomatic is clearly the case, in that it was clearly identified as having nerve root compression. This was the consequence of the disc prolapse.

[31] Having regard to the findings of Mr Hodgson, and he being the treating surgeon who actually saw what was the problem, I find his assessment must be given due weight. I find that it has been established, on the balance of probabilities, that the appellant did suffer the L3/4 disc prolapse on the occasion of his fall whilst skiing and that as such it was a personal injury by accident for which he is entitled to cover.

[32] Consequent upon that finding, the respondent's decision declining to grant cover is hereby quashed and substituted by the decision now made granting cover to the appellant for that personal injury, and which no doubt will give rise to entitlements in relation thereto backdated to when the appellant commenced to receive treatment for that injury down to and including the surgery that was carried out in April 2008.

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

**DATED** this ....17th....day of ....February.....2009

M J Beattie
**District Court Judge**