

IN THE DISTRICT COURT
HELD AT AUCKLAND

Decision No. 30 /2010

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 **GRAEME BLAIR**

(AI 186/09)

Appellant

AND

THE ACCIDENT COMPENSATION
CORPORATION

Respondent

HEARD at AUCKLAND on 8 February 2010

APPEARANCES

Mr G Blair in person.
Ms C Potter, Counsel for Respondent.

RESERVED JUDGMENT OF JUDGE M J BEATTIE

[1] The issue in this appeal concerns the correctness of the respondent's decision of 20 January 2009, whereby it declined to grant cover to the appellant for an inguinal hernia, it being contended that the hernia had not been caused by a single traumatic event and was therefore not personal injury by accident.

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

- On 2 April 2008 the appellant, then aged 73 years, was standing on a ladder pruning the branches of a tree with some loppers.

- In the course of this activity he stated that he suddenly felt pain in his groin which occurred when he was stretching upwards seeking to cut a branch above his head.
- The appellant said the pain was significant and forced him to cease that work.
- His belief at the time was that he had suffered a muscle strain, although he felt a lump in his groin.
- The appellant did not consult his doctor, Dr Paul Nola, until the following Monday, the 7th April.
- Dr Nola diagnosed an inguinal hernia and provided pain relief medication.
- Over the ensuing months the appellant consulted Dr Nola from time to time but the only treatment was that of a daily pain tablet.
- In December 2008 the appellant consulted Dr Nola because of the significant pain that he was now experiencing. It was at this time that the appellant learned that a claim for cover could be made for such an injury, and the claim was so made.
- The claim was considered by the respondent's Branch Medical Advisor, Dr Odedra, and it was on the basis of Dr Odedra's advice that the respondent issued its decision to decline cover on 20 January 2009.
- The appellant sought a review of that decision and prior to the review further information was sought from the appellant's GP.
- The review hearing took place on 3 April 2009 at which the appellant appeared and gave evidence. After reviewing the evidence the Reviewer ruled that the appellant had not established, on the balance of probabilities, that his hernia had been caused by the accident of the tree pruning and he therefore dismissed the application.

- For the purposes of the appeal to this Court further medical evidence has been introduced including a report from Mr David Innes, General Surgeon.

[3] The issue of cover for an inguinal hernia is one which has been considered by the Court on a number of occasions and the Court has recognised that the set of criteria put forward in a medical paper by Dr G D Smith should form the basis of determining whether or not an inguinal hernia could be considered as having been suffered as a consequence of a single traumatic event.

[4] Shortly after lodging his claim for cover the appellant was requested to complete a special form which the Corporation has which is a Hernia Questionnaire and within that questionnaire the appellant stated as follows:

"Pruning trees with a long handled lopper and parrot beak pruner which involved stretching overhead."

The appellant indicated that the pain he experienced was 3/4 on a scale of 1-10. He then went on to state that he believed at the time that the injury was a strained muscle which would gradually improve. He also indicated that he had never had any previous problems with a hernia.

[5] Another comment made by the appellant in that questionnaire was as follows:

"Initially merely tenderness which I assumed to be a strained muscle which would gradually improve. When I developed a lump in the groin I assumed that this was unconnected and glandular."

[6] In a medical questionnaire Dr Nola advised that on his examination of him on 7 April there was pain and swelling in the left groin. He gave his opinion that the accident was the cause of the hernia, that it was from a traumatic event.

[7] Dr Nola's notes show that when the appellant consulted him on 7 April 2008, he did so for more than one medical condition, that he had been suffering from diarrhoea, and was also experiencing back pain. The note relating to the inguinal hernia did not make any mention of how it may have occurred.

[8] The initial advice given by the respondent's Branch Medical Advisor, Dr Odedra, and her comments in her report stated, inter alia, as follows:

"13/01/2009

... He was first diagnosed with a hernia some 5 days after this accident without any indication that an accident had caused the hernia. He was seen again on 21/04/2008 with the main problem being the hernia but still no evidence of accident related. It wasn't until he was seen again in December 08 that an accident was attributed.

....
BMA Comments: Generally simply stretching as described is unlikely to cause a traumatic hernia on basis of a tissue injury to lead to a hernia, however it is plausible that this type of stretching would aggravate a previously pre existing, dormant hernia to become symptomatic. As noted the examination around the time of the symptoms dated 7.4.08 does not document any signs of trauma or acute injury. It is most likely on balance of probability that presentation circumstances support an underlying Hernia becoming symptomatic; certainly initial examinations do not indicate a diagnosis of traumatic hernia as per hernia guidelines form ACC."

[9] In a subsequent report, Dr Odedra again places considerable store on the fact that it was not until December 2008 that an accident was being attributed to the appellant's hernia. Dr Odedra referred to the G D Smith criteria and made the following points:

- The majority of inguinal hernias are not caused by acute tissue trauma from accidents, only some 6% to 7% are caused by trauma.
- The majority of hernia occur due to underlying/pre-existing weakness.
- It is common for an underlying hernia to become symptomatic with some activity and cause pain and symptoms and become noticeable by increasing in size to the point of a lump being identified.
- A traumatic hernia is normally acutely painful and there may be other signs of injury such as bruising and swelling.
- If there are no signs of tissue damage or significant pain it is not possible, on the balance of probability, to suggest the hernia was due to acute traumatic injury.
- In the case of Mr Blair he only felt discomfort and there was no indication of any acute sign of tissue injury. There is no documentation of signs or symptoms of acute traumatic injury or signs of a resolving bruise.

- Normally an acute traumatic hernia due to tissue injury requires a significant incident or accident and would be considered to be painful and generally would mean that following this event there would be acute pain and all activities would have been significantly affected and the causative activity would be remembered.
- Generally, simply stretching as described is unlikely to cause a traumatic hernia on the basis of a tissue injury to lead to a hernia, but it is plausible that this type of stretching would aggravate a previously pre-existing dormant hernia.

[10] For the purposes of the appeal, Counsel for the Respondent, sought the opinion of Mr David Innes, General Surgeon, who advises that he has a large hernia practice. Mr Innes was asked to comment on the appellant's claim based on the evidence. Mr Innes stated, *inter alia*, as follows:

“. . . In my practice experience, determination of traumatic causation of inguinal hernia is largely dependent on the contemporaneous history as recorded in the GP notes, or in specialist notes if the patient has been referred early for surgery. The usual picture is:-

- [a] Patient carries out an activity, or suffers an accident, which is considered likely to cause a hernia, and suffers pain.
- [b] Patient notices an inguinal lump within a short period, often in the shower or bath, usually within 48 hours, after the event.
- [c] The patient attends a GP with minimal delay and the diagnosis of hernia is made.”

Mr Innes then commented specifically on the appellant's claim as follows:

“1. . . Statistically a 74 year old man is much more likely to suffer an inguinal hernia due to degenerative changes than suffer a traumatic hernia.

2. There is disparity in the patient's account and the GP's account as to the actual activity the patient was performing when he may have injured himself.

3. Sawing, or reaching high with pruning tools are not activities that I consider carry a high risk of precipitating a hernia, although it is not impossible.

4. In my opinion, maximum weight should be put on the data recorded at the patient's first consultation for hernia in April 2008, [no record that the hernia was due to

injury], and minimal weight put on the detailed accounts given by the patient many months later."

Mr Innes then gave his opinion as follows:

"In my opinion, the ACC should decline the patient's claim. The patient has not met the requirements of contemporaneous account of accident/trauma at the first GP consultation in April 2008. While there is still a small chance that the hernia was accident related there is no way to prove or disprove this clinically at this stage, and on the balance of probabilities it is far more likely that the hernia development was associated with aging related weakening of fibrous tissues."

[11] As earlier noted, the respondent, when considering claims for cover for accident related hernias, has adopted a set of criteria which the Court has recognised as being appropriate and it has been the respondent's practice that if those guidelines are met then cover will be granted. Those guidelines are as follows:

- A single strenuous event is claimed to have caused the hernia.
- If the accident occurred in the workplace, an incident or muscle strain is officially reported.
- A significant groin pain was present at the time of the accident.
- A medical practitioner diagnoses traumatic inguinal hernia, using the technique outlined in Diagnosing Hernia, within 30 days of the accident, but preferably within 10 days.
- There is no history suggestive of gradual onset or congenital inguinal hernia.

[12] It is the appellant's submission that the circumstances under which he suffered his hernia in all respects meets those guidelines.

[13] The appellant states that when he first saw his GP he had no knowledge of there being a possibility of a claim and therefore nothing really was made of the circumstances under which the hernia came to light.

[14] The appellant submitted that Dr Nola had covered the matter by confirming that in his opinion the hernia had resulted from a traumatic event, even though that advice was not given until the claim for cover was lodged.

[15] Ms Potter, for the respondent, referred to the fact that at the time of the appellant first seeing Dr Nola and then on subsequent visits thereafter, no mention was made of this traumatic event of stretching up with the loppers and feeling the onset of pain. Further she submitted that it was significant that the appellant did not identify the pain that he suffered as being significant or severe. Counsel also noted that the doctor simply indicated that the appellant should keep an eye on the problem and to see whether it developed.

[16] Counsel submitted that the appellant could not establish on the balance of probabilities that his hernia had resulted from a single traumatic rupture of the abdominal wall caused in a single strenuous event.

DECISION

[17] For the appellant to be entitled to cover for his inguinal hernia it must be established, on the balance of probabilities, that this injury was suffered in an accident, that is, a specific event or series of events.

[18] It is accepted by the respondent that an inguinal hernia can be caused by a single strenuous and traumatic event, but it has set down guidelines which have been identified as giving a strong indication of whether any particular hernia so suffered can be said to have been caused by a single traumatic event.

[19] In the case of this appellant, his evidence is uncontested that he was stretching upwards on a ladder attempting to cut a branch of a tree with loppers and in so doing applied significant force and whilst so applying that force he felt pain in his groin.

[20] The evidence of the appellant is that the pain caused him to double-up and certainly prevented him from continuing with that particular activity.

[21] The further evidence of the appellant is that he initially thought that it was a muscle or groin strain, but then a lump appeared and when the pain did not go away as he thought it might he consulted his doctor, and as the appellant put it, he consulted his doctor on the third working day after the accident had occurred.

[22] The documentary evidence is that Dr Nola diagnosed an inguinal hernia but it is also the case that the appellant did not give any detail as to how this may have occurred and his explanation is that he didn't think it was relevant as at that time he had no

understanding that the suffering of a hernia in a traumatic event would be a situation which would be covered by Accident Compensation.

[23] Much has been noted, firstly by the Branch Medical Officer, then the Reviewer, and finally Counsel for the Respondent, about the fact that there is no mention of the traumatic event being involved until a claim for cover is made in December 2008, some eight months later.

[24] The appellant has explained this simply by stating that he had not been aware of a right to claim for cover, and it seems equally the case that his GP did not seek to inform him until he did so at the December appointment, and Dr Nola's notes made at that time stated, *inter alia*, "Noticed pain and swelling at the time".

[25] It was subsequent to the December appointment, and when Dr Nola was asked to complete a hernia questionnaire, that he confirmed that the hernia which he had diagnosed back on the 7th April, was a condition which he considered had been caused by a single traumatic event.

[26] In the present case, we have the fact of a doctor examining and diagnosing the hernia within a matter of a few days and then when subsequently the issue came to be whether it was indeed from a traumatic event, Dr Nola confirmed that it was.

[27] The fact of the matter is that the appellant's situation does tick all the boxes of the criteria for accident related hernia. When considering whether the groin pain was severe at the time of the strain, the appellant was having to think back some eight months and as he candidly said, he felt that the pain was significant, sufficient for him to double-up, and ongoing, and that maybe he was a little conservative in his assessment.

[28] The appellant, although of 73 years of age at the time, had had no previous hernia problems and it is the case that he suffered the pain and the lump and I find that it is stretching things to simply state that it was there all the time and was just the combination of a gradual process.

[29] Claims of this type are very much determined on the facts. The Court has seen and heard the appellant and has considered the evidence, and in particular the explanations he has given for what might have been stated by previous decision makers as being matters which went against the claim being successful.

[30] Having regard to the facts and the correct explanation which has been put on them, I find that the appellant has satisfied the onus which is upon him in claims of this nature. Even the opinion of Mr Innes is wrapped up in the fact that there was no contemporaneous account of accident/trauma at the first GP consultation. That, I find, is not insurmountable if a reasonable and believable explanation is given, and this is the situation which I find to be the case with this appellant.

[31] Accordingly, I find that the appellant is entitled to cover for his inguinal hernia suffered as a consequence of a traumatic event on 2 April 2008 and the decision to decline cover is hereby quashed.

[32] I make no order for costs as the appellant represented himself, but if he has incurred qualifying disbursements then I direct that the respondent reimburse him for same.

DATED this 25th day of February 2010


 M J Beattie
 District Court Judge

ROLE:

Despite medical evidence to the contrary, ~~it~~
 a lack of evidence or a delay in recall of
 evidence of a contemporaneous account
 of accident/trauma is not insurmountable
 if a reasonable and believable explanation is
 given, ~~and~~

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