IN THE DISTRICT COURT
HELD AT DUNEDIN

Decision No. 187 /2009

IN THE MATTER	of Injury Prevention, Rehabilitation, and Compensation Act 2001
AND	
IN THE MATTER	of an appeal pursuant to Section 149 of the Act
BETWEEN	**JOSEPH FARRELL**
	(AI 534/08)
	Appellant
AND	**ACCIDENT COMPENSATION CORPORATION**
	Respondent

HEARD at DUNEDIN on 20 August 2009

APPEARANCES

Mr P Sara, Counsel for Appellant.
Mr I Hunt, Counsel for Respondent.

RESERVED JUDGMENT OF JUDGE M J BEATTIE

[1] The issue in this appeal arises from the respondent's decision of 2 May 2008, whereby it declined to approve payment for elective surgery described as *surgical dislocation of left hip* on the grounds that such surgery was not to treat any medical condition arising from the appellant's covered personal injury.

[2] It is the respondent's contention that the purpose of the surgery was to treat a pre-existing condition of the appellant's left hip described as *femoro-acetabular impingement*, being a development condition and not related to trauma.

[3] In contrast, it was the appellant's contention that the need for surgery arose as a consequence of a labral tear suffered in the accident of 11 May 2007, and it was the fact of the tear which necessitated the surgery rather than the acetabular impingement.

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

- At the material time the appellant was aged 33 and was engaged in a plumbing apprenticeship.
- On 11 May 2007 the appellant was lifting a concrete manhole cover down into a trench on a wet day with another person assisting. The trench was muddy and the appellant slipped and fell injuring his back and left hip.
- The respondent provided cover for a lumbar and thigh sprain.
- Because of ongoing pain, the appellant's GP referred him to Mr Patrick Medlicott, Orthopaedic Specialist, and Mr Medlicott first saw and examined the appellant on 8 June 2007.
- Mr Medlicott considered that the appellant's problems were in his lumbo sacral region and he referred the appellant on to Mr Bruce Hodgson, Orthopaedic Surgeon, for surgical assessment.
- Mr Hodgson saw the appellant on or about 30 October 2007. He had X-rays of the left hip for reference.
- Mr Hodgson reported to Mr Medlicott that the appellant's problem was an acetabular labral tear of his left hip and that this was causing the pain in his hip and buttock.
- Mr Hodgson did not consider that the appellant's lumbosacral region was the cause of pain.
- Mr Hodgson obtained an MRI scan of the appellant's left hip and in December 2007 he referred the appellant on to Mr Paul Armour, Orthopaedic Surgeon, a surgeon with extensive experience with arthroscopic procedures of the hip.
- Mr Armour saw and examined the appellant on 21 February 2008 and submitted an Assessment Report and Treatment Plan to the respondent requesting approval to carry out surgery stated as being "surgical dislocation of left hip".
- At the foot of that application Mr Armour indicated *"Not sure"* to the question whether the treatment was for a personal injury caused by accident and for which the claimant has cover.

- The respondent sought clarification of the reason for surgery, asking the question, *"Please advise if the labral tear is a result of his accident or is it caused by his onset of osteoarthritis."*

- Mr Armour responded to that question as follows:

  "In my opinion Mr Farrell suffers from femoro-acetabular impingement. The labral tear is only part of the pathology with which he presents. It is his anatomy over time that has generated his current pathology rather than personal injury by accident. I hope this clarifies issues for you."

- Following consideration of that response from Mr Armour, the respondent issued its decision declining approval of the surgery, the letter of declinature quoting Mr Armour's letter of 8 April 2008 as the reason.

- The appellant sought a review of the respondent's decision but that in any event Mr Armour carried out the surgery on 13 August 2008.

- A review hearing took place on 26 September 2008 at which the appellant was represented by counsel who introduced a post-operation report from Mr Armour.

- In his decision dated 21 October 2008 the Reviewer, Mr T Yates, concluded from the evidence that it was only a possibility that the appellant had suffered the labral tear in the May 2007 accident, rather than it being more usual for it to be a gradual process. He ruled that the appellant's need for surgery was the pre-existing pathology and not for personal injury caused by accident.

- For the purposes of the appeal to this Court, Counsel for the Appellant has introduced two reports from Mr John Dunbar, Orthopaedic Surgeon.

[5] The issue in this appeal is one which requires careful scrutiny of the medical evidence, being a combination of the evidence that was considered by the respondent before it made its decision, and further evidence which was available to the Reviewer, and thirdly the medical evidence in the form of reports from Mr Dunbar that have been introduced for the purposes of the appeal.

The Medical Evidence

1. Report from Patrick Medlicott, Orthopaedic Specialist, dated 8June 2007 to appellant's GP.

Mr Medlicott noted the history which included a history of low back pain dating back to 2004 and in respect of which there had been an aggravating event in December 2006. Mr Medlicott noted a mild restriction on internal rotation of his left hip compared to the right and a suggestion of a sacroiliac type pain on rotation of the hip on the left side. He gave his assessment as follows:

> *"I think that this young man probably has some degree of lumbosacral disc disease plus or minus a mild sacroiliac joint irritation and or perhaps even a rheumatic type of syndrome such as ankylosing spondylitis."*

It would seem Mr Medlicott's attention was in the lumbosacral region and he arranged for an MRI scan of the appellant's lower back.

2. Letter from Mr Medlicott dated 23 July 2007 to Mr Bruce Hodgson, Orthopaedic Surgeon.

Following the MRI scan, Mr Medlicott referred the appellant to Mr Hodgson for assessment. Mr Medlicott's comments simply noted the disc changes at L4/L5 and L5/S1. He sought Mr Hodgson's opinion as to whether any surgical solution was possible.

3. Report from Mr Bruce Hodgson dated 30 October 2007 to Mr Medlicott.

Mr Hodgson examined the appellant and reported that he noted the appellant's history of low back pain. By reference to plain X-rays of the left hip, Mr Hodgson advised that the appellant had an acetabular labral tear of his left hip. He further noted that the MRI scan of the lumbar spine did not indicate any nerve root compression. He considered that a more specific MRI scan of the left hip was required.

4. Letter from Mr Hodgson dated 4 December 2007 to Mr Paul Armour, Orthopaedic Surgeon.

Following the obtaining of that further MRI scan, Mr Hodgson referred the appellant on to Mr Paul Armour whom he noted had extensive experience with arthroscopic procedures of the hip. Mr Hodgson confirmed that from his assessment he considered that the appellant's problems were not related to his back but were related to the pathology in his left hip. He advised Mr Armour what the further MRI scan had revealed and he stated:

> *"This has revealed (as I suspected) a significant acetabular labral tear with some thinning of the femoral head cartilage and significant femora acetabular impingement."*

5. Assessment Report and Treatment Plan dated 21 February 2008 from Mr Armour.

Mr Armour requested approval for surgical treatment described as "surgical dislocation left hip" and as earlier noted he answered "Not sure" to the question whether the treatment was for personal injury caused by accident.

6. Letter from Mr Armour dated 8 April to ACC.

This was Mr Armour's response to the respondent's question about the labral tear. He stated as follows:

> *"In my opinion Mr Farrell suffers from femoro-acetabular impingement. The labral tear is only part of the pathology with which he presents. It is his anatomy over time that has generated his current pathology rather than personal injury by accident. I hope this clarifies issues for you."*

7. Operation Notes of Mr Armour dated 13 August 2008.

Mr Armour carried out the surgical dislocation of the appellant's left hip at the Southern Cross Hospital, Christchurch. Under the heading "Findings" he noted:

> "*Large labral tear with associated area of chondral damage and flap formation in relation to the labral tear. Osteochondral prominence antero-superiorly at the head/neck junction.*

8. Letter dated 1 September 2008 from Mr Armour to appellant's counsel.

Mr Sara sought Mr Armour's opinion about the pending review hearing and he advised, inter alia, as follows:

> *"We know that the natural history of femoro-acetabular impingement is to gradually develop osteoarthritic degeneration. The pathology generated by cam pincer impingement or a combination of both causes damage to the hip which will ultimately result in osteoarthritis. We know that in perhaps only 10 per cent of cases can we now not identify a cause for osteoarthritic degeneration of the hip (Reinhold Ganz). Much of the pathology that we see locally is due to femoro-acetabular impingement.*
>
> *Having operated on Mr Farrell's hip, I can quite categorically say that he does not have osteoarthritis. He did have pathology associated with his abnormal anatomy which undoubtedly is implicated in some of the pathology that he presented to me at surgery. However, what I cannot say is how much of the pathology that he demonstrated at operation was caused by the accident and how much was caused as a result of his subtle, but abnormal anatomy prior to the accident. Certainly, he indicates he was asymptomatic prior to the injury and he is of course significantly younger than the previous patient documented above. Therefore, one could perhaps suggest that the pathology that was almost certainly present prior to his accident, but which was asymptomatic was rendered significantly worse by possibly extension of either his labral tear or further damage to the articular surface of the joint. Given Judge Ongley's decision with respect to R Sparks, it would seem that possibly the patient's injury of the*

11.05.2007 when he slipped, developing acute discomfort about his left hip could have extended the pre-existing pathology rendering it symptomatic. I would be prepared to support this contention. However, without the accident, the patient would eventually become symptomatic."

9. Letter from Mr Armour dated 15 September 2008 to appellant's counsel.

Mr Sara had sought further clarification on the issue of causation and in particular what part of the appellant's pathology was caused by accident and what had been the result of his abnormal anatomy prior to the accident. Mr Armour responded as follows:

"I am in receipt of your correspondence dated 9.09.2008. I have made clear I believe in my report that I in principle support that Mr Farrell has suffered personal injury by accident. My job is not to argue points of law, but to provide an opinion on what I believe has either generated or contributed to the patient's clinical situation. My opinion is that on the basis of probability, he has suffered personal injury by accident to pre-existing pathology, rendering it symptomatic and causing enough pathological change in the face of a pre-existing condition to necessitate treatment."

10. Report from Mr John Dunbar, Orthopaedic Surgeon, dated 22 May 2009 to Mr Sara.

Mr Dunbar examined the appellant and was provided with the correspondence from Mr Armour, including his operation notes, for reference. Mr Dunbar noted the appellant's pathology at the time of the operation. Mr Dunbar then gave his medico-legal assessment of the appellant's injury, he stating as follows:

"There is no doubt that Mr Farrell can be said to have a diagnosis of femoro-acetabular impingement in his left hip with thinning of the articular cartilage on the femoral head and an acetabular labral tear. However, I understand the point of the argument in Mr Farrell's case is not so much the diagnosis, but whether in fact he is likely to have suffered a significant pathological event at the time of the injury when he slipped in the trench. I further believe that this is a situation where one has to listen to the patient's account of events as that is more useful in many ways than the evidence of an MRI or even evidence at the time of surgery. It is clear in my mind that Mr Farrell had features of femoro-acetabular impingement prior to his fall in the trench, but he was asymptomatic and he did not require surgery for the condition at that time. After his injury he still had femoro-acetabular impingement, but he did require surgery for the condition and it is reasonable to assume that something must have happened in his hip. Mr Armour himself said "I in principle support that Mr Farrell has suffered personal injury by accident.

Mr Farrell gave me a very clear history of a significant injury sliding into a muddy trench with a concrete manhole cover in his grip but one which he himself did not have the strength to lift alone. He immediately suffered pain which from the description he gave arose from his hip and was sufficiently severe to be moderately disabling. I believe it is therefore probable that some physical event occurred in Mr Farrell's hip to explain his sudden change in symptomatology. If we then consider the pathology present in Mr Farrell's hip at the time of Mr Armour's surgery, there appear to be three pathological entities. One of these is the shape of the femoral head and neck, and its relationship to the acetabulum. This is the primary cause of femoro-acetabular impingement and was highly likely to have been unaltered when he fell into the trench. The second pathological process was the damage to the articular cartilage on the femoral head. I believe it is probable that there was pre-existing articular cartilage damage which was probably asymptomatic at the time of the fall. Whilst it is possible Mr Farrell may have

suffered further articular cartilage damage I do not believe this would have been likely to have produced his symptoms. The third pathological process in his hip was the labral tear. In my opinion the sudden onset of pain that occurred in Mr Farrell's hip is likely to have been caused by tearing of the labrum, given that we know the actual pathology in Mr Farrell's hip.

One might argue that labral tearing is part of the pathological process occurring as a consequence of femoro-acetabular impingement and that is certainly the case. However, where labral tearing does occur in this situation, it would usually be expected to occur over a relatively long period of time and have a relatively slow onset of symptomatology, if at all. It is difficult to believe, given Mr Farrell's history of acute onset of pain and disability, that the extent of the pathology found at Mr Armour's operation was the same as the extent of the pathology prior to the injury. I believe it is fair to say that it is more probable than not that Mr Farrell suffered at the least, an extension of a labral tear at the time of his injury and at the most suffered the full extent of the labral tear found at surgery."

11. Letter from Mr Dunbar dated 19 August 2009 to Mr Sara.

Mr Dunbar was provided with the reports from Mr Hodgson and Mr Medlicott which had referred to buttock and hip pain being present prior to the May 2007 injury. Mr Dunbar commented as follows:

"Thus, even with the additional information available, I still have to conclude that some significant change occurred in his hip and for the reasons previously stated I can only conclude that he suffered either an extension of a labral tear or a tear in a previously untorn labrum.

In relation to the need for surgery, as a surgeon myself I would be reluctant to suggest that a patient whom I knew to have femoro-acetabular impingement, but with mild symptoms and who was able to work, undergo a dislocation of the hip for symptoms with which the patient could cope. However, if the patient developed more severe symptoms such that work was difficult and only possible with the cover of anti-inflammatory agents then one would be much more likely to offer the patient an operation. It is always a question of balancing the person's symptoms prior to the surgery with the risks inherent in the surgical procedure and a surgical hip dislocation does carry some significant risks."

Mr Dunbar then commented on the need and the requirement for surgery. He stated as follows:

"I can't answer for Mr Armour, but in my opinion Mr Farrell's surgery was done, not because he had femoro-acetabular impingement, but because he had developed significant symptoms, which in my opinion were related to a labral tear, albeit contributed to by his femoro-acetabular impingement. There is no point in repairing a labral tear without addressing the associated anatomical anomalies in the hop which would only cause early failure of the labral repair if not remedied."

[6] Mr Sara, for the appellant, submitted as follows:

- Prior to the May 2007 accident, the appellant had a functional hip despite two pre-existing conditions, namely the shape of the femoral head and damage to the articular cartilage of the femoral head.

- Those pre-existing conditions were not the reason for surgery.

- The labral tear brought about the need for surgery. It was an acute condition and had been caused in the accident.

- The need to repair the labral tear was a substantial reason for surgery and the fact that other pre-existing conditions were attended to cannot detract from the surgical requirement to treat the injury suffered in the accident.

- Whether the tear was aggravated by the fall or the whole tear caused by the fall, either way it is a condition for which the respondent is liable to meet the cost of treatment.

[7] Mr Hunt, for the respondent, submitted as follows:

- It is not accepted that the labral tear was caused in the accident. There is a serious question-mark over this.

- A labral tear can be caused form non-accidental factors and this is its usual path.

- The conclusions reached by Mr Dunbar are not consistent with the history, particularly that referred to by Mr Medlicott who refers to pain dating back to 2004.

- The comments made by Mr Armour are inconsistent with the subsequent opinion provided by Mr Dunbar. Whereas Mr Armour stated that it was the appellant's anatomy at the time that has generated his current pathology rather than personal injury by accident.

- The reason and purpose of the surgery is for non-accident related conditions.

- The history of the appellant in relation to hip pain would indicate that the femoro-acetabular impingement had occurred over a period of time.

- The balance from the evidence indicates the labral tearing to have been more likely than not to have been a consequence of the pre-existing pathology and not from accident.

- The purpose and reason for the surgery is not to treat, nor is it substantially related to, a physical injury for which the appellant has cover.

DECISION

[8] The legal issue at the centre of this appeal is whether the purpose of the surgery which was sought was to treat a medical condition which was a consequence of a personal injury for which the claimant had cover.

[9] The particular surgery for which permission was sought was surgical dislocation of the left hip.

[10] The appellant's hip condition was identified by Mr Hodgson following the obtaining of an MRI scan, and it was Mr Hodgson's opinion that the acetabular labral tear of the left hip was "undoubtedly causing the pain the appellant was experiencing in his left hip and buttock". At that time, Mr Hodgson discounted any pain being caused from conditions associated with his lumbar spine and this was confirmed subsequently by Mr Armour.

[11] Mr Hunt placed considerable emphasis on the history and of the fact that the appellant was having "problems" as far back as 2004.

[12] I have considered the comments from Mr Medlicott, Mr Hodgson, and Mr Armour, and I find that all three refer in the main to a history of low back pain dating back to 2004, and it was Mr Medlicott's opinion that the appellant had some degree of lumbo-sacral disease and which was the cause of his problem. He gave that opinion on 8 June 2007, just a short time after the May accident.

[13] It is the case, of course, that Mr Medlicott referred the appellant on to specialists.

[14] In December 2007, Mr Hodgson referred the appellant to Mr Armour. He was referred to Mr Armour because of his specialist expertise in surgical procedures of the hip. Mr Hodgson had identified that the problem of the appellant was "a significant acetabular labral tear with some thinning of the femoral head cartilage and significant acetabular impingement."

[15] The respondent's reason for declining approval for surgery was its interpretation of Mr Armour's letter of 8 April 2008, set out in paragraph 6 of the medical evidence above.

In a letter report to Mr Sara, Mr Armour put that earlier comment in context, where he noted that the appellant did have pathology associated with his abnormal anatomy, but that it was the labral tear that brought about the need for surgery as this had rendered the pre-existing condition symptomatic.

[16] Mr Armour considered it to be significant that the appellant did not have osteoarthritis in the hip and therefore the hip was not the subject of osteoarthritic degeneration.

[17] It was Mr Armour's opinion that it was probable that the appellant suffered personal injury by accident to his pre-existing pathology. He considered there was a pathological change by the extension or creation of the labral tear.

[18] Mr Dunbar provided an opinion and he noted that in these situations it was essential to listen to the patient's accounts of events. Mr Dunbar concluded that whilst the appellant would have had femoro acetabular impingement prior to the May 2007 accident, it was asymptomatic and that it was following the fall that the pain commenced and where the need for surgery was identified as a consequence of the labral tear. It was Mr Dunbar's opinion that the sudden onset of pain that occurred with this appellant after that May accident, makes it likely to have been the case that the tear was caused in that accident.

[19] Mr Dunbar gave serious consideration to the labral tear being part of the pathological process of the femoral acetabular impingement, and the noted that where a labral tear did occur in that situation it would be expected to occur over a long period of time and have a relatively slow onset of symptomatology. He opined that because the appellant's history was one of acute onset of pain and disability, and having regard to the extent of the pathology found at the time of operation, it is difficult to believe that the appellant's pathology prior to the injury was the same as it was after. He considered it more probable that the appellant had suffered at least an extension of the tear in that accident.

[20] Finally, it was noted by Mr Dunbar that there was no point in repairing a labral tear without addressing the associated anatomical anomalies in the hip, which would only cause early failure of the labral repair if not remedied.

[21] I consider that last point made by Mr Dunbar to be extremely significant, and when it is considered in conjunction with the comments of Mr Armour and Mr Hodgson that the labral tear was a significant tear, I find that the tear was the cause of the pain and as such it required to be surgically remedied to bring about a cessation of the pain which the appellant was experiencing.

[22] I have carefully considered Mr Armour's letter of 8 April 2008 and find that he is simply indicating that the labral tear is only part of the pathology. The other aspects of his pathology have been explained in considerable detail by Mr Dunbar, and where there is no dispute that there was femoro-acetabular impingement brought about by the particular anatomy of this appellant. That background, I find, does not detract from the finding which I have made that the need for surgery was primarily to repair the labral tear, which, on the balance of probabilities I find had been caused in the accident of 11 May 2007.

[23] For the foregoing reasons, therefore, I find that the appellant was entitled to have the costs of his surgical treatment met by the respondent, being surgery necessary to treat a medical condition arising from a covered personal injury.

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

DATED this 30th day of October 2009

M J Beattie
District Court Judge