

IN THE DISTRICT COURT
HELD AT WELLINGTON

Decision No. 153 /2009

UNDER

The Injury Prevention, Rehabilitation,
and Compensation Act 2001

IN THE MATTER

of an appeal pursuant to Section 149
of the Act

BETWEEN

DAVID MacDONALD

Appellant

(AI 149/07)

AND

ACCIDENT COMPENSATION
CORPORATION a body corporate
duly constituted under the provisions of
the said Act

Respondent

HEARING at WELLINGTON on 20 July 2009.

APPEARANCES

Ms R L Brown appeared for the appellant.
Ms D S Lester appeared for the respondent.

RESERVED DECISION OF JUDGE J CADENHEAD

THE ISSUE

[1] This is an appeal of the DRSL Review decision to uphold ACC's decision of 22 December 2007 to decline Mr MacDonald's claim for cover for his right inguinal hernia.

THE BACKGROUND OF FACTS

[2] On 28 June 2006 Mr MacDonald was working as a chef. He lifted a 30-litre bucket full of parsnips. This was when he first noticed a right inguinal hernia, with pain in his right groin.

[3] Mr MacDonald presented to his GP on 3 July 2006. The GP notes of this date state:

"Lump in right side of groin present for a few days. Tender sometimes."

[4] On 7 July 2006 Mr MacDonald went back to his GP. The notes of that date state:

"Discomfort +++ with it and so now sick of it. Has insurance so wants to go private."

[5] On 28 July 2006, Mr MacDonald saw Mr Stephen Packer, general surgeon. Mr Packer stated (in part):

"David was referred by Dr Pereira because of a hernia in his right groin. He gives a past history of having strained his [right] groin when moving a bucket of parsnips weighing 20-30 kg out of a sink while at work, felt a sudden pain in his right groin. This was about two months ago.

The pain persisted as a niggling pain and he became aware of a swelling in the groin and was seen at the Practice on 3rd July.

...

Clinically he has an obvious right inguinal hernia which is easily reducible and being controlled by pressure over the deep ring appears to be an indirect right inguinal hernia. Scrotal contents are normal and there is no hernia on the other side.

I have discussed management with him. Surgery is indicated because of the degree of symptoms."

[6] On 18 September 2006 he had a further consultation with his GP. He had had an operation for his left inguinal hernia at this point and filed out an ACC45 form to lodge a claim for cover for his right inguinal hernia.

[7] On 20 September 2006, Mr MacDonald returned to his GP. The notes of this date state:

"INSURANCE CO WANT HIM TO FILL OUT ACC FORM

Always doing heavy lifting with work – bags of potatoes, also lifting sheep during farm hand work etc so hernia could have been caused by heavy lifting. The day he noticed hernia had pulled a bucket full of water out of the sink. 20-30 litre bucket of water, lifting f[r]om waist high with cooking job. Has two jobs.

Got immediate pain after putting the bucket down. Immediately felt uncomfortable and that night notice the lump and a week later came to see Dr."

[8] On 24 September 2006 Mr MacDonald filled out an ACC Hernia Questionnaire. This stated:

"What were you doing at the time of the accident? Lifting a full bucket out of a sink.

What did you do immediately after the accident? Sat down

Did the accident happen at work? Yes

If yes, did you make an official report of the accident? Yes

Did you suffer any pain at the time of the accident? Yes

(a) On a scale of one to ten (where one is minor pain and ten is severe pain) where would the pain you experienced fit on this scale? 4."

[9] Mr MacDonald indicated the pain was similar to being kicked in the testicles and that it was also "very tight."

[10] On 17 October 2006 ACC declined cover for Mr MacDonald's right inguinal hernia as "the information we have suggests that your hernia condition did not result from a traumatic rupture of the abdominal wall."

[11] Mr MacDonald filed a review of this decision, which was heard on 1 March 2007. The reviewer upheld ACC's decision to decline cover for Mr MacDonald's right inguinal hernia.

[12] On 18 July 2008 Mr Packer, the treating surgeon, provided further comment on Mr MacDonald's case. He stated (in part):

"I have reviewed Mr MacDonald's case record. I noted on 28 July 2006 that he had strained his [right] groin while moving a bucket of parsnips out of the sink (20-30 kg weight) and felt a sudden pain in his right groin. He saw his own doctor within a week and apparently [an] ACC claim form was completed. He subsequently came to operation and the hernia was repaired on 5 September 06.

On the information I was given there was an incident which resulted in pain and subsequent finding of a groin hernia within a period of one week. On the balance of probabilities, it is more likely than not that this event at least contributed to the cause of his hernia."

[13] ACC went back to Mr Packer for further information and following this further information, referred to Dr Allan Walker, GP and ACC Branch Medical Advisor. His comments state (in part):

"In this case, neither the initial general practitioner consulted nor the treating surgeon Mr Packer when the claimant presented to them formed the opinion that

the hernia was result of personal injury caused by accident. It was only at a latter date after surgery to repair the indirect inguinal hernia that the claimant's insurance company raised the question off [sic] personal injury caused by accident. When completing the hernia questionnaire the general practitioner Dr Gardner fails to answer the question regarding whether the incident described could cause a tear of the abdominal wall sufficient to course[sic] an acute traumatic hernia. Mr Packer has discussed the "attempts of various individuals to try and force all clinical events into a single describe pattern" and that indirect inguinal hernias as in this case can occur in the absence of a physical injury. The case law states that in order to obtain cover for a personal injury caused by accident there must be an injury to the abdominal wall over and above the appearance of a hernia. (my emphasis added)

LAW

[14] Section 8 of the 2001 Act states that a person has cover under that Act if he or she satisfies any of the criteria contained in sections 20, 21 or 22 for personal injury suffered after 1 April 2002. Section 20 concerns cover for personal injury suffered in New Zealand, and is relevant for the purposes of this review. In particular, it refers to personal injury (defined in section 26) caused by an accident (defined in section 25).

Section 25 states in part:

"25. Accident

(1) Accident means any of the following kinds of occurrences:

(a) a specific event, or a series of events, that –

(i) involves the application of a force (including gravity) or resistance external to the human body; and

(ii) is not a gradual process...

(3) The fact that a person has suffered a personal injury is not of itself to be construed as an indication or presumption that it was caused by an accident."

Section 26 describes personal injury and states in part:

"26. Personal Injury

(1) Personal injury means-

(a)...

(b) physical injuries suffered by a person, including, for example, a strain or a sprain; or

...

(2) Personal injury does not include personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is personal injury of a kind described in section 20(2)(e) to (h)."

THE APPELLANT SUBMITS

[15] It is submitted that on the balance of probabilities Mr MacDonald's hernia is a personal injury first caused by a specific event, or a series of events, that occurred on or around 1 July 2006 while lifting a 20-30 kg bucket of parsnips out of a sink and therefore he should receive cover for the hernia.

[16] When deciding whether to give cover for hernias, ACC apply the policy guidelines for hernia cover that are set out in ACC's publication "ACC News" Issue 59 August 2003. These guidelines are:

1. A single strenuous event is claimed to have caused the hernia.
2. If the accident occurred in a workplace, an incident of muscle strain is officially reported.
3. Significant groin pain was present at the time of the accident.
4. A medical practitioner diagnoses traumatic inguinal hernia within 30 days of the accident but preferable within 10 days.
5. There is no history suggestive of gradual onset or congenital inguinal hernia.

[17] In *Brock* (240/2004) Judge Cadenhead said that there were 4 evidentiary guidelines that should be utilised (although not applied rigidly) when considering what had caused a hernia. These four guidelines were:

1. An officially reported incident of muscle strain.
2. Severe groin pain at the time of the strain.
3. Diagnosis of a hernia by a doctor within 30 days.
4. No previous history of hernia.

[18] In *Stanbury* (28/00) Judge Beattie, in referring to the Corporation's rigid adherence to these policy guidelines said:

"The court can understand the respondent's reluctance to accept claims for cover for injuries where there is no contemporaneous medical confirmation of same and the Court can understand the respondent having policy criteria for certain types of injury. However the court cannot accept that such policy criteria must be rigidly adhered to when all other evidence points to a genuine case."

[19] It is submitted that ACC is applying the guidelines too rigidly in Mr MacDonald's case, and that all the evidence points to a genuine case of personal injury caused by an accident, so as to attract ACC cover.

[20] Mr MacDonald had no previous history of right inguinal hernia, he had pain at a level of 4 out of 10 at the time of the incident and the hernia was diagnosed within 30 days of the lifting incident, and he stated in his Hernia Questionnaire that he officially reported an incident of muscle strain. So out of the four evidentiary guidelines from *Brock* Mr MacDonald meets all of the criteria.

[21] Mr MacDonald needs to prove on the balance of probabilities that his hernia was caused by an accident. He does not need to prove it to a level of medical certainty. See *Smith v ACC* (23/8/04 Judge Beattie, DC Wellington 255/04) where the Judge said (at para 26)

"I find that Professor Gorman is looking for that degree of certainty which is far higher for medical certainty than the evidential standard of proof for medico-legal issues which arise under ACC legislation."

[22] It is submitted that the medical evidence from Mr MacDonald's GP and Mr Packer supports that Mr MacDonald's hernia resulted from a single traumatic event, that is, the lifting a heavy bucket of parsnips at work on or around 1 July 2006.

[23] ACC has relied upon the medical evidence of their Branch Medical Advisor; however his opinion is contrary to the expert medical evidence on file by the treating surgeon.

[24] Dr A Walker, GP/Branch Medical Advisor of ACC said:

In this case, neither the initial general practitioner consulted nor the treating surgeon Mr Packer when the claimant presented to them formed the opinion that the hernia was result of personal injury caused by accident. It was only at a latter date after surgery to repair the indirect inguinal hernia that the claimant's insurance company raised the question off personal injury caused by accident. When completing the hernia questionnaire the general practitioner Dr Gardner

fails to answer the question regarding whether the incident described could cause a tear of the abdominal wall sufficient to cause an acute traumatic hernia. Mr Packer has discussed the "attempts of various individuals to try and force all clinical events into a single describe pattern" and that indirect inguinal hernias as in this case can occur in the absence of a physical injury. The case law states that in order to obtain cover for a personal injury caused by accident there must be an injury to the abdominal wall over and above the appearance of a hernia.

Mr MacDonald related a specific incident where his hernia was painful. It is submitted that his hernia was caused on this incident. Unfortunately, a claim was not lodged with ACC for Mr MacDonald's hernia until later on despite early consultation. Mr MacDonald gave evidence at the review hearing that he was "put wrong, in which I should have filed an ACC form in the first place." In addition, Mr Packer, the operating surgeon stated:

On the information I was given there was an incident which resulted in pain and subsequent finding of a groin hernia within a period of one week. On the balance of probabilities, it is more likely than not that this event at least contributed to the cause of his hernia.

[25] With respect, it is submitted that Dr Walker's report should be given less weight than Dr Pereira's notes and Mr Packer's letter. Dr Walker is an employee of ACC and is not an expert in this field, rather his expertise relates to the area of general practice. Nor did he have the benefit of a personal examination of Mr MacDonald, whereas both Dr Pereira and Mr Packer did. Dr Walker's opinion is simply based on generalised second hand information.

directly relevant

[26] As stated above, Mr Packer stated he believes "on the balance of probabilities, it is more likely than not that [the event described] at least contributed to the cause of [Mr MacDonald's] hernia." Mr MacDonald needs to show that his need for surgery was not wholly or substantially caused by a pre-existing gradual process condition.

[27] It is submitted that Mr MacDonald has proved on the balance of probabilities that his hernia was caused by an event or series of events of lifting on or around 1 July 2006 and therefore he should receive cover and entitlements.

THE CASE FOR THE RESPONDENT

[28] The respondent relies on the decision of the reviewer and the medical reports received from Dr A. Walker in the declination of the claim. It seemed to me that the main thrust of Dr Walker's decision was that the degree of pain was not severe enough nor had it been proved that the accident had caused a rupture of the abdominal wall. The submission was that the earlier medical reports of the appellant

were not clear enough to support the claim. In addition Dr Walker provided some general evidence as to the occurrence and validity of hernia claims.

DECISION

[29] This is a difficult claim, but after reading all the medical reports along with the other evidence I have come to a view that the medical evidence of the operating surgeon Mr Packer must be given considerable weight. I am of the view that his evidence along with the other facts is sufficient to satisfy the onus of proof in favour of the appellant. He, after all, was the operating surgeon and on a balance of probabilities he thought that the incident caused the hernia. This conclusion was not given to the reviewer as the letter expressing it was later in point of time.

[30] I allow the appeal and set aside the opinion of the respondent and the reviewer. I award the appellant \$2000 in costs and disbursements.

DATED this ^{11th} day of *Sept* 2009



(J Cadenhead)
District Court Judge