IN THE DISTRICT COURT
HELD AT AUCKLAND

Decision No. 38 /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	**KULJEET SINGH**
	(AI 85/07)
	Appellant
AND	**THE ACCIDENT COMPENSATION CORPORATION**
	Respondent

HEARD at AUCKLAND on 8 February 2010

APPEARANCES

Ms R Syed, Counsel for Appellant.
Ms C Potter, Counsel for Respondent.

RESERVED JUDGMENT OF JUDGE M J BEATTIE

[1] The issue in this appeal concerns the respondent's decision of 6 October 2005, whereby it suspended entitlements to the appellant on the grounds that his ongoing medical condition was not attributable to the low back injuries suffered by the appellant in December 1994 and April 2002 respectively, but rather, was due to pre-existing degeneration of the lumbar spine.

[2] It is Counsel for the Appellant's contention that whilst it is accepted that there was some pre-existing degeneration in the appellant's lumbar spine, a material and contributing cause of his ongoing chronic low back pain is attributable to the L4 to S1 disc injuries suffered in the accidents, the effects of which continue so that it cannot be stated that the

ongoing medical condition is wholly or substantially caused by the aging process of degeneration.

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

- In early 1994, when aged 34 years, the appellant emigrated to New Zealand from India.
- On 26 December 1994 the appellant suffered an injury to his lower back when he was attempting to push his car out of a drain. The car moved forward and he fell forward landing awkwardly injuring his back.
- The appellant immediately experienced severe low back pain and this was subsequently identified as discogenic pain.
- The appellant was seen by Mr Alaistair Hadlow, General Orthopaedic and Spinal Surgeon, in February 1995, in relation to his injuries. He reported to the respondent.
- Following an MRI scan in December 1996, Mr Hadlow performed an L4-S1 fusion, and an L5/S1 discectomy in April 1997.
- Despite such surgery the appellant continued to experience ongoing pain and was diagnosed as having a chronic pain syndrome.
- In April 2002 the appellant was involved in a motor accident when the car he was driving rolled and he injured his neck and low back. The medical opinion seems to be that this accident aggravated his earlier low back injury.
- The appellant has been seen by various medical specialists who have provided reports to the respondent from time to time.
- The respondent's decision to suspend entitlements was made following reports provided to the respondent by Mr Brian Otto, Orthopaedic Surgeon.
- In all, Mr Otto provided three reports to the respondent dated 21 July 2005, 19 September 2005 and 28 September 2005.
- The appellant sought a review of the respondent's decision and the review process was not concluded until 8 January 2007. The Reviewer considered all

the medical reports and in a decision dated 25 January 2007 the Reviewer found that Mr Otto's reports established that the appellant's ongoing incapacity was substantially degenerative in nature and that the evidence did not support any injury cause for his ongoing symptoms. The Reviewer therefore confirmed the respondent's decision to suspend entitlements.

- For the purposes of the appeal to this Court a further report from Mr Peter Robertson, Orthopaedic Surgeon, has been introduced on behalf of the appellant. Mr Robertson being a surgeon who initially saw and examined the appellant in 1996.

[4] The issue in this appeal requires a consideration of the medical evidence and the relevant passages from the various medical reports that have been provided over the years are as follows:

1. Report from Alastair Hadlow, Orthopaedic Surgeon, to ACC, dated 21 February 1995.

Mr Hadlow had been requested by the Corporation to assess the appellant's back injury suffered on 26 December 1994. Mr Hadlow noted that the appellant was experiencing an aching pain which fluctuated in severity and was located at the Thoracolumber junction. He noticed that X-rays taken of the Thoracolumber junction were normal with no significant bone or joint abnormality seen. It was Mr Hadlow's opinion that the appellant had damaged one of the discs in his back and was suffering from discogenic pain. He recommended that he continue with his osteopathic treatment.

2. Letter from Paul Eton, Orthopaedic Surgeon, to Alaistair Hadlow, dated 18 December 1996.

Mr Eton had been treating the appellant and sought the opinion of Mr Hadlow following the obtaining of an MRI scan. In his letter to Mr Hadlow, Mr Eton identified that the MRI scan showed degenerative disc at L4/5 and L5/1 and a disc prolapse at L5/S1 causing pressure on the nerve root. Mr Eton sought Mr Hadlow's view on further management of the appellant's condition.

3. Letter from Alastair Hadlow to Mr Paul Eton dated 17 January 1997.

This was Mr Hadlow's response to Mr Eton's request for his opinion. He confirmed that the MRI scan showed discogenic disease and with a central and right paramedian disc prolapse at L5/S1 interfering with the right S1 nerve root. Mr Hadlow indicated that an L5/S1 disc discectomy and an L4 to S1 instrumented fusion would be the suggested treatment.

4. Letter from Alastair Hadlow to appellant's GP dated 28 January 1998.

Mr Hadlow saw the appellant some eight months after he had carried out the spinal fusion surgery in April 1997. He reported that the appellant was still complaining of low back pain and in Mr Hadlow's opinion the appellant was fit for light duties.

5. Report from Mr Colin Hooker, Orthopaedic Surgeon, to ACC dated 4 June 1999.

Mr Hooker was requested to provide a medical report on the appellant's then condition. Mr Hooker noted that the appellant was not working and not doing so because of back pain. Mr Hooker had reference to X-rays of the lumbar spine carried out on 3 June 1999 and which noted the two-level lumbar fusion. He further noted as follows:

> There is evidence of extensive new bone formation, particularly on the right side between the transverse process of the IVth lumbar vertebra and the sacrum, and evidence of possible lamina bone removal or absence dorsally. The disc spaces, as far as can be seen, appear essentially normal.

Mr Hooker then stated:

> ...The diagnosis, in my opinion, is that of a lumbar disc injury with prolapsed of disc material, but with a disappointing result at this stage from surgical treatment, with Mr Singh unable to undertake his pre-accident work.
>
> From the history given to me today, including the past history, it must be accepted that the injury sustained in December 1994 is the sole cause of Mr Singh's current incapacity. There was no significant pre-existing abnormality of which I am aware.

6. Report from Dr G Emrys, Occupational Medicine Specialist, dated 12 August 2002 to ACC

Dr Emrys had been requested to review the appellant's condition subsequent to the back injury suffered in April 2002. Dr Emrys considered that the recent injury had aggravated the appellant's pre-existing chronic pain syndrome. He indicated that the appellant was

not suffering from any non-accident related medical problems. He noted that the appellant was continuing to suffer from persistent pain and he noted:

> "With encouragement I believe Mr Singh will gain increased control over his lower back pain and should be able to return to full-time employment."

7. Report from Dr Tony Chew, Occupational Medicine Specialist, dated 11 April 2003 to ACC.

Dr Chew was asked to consider whether it was appropriate for the appellant to be referred for a psychological assessment. His response in his letter was as follows:

> Mr Singh has a well-established chronic musculo-skeletal pain disorder. He may benefit from participating in a multidisciplinary pain management programme. This should be undertaken prior to commencing a RTW programme."

8. Report from Dr Xiong, Specialist in Rehabilitation Medicine, dated 28 October 2003 to ACC.

Dr Xiong was providing an Initial Medical Assessment to the Corporation. After carrying out an examination he gave his opinion on the appellant's then condition as follows:

> Based on the history and clinical examination it is quite evident that the diagnosis is chronic low back pain ever since the injury in 1994. Subsequently he had surgery and fusion posterolaterally between L4 to S1 with Moss Miami fixation.
>
> His injury was then aggravated by a new accident on the 22nd April 2002.
>
> From today's assessment the low back pain is relatively non specific and is almost certainly a chronic low back pain syndrome without any major radicular compromise at this stage. I do not feel that there are any further investigations or treatment required.

Dr Xiong said that the appellant should be encouraged to return to work.

9. Report from Dr E Dryson, Occupational Medicine Specialist, dated 12 September 2005 to ACC.

This was another Initial Medical Assessment. Dr Dryson made the following comments about the appellant's then condition.

> Mr Singh is reporting persisting and debilitating pain.
>
> There is no pathological abnormality to explain such pain on clinical examination. He does not fit the pattern of a fibromyalgia syndrome since he does not have the typical tender points associated with this condition.

> Although the medical file makes it clear that there was some degenerative disc disease in the low back, this has been subsequently treated by recent surgery and appearances are satisfactory on x-ray.
>
> There is therefore no objective evidence of any impairment related to injury on which to base a fitness for work assessment. It needs to be said on that basis therefore that in respect of injury Mr Singh is unrestrictedly fit to resume employment.

10. Report from Mr Brian Otto, Orthopaedic Surgeon, dated 21 July 2005 to ACC.

Mr Otto had a full history and after carrying out an examination he stated, inter alia, as follows:

> ...His back pain symptoms are associated with stiffness, but no neurological changes, and there doesn't appear to be any additional surgical management that will alter his current mobility and complaints of pain, and it is very likely that some of his symptoms are generated from the pathologically changed discs at L4-5 and L5-S1, and that there are psychosocial features also entering into the total clinical picture. There has been a breakdown also in his family circle and Mr Singh is separated from his wife, and living by himself, he has more responsibilities in self care cooking etc, all of which impact on his ability to resettle in employment.

He then further stated as follows:

> ...the changes in the discs were advanced at the time of the MRI scan and could equally be shown to be reflecting degenerative changes in the spine, aggravated by the effects of the injury, and brought to his attention when he attempted to push the car out of the mud in December of 1994 whilst in Hamilton. The event that precipitated his symptoms loaded already worn discs making them symptomatic. In my opinion, the early disc degenerative changes in the lumbar spine were the primary cause for the changes, and have not been subsequently relieved by the surgery and decompression, but as his case has been accepted by Accident Compensation for the surgical management, he does appear to be an ongoing responsibility for cover, based on that original acceptance.

Mr Otto did not consider that there was any treatment that was going to alter the appellant's clinical state.

11. Report from Mr Otto dated 19 September 2005 to ACC.

Mr Otto examined the appellant again and he also had X-rays of July 2005 to refer to. He noted that the appellant was still experiencing significant pain. He then commented as follows:

> ...The pain possibly is emanating the discs, which may have micro-movement despite the fact that there has been a instrumented fusion between L4 and the sacrum. He was known to have a central disc protrusion at L4-5, which led to his surgical procedure, and a worn disc at the adjacent level at L5-S1, and originally he appeared to get a satisfactory outcome from the fusion, but as he returned to work and sat, the increasing symptoms made it impossible for him to contribute reliably in a comfortable fashion in his work.

Mr Otto was asked whether the appellant's current disability or incapacity or function was due entirely or predominantly to degenerative or non-injury related components. His answer was as follows:

> ...The answer is that it appears that he may have had some wear at the L5-S1 disc, but the L4-5 central disc problem was created by the injury that he stated. The incomplete result from surgery may relate to ongoing changes within the disc at the L4-5 level.

12. Letter from Mr Otto to ACC dated 28 September 2005.

The Corporation had sought further detail from Mr Otto. He stated as follows:

> What is understood in terms of genesis of pain is that following even trivial injury in the presence of degenerative changes, additional change within the disc can start to generate pain, and noting that he had 2 levels of disc pathology in the lumbar spine, in the treatment it was essential to include both those discs in a fusion mass to try and resolve symptoms.
>
> 1. The pain and pathology and the combination of loss of disc height with effects on the facets joints posteriorly but much of the pain may be generated from within the disc itself and with the instrumented fusion, although the fusion mass may be solid, there may be ongoing symptoms of pain which is assumed to be coming from the degenerative disc itself. As noted in this mans case there was improvement for a period of time following the surgery, and he was able to get back to gainful employment, but then his back pain symptoms increased and this was despite the fact that a solid fusion was noted to be present, and it is therefore assumed that the ongoing symptoms relate to the changes within the disc generating the additional pain.
>
> 2. The answer is no. The surgery itself has been very efficiently carried out and the placement of the screws has been anatomical. The bone graft has been excellent and is good volume and is solid. The problem remains however that the primary pathology may have been within the disc and the potential to generate pain is still present, and is likely to be generating his symptoms. I don't believe the surgery has contributed to the incapacity but rather the original underlying disc degenerative changes at the 2 designated levels in the lumbar spine.

13. Report from Peter Robertson, Orthopaedic and Spinal Surgeon, dated 27 July 2009 to appellant's counsel.

Mr Robertson had first seen and examined the appellant shortly after he had undergone the fusion surgery and so was familiar with the appellant's background. He was asked to provide his opinion on the Review decision and of the medical evidence upon which the Reviewer had relied. His opinion is as follows:

> It is my expert opinion that the medical evidence provided establishes that Mr Singh suffered personal injury by accident sustaining a disc injury and disc prolapsed affecting the lower two lumbar discs in 1994. This subsequently led to ongoing disability requiring an evaluation with MR scan in 1996 which demonstrated the anticipated findings occurring after previous injury for the lower two discs. Mr Singh underwent surgery which was the accepted surgical procedure of the time and appears to have been uncomplicated. Unfortunately he failed to achieve a successful clinical result and has been left with ongoing pain and disability and has

> not worked meaningfully from that time. This lead to the requirement for ACC to continue paying earnings related compensation. When I had been asked to review Mr Singh in detail I thought it was unlikely that his situation would improve and the current level of disability should be reluctantly accepted. Therefore the causation of Mr Singh's current disability has been an original personal injury by accident and I cannot find any evidence to support an alternative hypothesis based on the information that has been provided to me. As noted the observation of degenerative or spondylotic changes on the MR scan performed two years after the injury is not a relevant way to exclude Mr Singh for coverage by personal injury by accident on the basis of the medical evidence and the literature. The subsequent events and Mr Singh's inability to return to work represent the inability for surgical and other treatments of this type of condition to universally achieve clinical success and are unfortunate but not infrequent.
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> This opinion I have given concurs with the opinion of Mr Colin Hooker, orthopaedic specialist, given in June 1999. It also concurs with one of the opinions given by Mr Otto in September 2005. For reasons that are unclear Mr Hancox has chosen to prefer one of the opinions put forward by Mr Otto in the conclusion of his review. As indicated above this opinion given by Mr Otto is not supported by the bio-medical understanding of the pathogenesis of annular tear and disc injury where trauma is involved.

[5] Ms Syed, for the appellant, submitted that despite some of the statements made by Mr Otto, the fact of the matter was that he acknowledged, in his report of 19 September 2005, that the appellant's L4/5 central disc problem was created by the injury. She submitted that whilst there was evidence of degeneration, there was no evidence that in fact it was the cause of the problem as opposed to the chronic pain created by the aftermath of the disc injury that he had suffered. She submitted that in those circumstances it could not be shown that the appellant's chronic pain syndrome was wholly or substantially as a consequence of degeneration and not significantly from injury by accident.

[6] Ms Potter submitted that the medical opinion was that the appellant had significant degeneration at the time of his first injury and that the final word from Mr Otto, in his report of 28 September 2005, was that the ongoing problem was the original underlying disc degenerative changes in the appellant's lumbar spine. She submitted that in those circumstances the respondent was correct to determine that the appellant was no longer eligible for entitlements under the Act.

DECISION

[7] The respondent's decision was made pursuant to Section 117(1) in that it considered that it was not satisfied that the appellant was entitled to continue to receive entitlements on the basis that his then medical condition was not attributable to the personal injuries for which he had cover.

[8] The respondent's assertion that it was not satisfied was based on the medical reports of Mr Brian Otto, who in all provided three reports to the respondent in the latter part of 2005.

[9] The third and final letter from Mr Otto, dated 28 September 2005, was in response to a request for further information made by the respondent. The Court was not provided with the letter of request and so it does not know precisely what were the questions posed and in respect of which Mr Otto answered, those answers being set out in Report No.12 above.

[10] Counsel for the respondent submitted that Mr Otto's response in that letter was to the effect that the surgery which had been carried out in 1997 was in every respect successful and it was Mr Otto's opinion that the primary pathology which was generating the pain was the underlying degenerative changes in the two levels of the appellant's lumber spine where that surgery had taken place.

[11] It is the case that pursuant to Section 26(4) personal injury does not include injury caused wholly or substantially by the aging process. Natural disc degeneration is part of the aging process and is therefore excluded from being considered as a personal injury.

[12] The appellant had obtained cover for a disc prolapse at L5/S1 and, as identified by Mr Hadlow, that disc prolapse was interfering with the right S1 nerve root. It was as a consequence of that condition that Mr Hadlow carried out a discectomy and what is described as an instrumented fusion, the discectomy being at L5/S1 and the instrumented fusion taking in L4 to S1.

[13] There can be no question but that the surgery was required to treat a covered personal injury and that whilst on the face of it the surgery appeared to be successful, nevertheless the evidence is that the appellant continued to experience pain and that this pain returned after that surgery within six months.

[14] The fact of the operation not being successful or as successful as would have been liked, was identified by Mr Hooker in his assessment of the appellant's condition in 1999 where he talks of the disappointing result from that surgical treatment and he did identify that the injury sustained by the appellant must be considered the sole cause of his current incapacity.

[15] The appellant's condition was further compromised by his back injury in the motor accident in 2002, and whilst it may be that the injury suffered at that time was confined to being a soft tissue injury in his lower lumbar spine, nevertheless it translated into a significantly greater level of pain.

[16] The medical specialists who saw and examined the appellant after the 2002 aggravation, namely Dr Emrys, Dr Chew and Dr Xiong, all identify the appellant as now suffering from a chronic pain syndrome attributable to that spinal injury and the spinal fusion that took place.

[17] The only sceptic was Dr Dryson who considered that there was no pathological basis for the pain, but it must be noted that Dr Dryson was carrying out an Initial Medical Assessment and considering the matter in relation to the appellant's ability to work, and it was not in the context of a causative link.

[18] I must note that in addition to the medical reports that were obtained over the years on the appellant's medical condition, there was a psychological report provided by a Dr Jan Reeves, in February 2005, who was looking at the appellant's situation from a psychological perspective and who gave as her opinion that there was a significant component of malingering in the appellant's presentation.

[19] The Court must consider that comment in the light of the many reports which have identified that the appellant does have a chronic pain syndrome, and I find that whilst there might be psycho-social features in the total clinical picture, as identified by Dr Jan Reeves, nevertheless the medical evidence from the medical specialists is to the effect that the chronic pain is real.

[20] The position as I see it is that Mr Otto, whilst acknowledging the appellant's pain, does not seem to acknowledge it as a chronic pain syndrome, and in that regard he is in a minority of one. The report from Mr Robertson is also confirmatory of the fact that the surgery failed to achieve a successful result and that the appellant has been left with ongoing pain and that the cause of that pain is from the surgical procedure. To suggest that it is only being caused by some underlying degenerative condition is to ignore the history of this appellant's condition.

[21] I find that the opinion expressed by Mr Robertson must be given significant weight as he is a specialist who first saw and examined the appellant in 2006 and has been familiar

with the appellant's condition since that time. His advice is quite clear that the ongoing pain problems being suffered by the appellant are attributable to his personal injury by accident, as that injury was treated by the subsequent surgery which has not been as successful as was hoped.

[22] In all the circumstances, I find that there was not sufficient evidence for the respondent to be satisfied, on the balance of probabilities, that the appellant was no longer entitled to receive entitlements. The evidence which I find to be indicative of the appellant's present condition, or at least his condition at the time the respondent made its decision, was to the effect that his chronic low back pain condition continued to be attributable to the aftermath of his personal injury first suffered in 1994, and aggravated in 2002.

[23] Accordingly, the respondent's decision is hereby quashed and the appellant is entitled to have entitlements reinstated from the date of suspension for so long thereafter as he can continue to establish qualifying criteria.

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

DATED this 3rd day of March 2010

M J Beattie
District Court Judge