

**IN THE DISTRICT COURT
AT AUCKLAND**

Decision No. [2014] NZACC 233

UNDER The Accident Compensation Act 2001 (**the Act**)
IN THE MATTER OF an appeal pursuant to section 151 of the Act
BETWEEN D WYATT
ACR 315/12
Appellant
AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Heard: At Auckland, 2 September 2014

Court: Judge J A Smith

Appearances: Mr P Schmidt for the appellant
Ms I McLachlan for the Accident Compensation Corporation ("**the Corporation**")

Date: 23 September 2014

RESERVED JUDGMENT OF JUDGE J A SMITH

- A. The Corporation decision and review decision are quashed.**
- B. Mr Wyatt was at the relevant time suffering from a general sensitisation pain disorder caused by the cumulative effects of his injuries of 2005, 2007 and 2008.**
- C. Mr Wyatt is to be reinstated to all entitlements due to him from 24 February 2011.**
- D. Costs are reserved. If parties cannot agree, any application is to be filed within 20 working days; reply 10 working days thereafter; and final reply, if any, 5 working days after that.**

REASONS FOR DECISION

Introduction

[1] Has Mr Wyatt developed a central sensitisation disorder arising from accidents in 2005 and/or 2007 and/or 2008, or a central somatoform mental injury arising as a result of those physical injuries?

Background

[2] In October 2005 Mr Wyatt suffered an elbow and arm injury when he lacerated his arm with a water blaster. A claim was accepted by the Corporation. Significant damage appears to have been done but Mr Wyatt returned to work after several weeks of recovery.

[3] In 2007 he suffered an injury when he was hit on the head by a digger arm. The Corporation then gave cover for scalp contusions, abrasions and whiplash injury. There is a dispute between the parties as to whether Mr Wyatt also suffered a brain injury at the time. He was certified unfit for five days and returned to work.

[4] In early 2008 he suffered a lumbar sprain when he jumped from a digger on uneven ground and jarred his back. He was given cover for this also, although the ACC provided no detail. On this occasion he was on compensation some four months. He appears to have suffered ongoing pain and investigations then began.

[5] As early as July 2008 Mr Barnes noted that he was presenting with rather diffuse symptoms. After several other reports he was referred in January 2009 to Dr Laubscher, a pain specialist, who noted wide spread musculoskeletal pain, right forearm pain, lower back pain and right sided headache. Dr Laubscher concluded that the appellant had pain disorder and recommended referral to the Auckland Regional Pain Service (TARPS).

[6] One of the TARP specialists Dr Thomas, an anaesthetist, opined that the appellant had “*widespread non specific musculoskeletal pain with central neural sensitisation*”. Subsequently the appellant was referred to Mr Otto, an orthopaedic specialist, who opined that there was no pathology to account for the appellant’s ongoing symptoms. He found that the appellant’s cervical spine was essentially normal.

[7] On 1 September 2009 the Corporation wrote to the appellant advising him that his entitlements in relation to the 2008 injury had been suspended. A review was filed but later withdrawn. The Corporation appeared to have ignored this injury from this point on, although it could be relevant to the further claims.

[8] Again, many reports followed with questions of a regional pain syndrome injury and in November 2010 Dr Simcock reported “*the inability to exert full power in his right arm is due to a mental block or in other words a psychological mechanism. I do not find any evidence of damage to the central nervous system or spinal cord causing impairment of motor function*”.

[9] In February 2011 the Corporation wrote to the appellant declining ongoing entitlements to the 2005 and 2007 injuries. A review was filed on the same day. Subsequently, on 25 March, a mental injury cover claim was also filed for chronic pain syndrome arising as a complication of the *original head injury* in 2007. The word somatoform disorder was used but the certificate itself discussed chronic pain syndrome.

[10] Dr Neff, a pain specialist, eventually concluded that the appellant’s symptoms could not be attributed to a psychiatric disorder. He was of the view that the appellant suffered from central sensitisation disorder.

Mental or physical injury

[11] Clearly modern science is drawing the distinction between mental and physical injury closer together. Recent studies have shown that neural brain triggers occur in respect of a number of symptoms previously thought to be mental disorders such as

phantom limbs and the like. Nevertheless, the distinction is still drawn in the Act and this forces specialists to consider whether certain symptoms are mental or physical.

[12] The Court has grappled with this on a number of occasions, and the most pertinent comment to this case is in *Kumara v ACC*¹ where Ongley DCJ noted at paragraph [40]:

...and an incidental question here is whether a pain disorder is a mental injury. Evidence offered at appeals indicates that pain disorders are often dealt with as the subject of mental injury cover. I note however that Dr Walsh stated that the term chronic pain syndrome usually refers to a physical syndrome not mental disorder. Evidence in numerous appeals connects chronic pain syndrome with central neural sensitisation, a disorder of neural pain perception or nociception, not a psychological disorder or a disorder of the mind.

Section 27 defines mental injury as a clinically significant behavioural, cognitive or psychological dysfunction. Central neural sensitisation does not readily fit into that description. A pain disorder may therefore raise questions relating to entitlements without requiring cover for mental injury. The point has not been argued here and could probably be regarded for the time being as a distinction without a difference.

[13] In this case, part of the Corporation's position was that the claim had been made for somatoform disorder, which they say is a mental injury. It seems to be implied that, because the specialist evidence is that it is central sensitisation disorder, it is therefore not a somatoform disorder and can be ignored.

[14] There seems to be a tendency by the Corporation to try and limit personal injuries by a diagnosis which is imposed either by the Corporation or a particular specialist. Quite clearly the cover under the Act is in respect of the injury, not in respect of a diagnosis which may occur in relation to it from time to time. In this case, if it is a mental injury it would need to be a consequence of a covered injury (which we will go on to discuss in due course). If it is a physical injury, it is argued by the appellant that it is the result of physical injuries that have occurred earlier, in other words a consequence of physical injury. As His Honour Ongley DCJ noted, it is largely a distinction without a difference. For current purposes the issue is whether or not Mr Wyatt has continuing sequelae to his original injuries, whether mental or physical. In this regard I see all these injuries as relevant, and consider the

failure to include the 2008 injury in the decision letter of 11 February 2011 as an error by the Corporation.

Is this a physical injury?

[15] I have concluded on the basis of the evidence before the Court that Mr Wyatt clearly has a physical disorder. My reason for this statement is the observation by a number of specialists of muscle spasming in various parts of Mr Wyatt's body at the time of consultation. Specialists have noted, and I accept, that muscle spasming cannot be faked. It is a physical symptom. Quite clearly in this case the cause of that spasming has not been clearly identified.

[16] For this reason I discount Mr Otto's opinion because he fails to observe the spasming cited by other relevant expert witnesses. The failure to observe a most basic physical manifestation brings into question Mr Otto's opinion as a whole. Nevertheless, Mr Otto seems to be correct in the sense that there are no clear changes to Mr Wyatt's bone structure. As an orthopaedic surgeon that is as far as his opinion could take us and in that there appears to be no dispute.

[17] In respect of this issue I agree that the most appropriate specialists are pain specialists, and also anaesthetists who deal with the particular issues of the nerve and conduction of pain. There appears to be a general agreement among most specialists that Mr Wyatt is suffering from some form of pain disorder.

[18] Given the clear evidence of muscle spasming I am prepared to accept for the current purposes that it is a physical disorder which could be described as a pain syndrome of central sensitisation disorder. In my view nothing turns on the name. Mr Wyatt has non specific pain and associated muscle spasm for which a clear cause cannot be found.

¹ [2013] NZACC 265

The argument

[19] The argument for the appellant was that such events can occur as a result of multiple injuries in some cases. The appellant contends that although not common, on a population basis it clearly occurs from time to time.

[20] There are many examples of such cases before the Corporation and in various decisions of which *Kumara* is but one. In *Kumara* there was an earlier injury which was aggravated by a second injury in 2007.

[21] The appellant contends that in the current case the cumulative effect of the accidents came to a point where the lumbar spine injury in 2008, relatively minor on its own, combined with the previous scalp contusions and the arm lacerations to create a pain response in his body.

[22] There was some argument as to whether the 2007 accident, where he was hit on the head, was in part responsible. At the end of the day I do not need to conclude this issue. I accept the issue is whether there was a combination of the three incidents that led to a situation where the pain sensitisation syndrome occurred in Mr Wyatt's body.

Evaluation

[23] I note there appears to be other cases where multiple injuries lead to similar outcomes. The question, quite simply, is whether I am satisfied that the pain syndrome from which he is now suffering is one that was caused (on the balance of probabilities) by a covered accident or a combination of them.

[24] I conclude that this question must be answered in the affirmative. This case, in my view, is well away from the margins. My reasoning is as follows:

[a] There was a proximity between the complaints of pain and the injury in 2008;

[b] There has been a consistency in the complaints made;

[c] The pain syndrome is clearly observable through muscle spasming in the body, which is otherwise unexplained;

[d] The first injury to Mr Wyatt was relatively significant in that it involved opening up his arm through a high pressure water blaster. This was a considerable intrusion into his bodily integrity.

[25] In assessing whether these factors are sufficient to establish causation the Court of course keeps in mind the test of *ACC v Ambros*². There is clear medical support for such an outcome, particularly in the conclusions of Dr Laubscher and Dr Neff. The difficulty for the Corporation is that there does not appear to be an alternative diagnosis. Whether it is a mental injury or a physical injury is irrelevant to the question of causation. The Corporation seemed to be suggesting that he has simply developed this pain syndrome for reasons completely unrelated to his injury and with other physical or other factors involved.

[26] The closest is Mr Simcock, who says:

Mr Wyatt does not have a single diagnosis

[27] and later:

I do not consider that there is a direct causal relationship described and his current condition.

[28] His explanation is that there is a significant psychological complaint.

[29] Even if psychological cause is an alternative explanation, I consider on a robust application of the evidence that the balance of probabilities would support a connection to the earlier injuries for the reasons I have outlined.

[30] The Corporation concluded that there was no *pathological* link between the current condition and the personal injuries of October 2005 and November 2007. They did not identify the accident of 2008 and I am unclear as to why that is. Nevertheless, I am unclear as to what the *pathological* link they are describing in

their letter of February 2011 is, and this does not appear to reflect the causative link required under the Act. The alternative claim is described as somatoform disorder, but that was only a possible diagnosis. The claim is for pain syndrome arising from one or more accidents. The decision of August 2011 is for pain syndrome arising from the injuries, and is therefore the same issue.

Outcome

[31] For the reasons I have described at some length, it is my view that the decision of the Corporation of 11 February cannot be sustained. Mr Wyatt has a claim for ongoing disability due to general pain sensitisation as a result of his claims of October 2005, November 2007 and June 2008 and as a consequence of those injuries or one of them.

[32] As to the 18 August 2011 decision, this is essentially the same issue. In my view nothing turns on whether the injury is described as physical or mental, although the circumstances of this case support physical injury due to the ongoing back spasming.

[33] In the circumstances the Corporation could not be satisfied at the time it suspended his entitlements that Mr Wyatt was not entitled to payment. I am unable to see any reasonable alternate thesis to develop through the reports that would explain the ongoing back spasming, which was clearly evident to most specialists. I consider the diagnosis of Mr Otto to be unsafe for the reasons I have outlined.

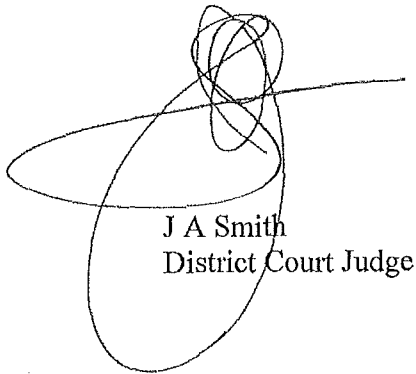
[34] Accordingly I conclude that:

- [a] The Corporation and review decisions of February 2011 and August 2011 are quashed.
- [b] That Mr Wyatt was at the relevant time suffering from a general sensitisation pain disorder caused by the cumulative effect of his injuries of 2005, 2007 and 2008.

[c] That he is to be reinstated to all entitlements due to him from 24 February 2011.

[35] This is a case where it appears that an order for costs in favour of the appellant would be appropriate. If the parties are unable to agree on a figure application is to be made within 20 working days, reply within 10, final reply if any, within 5 days thereafter.

SIGNED at AUCKLAND this 23rd day of September 2014



J A Smith
District Court Judge

