

IN THE DISTRICT COURT
HELD AT AUCKLAND

Decision No. [2011] NZACC 45

IN THE MATTER of the Accident Compensation Act 2001

AND

IN THE MATTER of an appeal pursuant to Section 149 of the Act .

BETWEEN **LIANGFANG LU**

(AI 337/09)

Appellant

AND

ACCIDENT COMPENSATION
CORPORATION

Respondent

HEARD at AUCKLAND on 11 November 2010

APPEARANCES

Mr J Tam, Counsel for Appellant.

Ms F Becroft, Counsel for Respondent.

RESERVED JUDGEMENT OF JUDGE M J BEATTIE

[1] The issue in this appeal arises from the respondent's decision of 6 October 2008, whereby it suspended entitlements to the appellant on the grounds that his then current medical condition was not attributable to the back injury suffered by him on 13 February 2008.

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

- The appellant is Chinese by ethnicity and came to New Zealand in 2002. At the material time the appellant was working as a painter.
- On 13 February 2008, while so working as a painter, he stood up from a squatting position and in turning around he twisted his back

and fell to the ground. He immediately began experiencing low back pain.

- The appellant consulted his GP, Dr H Kong, and he was referred on for acupuncture treatment.
- A claim for cover was lodged on or about 14 February 2008 on the occasion of the appellant first consulting his GP, and the injury was stated as being 'lumbar sprain'. Cover was duly granted to the appellant for his injury.
- The appellant continued to experience severe low back pain, and on 13 June 2008, at the respondent's request, he was referred to Dr Charles Ng, Musculoskeletal Specialist, for assessment and treatment plan.
- Dr Ng identified that he was still experiencing significant pain in his lumbar spine and he directed that an MRI scan be obtained.
- An MRI scan of the appellant's lumbar spine was carried out on 8 July 2008 and reported to Dr Ng.
- The MRI scan identified a foraminal annular tear of the L4/5 disc, with bulging and which Dr Ng advised was likely to be the cause of his chronic lumbar pain. Dr Ng directed the appellant to a physiotherapist.
- On 17 September 2008 the appellant was seen by Mr Brian Otto, Orthopaedic Surgeon, again at the direction of the respondent, and Dr Otto provided a report dated 17 September 2008.
- Details of Mr Otto's report will be considered hereafter, but it is the case that his bottom-line advice was that the appellant's ongoing lumbar pain problems were attributable to disc degeneration and not from the injury event.
- It was consequent upon Mr Otto's report that the respondent issued its decision of 6 October 2008 suspending entitlements.
- The appellant sought a review of that decision, and one of the matters addressed by the appellant prior to review was to advise that the

nature of the accident event was greater than had been Mr Otto's understanding, and that it had in fact involved a fall.

- A Mediation Conference was held on 1 December 2008 at which the appellant, through an interpreter, gave further details of the circumstances of the injury event, and that mediation resulted in an agreement whereby the respondent acknowledged that the injury was suffered when the appellant fell to the ground. The respondent undertook to advise Mr Otto of that fact.
- Consequent upon that further advice, Mr Otto provided a further report dated 17 December 2008.
- The appellant sought an independent assessment and opinion from Mr Alistair Hadlow, Orthopaedic and Spinal Surgeon, and he provided a report dated 3 February 2009.
- It is the case that the difference between Mr Hadlow's report and the two reports from Mr Otto, was that Mr Hadlow had actually examined and seen the MRI scan itself, whereas Mr Otto's reports had relied on the scan report only.
- When that difference was identified, the MRI scan itself was given to Mr Otto for consideration and he provided a further report on 15 May 2009.
- The Review Hearing was concluded after Mr Otto's further report had been presented, and in a Review Decision dated 8 July 2009, the Reviewer advised that he preferred the opinion provided by Mr Otto and he found that the changes noted at L4/5 were part of a degenerative condition rather than due to an acute injury, and the respondent's decision suspending entitlements was therefore confirmed.
- For the purposes of the appeal to this Court no further medical evidence has been introduced.

[3] The medical evidence in this case consists principally of reports from Mr Otto and one from Mr Hadlow, although of the three reports from Dr Ng, the third report

considers matters from a medico-legal perspective. The medical evidence to which the Court has been referred is as follows:

1. Report from Dr Charles Ng dated 13 June 2008 to ACC.

This report was an assessment report and treatment plan. The report noted that the appellant, now aged 45, had suffered a back injury some 20 years earlier in China, but had fully recovered from that injury and had not had any further back problems until the recent injuring event. Dr Ng's report identified that the pain and tenderness being experienced by the appellant was at the L4/5 and L5/S1 interspinous spaces. He recommended an MRI scan.

2. Report of result of MRI scan dated 8 July 2008.

That report stated, inter alia, as follows:

Findings: There is a mild compression fracture of the body of L1 with 20% loss of height and mild herniation of disc through the superior and inferior endplates of the vertebral body but no evidence of significant bone marrow oedema. This would suggest that the compression fracture is old. No retropulsed fragments or stenosis.

There is prominent dessication and mild loss of height of the T12/L1 and L1/2 discs. The foramina at these levels appear normal.

The other lumbar discs are reasonably well hydrated.

There is a small right paramedian annular tear of the L4/5 disc with mild bulging.

The central canal and foramina are unremarkable. The conus ends at T12. No abnormality is seen in the thecal sac.

On fat suppressed images no abnormality of the sacrum and SI joints.

Impression: There is an old compression fracture of L1. No evidence of canal stenosis. There is a small right paramedian and foraminal annular tear of the L4/5 disc with bulging into the foramen but no impingement on the exiting right L4 nerve root is seen.

3. Report from Dr Ng dated 18 July 2008.

This was a follow-up report consequent upon the MRI scan. Dr Ng stated, inter alia, as follows:

Mr Liangfang Lu attended today with the assistance of an interpreter. His recent MRI of the lumbar spine has demonstrated annular tears in the L4-5 disc which is the likely cause of his chronic lumbar pain. His pain remains the same, occurring with prolonged sitting and bending. Pain VAS is 30 to 40/100. Occasionally he uses analgesics.

4. Report from Mr Brian Otto dated 17 September 2008 to ACC.

Mr Otto had details of the MRI scan and the report of Dr Ng consequent upon it. It is to be noted that at the time of this report Mr Otto was under the impression that the

appellant twisted his back as he was getting off a chair. He then stated, inter alia, as follows:

In keeping with his age of 48 and the potential for disc degeneration throughout the years, he is demonstrating some annular tears at the 4-5 level and slight bulging of the L4-5 disc, and that does appear to be producing some mild back discomfort and stiffness, particularly on bending and turning functions.

The feature however is both those areas represent early degenerative changes and have been unmasked by his sitting and standing and turning action getting off the chair in his work programme, and there is no specific additional treatment apart from the anti inflammatories that he is receiving at the present time. He doesn't require any surgical management and it is important for him to improve his core body strength with a swimming programme, which he is undertaking at the present time, and notes that that has been beneficial.

...

As outlined, he has 2 levels of pain and symptoms in his spine. An original fracture from 20 years ago whilst living in China, has associated with it adjacent levels of wear at the D12-L1 and L2 discs, and there are changes at the L4-5 disc with some bulging of the disc and an annular tear, representative of disc degeneration at that level lower in the lumbar spine. Not infrequently slight alignment changes can put additional stress at lower levels in the lumbar spine and cause symptoms there, but it is clear that he has some early disc degeneration at the L4-5 along with the original injury site producing local symptoms.

This does appear to be disc degeneration at two levels, at an original fracture site, and then lower at the L4-5 level in the lumbar spine.

As noted, the action of getting off a seat after sitting doing printing work activity, and rotating, to produce back pain is not normally considered to be a personal injury by accident, and has simply served to unmask underlying changes in the lumbar spine, which were progressing, as part of the degenerative process. The stated injury event has served to unmask those underlying changes.

Frequently emphasis is laid on the fact that annular tears within the annulus but that can be seen to be part of a degenerative process rather than being initiated by a twisting or turning event, and if the annulus had been normal, then the forces required to produce that tear would have been significant, and that is certainly not part of the history in this case. For that reason I believe he has only unmasked the underlying changes that were already present in the lumbar spine, causing the secondary mechanical discomfort and spasm and changes which he complains of at the present time.

5. Letter from Dr Ng dated 13 October 2008 to ACC.

This was a letter from Dr Ng seeking to clarify the circumstances of the injury accident and also the relevance of the back injury suffered 20 years ago. He stated as follows:

I have been asked by Mr Lu to clarify that although he suffered an injury to his lower back 20 years ago, he recovered from that injury and has not had any further back problems until this current one. A compression fracture of the L1 vertebra was seen on his x-ray and MRI. This is likely to relate to the back injury 20 years ago. However, his current pain and clinical features relate to the lower part of the lumbar spine and are consistent with a L4-5 disc injury.

6. Report from Mr Otto dated 17 December 2008.

Mr Otto was asked to report again following being informed of the exact circumstances of the injury event, as well as the old injury. He stated, inter alia, as follows:

...The old fracture that he suffered at the thorocolumbar junction predominantly involving the L1 vertebra with changes adjacent to it, reflects the injury of some 20 years beforehand whilst in China, and does not appear to be the symptom producing area, although it has to be considered that the spine acts as a whole column complex, and that angular deformity at a junctional zone such as at L1 (thorocolumbar junctional area) can change the lordosis and may be a factor in altered mechanics lower in the lumbar spine, with accumulative change over succeeding years.

The pathology that was being identified and then dealt with was disc degeneration, that is a narrowing of the L4-5 disc space, a thinning of the wall of the annulus, which contains disc material, and an asymmetrical bulge, with a tear in the annulus, and those changes are clearly degenerative in origin.

If the disc had been normal, the force required to produce symptoms from a tear or damage to it, is a very significant one, but if in fact pre existing changes have thinned the wall of the annulus and caused the disc to change in height, minor trauma can produce pain and unmask those pre existing changes, and that is a more accurate description of what is, in my opinion, the clinical state with this man.

...

His current clinical situation is that he has disc degeneration at the L4-5 level, with discogenic reference pain and an element of back spasm and changes that suggest that there may be some underlying segmental instability associated with these degenerative changes.

The original fracture at L1 and the associated changes in that area may have served to change the alignment of the lumbar lordosis somewhat, and accentuate changes further down the spine at the L4-5 level, but the primary pathology is focused at the L4-5 level, and that is the symptom producing level at this review.

The cause of the changes at the L4-5 level, in my opinion, are accumulative disc degenerative changes over a number of years, which have now become manifest and reflect the degenerative change in the slowness with which the symptoms are resolving, noting that the underlying pathology is established and is likely to continue to contribute to symptoms now and into the future for a further period of time.

The effects of any injury, although not noted to be within the scope of my definition, are spent. The ongoing symptoms reflect the underlying degenerative changes within the L4-5 disc, which is a pre existing change, noting that they were clearly established on the MRI scan 4 ½ months after the stated injury, and in my opinion, require a much longer period of time to be established, and therefore preceded the injury event, and have been simply unmasked by it.

7. Report from Alistair Hadlow, Orthopaedic and Spinal Surgeon, dated 3 February 2009.

The first point to be noted is that Mr Hadlow actually had the MRI scan itself and his report was made consequent upon him reviewing the scan. Mr Hadlow then stated, inter alia, as follows:

...I have reviewed this MRI scan. This confirms the old wedge compression fracture at L1 with discogenic disease at T12/L1 and L1/2. The discs below show normal signal. There is a suggestion of a small right paramedian annular tear in the L4/5 disc as evidenced by some mild bulging.

Liangfang came to see me today for a second opinion with regard to his back. What is of concern to him is a report by Dr Brian Otto which has stated that he has degenerate changes in the L4/5 disc which is the cause of his current ongoing symptoms.

I questioned Liangfang today as to whether Mr Otto had actually reviewed the MRI scan. His answer was that Mr Otto had not personally reviewed the MRI scan as he did not take it along to Mr Otto's interview.

On the basis of my review of the MRI scan today, the signal in the L4/5 disc is almost normal and there is no evidence of accumulative disc degenerate changes which would have occurred over a number of years as a result of altered biomechanics in Liangfang's spine as a result of his previous fracture at L1, as suggested by Mr Otto.

It is my opinion that Liangfang on the basis of his clinical history and the MRI findings, most likely had an acute annular tear of the L4/5 disc. This would be in keeping with an accident as he described.

8. Report from Mr Otto dated 15 May 2009 to ACC.

Mr Otto was asked to consider the issue again and the MRI scan itself was provided to Mr Otto for that purpose. Mr Otto stated, inter alia, as follows:

...The spasm and restricted motion in the spine could easily have been explained based on an aggravation of the pre existing changes at the thorocolumbar junction, that is the old fracture at L1 and the adjacent disc pathologies.

It is noted that clinically he indicated that that was the major zone from which his pain appeared to be emanating, and to that extent the pre existing injury from the road traffic accident 30 years ago may well have been the major symptom producing area.

More emphasis has been placed on the lower part of the lumbar spine at the 4-5 level, because of the associated muscle spasm, and the subsequent radiological evidence of an asymmetrical bulge at the L5-S1 disc, and the fact that that change of itself can become symptom producing and there would be no doubt that that would be of benefit in Mr Lu's case if it was proven to be the major symptoms producing change in his spine, where a new injury could be identified as causing that change.

This is where the problem arises in this case, in that the assumptions are made that that is the sole symptom producing area of back pain in this case, and yet the radiological evidence of itself, in the absence of neurological change, makes that diagnosis presumptive.

The only way in which the relevance of the change at the L4-5 level can be established would be by discography and reproduction of the original pain and symptoms and muscle spasm in this case, and that is not justified as entering a disc with a needle to replicate the pain when no additional specific treatment will be required, carries with it a risk of further changing the disc and problems in the future, and that is not justified.

In the absence of that specific supporting evidence, my assessment of the spine, and I have reviewed the disc that we have as well as the MRI scan, is that the annular bulge and thinning of the wall of the annulus are part of a degenerative process, and that remains my opinion.

Discography would be very helpful in showing the degree of change within the disc that I suspect is present, and vindicate that opinion, but as stated above, is not justified noting that it will not lead to additional specific treatment in this case.

The issues from a clinical standpoint remain. The described injury does not fit with my opinion of a personal injury by accident, there are pre existing changes from an old fracture at L1 with adjacent disc pathology, that on clinical grounds he was identifying initially as the major site of his back pain and also at the repeat review.

[4] Mr Tam, Counsel for the Appellant, submitted that Mr Otto's first two opinions must be questioned in that they were given on the basis of not seeing the MRI scan and also an incorrect understanding of the circumstances of the injuring event. Counsel submitted that it is only Mr Otto who refers to degeneration at L4/5 and this is not the assessment made by either Dr Ng or Mr Hadlow.

[5] Counsel referred to the third report of Mr Otto which looked at the situation at L4/5 and where Mr Otto identified that the only way the matter could be properly established would be by discography, and he referred to the fact that without discography Mr Otto was merely giving his opinion. Counsel submitted that in those circumstances the true factual basis, necessary to satisfy the legal requirements for suspension of entitlements, had not been made out.

[6] Ms Becroft submitted that there is clear evidence of a pre-existing condition, and she further submitted that the opinion of Mr Hadlow was brief and less comprehensive than that provided by Mr Otto in relation to the annular tear of the L4/5 disc. Counsel submitted that the only consequence of the injuring event was an exacerbation of symptoms of the pre-existing degeneration. Finally, Counsel submitted that the standard of proof required to establish suspension would not require the carrying out of discography.

DECISION

[7] The respondent's decision in issue is one made pursuant to Section 117(1) of the Act, and as is now well-established following the decision of Justice Mallon in *Ellwood* [2007] NZAR 205, the onus is on the respondent to establish, on the balance of probabilities, that there is no eligibility for continuation of entitlements. Furthermore, it was stated in that decision that where the evidence was in balance or unclear the respondent would not be able to be so satisfied of its right to suspend.

[8] The evidence from the MRI scan clearly identifies that there is some discogenic disease associated with the old fracture at L1, as the discs of L1/2 show a below

normal height. It is the clear advice of Mr Hadlow, on his examination of the MRI scan, that the signal in the L4/5 disc was almost normal and no evidence of the cumulative disc degenerative changes. In other words, Mr Hadlow was quite clear that there was no degeneration at that level and that the medical condition identified, of an annular tear, was a condition caused in the accident as described by the appellant.

[9] Mr Otto, on the other hand, identified degeneration without actually seeing the MRI scan, and with the MRI scan report making no reference to degeneration at L4/5, simply identifying a foraminal annular tear. In the final opinion given by Mr Otto, he simply states that the annular bulge and thinning of the wall of the annulus are part of a degenerative process and that remains his opinion.

[10] Whilst it is clear that any injury or ongoing effects of the old fracture at L1 cannot be the subject of any cover or entitlement, the situation as identified by both Mr Hadlow and Dr Ng, is that it is the annular tear at L4/5 which is causing the problem.

[11] Mr Otto uses the phrase "in the absence of specific supporting evidence", that is, from a discography, he would remain with his opinion that the circumstances of the annular tear at L4/5 are of long-standing, and that the condition was simply unmasked by the injuring event.

[12] The information which Mr Otto had for his first two reports was the MRI scan report which identified the old compression fracture at L1 and it then stated that the other lumbar discs were reasonably well hydrated. It then stated: "There is a small right paramedian annular tear at the L4/5 disc with mild bulging". From that evidence, Mr Otto has identified disc degeneration at L4/5 and which he says is a cumulative disc degeneration over a number of years. As earlier noted, Mr Hadlow when examining the scan identified no degeneration, as had been the statement by the radiologist himself.

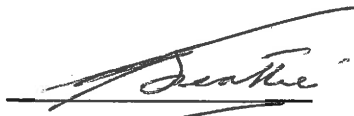
[13] In those circumstances, I find that Mr Otto has not correctly identified the state of affairs when he had the opportunity of examining the MRI scan, and he has stuck to his tried and true assertion that degeneration is the cause.

[14] In the present case, I find that his opinion cannot achieve a sufficient degree of probability, in the light of the opinions of Mr Hadlow and Dr Ng, and therefore it is a case where the respondent did not have sufficient information upon which it could determine that entitlements for the appellant could no longer continue.

[15] Accordingly, the respondent's decision suspending entitlements is hereby quashed, and entitlements to the appellant must be reinstated as from the date of suspension.

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

DATED this 17th day of February 2011

A handwritten signature in cursive script, appearing to read "Beattie", is written over a horizontal line.

M J Beattie
District Court Judge