

**IN THE DISTRICT COURT  
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE  
KI TE WHANGANUI-A-TARA**

**[2022] NZACC 197      ACR 264/20**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	GAYE STEWART Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing:            3 October 2022  
Held at:            Hamilton/Kirikiria

Appearances:    K Koloni for the Appellant  
                         P McBride for the Accident Compensation Corporation

Judgment:        10 October 2022

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**RESERVED JUDGMENT OF JUDGE P R SPILLER**  
**[Loss of weekly compensation where vocational independence determined –  
s 112, Accident Compensation Act 2001 (the Act)]**

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**Introduction**

[1] This is an appeal relating to the decision of a Reviewer dated 10 November 2020, which covered three matters. The Reviewer:

- (1) dismissed the review of the Corporation’s decision, dated 20 July 2012, advising Ms Stewart that she had vocational independence;
- (2) quashed the Corporation’s decision, dated 18 December 2019, accepting that Ms Stewart’s vocational independence had deteriorated from 18 May 2018; and

- (3) made an award of costs totalling \$1,357.59. As noted in paragraph [51] below, the second part of the Reviewer's decision has since been superseded by a subsequent decision of the Corporation dated 5 May 2021, and so is no longer part of this appeal.

[2] At the hearing on 3 October 2022, Ms Koloni advised that Ms Stewart would be called to give evidence. This was despite clear directions provided earlier by the Court that no further evidence would be provided after submissions. This Court notes the importance of the principle that submissions should follow the close of evidence, to allow for an orderly and rational process. However, the Court may hear any evidence that it thinks fit (s 156(1) of the Act), and there were certain matters of fact which remained unclear to the Court. Primarily, in the interests of justice being done and seen to be done to Ms Stewart, the Court allowed her to give evidence, be examined and cross-examined.

### **Background**

[3] Ms Stewart was born in October 1956. She worked in administrative roles, most recently as a counter manager.

[4] In April 1986, Ms Stewart received cover for sprain/strain of her left ankle, and for causalgia due to post-traumatic nerve pain in her left ankle. As a result of this injury and the limp she developed, her lower back became injured and painful. She undertook an impairment assessment for her left foot and her injured back. Ms Stewart was subsequently awarded permanent impairment of 23% and received financial compensation.

[5] On 1 May 2009, Ms Stewart had an accident in the gym when she was squatting with weights and felt pain in her right knee. She suffered a sprain of the right knee and leg and an acute meniscal tear, medial, with anterior horn, for which the Corporation approved cover. She was not able to work full-time after this accident. While she endeavoured to return to some part-time work, this was not successful due to pain and inflammation in her right knee.

[6] On 23 June 2009, Ms Stewart had surgical replacement of her right knee joint, performed by Ms Margy Pohl, Orthopaedic Surgeon. Following the surgery, Ms Stewart had chronic infection of the joint, causing early loosening of the prosthesis. She received cover and weekly compensation.

[7] On 14 April 2010, Ms Stewart was seen by Mr Marc Hirner, Orthopaedic Surgeon, who found that she had a swollen, painful knee with restricted range of movement.

[8] On 28 April 2010, Mrs Stewart's GP, Dr Cassandra Winton, submitted an ACC45 medical certificate noting "Complications of infection in the bone during R knee joint replacement".

[9] On 2 July 2010 and 25 February 2011, Ms Stewart received surgical revision on her right knee.

[10] On 5 September 2011, Ms Joanna Kaipō, Occupational Assessor, conducted an Initial Occupational Assessment (IOA) of Ms Stewart, and 15 work types were identified for her employment.

[11] On 10 October 2011, Dr Kantilal Kanji, GP, who had an interest in occupational medicine, completed an Initial Medical Assessment (IMA) report for the purpose of considering vocational independence. Dr Kanji noted:

Gaye was originally seen by Mr Hirner on 14 April 2010, over 10 months following a total knee replacement. This was complicated by unrelenting pain and stiffness, which had no diagnostic cause. Mr Hirner found that she had a swollen, painful right knee with restricted range of movement. An X-ray showed definite evidence of loosening of the tibial component ....

Gaye was pleasant, open, cooperative ... in some discomfort while sitting during the history taking. She had difficulty with ... mobility during the assessment and manoeuvring on the examination bed. She is unable to walk unsupported for example leaning on the wall or walking stick. Heel and toe walking was not possible bilaterally. There was flexion deformity of 25°, with flexion possible to only 55°. There was hyperalgesia from the distal 3rd of the thigh to include the knee as far as the ankle. The right foot was normal ...

[12] Dr Kanji assessed that none of the identified work types was medically sustainable, including:

#### General Clerk

This work type is not suitable because there is minimal opportunity for posture variability and there are physical tasks that Gaye would not be capable of. This is based principally with reference to standing, walking, sitting, lifting, carrying, pushing or pulling reaching, squatting or crouching, kneeling.

Gaye agrees and had the following comments “can't sit there with the leg up”.

#### Accounts Clerk

This work type is not suitable because the physical demands exceed the identified restrictions noted above which would adversely affect Gaye. This is based in particular with the need for constant sitting.

Gaye agrees and had the following comments “the same thing”.

#### Office Manager

This work type is not suitable because Gaye would not be capable of the tasks of this work type which exceed the identified restrictions noted above. This is especially so with respect to standing, sitting, walking.

Gaye agrees and had the following comments “had to stop 3 of my jobs because of my knee”.

#### Credit or Loans Officer

This work type is not suitable because the tasks required are materially present to varying degrees, beyond Gaye's capability, based on the restrictions noted above. This is based specifically with reference to constant sitting.

Gaye agrees and had the following comments “can't do anything for sitting or standing for any period of time”.

[13] Dr Kanji recommended that further assessment should be arranged once better pain management had been achieved. Dr Kanji observed:

The current vocational incapacity is wholly related to the covered injury.

There is no contribution from non-accident factors to the current vocational state.

Gaye will not be able to return to pre-accident employment as a counter manager based on today's assessment and work tasks required in that specific occupation.

It appears that there is the outstanding issue of chronic pain, pain management and the dosage of gabapentin being too low.

It is this pain that is rendering unsuitability of any work types above.

[14] On 20 October 2011, Dr Kanji responded to questions put by the Corporation:

*Q 1. With regards to her driving what are her restrictions?*

Sitting and flexion deformity of the right knee.

*Q 2. You have mentioned for a further assessment to be completed in 3 mths, why 3 mths if pain has been discussed and being managed can this be reassessed earlier?*

Possibly, and 3 months has been removed, however responses to pharmacological changes may take time to manipulate dosages et cetera.

*Q 3. Is it the pain stopping her from being able to return to identified work types?*

Yes it is, and mentioned under analysis ....

[15] On 9 November 2011, Ms Stewart completed eight weeks of a 12-week Functional Reactivation Programme. Ms Vasantha Bjornholdt, Physiotherapist, noted that non-completion of the programme was due to Ms Stewart's pain and swelling. Ms Stewart later resumed physiotherapy sessions but continued to experience ongoing swelling and pain.

[16] On 23 December 2011, Ms Claire Thorne of the Corporation referred Ms Stewart for a Functional Capacity Evaluation (FCE). Ms Thorne noted that Ms Stewart had been very slow at progressing after revision to her knee replacement, and there had been an increase in pain and reduced movement when the specialist felt that she would be able to return to work.

[17] On 16 January 2012, Mr Robert Sellars, Physiotherapist, completed an FCE of Ms Stewart. He noted that Ms Stewart reported that she was generally better but still had significant variation in how her knee was feeling and how much mobility was present. She reported aggravating factors as sustained standing (more than five minutes), walking (more than 10 minutes), and driving and household chores involving knees. She said that she would like to return to work in the future but thought that she was currently able to do very little.

[18] In Mr Sellars' report, he recorded Ms Stewart's pain:

Before the Functional Capacity Evaluation (FCE) of Ms Stewart, her pain was noted as 7/10+ (very strong pain); during the FCE there was a slight increase with the material handling test; and after the FCE the pain was noted as 8/10+ (very strong pain).

[19] Mr Sellars' summary of Ms Stewart's FCE was:

Clinically her right knee is functionally stable with no significant muscle wasting. Mild swelling of the joint persists. No give-way was noted and her presentation has improved significantly compared to when she was seen by Dr Kanji three months ago.

Physically she demonstrates ability for light-medium work. I estimate she has ability for weightbearing (standing and walking) on an occasional basis.

Psychologically she is hypervigilant to her symptoms and reports marked psychosocial and psychological issues and moderate depression. These factors are certainly affecting her recovery.

Functionally and vocationally I estimate she is physically safe for fulltime light medium work.

[20] On 24 January 2012, Mr Hirner provided a report in response to questions from the Corporation. He noted that he had read through the functional assessment. He recorded that Ms Stewart was now fit to return to work. However, Mr Hirner advised that Ms Stewart's return to the pre-injury job of a Cosmetic Counter Sales Assistant was thought unlikely, and that it would be almost impossible for her to do any employment that involved standing for long periods of time. A complicating factor was that she had fibromyalgia and she needed to be trialled at various jobs before return to full-time employment.

[21] On 3 February 2012, Ms Stewart suffered a further accident, resulting in pain and bruising to her calves and knees.

[22] On 22 February 2012, Ms Elizabeth Mason, Physiotherapist, noted that Ms Stewart's pain remained 6/10 on the pain scale, which could increase to 8/10 depending on activity. Ms Mason also noted Ms Stewart's fibromyalgia, depression, and limitations in functional deficits at work and/or home.

[23] On 2 March 2012, Dr Winton provided a medical certificate to the Corporation noting Ms Stewart's incapacity for any work duties from 29 February 2012 for 60 days, and then capacity to work for 10 hours a week for six weeks.

[24] On 7 March 2012, Ms Joanna Kaipo of the Corporation prepared a work preparation report and noted that Ms Stewart was continuing to experience a range of injury-related issues including pain and discomfort in her right knee.

[25] On 3 April 2012, Ms Stewart started a work trial with a hearing centre, for nine hours per week in the first two weeks (split over three days in the week). Ms Stewart did not maintain this work plan due to the pain and suffering she experienced after the second week.

[26] On 7 June 2012, a Vocational Independence Occupational Assessment (VIOA) was undertaken by Ms Leanne Wallace. Twenty separate work types were identified as suitable.

[27] On 11 June 2012, Dr Winton completed a Vocational Independence Assessment: General Practitioner questionnaire, answering the following questions:

*Injury Details: What treatment and medication is the client currently receiving?*

Pain management - Gabapentin, Celebrex, exercise in pool.

*Are there any non-injury related conditions that impact on the client's ability to return to the workforce?*

Suspected fibromyalgia. Stress related to husband's current condition (new diagnosis of multiple myeloma).

*Does the client have any capacity for work in relation to their pre-injury occupation?*

No (was standing all day).

*Does the client have any capacity to work in other types of employment?*

Reception work, limited hours, approx. 20 / wk.

[28] On 21 June 2012, Mr Iain Kelman, Orthopaedic Surgeon, provided a Vocational Independence Medical Assessment (VIMA) report, following his examination of Ms Stewart. Mr Kelman noted that Ms Stewart underwent a short work trial, but that this was not entirely successful as her husband suffered an illness during this time. Mr Kelman further noted that Ms Stewart complained of the following symptoms in her right knee:

- Pain in her right knee which she grades at 6-7/10 on the Visual Analogue Scale.
- Sharp pain of the medial joint line.
- She states there her leg feels heavy and tight.
- There was stiffness of her knee and she states she is not able to bend it further than 80° of flexion.
- She stated that when she was working her knee swelled after five hours of work.
- Sensation to the reduced lumbar lordosis distal to the knee was normal.
- The function of her ankle, foot and toes was normal.
- She had subsequently developed mechanical back pain.
- Her standing time is limited to 5-10 minutes.
- She is able to walk for 20 minutes with a walking aid.
- When sitting she requires to have her right leg elevated.
- The pain wakes her from her sleep at night.
- She has been told that she has sleep apnoea but this is not being treated at the present time.

[29] Mr Kelman diagnosed an infected total right knee replacement, treated by a two-stage revision which had been complicated by stiffness and chronic pain. Mr Kelman assessed Ms Stewart's ability to undertake employment in six identified roles for 30 hours or more per week:

#### 1. General Clerk

She states that she has a lot of experience in clerical work.

With respect to the Work Type Detail Sheet this is a sedentary position. Sitting constantly is required. Bending, lifting and carrying is not a significant component. It would be possible for her to carry out the tasks described for 30 hours per week.

#### 2. Accounts Clerk

She states that she has done this work in the past and could possibly do so in the future.

With respect to the Work Type Detail Sheet this is work of a sedentary physical demand. Bending, lifting, carrying, walking and driving are not required. She is able to undertake the physical tasks described and therefore this work is medically sustainable 30 hours per week.

#### 3. Office Manager

She states that she could do this work.



With respect to the Work Type Detail Sheet this is a sedentary position.

Standing and walking does occur within the office area. Bending, squatting and crouching, kneeling and driving are not required. She is able to undertake the physical tasks described and therefore this work is medically sustainable 30 hours per week.

#### 4. Credit or Loans Officer

She states it is possible for her to do this work.

With respect to the Work Type Detail Sheet this is a sedentary position. Lifting and carrying is not a significant component. Bending, squatting and crouching is not a component. Driving is not required. She is able to undertake the physical tasks and therefore this work is medically sustainable 30 hours per week.

#### 5. Coding Clerk

She felt it was possible for her to do this work

With respect to the Work Type Detail Sheet this is work of sedentary physical demand. Standing, walking and carrying is not required. Driving is not required. She has the physical ability to undertake the tasks described and therefore this work is medically sustainable 30 hours per week.

#### 6. Cost Clerk

She felt it was possible for her to do this work.

With respect to the Work Type Detail Sheet this is work of sedentary physical demand. Sitting is required. Standing and walking occurs only within an office environment. Driving is not required. She has the physical ability to undertake these tasks and therefore this work is medically sustainable 30 hours per week.

[30] On 20 July 2012, the Corporation advised Ms Stewart that she was vocationally independent, based on information from her occupational and medical assessments. The Corporation noted that this information showed that Ms Stewart had vocational independence and an ability to work for 30 or more hours a week in the above six types of work. Weekly compensation ceased from 20 October 2012.

[31] On 15 May 2018, Ms Stewart suffered the onset of sudden pain in her right knee when she tripped while walking. On 21 May 2018, an injury claim form was lodged by Ms Cheryl Hobson, Physiotherapist. Cover for a sprained right knee was accepted by the Corporation.

[32] On 3 July 2018 Ms Stewart underwent an x-ray of her right knee. Ms Rebecca Hughes, Radiologist, noted:

There is a long stem right total hip joint replacement in situ. Position appears satisfactory.

No periprosthetic lucency to suggest loosening.

The patella has been resurfaced.

A small knee joint effusion is noted.

[33] On 12 July 2018, Mr Stewart Hardy, Orthopaedic Surgeon, reported:

... Clinical examination today reveals a woman who walks with a slight limp. She has a moderately swollen knee, which almost fully extends and flexes to just about 80°.

... I agree that Gay is in trouble with her knee and in the first instance I think we need to rule out infection, initially with an ESR and C. reactive protein.

[34] On 21 August 2018, Mr Neville Strick, Orthopaedic Surgeon, reported:

This is a difficult problem to really nail down exactly what is going on and I think there may be a place for opening the knee up and considering if there is evidence of loosening a full revision.

[35] On 27 August 2018, Mr Strick lodged an assessment report and treatment plan, requesting funding to perform a right revision knee joint replacement. The specific diagnosis was a “failed revision TKJR right knee”.

[36] On 11 October 2018, Dr Sudhindra Rao, the Corporation’s medical advisor, stated:

... I note that the client underwent a treatment injury claim which was retrospectively accepted. The reasons for this are uncertain given Mr Taine’s original comment. However, it is to be noted that the client has never really recovered satisfactorily from the revision knee replacement and has ongoing symptoms with the more recent claim, suggesting some aggravation of the knee. However, all the testing including bone scan suggests that there is no strong evidence for infection and this is reflected by the comments of Mr Hardy who is more emphatic than Mr Strick in regards to the possibility of infection.

I would like this case discussed in the full CAP meeting. I would appreciate if all the imaging including the bone scan could be obtained.

[37] On 30 October 2018, a Clinical Advisory Panel (CAP) considered the position, noting that the pathology for which surgery was required was unclear, but that the cause of the current knee symptoms was likely linked to the covered treatment injury.

[38] On 6 December 2018, surgery was undertaken on Ms Stewart's right knee by Mr Strick. The surgery was funded by the Corporation.

[39] On 23 September 2019, Dr Peter Thakurdas, the Corporation's medical advisor, provided a medical comment:

Client's symptoms in/around mid 2018 prompted Orthopaedic Surgeon review (see 12/07/2018 report above). The 12/07/2018 examination findings appear worse than those of the 21/06/2012 VIMA. When considering the 21/08/2018 ARTP, CAP opined that Client's right knee symptoms and need for (06/12/2018 revision) surgery was considered related to the covered treatment injury.

Client's R-knee condition in July 2018 were sufficient to prompt referral by Orthopaedic Surgeon to another that prompted further surgery, Client's VI at that stage could be considered [in retrospect] at best questionable. It seems more likely that there was VI deterioration at the 12/07/2018 Surgeon's review at which point Client's symptoms and examination findings seem worse than those of the 21/06/2012 VIMA.

It is difficult to speculate about VI deterioration from 18/05/2018. However, based on above, there may be a case for backdating VI deterioration to the 12/07/2018 Surgeon's review.

[40] On 25 October 2019, Ms Marea Brown, Occupational Assessor, completed a further Vocational Independence Occupational Assessment (VIOA). Ms Brown considered Ms Stewart's work history, education, training and transferrable skills and determined that she was suitable for 13 work types. Ms Brown concluded that Ms Stewart had "no vocational barriers to any of the work types identified in this assessment".

[41] On 20 November 2019, Dr David Prestage, Occupational Physician, completed a further Vocational Independence Medical Assessment (VIMA) and concluded that she did not have vocational independence:

According to Ms Stewart, she still feels as if there is an area from mid-calf to mid-thigh that has a tight painful rubber band around it. It is a deep pain that

wakes her at night and stops her sleeping well. At the moment she is taking pregabalin 300 mg twice a day and celecoxib 200 mg twice a day, in addition to regular paracetamol.

Ms Stewart said she reads a lot and does some computer work. When she is not coughing, she goes to hydrotherapy for up to 2 hours 3 times a week. If she does not go every few days, she starts to struggle. This has been the case during her recent and ongoing presumed viral chest infection.

Ms Stewart said she cannot physically stand to cook for more than 5-10 minutes due to increasing back pain which she feels is due to limping and favouring one leg. She cannot walk for more than about 5 minutes. She generally uses a walking frame which gives her something to sit on.

Ms Stewart and her husband live in a caravan so there is not much to do but it takes her three goes to do the vacuuming of what is a small area. She does not do much of the cooking anymore due to her difficulties with standing. When cooking, she generally cooks relatively simple dishes. She said it is frustrating she cannot lead a semi-normal life. She uses a laundromat for most of their laundry and uses small airers.

Ms Stewart said she 'hates steps and stairs with a vengeance'. She struggles to go up the steps into the caravan. She cannot walk and hold a cup of coffee, as she has to hang on with one hand.

According to Ms Stewart, she finds it difficult to come to terms with being unable to do the things she used to do. She drives when she feels her knee will cope but generally only for short distances. She cannot drive for a couple of hours, as her leg becomes too painful and stiff.

Ms Stewart said she potters around as much as she can but she has to do things in 'stops and starts'. She regularly sits through the day, generally with her leg elevated as it becomes too painful if it is down for too long. At times, she can only sit at a computer for about half an hour at a time when she is sitting on her bed with her leg up but her tolerance at a computer on a desk is much less.

Ms Stewart most recently worked in a work trial at Whanganui Hearing Centre. She started with 3 hours per day twice a week but when the hours were increased, she had to take more and more pain relief. Her husband was ill and she was advised it was better to stop the trial. However, she said despite these other stressors, her pain was becoming uncontrolled.

The main barrier to vocational independence is Ms Stewart's persistent right knee pain and dysfunction. This causes significant disability in relation to standing and walking. In my opinion, this limitation is sufficient for her to be unfit for any employment for 30 hours or more per week. The difficulties in getting to and from work, and being able to sit for 6 hours per day without being able to elevate her leg are likely to make it impossible for her to sustain employment for a full week.

However, there are also significant psychosocial issues affecting Ms Stewart's overall level of function and also her disability. Her husband is not well which has added to her stress. She has a history of fibromyalgia which is very likely leading to a degree of central sensitisation which will be amplifying both her mechanical nociceptive pain and the associated neuropathic pain.

Ms Stewart feels it is possible she damaged her knee joint replacement when she fell in hospital after the second stage of the two-stage revision procedure, and that this may have led to the prosthesis being loose and needing replacement last year. We discussed this but my opinion was that it is impossible at this stage to provide a definitive answer to the question.

Ms Stewart firmly believes she cannot sustain full-time employment and this in its own right will be a barrier to a return to work. She has been affected for a long time and her level of function is unlikely to change in the future.

The issue of whether there has been a deterioration in vocational independence is reasonably straightforward. Going by Ms Stewart's presentation to me, she has deteriorated since the Vocational Independence Medical Assessment by Mr Kelman on 21 June 2012. According to him, Ms Stewart was capable of sustaining appropriate employment at the time. Ms Stewart disagrees with this, and said she was not coping with the work trial at the Whanganui Hearing Centre and that it was not as simple as her stopping the trial due to her husband's illness; she was adamant she would have had to stop it anyway.

I note the Work Readiness Programme report dated 16 May 2012 states Ms Stewart got up to 25 hours per week which was the aim by the 4th week of the work trial. She appears to have only achieved 25 hours per week for a maximum of 2 weeks, and possibly only 1 week. She did not achieve 30 hours or more per week at any stage, and she has not worked since.

According to Ms Stewart, she was incapable of sustaining 30 hours or more per week at that time. She has been provided with earnings-related compensation from 6 December 2018 when she underwent the revision total knee joint replacement. It seems reasonable to assume Ms Stewart did not simply lose vocational independence on the date of surgery and that her inability to sustain 30 hours or more per week pre-dated this procedure.

Mr Hardy commented in his report dated 12 July 2018 'Her knee has not been perfect since then but over the last few months she has had increasing pain and disability'. It appears reasonable to assume at this stage Ms Stewart was probably unable to sustain employment. The difficulty is assessing when Ms Stewart's disability was sufficient for her to be regarded as unfit for full-time work, presuming Mr Kelman's conclusions regarding her work capacity were correct.

In his report dated 21 June 2012, Mr Kelman noted the following:

- Ms Stewart rated her right knee pain as 6-7/10.
- The knee swelled after 5 hours of work.
- When sitting, she need[ed] to have her right leg elevated.
- She was unable to complete her household chores.
- The range of motion of the knee was 0-90°, though this is not compatible with his report of a fixed flexion deformity of 5°.

It does not appear Mr Kelman assessed how Ms Stewart's knee pain and the need to keep the leg elevated would impact on her ability to work. It is very difficult for a person to work for 6 hours per day with a leg elevated, as this generally leads to physical discomfort, particularly back pain.

While it is difficult, if not impossible, to assess Ms Stewart's level of function at the time of Mr Kelman's Vocational Independence Medical Assessment, there is some doubt whether she would have sustained employment for 30 hours or more per week in any occupation.

In summary, Ms Stewart's current level of function is such that she is not vocationally independent. She was regarded as vocationally independent in June 2012, though this may have been an overestimate of her capabilities.

My personal view is that there has never been any evidence Ms Stewart could sustain 30 hours or more per week, and that Mr Kelman does not appear to have taken her symptoms and reduced level of function into account when assessing her work capacity. I would regard her as not likely to have been vocationally independent at the time of the Vocational Independence Medical Assessment due to her difficulties noted by Mr Kelman, in particular the need to keep the right leg elevated; the incompatibility of a range of motion of 0/90° with a fixed flexion deformity of 5°, and a lack of comment regarding how Ms Stewart's symptoms would affect her ability to work, and vice versa.

[42] On 4 December 2019, the Corporation's medical advisor, Dr Peter Thakurdas, provided a medical comment:

Client's Employment at the time according to Eos was: Hairdressr [sic], beautician Or Rel.workr. At initial interview (21/03/2016), Client's business and nature of the business was recorded as "nutrimetics manager - selling personal care and health care products almost 2 yrs". This seems consistent with her occupation (Self-Employed Sales & Marketing Manager) in a prior 17/12/2015, and subsequent 09/09/2016, claim. Her 20/02/2018 accident claim indicated she was a non earner at that time.

This employment history suggests some, albeit possibly weak, support for the 2012 VIMA despite what may now seem reasonable criticisms of it in the 2019 VIMA.

Even though Client's Earnings related compensation on this (10/03/2016) claim ceased on 29/03/2016, it would not be inconceivable that the then problems with Client's right knee precipitated (possibly subconsciously) the 10/03/2016 fall, i.e., that date of accident (10/03/2016) may well be a more significant date in terms of VI deterioration than the previously proposed 2018 dates.

Recommendations on Questions:

Based on above, a compromise is suggested, i.e., consider back-dating VI deterioration to an even earlier date of "10/03/2016".

[43] On 12 December 2019, Mr Andrew O'Donoghue, the Corporation's technical specialist, provided a report:

...The MA suggests backdating Vocational independence deterioration to 2016. The client is not seeking this. The nature of the injuries in that claim have no connection to the injury we are considering, and I think it would be a long bow to suggest that there was a loss of vocational independence from that time.

The initial referral asked for consideration of the relative merits of the client's request for backdating vocational independence deterioration to 18-5-2018 (with supporting medical certification) versus 12-7-2018, which is the date of the surgeon's review. (I can't see where that latter date was from - it seems she saw the surgeon on 21-8-2018, but it makes no difference to what I am suggesting). Given the forgoing points, I suggest that a pragmatic approach would be to agree to the client's request and use 18-5-2018.

[44] On 18 December 2019, the Corporation advised Ms Stewart that she was entitled to backdated weekly compensation to 18 May 2018, as requested by her. Ms Stewart lodged an application for review of this decision.

[45] On 6 January 2020, Ms Stewart also lodged an application for review of the Corporation's decision of 20 July 2012. On 20 March 2020, the Corporation declined to accept the late lodgement of the review application. Ms Stewart applied for a review of the Corporation's decision to decline.

[46] On 3 August 2020, a Reviewer quashed the Corporation's decision and ordered that the Corporation accept Ms Stewart's late lodgement of the review application. The Reviewer noted that, in the three months after the Corporation's decision of 20 July 2012, Ms Stewart was under considerable stresses due to her husband's illness and the increased responsibility she had to care for him. The Reviewer added that Ms Stewart was dealing with her own injury issues, and it was reasonable to conclude that, in these circumstances, she would have been overwhelmed, which prevented her from applying for a review within time.

[47] On 5 October 2020, review proceedings were held. On 10 November 2020, the Reviewer found as follows:

- (a) The Reviewer dismissed the review of the Corporation's decision of 20 July 2012, on the basis that Ms Stewart had failed to show on a balance of probabilities that she had not attained vocational independence at that date.
- (b) The Reviewer quashed the Corporation's decision of 19 December 2019, on the basis that the Corporation had not fully explained or investigated why Ms Stewart's deterioration date should not be earlier than 18 May 2018.

- (c) The Reviewer ordered costs to Ms Stewart totalling \$1,357.59.

[48] On 14 December 2020, a Notice of Appeal was lodged.

[49] On 14 April 2021, Dr Gil Newburn, Neuropsychiatrist, reported that Ms Stewart suffered from a severe chronic pain disorder, consequent on altered central modulation secondary to a well-defined orthopaedic injury for which she has cover from the Corporation.

[50] On 5 May 2021, the Corporation reported (following the Reviewer's decision noted at paragraph [47](b) above) that it had decided that it was unable to change Ms Stewart's deterioration date from 18 May 2018, as there was insufficient medical support for backdating the vocational independence deterioration date.

[51] On 20 July 2021, Judge Henare noted in a Minute that, since the Corporation has complied with the Reviewer's directions, the Court found that the Corporation's decision of 18 December 2019 was superseded by the 5 May 2021 decision and was no longer part of the present appeal. Judge Henare advised that, if Ms Stewart disputed the 5 May 2021 decision, she should lodge a review application challenging this new decision.

### **Relevant law**

[52] Section 6 of the Accident Compensation Act 2001 (the Act) defines vocational independence (VI) as follows:

... in relation to a claimant, means the claimant's capacity, as determined under section 107 to engage in work—

- (a) for which he or she is suited by reason of experience, education, or training, or any combination of those things; and
- (b) for 30 hours or more a week.

[53] Section 107(1) of the Act provides that the Corporation may determine a claimant's VI where that claimant is in receipt of weekly compensation. Section 108 notes that a VI assessment must consist of an occupational assessment and a medical assessment. Section 108(3) provides that the purpose of a medical assessment is to



provide an opinion for the Corporation as to whether, having regard to the claimant's personal injury, the claimant has the capacity to undertake any type of work identified in the occupational assessment.

[54] Section 112 of the Act provides that a claimant with vocational independence can lose entitlement to weekly compensation:

If the Corporation determines under section 107 that a claimant has vocational independence, the claimant loses his or her entitlement to weekly compensation 3 months after the date on which he or she is notified of the determination.

[55] In *McGrath*,<sup>1</sup> at issue was the pain associated with the appellant's injury and its impact on her ability to attain vocational independence. Chief Justice Elias of the Supreme Court stated:

[44] As it was, we consider that there was no basis upon which the Corporation could reasonably have considered that vocational independence was likely to be found on assessment of Ms McGrath when it gave her notice of assessment in September 2008.

[56] In *Martin*,<sup>2</sup> Justice Ronald Young stated:

[33] The District Court Judge's function on rehearing, when dealing with the medical assessment, is to take all of the medical evidence, including that from the medical assessor and any other medical evidence into account in deciding whether or not the appellant is vocationally independent. In doing so, it will be inappropriate to give the medical assessor's opinion, simply by virtue of the fact that it is an opinion of the medical assessor, any preeminent position. In assessing the medical evidence, the reviewer and the District Court's job will be to apply a traditional approach to an analysis of the competing expert evidence. For example, how do the medical practitioner's particular qualifications and experience relate to the claimant's disability? What is the quality of the medical report, including the thoroughness of the detail? There will be a range of other factors that will be relevant in individual cases.

[57] In *Wildbore*,<sup>3</sup> Judge Cadenhead stated:

[53] The recent decision in *Bondarenko* (173/05) held that the vocational independence assessment process is not to be examined in a mechanical and rigid way. Rather, what is required is a common sense application of the legislation to the requirements of the procedure.

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<sup>1</sup> *McGrath v Accident Compensation Corporation* [2011] NZSC 77, [2011] 3 NZLR 733, (2011) 9 NZELC 93,849

<sup>2</sup> *Martin v Accident Compensation Corporation* [2009] 3 NZLR 701.

<sup>3</sup> *Wildbore v Accident Compensation Corporation* [2006] NZACC 94.

[58] Section 149(1) of the Act provides that a claimant may appeal to the District Court against a review decision, or a decision as to an award of costs and expenses under section 148. Section 161(1) provides that the Court must determine an appeal by dismissing the appeal, or modifying the review decision, or quashing the review decision.

[59] Section 148 of the Act provides:

- (1) The Corporation is responsible for meeting all the costs incurred by a reviewer in conducting a review.
- (2) Whether or not there is a hearing, the reviewer—
  - (a) must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant;
  - (b) may award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review;
  - (c) may award any other person costs and expenses, if the reviewer makes a review decision in favour of the person.
- (3) If a review application is made and the Corporation revises its decision fully or partly in favour of the applicant for review before a review is heard, whether before or after a reviewer is appointed and whether or not a review hearing has been scheduled, the Corporation must award costs and expenses on the same basis as a reviewer would under subsection (2)(a).
- (4) The award of costs and expenses under this section must be in accordance with regulations made for the purpose.

[60] In *Kacem v Bashir*,<sup>4</sup> Tipping J stated in the Supreme Court:

[32] ... a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

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<sup>4</sup> *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, [2010] NZFLR 884, (2010) 28 FRNZ 483.

## Discussion

### *The Corporation's decision of 20 July 2012*

[61] As noted above, the Reviewer, in the decision of 10 November 2020, upheld the Corporation's decision, dated 20 July 2012, advising Ms Stewart that she had vocational independence, and hence her weekly compensation would cease.

[62] Claimants who receive weekly compensation may be required by the Corporation, at such reasonable intervals as the Corporation considers appropriate, to be assessed as to their vocational independence.<sup>5</sup> A determination that a claimant has achieved vocational independence results in the loss of weekly compensation three months after notification to the claimant.<sup>6</sup> Vocational independence is achieved when a claimant is determined by assessment to have the capacity to engage for 30 hours or more a week in work for which he or she is suited.<sup>7</sup> The assessment provided for by the legislation consists of an occupational assessment (which identifies the types of work suitable for the claimant) and a medical assessment (which provides an opinion as to whether the claimant has the capacity to undertake any of the types of work identified in the occupational assessment).<sup>8</sup>

[63] Mr McBride, for the Corporation, submits Ms Stewart did not dispute the Corporation's decision for some seven years and has not produced any evidence which showed that the assessment of Mr Kelman could not be relied upon and that Ms Stewart was not in fact vocationally independent. He submits the Corporation was entitled to rely on the opinions of the assessors in reaching its decision that Ms Stewart had vocational independence in 2012. Mr Kelman's medical assessment is the only one at the time. Mr McBride notes this assessment was a snapshot in time, based on the information then available and Dr Prestage's views were based on a much later set of circumstances.

[64] This Court accepts that Ms Stewart's delay in disputing the Corporation's decision for a lengthy period raises a valid concern. However, on 3 August 2020, a

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<sup>5</sup> Section 107.

<sup>6</sup> Section 112.

<sup>7</sup> Section 6(1).

<sup>8</sup> Section 108.

Reviewer decided that Ms Stewart had extenuating circumstances and no appeal was raised against that decision. A further concern of the Court is that (as noted in paragraph [28] above) Ms Stewart did not object to Mr Kelman's findings that she could do the six work types he identified, and it is recorded that she stated repeatedly that she could do the work types identified. In response to this concern put by the Court, Ms Stewart stated that she understood at the time that the issue was whether she had the skill-set to work in the roles identified rather than an ability to work 30 hours or more in the roles.

[65] This Court now turns to the following further considerations.

[66] First, since Ms Stewart's accident in May 2009, when she suffered a sprain of the right knee and leg and an acute meniscal tear, for which the Corporation approved cover, she has not been able to work full-time. While she endeavoured to return to some part-time work, this was not successful due to pain and inflammation in her right knee.

[67] Second, in October 2011 (nine months before the Corporation's decision that Ms Stewart had vocational independence) Dr Kanji, GP, completed an Initial Medical Assessment of vocational independence. Dr Kanji advised that Ms Stewart's chronic pain rendered unsuitable any work types which had been identified. Dr Kanji identified a number of restrictions in Ms Stewart's mobility. Specifically, Dr Kanji found that four work types that the Corporation later found Ms Stewart suitable were not medically sustainable, because they were beyond Ms Stewart's capability (particularly in relation to sitting or standing for any period of time). Dr Kanji recommended that further assessment should be arranged once better pain management had been achieved.

[68] Third, in the ensuing eight months until a further medical assessment was done, there were ongoing reports of Ms Stewart's pain, swelling, restricted mobility and incapacity for sustained work. These reports included those of Ms Bjornholdt, Physiotherapist; Ms Thorne of the Corporation; Mr Sellars, Physiotherapist; Ms Mason, Physiotherapist; and Ms Kaipo of the Corporation. Two months before the further medical assessment, Ms Stewart could not maintain a work trial for nine

hours per week in the first two weeks, due to the pain and suffering she experienced after the second week.

[69] Fourth, in the Vocational Independence Medical Assessment conducted by Mr Kelman, Orthopaedic Surgeon, and relied upon by the Corporation in its decision of July 2012, Ms Stewart's ongoing symptoms in her right knee were noted. These included pain in the right knee which she graded at 6-7/10 on the Visual Analogue Scale; sharp pain of the medial joint line; her leg feeling heavy and tight; stiffness of the knee and inability to bend it further than 80° of flexion; her standing time being limited to 5-10 minutes; her inability to walk for 20 minutes with a walking aid; requiring to have her right leg elevated when sitting; and pain waking her from her sleep at night. However, Mr Kelman, in advising that Ms Stewart was able to undertake six sedentary work types (including four expressly rejected by Mr Kanji), Mr Kelman did not refer to the above restrictions, particularly the pain issues.

[70] Fifth, the further Vocational Independence Medical Assessment, conducted by Dr Prestage, Occupational Physician, in November 2019, noted that Mr Kelman did not assess how Ms Stewart's knee pain and the need to keep her leg elevated would impact on her ability to work. Dr Prestage observed that it was very difficult for a person to work for six hours per day with a leg elevated, as this generally led to physical discomfort, particularly back pain. Dr Prestage's view was that there had never been any evidence that Ms Stewart could sustain 30 hours or more per week, and that Mr Kelman did not appear to have taken her symptoms and reduced level of function into account when assessing her work capacity.

[71] Sixth, this Court's function on rehearing Ms Stewart's matter, when dealing with a medical assessment of vocational independence, is to take all of the medical evidence, including that from the medical assessor (Mr Kelman) and any other medical evidence into account in deciding whether or not Ms Stewart was vocationally independent. In doing so, it is inappropriate to give Mr Kelman's opinion, simply by virtue of the fact that it is an opinion of the medical assessor, any preeminent position. In assessing the medical evidence, this Court's job is to take into account such matters as the quality of Mr Kelman's report, including the

thoroughness of the detail.<sup>9</sup> In this regard, this Court finds that Mr Kelman's report is wanting in terms of the information that was available at the time.

*The Reviewer's award of costs*

[72] The Reviewer, in the decision of 10 November 2020, noted that Ms Stewart was successful with one of her review applications and therefore was entitled to an award of costs for that matter; and that she acted reasonably in lodging the other review application, and so review costs should be awarded for that matter also. The Reviewer awarded costs totalling \$1,357.59, comprising \$818.14 for preparation for hearing x 2; \$340.85 for appearance at the hearing; and \$198.60 for disbursements and travel. The Reviewer did not allow costs for the second hour of the hearing (\$204.53), as the Regulations allowed a maximum of \$136.32 for this time; and did not allow costs of \$17.05 for a further 15 minutes, as the hearing concluded on the papers. Ms Koloni submits that the above award was incorrect according to the Regulations.

[73] This Court notes that the Reviewer's decision as to the amount of costs awarded was a discretionary one. The criteria for a successful appeal regarding the exercise of discretion are stricter than in the case of a general appeal. The criteria are: error of law or principle; taking account of irrelevant considerations; failing to take account of a relevant consideration; or the decision is plainly wrong.<sup>10</sup> This Court cannot discern that any of these criteria have been met.

**Conclusion**

[74] For the above reasons, the appeal against the Reviewer's decision of 10 November 2020, upholding the Corporation's decision dated 20 July 2012, advising Ms Stewart that she had vocational independence is allowed. The review decision is therefore set aside in this regard.

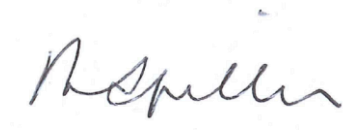
[75] The appeal in respect of the Reviewer's decision of 10 November 2020 as to costs is dismissed.

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<sup>9</sup> See *Martin*, n2 at [33].

<sup>10</sup> See *Kacem v Bashir*, n4 at [32].

[76] Having succeeded on the primary issue, Ms Stewart is entitled to costs. If these cannot be agreed within one month, I shall determine the issue following the filing of memoranda.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller  
District Court Judge

Solicitors for the Respondent: McBride Davenport James