

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2021] NZACC 22          ACR 381/17**

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

Hearing:          25 November 2020

Heard at:          Dunedin/Otepoti

Appearances:    Mr P Sara for the appellant  
                         Mr C Light for the respondent

Judgment:        2 February 2021

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**RESERVED JUDGMENT OF JUDGE C J McGUIRE  
[Vocational Independence s 109 and s 113 Accident Compensation Act 2001]**

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[1] On 21 September 2016, the Corporation advised the appellant, Mr Yeo, his vocational independence had deteriorated with effect from 1 July 2013. The issue for determination on this appeal is the date on which Mr Yeo no longer had vocational independence. He contends that the date should be earlier than 1 July 2013.

## **Background**

[2] Counsel for the appellant, Mr Sara, acknowledges that the relevant background is sufficiently captured in the Reviewer's decision. Accordingly, it is reproduced here.

[3] In 2007, Mr Yeo injured his back at work. He was lifting a garage door when the wind caught it, causing him to twist around awkwardly, wrenching his back. At the time of the injury, Mr Yeo was employed as store supervisor for Windsor Doors Limited. Following the accident, he was required to take a few months off due to pain.

[4] On 13 August 2008, Mr Yeo reinjured his lumbar spine, again at work, whilst lifting a roller door onto a truck. Mr Yeo presented to his doctor on 14 August 2008 who diagnosed a lumbar sprain and lodged a claim for cover for the same. The Corporation accepted cover for the described injury on 18 August 2008.

[5] A workplace assessment conducted on 17 October 2008 concluded that Mr Yeo was unable to safely resume pre-injury duties and hours of work. Accordingly, Mr Yeo did not return to work.

## **Specialist Assessment and Surgery**

[6] Mr Yeo's pain did not resolve, so he was referred to neurosurgeon, Mr Nicholas Finnis. Mr Finnis ordered an MRI, which was undertaken on 20 November 2008. The MRI showed disc degeneration at L4/5, L5/S1 and L2/L3.

[7] On 9 December 2008, Mr Finnis met with Mr Yeo post-MRI and diagnosed "mechanical back pain predominantly with pain into his legs" which he considered was coming from the L5/S1 level. Following further investigation, Mr Finnis eventually recommended surgery, for which he sought funding. The Corporation approved the funding on 16 March 2009.

[8] On 11 May 2009, Mr Yeo underwent two level (L4/5 and L5/S1) anterior lumbar interbody fusions. A post operative report from Mr Finnis dated 17 June 2009 recorded:

(Mr Yeo) has done well from surgery with very little back pain from day to day. He doesn't have any pain going down his buttock regions and into the leg as he had prior to surgery either. He still gets a little bit of pain when he coughs or sneezes. He is not getting problems around the abdomen with the wound.

[9] Mr Finnis recorded that he was happy with the outcome from surgery. He recommended Mr Yeo increase his activities and that an activity-based programme from the Corporation "may be a good idea". He considered that Mr Yeo could get back to some form of work within one or two months (noting that he had lost his job at Windsor Doors).

[10] This report was followed up by another report, dated 8 September 2009, whereby Mr Finnis advised that any work undertaken by Mr Yeo should involve lighter duties and returning to his pre-injury job would be inappropriate as it involved heavy lifting.

### **Vocational Rehabilitation and an Increase in Pain**

[11] Following his surgery, the Corporation arranged for Mr Yeo to undergo vocational rehabilitation, which involved the completion of an Initial Medical Assessment (IMA). This was undertaken by Dr Xianghu Xiong, a Rehabilitation Medicine Specialist, who assessed Mr Yeo on 23 November 2009 and provided a report the same day. Dr Xiong recorded that Mr Yeo was beginning to experience a recurrence of symptoms in his spine and that he is now in constant pain.

[12] Despite the pain, Dr Xiong determined that no further treatment or investigations were required and considered that Mr Yeo could medically sustain 11 different work types. Dr Xiong concluded by noting that "overall the prognosis should be very good and he (Mr Yeo) should be able to make a way to get back to work in the near future and achieve vocational independence".

[13] Around this time, Mr Yeo also began a work trial at car rental company, Affordable Rentals, working about four and a half hours a day, five days a week.

[14] On 10 March 2010, Mr Yeo underwent a medical case review with occupational medical specialist, Dr Tim Rumble. Dr Rumble recorded that:

After surgery these symptoms resolved, but Alex reports that in recent months the low back and leg pain have returned, and are now at approximately the same level as they were prior to the surgery. He reports that there have been no new accidents. There are no pins and needles in either leg, and no areas of weakness ...

Alex reports that the low back pain resolved almost completely during the Work Hardening Programme, but has recurred since ... Alex also describes that in more recent months he has developed cervical spine pain. He describes that this pain has been present for many years at a relatively low level, but in recent times has become much more significant ...

Alex reports that his major concern is around the level of low back pain he is experiencing. He describes that pain levels are manageable for around 5-6 hours of activity, but after this there is significant escalation in low back pain which he believes would preclude any full time work. He describes that this has not changed in around the 4 months that he has been at work. He reports that he is able to stand for around 4 hours at a time, after which he needs to rest.

[15] Dr Rumble considered that seven work types were medically sustainable, however, noted that there is considerable merit in a further pain programme as he considered that Mr Yeo's pain is the biggest barrier to his vocational rehabilitation. He also considered that Dr Xiong's report was "undertaken at a time when Alex's reported level of pain was considerably less than it is at present", but:

[w]ith improved analgesia to reduce levels of pain I believe that jobs which allow some posture change (i.e. not performed solely seated or standing) and which do not require significant manual handling are both suitable and sustainable. However if it is not possible to better control pain levels, then Alex will definitely find difficulty with any full time work, irrespective of the specific tasks performed.

[16] In light of Dr Rumble's report, the Corporation referred Mr Yeo for a comprehensive pain assessment with Dr John MacVicar, a musculoskeletal pain medicine specialist. Dr MacVicar reported on 22 April 2010. He considered that Mr Yeo had not enjoyed the long-term benefits from his surgery and agreed with Dr Rumble's recommendation that Mr Yeo improve his analgesia to manage his pain better before vocational independence should be considered. He also recommended medial branch blocks to assist with Mr Yeo's pain.

[17] The medial branch blocks were administered in June and July 2010, however, a report from Dr MacVicar, dated 9 August 2020, recorded that Mr Yeo had a negative response to these and as such, he did not propose any further intervention.

[18] Following the comprehensive pain assessment, the Corporation arranged for Mr Yeo to receive psychological support. The Pain Management Psychological Service Programme was completed on 6 October 2010, following which, it was concluded that “it is now suitable for Mr Yeo to have a self management programme aimed at helping him live with his pain”.

[19] On 6 November 2010, the Corporation wrote to Mr Yeo advising that it considered his individual rehabilitation programme had been completed and it planned to assess his vocational independence.

### **Vocational Independent Medical Assessment**

[20] The Corporation then arranged for Mr Yeo to be assessed by Dr Martin Robb, an occupational medicine specialist, for the purposes of completing a Vocational Independent Medical Assessment (VIMA). This was completed on 4 February 2011.

[21] Dr Robb considered that Mr Yeo’s medical rehabilitation was complete, he was ready to consider vocational independence, and that Mr Yeo could medically sustain 10 different work types, being:

- Supply and distribution manager;
- Despatching and receiving clerk;
- Stock clerk;
- Retail manager;
- Café or restaurant manager;
- Hotel or motel manager;
- Accommodation and hospitality manager;
- Sales representative;
- Motor vehicle or caravan sales person; and
- Forklift driver.

[22] Dr Robb discounted any work types that involved frequent sitting and/or frequent standing/walking as well as lifting, bending or twisting.

[23] Based on the results of the VIMA, on 15 February 2011, the Corporation wrote to Mr Yeo advising that he was now considered vocationally independent in 10 different work types, and as such, his weekly compensation would cease on 14 May 2011.

### **Mr Yeo Gains Employment**

[24] Following the Christchurch earthquake, in 2011, Mr Yeo and his wife moved to Hawea/Wanaka. In winter 2011, Mr Yeo gained seasonal employment working as a car parking attendant at Cadrona Ski Resort. He was re-employed in this position for the 2012 and 2013 winter season, however, he resigned in mid July 2013 due to reaggravation of his back pain. He then went on the sickness benefit.

[25] In late 2014, Mr Yeo gained employment at the Hawea Hotel, performing kitchen duties and cleaning for approximately 20 hours a week. However, this caused a significant deterioration in his pain within weeks and Mr Yeo had to resign. He returned to the sickness benefit.

### **Comprehensive Pain Management Assessment**

[26] On 30 July 2014, following a request from Mr Yeo's general practitioner, Dr Julian Pettit, Mr Yeo was assessed by pain specialist, Dr Mike Anderson. Dr Anderson provided a report on 5 August 2014. He recorded that Mr Yeo's pain had returned to pre-surgery levels within four to six months of surgery. This had significantly worsened in about July 2013, which he considered coincided with Mr Yeo's work at Cardrona, where Mr Yeo's pain would reach significant levels by lunch time and he would struggle to continue to work to the end of the day. He noted that Mr Yeo had now stopped working due to his pain.

[27] Dr Anderson diagnosed Mr Yeo with a "persistent (chronic) pain problem", specifically regional pain syndrome involving his low back with radiation into his

buttock and legs. Dr Anderson recommended adjustments to Mr Yeo's pain medication to assist with his ongoing back pain.

### **Further Specialist Assessment**

[28] On 17 March 2015, Mr Yeo was assessed by Mr Paul Eaton, an orthopaedic surgeon. Mr Eaton noted that although Mr Yeo was initially able to work, the increased activity due to his work duties meant his pain worsened considerably such that he had to discontinue work. Mr Eaton was unsure of his current diagnosis, that is, he was unsure whether Mr Yeo was suffering from chronic regional pain syndrome or an incomplete fusion at L4-5 or new disc pathology at the level above this. He therefore ordered an MRI.

[29] The MRI conducted on 22 April 2015 confirmed a non-union fusion of L4/5. In other words, the lumbar surgery had been unsuccessful.

[30] On 23 September 2015, Dr Pettit lodged a medical certificate with the Corporation on the basis that Mr Yeo was "unable to do any manual labour due to chronic low back pain. He has seen orthopaedic surgeon and MRI results do not support surgery. Awaits review by musculoskeletal physician."

[31] The receipt of this new medical certificate triggered investigation by the Corporation as to Mr Yeo's vocational independence deterioration, which included seeking further information from Dr Pettit.

[32] On 16 October 2015, Dr Pettit wrote to the Corporation advising that:

(Mr Yeo) had been previously assessed by Martin Robb in 2011 with regard to his ability to work. Following this he went back to various types of work including ski field work and more recently, working as a kitchen hand and chef over the past summer at Lake Hawea Hotel.

It was during this time that his back pain seemed to deteriorate due to the load required with the chef work. He has been off work since late January this year and has tried some medication changes for his chronic pain which have not helped. He has been reviewed by Paul Eaton, orthopaedic surgeon and MRI has not found any surgically amenable lesions ...

The situation has obviously deteriorated since the review in 2011. He may be able to perform some types of work but I don't think we can use his previous report. I wonder if an updated report may be useful in this case.

### **Further VIMA**

[33] On 23 December 2015, Mr Yeo underwent another VIMA, this time with occupational medical specialist, Dr Keith Murray. Dr Murray detailed Mr Yeo's history of lumbar pain together with his work history following the vocational independence decision of 15 September 2011. Of his work tasks whilst at Cardrona, Dr Murray recorded that Mr Yeo advised that he occasionally needed to stretch out on a couch for a couple of hours in the middle of the day if his back got tired and sore but that "he didn't have to lie down very often, as provided he was moving around he could generally manage".

[34] Of his work at Hawea Hotel, Dr Murray recorded:

When working at the Hawea Hotel he would go in at 3 or 4 pm and work until about 10 pm, except over the Christmas holiday period when he would work much longer hours. He was cleaning the kitchen, cooking the bar meals and doing dishes. He was quite sore by the time he got home and would lie flat on a fold out couch for an hour or two when he got home and would then go to bed. In about January this year Eva went to Nelson for three days and when she got back she found that he was much worse and very sore, and she took him to the GP and rang the hotel and told them that he couldn't work. He explains that he gave it four weeks to see if his back would get better, but it didn't so he then resigned. He has been on the sickness benefit since then.

[35] Dr Murray recorded that Mr Yeo considered he had gone downhill "horrendously" since January 2015, with his pain mostly felt in his lower back and some in his legs. Dr Murray noted that "he is currently able to do many light duties but needs to lie down frequently during the day to relieve his back pain". He considered that the most likely cause of his pain is the failure of the complete fusion at the L4/5 level and that "there is no evidence that a pain syndrome per se is the cause of his pain".

[36] Dr Murray concluded by noting that he did not feel Mr Yeo had capacity for work for 30 hours or more in any type of employment due to his frequent requirement to lie down and relieve his pain during the day, despite being on Sevredol.

[37] Accordingly, the Corporation wrote to Mr Yeo advising that it had accepted that he had vocational independence deterioration from 23 September 2015, being the date that Mr Yeo's medical certificate was lodged. On 29 January 2016, Dr Bruce Hodgson referred Mr Yeo for a CT Scan.

[38] The scan, taken on 12 February 2016, showed an incomplete fusion at L4/5. Mr Hodgson requested funding for surgery dated 5 April 2016, stating the L4/5 fusion and interbody fusion did not result in a satisfactory union and there was a clear pseudarthrosis. The Corporation subsequently agreed to fund corrective lumbar fusion surgery, which was carried out on 25 May 2016.

[39] Prior to this, on 6 April 2016. Mr Yeo's GP, Dr Pettit, wrote to the Corporation as follows:

I am writing with regard to Alex whom I imagine you know well. He has had his vocational independence review in September last year following chronic back pain revealing an incomplete fusion at L4/5. This back pain has been a feature of his ongoing health problems since he arrived in Wanaka in 2011. It has only been recognised as a possible failure to rehabilitate from his previous surgery. I believe that he reduced his ability to work over the past 5 years as he has struggled on off the medical sickness benefit due to chronic low back pain.

Could you please look into whether or not he is entitled to retrospective weekly entitlements for this period?

[40] On 20 July 2016, Dr Newburn, registrar in occupational medicine, conducted a medical case review.

[41] Dr Newburn referred to the history including that Mr Yeo experienced persistent lumbar back pain but was able to secure full time work as a car park attendant at the Cardrona Ski Field in 2012. Dr Newburn said:

Alex tells me he was able to work full time at Cardrona Ski Field in 2012 and also worked there for around 2 or 3 months, the period May to July 2013. This is evidence of ongoing vocational independence. ... apart from a short period of kitchen work with a variable hours in 2014 for around 3 months, there is consistent reporting of pain issue interfering with function until vocational independence medical assessment by Dr Murray 23 December 2015, where Alex was found to not have vocational independence due to incomplete fusion at the L4/5 level.

## **Opinion**

On the basis of provided evidence from ACC in addition to discussion with client Alex today, I find that the date of vocational independence deterioration is most likely to have been approximately 1 July 2013 when he last worked full time at Cardrona Ski Field.

[42] Based on Dr Newburn's opinion, the Corporation issued a decision, dated 21 September 2016, to the effect that Mr Yeo had a deterioration of vocational independence from 1 July 2013 and that his weekly compensation would be backdated to that date. Mr Yeo applied to review that decision.

[43] An independent opinion from Dr Michael Anderson was sought. Dr Anderson was asked to address the question of the date he considered Mr Yeo's ability to perform the nominated job types had deteriorated following the initial vocational independence decision.

[44] In his opinion dated 20 June 2017 Dr Anderson said, amongst other things:

I would dispute that the recommended jobs were suitable for someone who still had significant pain following "failed low back surgery" and suggests that it was not appropriate for him to undertake any of the jobs recommended by Dr Robb.

...

It follows that I do not agree that Mr Yeo had vocational independence when he was assessed, but I understand that he did not seek a formal review about the vocational independence decision when it was made.

In terms of nominating a date subsequent to that date, there is objective evidence of Mr Yeo's diminished work capacity as evidenced by his attempts to obtain and maintain full time work. He was required to rest during the day while working at the Cardrona Ski Field due to worsening pain level. This is inconsistent with vocational independence which requires that the complainant be fit to do all the job tasks within the generic work types without restriction or accommodations from employers such as allowing a period of rest at work.

Therefore the date which should be used to determine when Mr Yeo lost his vocational independence is when he started work at Cardrona for the first time in 2011.

## **The Appellant's Submissions**

[45] Mr Yeo's counsel, Mr Sara, refers to s 109 of the Accident Compensation Act (the Act) which allows the Corporation to determine the claimant's vocational

independence “at such reasonable intervals as the Corporation considers appropriate”.

[46] Subsection 2 requires the Corporation to determine the claimant’s vocational independence again if the Corporation has reasonable grounds for believing that the claimant’s vocational independence may have deteriorated due to the injuries that were assessed in the previous vocational independence assessment.

[47] Mr Sara refers to *Young v Accident Compensation Corporation* where the focus on the appellant’s ability to work must relate to the work types proved for vocational independence.<sup>1</sup>

[48] He notes that Dr Newburn’s rationale for nominating the 1 July 2013 as the date of vocational independence deterioration was that it was the date the appellant last worked full time at Cardrona Ski Field. He submits that Dr Newburn was wrong to nominate 1 July 2013 as the date of deterioration on the basis that this was when Mr Yeo finally gave up work on account of his intolerable back pain.

[49] Mr Sara refers to Dr Murray’s VIMA report where referring to the Cardrona work he said:

He explains that his boss was good and if his back got tired and sore he could go and stretch out on a couch for a couple of hours in the middle of the day.

[50] Mr Sara says that the law is clear that medical fitness for occupational work types must mean the ability to perform all the tasks in all the generic job types without accommodation.

[51] He therefore submits that it is not permissible to use Mr Yeo’s work performance at Cardrona, with the accommodations that he was provided to allow for his back pain, to be the equivalent of fitness for work in relation to the nominated job types.

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<sup>1</sup> *Young v Accident Compensation Corporation* [2015] NZACC 11.

[52] Mr Sara refers to *Down v Accident Compensation Corporation* which said that “[t]he onus is on the appellant to satisfy the Court that there is reasonable evidence of deterioration in work capacity since the previous determination.”<sup>2</sup>

[53] Mr Sara says that Dr Newburn has conflated Mr Yeo’s apparent ability to continue his work as a car park attendant with vocational independence in the specified job types which were the subject of the vocational independence decision.

[54] He refers to Dr Murray’s VIMA, of 23 December 2015, which concluded that:

At present he cannot clearly be stated to have the capacity to work in any position for 30 hours or more per week. He could manage some part time work in sedentary and light positions and there would be no harm in him doing so, and in fact this would be likely to be beneficial for him provided that he limits the number of hours that he does so that his pain is not unduly aggravated.

[55] Mr Sara submits that Dr Newburn did not engage in this level of analysis and therefore, his opinion cannot be relied upon to indicate the date when Mr Yeo lost his vocational independence.

[56] He submits that the identification of 1 July 2013 as being the turning point in Mr Yeo’s vocational independence deterioration is misplaced. Although that was the date when Mr Yeo was not able to work at all, a turning point supposes that prior to that date, Mr Yeo had demonstrated the ability to work for 30 hours or more in the nominated job types.

[57] Mr Sara refers to his Mr Yeo’s evidence at the review where he said:

My employers were very good to me. I was hired on the basis that I had a bad back. The only difference in relation to my account from Dr Murray’s, is that most days I would stretch out on a couch for an hour over lunch time and it was only sometimes I needed to stretch out for the full two hours.

...

In 2012 I did about two and a half months and in 2013 I lasted only six weeks. For the whole of this time, I was getting sickness benefit certificates from my doctor.

From 2011 to 2013 at least, I was taking very powerful pain killing medication, including morphine.

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<sup>2</sup> *Down v Accident Compensation Corporation* DC Wellington 65/2006 23 March 2006 at [38].

[58] Mr Sara submits that this is evidence shows that Mr Yeo was not functioning at a physical demand level consistent with vocational independence well before he finally had to give up work all together.

[59] Mr Sara submits that Dr Anderson provides the best rationale, which is that Mr Yeo suffered his deterioration when he first started work at the Cardrona Ski Field in 2011.

### **The Respondent's Submissions**

[60] Mr Light, Counsel for the Corporation, refers to ss 109 and 113(1). If the Corporation determines under s 109 that a claimant no longer has vocational independence, it must determine under s 113(1) if there was an earlier date at which the claimant regained his or her entitlement to weekly compensation.

[61] He submits there is no legislative test for determining the earlier date and that ACC must decide the question on the basis of the available evidence.

[62] Mr Light notes that in *Young*, at paragraph 56, a retrospective claim for deterioration of vocational independence must be based on cogent evidence.<sup>3</sup>

[63] Mr Light submits that the question for the Court in determining the date of deterioration of vocational independence, is not the date at which Mr Yeo's previously assessed injury related condition deteriorated of itself, but instead the date at which the deterioration of the previously assessed injury affected his vocational independence so that he no longer had vocational independence.

[64] He submits that it is not enough for the injury to be symptomatic and that a claimant such as Mr Yeo may have ongoing back pain symptoms but may nevertheless have vocational independence to be able to continue to work in appropriate job types.

[65] He says that this was the assessment made by Dr Robb, who was well aware that Mr Yeo had ongoing pain symptoms but considered that if he worked in suitable

work types that did not aggravate his condition, Mr Yeo had vocational independence.

[66] Mr Light submits that 1 July 2013, as the date that Mr Yeo lost vocational independence, is favourable to him in that as a car park attendant, he was doing a job that involved prolonged standing, which Dr Robb had concluded was unsuitable.

[67] Mr Light says that Mr Yeo nevertheless managed to work for the 2011 and 2012 winter seasons at Cardrona and only stopped work about six weeks into the 2013 season. He acknowledges that Mr Yeo did the work with adjustments, such as the need for rest, but this was unsurprising because the job involved constant standing, for which he did not have vocational independence.

[68] Mr Light says that Mr Yeo was able to do this work to a considerable extent, despite the limitation on standing, otherwise he would not have worked at Cardrona for two full seasons and returned for a third season in 2013.

[69] Mr Light acknowledges that the evidence does show that Mr Yeo's condition deteriorated in about 2013 when he gave up his work at the Cardrona Ski Field. This was documented by Dr Anderson in his first report dated 5 August 2014.

[70] He notes that Dr Anderson specifically recorded that Mr Yeo's pain worsened when he worked at the Cardrona Ski Field in 2013. He also notes that Dr Anderson did not refer to the 2011 and 2012 years in that report because he was under the impression that Mr Yeo had started work in 2013.

[71] Mr Light presumes that Mr Yeo did not attribute deterioration to the 2011 or 2012 years otherwise he would have said so.

## **Decision**

[72] In 2007 and 2008, Mr Yeo injured his lumbar spine. A workplace assessment in October 2008 concluded that he was unable to resume pre-injury duties and hours of work safely.

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<sup>3</sup> *Young*, above n 1.

[73] Following the referral to neurosurgeon, Mr Finnis, surgery was recommended for which the Corporation approved funding on 16 March 2009.

[74] On 11 May 2009, Mr Yeo underwent two level (L4/5 and L5/S1) anterior lumbar interbody fusions.

[75] Rehabilitation followed and ultimately in a report of 4 February 2011 from Dr Robb, considered that the appellant's medical rehabilitation was complete and that he was ready to consider vocational independence. He considered Mr Yeo could medically sustain 10 different work types being supply and distribution manager; despatching and receiving clerk; stock clerk; retail manager; café or restaurant manager; hotel or motel manager; accommodation and hospitality manager; sales representative; motor vehicle or caravan salesperson; and forklift driver.

[76] Dr Robb discounted any work types that involved frequent sitting and/or frequent standing/walking as well as lifting, bending or twisting.

[77] In winter 2011, Mr Yeo gained seasonal employment working as a car parking attendant at Cardrona Ski Resort.

[78] It is noted that this work type is not amongst those identified by Dr Robb. Plainly, the fact that this role involved frequent standing and walking excluded it as a suitable work type.

[79] Mr Yeo worked at this job during the winter of 2011 and again in 2012. In the latter year, according to his evidence, he did approximately two and a half months work.

[80] However, in the 2013 season he resigned in mid July after six weeks work, due to reagravation of his back pain and he went on a sickness benefit.

[81] In late 2014, Mr Yeo gained employment at the Hawea Hotel performing kitchen duties and cleaning approximately 20 hours a week. This caused significant deterioration in his pain within weeks and he had to resign. He returned to the sickness benefit.

[82] The Corporation advised Mr Yeo on 21 September 2016 that his vocational independence had deteriorated with effect from 1 July 2013. Mr Yeo's position is that the independent opinion of Dr Michael Anderson on 20 June 2017 was that he lost his vocational independence when he started work at Cardrona for the first time in 2011.

[83] In his report, Dr Anderson disputed that the recommended jobs were suitable for anyone who still had significant pain following "failed back surgery" and suggested that it was not appropriate for him to undertake any of the jobs recommended by Dr Robb.

[84] Dr Anderson goes on to say:

Therefore the date which should be used to determine when Mr Yeo lost his vocational independence is when he started work at Cardrona for the first time in 2011.

[85] It is fair to say that the pathway to vocational independence is rarely a straightforward one but there is no doubting the worth of the underlying objective for both the individual and society of having the injured person once again participating in society as much as is reasonably possible.

[86] It is clear in Mr Yeo's case that he had taken this ethos on board and it is eloquently demonstrated in the fact that both the Cardrona and the Hawea Hotel work types were contra-indicated in Dr Robb's report. The added "challenge" that Mr Yeo faced was that, as was found after an MRI scan in 2015, his 2009 surgery had not been successful.

[87] The ultimate question, therefore, is: at what point following his VIMA of 4 February 2011 did Mr Yeo lose vocational independence?

[88] Notwithstanding the fact that the work at the Cardrona Ski Field was contra-indicated, it seems reasonably clear from the available evidence that the use of pain killing medication and the ability to rest on a couch at work allowed Mr Yeo to complete two seasons at this work role before it came to an end in 2013 after six weeks of that season.

[89] If the work role had been one of those identified by Dr Robb and Mr Yeo had still needed to lie on a couch during that work role then there would have been a powerful case for saying that he had lost vocational independence. However, that reasoning does not follow where the work role is not indicated as a suitable one, as in this case.

[90] I accept Mr Light's submission that for Mr Yeo's vocational independence to have deteriorated, his pain symptoms had to have resulted in a deterioration of vocational independence to the extent that he no longer had vocational independence to do any of the identified job types.

[91] I also accept his submission that there must be some cogent evidence that clearly identifies a deterioration date of vocational independence.

[92] The date nominated by Mr Yeo is from when he started working at the Cardrona Ski Field in 2011. Mr Light points out that this is only a few months after Dr Robb's assessment that Mr Yeo could work in a considerable number of work types despite his ongoing back pain.

[93] I conclude from the totality of the evidence that, in spite of being employed in an unsuitable role on the Cardrona Ski Field as a parking attendant, Mr Yeo was able to craft a regime that worked. Though that regime included resting during the working day, it worked for two years. The fact that he performed this role for two years and started again for a third year in 2013 supports this view. I do acknowledge, however, that it came to an end in 2013 after six weeks. Plainly the earlier balance of working and being able to rest was no longer sustainable.

[94] Therefore, I find the Corporation's decision, of 26 September 2016, that Mr Yeo's vocational independence had deteriorated with effect on 1 July 2013 to be a fair one.

[95] Accordingly, I must find that Mr Yeo has failed to prove on the balance of probabilities that this decision was wrong, and dismiss the appeal.

[96] Should there be any issue regarding costs, counsel have leave to file memoranda in respect thereof.



Judge C J McGuire  
District Court Judge

Solicitors: Peter Sara, Barrister and Solicitor, Dunedin for the appellant  
Young Hunter, Christchurch for the respondent