

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 89**

**ACR 096/20**

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

Hearing: On the papers

Appearances: The appellant is self-represented  
K Anderson for the respondent

Judgment: 13 May 2022

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**RESERVED JUDGMENT OF JUDGE P R SPILLER  
[Determination of vocational independence - s 107(1),  
Accident Compensation Act 2001]**

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**Introduction**

[1] This is an appeal from the decision of a Reviewer dated 8 May 2020. The Reviewer dismissed an application for review of WorkAon's decision dated 13 February 2017 determining that Ms Xu is vocationally independent and that her weekly compensation should cease.

**Background**

[2] Ms Xu was born in 1965, and she worked as a health care assistant.

[3] On 22 May 2014, Ms Xu sustained a neck and back injury while moving a patient in her role as a healthcare assistant. She advised her employer of the injury and took a day off work. After that, she carried on with her work, until her symptoms became severe. In October 2014, Dr David Murphy, Chiropractor, diagnosed sprains of the lumbar, thoracic and cervical spine, and recommended light duties. Dr Murphy lodged a claim for cover for Ms Xu's injury. In mid-November 2014, Ms Xu was certified as fully unfit for work.

[4] On 1 December 2014, Dr John Monigatti, Occupational Medicine Specialist, having seen Ms Xu, reported that her symptoms were likely not caused by the lifting incident, because they had resolved and recurred. Dr Monigatti assessed that Ms Xu's symptoms were suggestive of C8 nerve root irritation, probably secondary to facet joint arthropathy or a C7/T1 disc protrusion on a background of cervical spondylosis

[5] On 19 December 2014, WorkAon, which administered claims for the Auckland District Health Board, an accredited employer under the Corporation's partnership programme, declined Ms Xu's claim for cover for a work-related personal injury. The assessment was that Ms Xu had aggravated pre-existing arthrosis at work.

[6] On 13 February 2015, Dr John Malloy, Musculoskeletal Medicine Specialist, diagnosed that Ms Xu's neck pain was very likely to have been caused by two annular tears. Dr Malloy assessed that there was a clear link between Ms Xu's symptoms and her injury.

[7] On 9 July 2015, a Reviewer quashed WorkAon's decision, and concluded that Ms Xu was entitled to cover, arising from the work-related accident, for the C5/6 and C6/7 annular tears. As a result of that decision, Ms Xu received cover for her back injury. She received treatment and entitlements for her injury.

[8] On 4 November 2015, Ms Xu underwent an Initial Occupational Assessment with Carolyn Field, Occupational Assessor. Ms Field identified ten work types that would be vocationally suitable for Mrs Xu.

[9] On 13 November 2015, an Initial Medical Assessment was performed by Dr David Ruttenberg. He considered Ms Xu fit to perform 30 hours of work or more a week:

Mrs Xu is unfit for her usual work role and for work roles where there is a need for heavy lifting, forceful pushing and pulling actions and where she would adopt constrained postures of cervical spine. The reason for restrictions is related to pragmatic rather scientifically supported facts and given the difficulty in diagnosis today.

There is no injury related reason that she could not work in a full-time capacity given her current work capacity doing light duties.

[10] Dr Ruttenberg considered that the following roles were medically sustainable: medical laboratory technician, admissions clerk, and disability service officer.

[11] On 10 November 2016, a Vocational Independence Occupational Assessment report was completed by Paul Fennessy, Occupational Assessor. He identified 13 work types that would be vocationally suitable for Ms Xu.

[12] On 18 November 2016, Ms Xu attended a Vocational Independence Medical Assessment with Dr Evan Dryson, Occupational Medicine Specialist. Dr Dryson considered that five of the work types identified by Mr Fennessy would be medically sustainable: disability service officer, admissions clerk, sales assistant pharmacy and health remedies; sales assistant (souvenirs, gifts and duty-free), and sales assistant and sales persons NEC (Lotto counter).

[13] On 13 February 2017, WorkAon notified Ms Xu that she had vocational independence and an ability to work for 30 hours or more a week in the five work types identified by Dr Dryson. WorkAon therefore advised that Ms Xu was entitled to receive weekly compensation for a further three months only, terminating on 13 May 2017.

[14] In April 2017, the management of Ms Xu's claim was transferred from WorkAon to Wellnz.

[15] On 26 May 2017, Ms Xu applied for a review of WorkAon's decision of 13 February 2017. On 11 August 2017, Wellnz declined to accept the review

application because there were no extenuating circumstances which affected her ability to lodge a review within the three-month timeframe. Ms Xu applied for a review of this decision. On 8 January 2018, the application for review was dismissed. Following an appeal to the District Court, the Corporation agreed to accept the late review application, so that the substantive decision of 13 February 2017 could proceed to review to review.

[16] On 30 January 2020, the Corporation agreed to organise a medical case review with an appropriate specialist, to examine Ms Xu's current conditions.

[17] On 13 March 2020, Ms Xu attended an assessment with Dr Vasudeva Pai, Orthopaedic Specialist. He reported on whether Ms Xu was capable of being vocationally independent in any of the jobs identified for 30 hours per week or more:

In my opinion, she has capacity to work in medium level work. In fact today she states that she has been quite keen to go back to work. Her main difficulty appears to be getting a job. In my opinion there is no medical contraindication for her to return to work.

In my opinion, she does not require any orthopaedic management or surgery and self management with core stability exercises is strongly recommended. In my opinion there is no medical contraindication for her to do light to medium work to start with part time then slowly increase hours over the period of 6 weeks to 4 months with postural modifications. As she has not worked since 2016 I would recommend she should start work initially with four hours a day and within 6 weeks to 3 months she can increase to 8 hours. She states that because of her history with chronic pain and not working for a long period of time she finds it difficult to get a job although she goes for interviews quite regularly.

[18] On 14 April 2020, review proceedings were held. On 8 May 2020, the Reviewer dismissed the review, on the basis that Ms Xu had vocational independence in the five work types identified by Dr Dryson.

[19] On 20 April 2020, Dr Malloy provided a further report in which he confirmed that Ms Xu's annular tear at C6/7 was the only identifiable cause of persisting bilateral lower neck pain.

[20] On 18 May 2020, a Notice of Appeal was lodged.

## Relevant law

[21] 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.

[22] 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(1) 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.

[23] Section 112 provides that a determination of VI under s 107 results in a claimant losing his or her entitlement to weekly compensation, three months after the date upon which the claimant is notified of that determination.

[24] In *Martin*,<sup>1</sup> Ronald Young J 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.

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<sup>1</sup> *Martin v Accident Compensation Corporation* [2009] 3 NZLR 701, at [33].

[25] In *Brown*,<sup>2</sup> Ongley DCJ noted that the Corporation is not bound to train a claimant in order to be competitive in the market, and that the failure to obtain work does not of itself demonstrate that the claimant does not have the necessary ability.

[26] In *Kennedy*,<sup>3</sup> Ongley DCJ noted that the legislative scheme for vocational independence is not targeted on obtaining employment, but on assessing fitness for employment.

[27] In *Franich*,<sup>4</sup> Henare DCJ noted that:

[49] ... as discussed in *Herlihee* and *Collins*, the statutory test is not concerned with a person's ability to find employment the very next day, or whether a person has actively demonstrated an ability to work 30 hours or more per week, but rather whether, despite injury and related impairments, a person can work 30 hours per week. Thus, job availability is irrelevant to the consideration of vocational independence.

## Discussion

[28] The issue in this case is whether WorkAon's decision dated 13 February 2017, determining that Ms Xu is vocationally independent and that her weekly compensation should cease, was correct. The Corporation is entitled to determine a Ms Xu's vocational independence as she was in receipt of weekly compensation.<sup>5</sup> The assessment of Ms Xu's vocational independence, to work for 30 hours per week or more, must consist of an occupational assessment and a medical assessment.<sup>6</sup> Vocational independence assessment focusses on fitness for employment, and so job availability for Ms Xu or her difficulty in finding employment are irrelevant considerations.<sup>7</sup> If the assessment finds that Ms Xu has vocational independence, she loses her entitlement to weekly compensation.<sup>8</sup>

[29] Ms Xu submits as follows. Her accident resulted when she pushed a patient multiple times and her back was exhausted and injured. She refers in support to the report of Dr Malloy, Musculoskeletal Specialist. Her work-related back injury was

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<sup>2</sup> *Brown v Accident Compensation Corporation* [2006] NZACC 197, at [30].

<sup>3</sup> *Kennedy v Accident Compensation Corporation* [2013] NZACC 266, at [48].

<sup>4</sup> *Franich v Accident Compensation Corporation* [2019] NZACC 94 at [49].

<sup>5</sup> Section 107(1) of the Act.

<sup>6</sup> Section 108(1).

<sup>7</sup> See *Brown* note 2; *Kennedy* note 3; and *Franich* note 4.

<sup>8</sup> Section 112.

wrongly diagnosed from the beginning, which led to wrong treatments, and finally left her suffering from chronic pain. She cannot lift and push heavy things, or even do a little gardening work. Her condition resulted in her being unable to get a full-time job for many years. Dr Pai later gave her a health assessment, and told her that she could push patients and use a hoist, but this gave her back pain in the injured area. She is asking the Corporation to pay back the wages from the years when she could not get any job.

[30] This Court acknowledges the submissions and references of Ms Xu. However, the Court points to the following considerations.

[31] First, the Corporation conducted occupational and medical assessments of Ms Xu's vocational independence, as mandated by the Act, and these assessments conclusively reported that Ms Xu had fitness for employment in certain jobs. Ms Xu's fitness for employment was confirmed by Ms Field and Mr Fennessy, Occupational Assessors, and by Dr Ruttenberg and Dr Dryson, Medical Assessors.

[32] Second, Ms Xu has provided no opposing opinions from occupational or medical assessors as to her fitness for employment. The reports from Dr Malloy, referred to by Ms Xu, addressed the cause of Ms Xu's neck pain and did not comment on Ms Xu's fitness for employment.

[33] Third, the occupational and medical assessment reports provided to the Corporation are supported by the more recent report of Dr Pai, Orthopaedic Specialist. Dr Pai assessed that there was no medical contraindication for Ms Xu to return to work, that she had capacity for medium-level work, and that her main difficulty appeared to be getting a job.

### **Conclusion**

[34] In light of the above considerations, the Court finds that WorkAon, in its decision dated 13 February 2017, correctly determined that Ms Xu was vocationally independent and that her weekly compensation should cease.

[35] The decision of the Reviewer dated 8 May 2020 is therefore upheld. This appeal is dismissed.

[36] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', is written over a faint, light-colored rectangular stamp or watermark.

P R Spiller  
District Court Judge