IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 205 ACR 096/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL TO THE HIGH COURT PURSUANT TO SECTION 162 OF THE ACT
BETWEEN	HONGYAN XU Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

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

Judgment: 31 October 2022

JUDGMENT OF JUDGE D L HENARE
[Leave to Appeal - s 162 Accident Compensation Act 2001]

Introduction

[1] The applicant, Ms Xu, applies to this Court for leave to appeal to the High Court against a decision of His Honour Judge PR Spiller, delivered on 13 May 2022,[1]

[2] Judge Spiller dismissed the appeal, finding that Work Aon, by decision dated 13 February 2017, correctly determined that Ms Xu was vocationally independent and her weekly compensation should cease.

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[1] *Xu v Accident Compensation Corporation* [2022] NZACC 89.

[3] The parties filed submissions in writing, having been directed to do so, knowing the application would be determined on the papers.

Background

[4] Ms Xu sustained neck and back injuries 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 injuries which was granted by the Corporation.

[5] On 19 December 2014, WorkAon an accredited employer under the Corporation's partnership programme, which administered claims for the Auckland District Health Board, 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] WorkAon's decision was overturned by review decision dated 9 July 2015, on the basis 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 this decision, Ms Xu received cover for her back injury. She received treatment and entitlements for her injury.

[7] To assess Ms Xu's ongoing entitlement to weekly compensation, she attended a Vocational Independence Medical Assessment with Dr Dryson, Occupational Medicine Specialist on 18 November 2016.

[8] Dr Dryson considered the following work types identified by an occupational assessor would be medically sustainable, being: disability service officer, admissions clerk, sales assistant pharmacy and health remedies; sales assistant (souvenirs, gifts and duty-free), and sales assistant and salespersons NEC (Lotto counter).

[9] 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 advised Ms Xu of entitlement to receive weekly compensation for a further three months only, terminating on 13 May 2017.

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

[11] 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 hearing.

[12] The Corporation agreed to arrange a medical case review.

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

> 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.

[14] On 8 May 2020, the Reviewer dismissed the review, which Ms Xu appealed.

Judge Spiller's decision

[15] Judge Spiller noted Ms Xu's contentions that:

(i) She had been incorrectly diagnosed since her accident, leading to the wrong treatment and in consequence, she suffered chronic pain.

(ii) Her condition resulted in her being unable to get a full-time job for many years.

(iii) Dr Pai's assessment included advice that she could push patients and use a hoist, but this gave her back pain.

[16] His Honour identified relevant sections of the Accident Compensation Act 2001 (the Act) and relevant case law principles in the case that:

(a) All the medical evidence is to be taken into account in deciding whether a person is vocationally independent. Where there is competing medical evidence, a traditional approach is required, in which the qualifications and experience of the practitioner, quality of the medical reports (including thoroughness of detail) and other matters will be relevant. *Martin*[2]

(b) The Corporation is not bound to retrain a claimant in order to be competitive in the market, and failure to obtain work does not itself demonstrate a claimant does not have the necessary ability. *Brown*[3]

(c) The legislative scheme for vocational independence is not targeted on obtaining employment, but on assessing fitness for employment. *Kennedy*[4]

(d) The test is whether, despite injury and related impairments, a person can work 30 hours per week. Job availability is irrelevant to the consideration of vocational independence. *Franich*[5]

[17] Judge Spiller did not accept Ms Xu's submissions, for reasons that:

(a) The Corporation had conducted occupational and medical assessments as required by the Act, and they conclusively found Ms Xu could sustain vocational independence in certain work types. Her vocational independence was confirmed by Occupational Assessors, Ms Field and Mr Fennessy, and Medical Assessors, Dr Ruttenberg and Dr Dryson.

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2 *Martin v Accident Compensation Corporation* [2009] 3 NZLR 701.
3 *Brown v Accident Compensation Corporation* [2006] NZACC 197.
4 *Kennedy v Accident Compensation Corporation* [2013] NZACC 266.

(b) Ms Xu did not provide any opposing opinions from occupational or medical assessors as to her vocational independence. Ms Xu relied on a report of Dr Malloy; however, his opinion concerned the cause of her neck pain. He did not comment on her vocational independence.

(c) The occupational and medical assessments received by the Corporation were supported by the report from Dr Pai (Orthopaedic Specialist), namely, Ms Xu had capacity for medium-level work, and that her main difficulty appeared to be getting a job.

Relevant law

[18] Section 162(1) of the Act provides:

> A party to an appeal who is dissatisfied with the decision of the District Court as being wrong in law may, with the leave of the District Court, appeal to the High Court.

[19] The legal principles governing an application for leave to appeal are:

- The issue must arise squarely from the decision challenged: *Jackson v ACC*;[6] *Kenyon v ACC*.[7]
- The point of law must be "capable of bona fide and serious argument": Impact Manufacturing.[8]
- Care must be taken to avoid allowing issues of facts to be dressed up as questions of law: *Northland Co-Operative Dairy Co Limited v Rapana*.[9]
- Where an appeal is limited to questions of law, and mixed question of law and fact is a matter of law: *CIR v Walker*.[10]

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5 *Franich v Accident Compensation Corporation* [2019] NZACC 94.

6 *Jackson v Accident Compensation Corporation*, unreported, HC Auckland, Priestley J, 14 February 2002 AP 404-96-01.

7 *Kenyon v Accident Compensation Corporation* [2002] NZAR 385

8 *Impact Manufacturing*, unreported, Doogue J, HC Wellington AP266/00, 6 July 2001.

9 *Northland Co-Operative Dairy Co Limited v Rapana* [1999] ERNZ 361, 363 (CA).

10 CIR v Walker [1963] NZLR 339, 353 – 354 (CA).

- A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision: *Edwards v Blairstow*.[11]

- It is a question of law whether or not a statutory provision has been properly construed or interpreted and applied to the facts: *CIR v Walker*.[12]

- Even if the qualifying criteria are established there remains an extensive discretion in the grant or refusal of leave to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law: *Jackson* and *Kenyon*.[13]

Grounds of appeal

[20] Ms Xu's submissions in support of her application for leave to appeal are essentially the same submissions she made in the substantive appeal.

[21] No error of law is identified by Ms Xu.

[22] There is no suggestion the Act was incorrectly interpreted, or there was no evidence to support the decision or that the evidence is inconsistent with the decision.

Analysis

[23] It is clear from the decision the Court identified the correct tests in consideration of ss 6,107(1), 108(1), 108(3) and 112 of the Act and applied those tests to the available evidence.

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11 *Edwards v Bairstow* [1995] 3 All ER 48, 57.
12 Supra.
13 Supra.

[24] His Honour particularly considered the evidence of Dr Malloy, on whose opinion Ms Xu relies. His Honour found though Dr Malloy acknowledged Ms Xu's neck pain, he did not comment at all on this condition acting as a barrier to achieving vocational independence.

[25] In my opinion, the decision of Judge Spiller:

(a) Correctly applied relevant law to the facts to make the finding Ms Xu had achieved vocational independence. Applying the principles in *Martin*[14] His Honour understood he was required to consider all the evidence in deciding whether Ms Xu had achieved vocationally independence.

(b) Is supported by occupational and medical evidence which is not challenged by any opposing occupational or medical expert opinion.

(c) Determined an outcome in the appeal which is a permissible option in all the circumstances.

Conclusion

[26] No questions of law arise in this case. It is clear from the decision that the Court was conscious of and applied the correct legal tests, discussed, analysed and weighed the evidence and was entitled on the facts as found to determine Ms Xu was vocationally independent, and her weekly compensation should cease.

[27] Accordingly, the application for leave to appeal is dismissed. There is no issue as to costs.

Denese L Henare
District Court Judge

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[14] Supra.

K Anderson, Barrister, Sangro Chambers, Auckland for the respondent