

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 36

ACR 244/19

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF
THE ACT

BETWEEN EION ARTHUR
Appellant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: 3 March 2023
Held at: Hamilton/KiriKiri

Appearances: L Findlater for the Appellant
F Becroft for the Respondent

Judgment: 8 March 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Vocational independence - s 107, Accident Compensation Act 2001 (“the Act”)]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 17 June 2019. The Reviewer dismissed an application for review of the Corporation’s decision dated 10 January 2019 assessing Mr Arthur as vocationally independent.

Background

[2] Mr Arthur was born in December 1979. He worked in various roles, including as a builder, labourer and chef.

[3] On 19 June 2012, Mr Arthur suffered a right wrist sprain, when a sliding door accidentally closed on his wrist. At the time of the accident, he was working as a cook on a casual basis.

[4] On 21 June 2012, Mr Arthur's GP, Dr Thamer Alsulaiman submitted a claim for cover for a right sprain tendon wrist or hand, to the Corporation. On 25 June 2012, Mr Arthur was granted cover and began receiving weekly compensation. He was certified unfit for work, with restrictions around heavy lifting, pulling, and carrying.

[5] On 5 July 2012, x-rays were taken of Mr Arthur's wrist, and Dr Greg Hunt, Radiologist, reported no bone or joint abnormality. Nevertheless, GP notes indicated ongoing pain. He attended physiotherapy but continued to be certified unfit.

[6] On 27 July 2012, Dr Brendan O'Neill, Sports Physician, referred Mr Arthur for an MRI scan. Dr O'Neill was concerned that there might be an underlying structural defect or a more significant injury. He also indicated that there was a chance that Mr Arthur was suffering from chronic regional pain syndrome.

[7] On 4 September 2012, Dr O'Neill reported on the results of the MRI scan, that it appeared to show a significant tear of the triangular fibrocartilage ("TFC") with significant effusion around the wrist joint. He suggested an orthopaedic referral. At that stage Dr O'Neill thought that Mr Arthur was fit for light clerical office work only.

[8] On 25 September 2012, Mr Tim Tasman-Jones, Hand and Upper Limb Surgeon, reviewed Mr Arthur. Mr Tasman-Jones concluded that Mr Arthur had suffered from "persistent ulnar sided wrist pain from a large traumatic central tear to the triangular fibrocartilage (TFC) complex". Mr Tasman-Jones recommended a right wrist arthroscopy and debridement of the tear, with post-surgical recovery of three to four months. A surgery request was subsequently made and approved.

[9] On 30 October 2012, Mr Arthur's surgery proceeded. Post-surgical reporting from Mr Tasman-Jones was positive. Mr Arthur was subsequently referred to a hand

therapist for a wrist splint, a gradual strengthening programme and for pain management services.

[10] On 15 December 2012, an Initial Occupational Assessment (“IOA”) was undertaken by Ms Irene Taylor. She noted that Mr Arthur left school following sixth form and commenced, but did not complete, a building apprenticeship. His work experience covered 15 years in a range of jobs including work as a chef and a builder/labourer. His transferrable skills were detailed, along with 15 job options which Ms Taylor thought would be suited to Mr Arthur’s skills. No vocational barriers to him returning to work were identified. Mr Arthur advised that he wanted to return to permanent work with Fonterra as the pay was good.

[11] On 22 December 2012, a pain management psychological assessment of Mr Arthur was done by Mr Wayne Hewlett, Psychologist. He advised that Mr Arthur appeared to be coping quite well with his situation post-injury, although other commentators had noted some inconsistencies in pain and injury presentation.

[12] Mr Arthur’s physiotherapist subsequently advised the Corporation that Mr Arthur had fixed views regarding his injury, and he did not think that physiotherapy would assist.

[13] As of 2013, Mr Arthur was certified as fit for light duties, but these were not available at his pre-injury work. Physiotherapy continued to be funded and he was referred for a functional capacity evaluation (“FCE”).

[14] In February 2013, an FCE was undertaken. The assessor, Ms Stephanie Wilcox, Physiotherapist, concluded that Mr Arthur demonstrated the ability to complete light work tasks.

[15] On 7 February 2013, Mr Tasman-Jones reported and confirmed that Mr Arthur’s post-operative pain and discomfort were continuing to settle slowly, and that he had regained most of the movement in his wrist. He was still, however, complaining of residual symptoms preventing him from returning to heavy work.

Mr Tasman-Jones suggested to Mr Arthur that he might need to consider changing to a light job.

[16] In April 2013, Mr Tasman-Jones agreed to undertake further arthroscopic surgery to investigate Mr Arthur's persisting symptoms. Surgery funding was subsequently approved.

[17] On 7 May 2013, Mr Arthur underwent further surgery. Post-surgical reporting was again positive.

[18] On 4 July 2013, Mr Tasman-Jones advised that he expected that Mr Arthur would be fit to undertake light duties by August 2013.

[19] On 19 August 2013, Dr David Ruttenberg, Occupational Medicine Physician, provided an Initial Medical Assessment ("IMA") of Mr Arthur. Dr Ruttenberg detailed the nature of the injury and the treatment undertaken. He clinically examined Mr Arthur and noted his restrictions and limitations. Dr Ruttenberg thought that Mr Arthur was unfit for his pre-injury role and any role that required repetitive forceful gripping type actions with use of the right hand. Dr Ruttenberg anticipated that Mr Arthur would continue in his recovery, and at that stage felt that he was ready to work in the role of Dispatch and Receiving Clerk. A number of other roles were deemed unsuitable at that stage because they involved heavier work.

[20] By September 2013, Mr Arthur's medical certificates confirmed that he was fit for light duties.

[21] In November 2013, a further FCE was undertaken by Ms Marion Moore, and this concluded that Mr Arthur was capable of undertaking up to heavy work tasks. However, it was indicated that a general strengthening programme to increase overall strength, fitness and activity might assist Mr Arthur with a return to work.

[22] On 14 November 2013, Mr Tasman-Jones referred Mr Arthur to the Pain Service, suggesting whether a secondary regional pain syndrome had arisen (this notwithstanding normal nerve conduction studies).

[23] On 30 November 2013, Dr Ruttenberg completed a further report, noting elements of chronic regional pain syndrome, although no objective evidence to suggest ulnar or median nerve involvement. He confirmed that Mr Arthur was unable to engage substantially in his pre-injury work and concluded that he was limited in respect of heavy tasks because of pain. Dr Ruttenberg made various treatment recommendations, including a referral to a multi-disciplinary pain management team with some psychological input. He was quite optimistic regarding Mr Arthur's ability to return to work.

[24] In February 2014, Mr Tasman-Jones referred Mr Arthur to the Pain Clinic.

[25] On 26 May 2014, Mr Tasman-Jones reported again, following an MRI scan of Mr Arthur's right elbow. This scan showed a small partial tear to the inferior border of the supinator muscle with some residual swelling around the ulnar nerve. Mr Tasman-Jones did not think that these clinical findings would explain Mr Arthur's symptoms, and recommended a trial of an elbow splint at night.

[26] On 12 June 2014, Dr Luke Mercer, Pain Specialist, reported that there had been significant rehabilitation to date but still ongoing pain. He commented:

I felt that his right hand was slightly cooler than the left hand but there was no clear swelling and no colour changes, no atropic skin or nail changes observed. He has good range of motion of the hand, fingers and wrist and 4+/5 power of the right hand with some limitation apparently due to increasing pain. ...

It is my impression that Mr Arthur fulfils the criteria for complex regional pain syndrome. This pain syndrome has developed as a result of an initial traumatic sprain type injury that was temporarily relieved by surgical intervention but has suffered repeated aggravation with minor trauma. Given that his symptoms cover several nerve territories, I do not believe that the explanation here is a single nerve injury or neuralgia. Furthermore, he has had an MRI that does not demonstrate any clear anatomical basis for his persistent pain, at least in the elbow, wrist or forearm. There are some psychosocial factors that are likely to contribute at least partially to his ongoing pain syndrome, including his lack of occupation, his excessive at times alcohol use and his own understanding of pain specifically that there must be an underlying cause that has an anatomical basis that can be fixed.

[27] In July 2014, Mr Arthur's file was reviewed by Ms Christine Vorster, Branch Advisory Psychologist. She suggested addressing the psychological issues compromising Mr Arthur's pain management, in particular, excessive alcohol use.

[28] Subsequently, the Corporation continued to fund hand therapy, and the Pain Clinic continued to provide assistance.

[29] In October 2014, Mr Tasman-Jones reported again, noting increasing signs of right cubital tunnel syndrome in the elbow. A subsequent nerve conduction study was again normal, so Mr Tasman-Jones did not think that surgery was indicated. He did, however, recommend a steroid injection, which resulted in a marked improvement in symptoms.

[30] In January 2015, Mr Tasman-Jones suggested a second opinion from the Auckland Pain Clinic (“TARPS”). He noted that Mr Arthur continued to suffer from ongoing pain which he thought was substantially due to Complex Regional Pain Syndrome (“CRPS”). The Corporation approved funding for pain management at TARPS.

[31] On 24 February 2015 Dr Tipu Aamir and Dr Kieran Davis, both Pain specialists (and Dr Aamir is also a Psychiatrist), saw Mr Arthur under the Auckland Regional Pain Service concurrently. Dr Aamir looked at the psycho-social factors of Mr Arthur’s pain, and Dr Davis examined the pain history of the injury. They diagnosed CRPS. Dr Davis noted that “predominate symptoms now are pain in and around his elbow and dysesthetic sensations”.

[32] In April 2015, TARPS reported and suggested a second surgical opinion, noting that Mr Arthur was still not convinced that there was not some underlying pathology that had been missed.

[33] On 20 May 2015, Mr Chris Taylor, Orthopaedic Surgeon, provided a second opinion. He noted that Mr Arthur was very happy with the results of his wrist surgery but had ongoing symptoms in his right elbow. Mr Taylor suggested a further MRI scan and queried whether the condition was a pronator syndrome relating to biceps tendinosis. The subsequent MRI scan was inconclusive, but Mr Taylor still thought that there could be an ulnar nerve problem. He was hesitant regarding further surgery but noted that there were surgical options.

[34] On 9 September 2015, Mr Tasman-Jones reported again. He noted that Mr Arthur was keen to try surgery. Mr Tasman-Jones thought that, at best, there was a 50% probability that there would be some improvement and there was a real risk that further surgery could make things worse. An ARTP was subsequently filed, and surgery funding was approved.

[35] On 10 November 2015, the surgery on Mr Arthur proceeded, followed by further post-surgical hand therapy. Post-surgical reporting indicated some improvement in symptoms.

[36] On 21 March 2016, Dr David Prestage, Occupational Physician, undertook a further IMA. He indicated that Mr Arthur's belief in the structural nature and severity of his injuries was a significant barrier to his rehabilitation. Dr Prestage noted too that Mr Arthur was "absolutely opposed" to the possible need for psychological management for chronic musculoskeletal pain. In Dr Prestage's view, Mr Arthur needed to accept the reality of his condition, being a pain syndrome with underlying central sensitisation. Dr Prestage went on to identify the various job options as being medical unsustainable at that point in time, principally because of the physical demands in the roles identified.

[37] Mr Arthur was then referred for further pain management comprising of a functional reactivation programme.

[38] On 13 April 2016, Mr Tasman-Jones reported again, advising that Mr Arthur's wounds had healed well without complication and that he had regained a full range of movement in his elbow joint. Mr Tasman-Jones thought that Mr Arthur's CRPS was best managed with "time, a gradual strengthening exercise programme and a gradual return back to work:". Mr Tasman-Jones cleared Mr Arthur to return gradually to work on light and alternative duties.

[39] On 2 June 2016, Ms Janet Wagstaff reported that advised that Mr Arthur had done well in the functional reactivation programme and now had an excellent understanding of his pain. An extension of the programme was recommended and subsequently approved.

[40] In August 2016, a further FCE was undertaken by Ms Moore. She concluded that Mr Arthur had the capacity to safely undertake light work.

[41] In October 2016, Dr Prestage undertook a further IMA. He advised that Mr Arthur had done very well since last seen in March 2016, with the multi-disciplinary rehabilitation and pain management proving beneficial. Dr Prestage concluded that Mr Arthur was capable of undertaking employment up to a light level of physical demand in roles that did not require repetitive or prolonged lifting, carrying, or driving. Dr Prestage identified the job option of Dispatch and Receiving Clerk as being medically sustainable for Mr Arthur. Dr Prestage concluded:

Mr Arthur has made surprisingly good progress and should be encouraged to continue with current management. It is possible he will not regain an ability to return to heavy and/or highly repetitive work, and his overall transferable skills should be reviewed.

[42] In November 2016, Mr Tasman-Jones provided a further report advising that Mr Arthur's pain continued to improve.

[43] The Corporation subsequently continued to support Mr Arthur with the pain management programme and funded full gym and pool memberships for a period.

[44] On 17 February 2017, Ms Jillena Paekau, Career and Vocational Consultant, reported on Mr Arthur's transferrable skills and possible career options. Vocational rehabilitation was recommended, including computer training.

[45] On 29 March 2017, a further IOA was undertaken. The assessor, Ms Paekau, again identified Mr Arthur's skills and a number of job options that would be suitable for him. The roles identified in this assessment were lighter in nature and included a range of clerical and sales roles. Ms Paekau advised that Mr Arthur needed to participate in computer training, some driver's licensing and obtain some licensing endorsement certificates, in order to have a better chance in relation to the roles identified. Mr Arthur was subsequently referred for computer training with Step By Step.

[46] On 27 April 2017, Mr Tasman-Jones discharged Mr Arthur from his care, noting that the post-operative pain and discomfort had settled, and there had been a partial improvement in his range of motion and strength in his hand, with some ongoing ulnar nerve symptoms which were anticipated to settle slowly.

[47] On 22 May 2017, Mr Nick Ludford, a Step by Step trainer, confirmed that Mr Arthur had completed a computer training course and learnt many new skills, and noted:

Eoin has been a great and attentive student to teach and often mentioned how he looked forward to the lessons. He has developed a more keen interest in all things computing, and this will certainly hold him in good stead going forward into the workplace when he has recuperated from his injuries.

Eoin has therefore successfully completed his computer training that it typically encountered in the work type options of Stock Clerk, Human Resources Clerk, Recruitment Consultant and Sales Representative (groceries).

[48] Mr Arthur was subsequently supported with a work readiness programme, which included further physiotherapy.

[49] On 18 July 2017, a further FCE was undertaken by Mr Greg Stewart, who concluded that Mr Arthur had the capacity to undertake sedentary to light work.

[50] On 2 August 2017, Dr Prestage undertook a further IMA. He noted:

Mr Arthur's ongoing pain and the associated dysfunction of his right arm remain the reasons he has not simply returned to the workforce. However, he has again made steady progress since the last Initial Medical Assessment with a measurable increase in grip strength today. He also appears more positive regarding the future.

However, Mr Arthur is still hampered by his arm. As previously stated, he ideally requires interdisciplinary management but his views on psychological assessment and intervention are unchanged. This will hamper attempts at pain management.

[51] Dr Prestage concluded that Mr Arthur was capable of undertaking employment up to a light level of physical demand, and identified the roles of Stock Clerk, Human Resources Clerk and Recruitment Consultant as medically sustainable. Mr Arthur was subsequently referred for further psychological services, and funding for the physical programme also continued.

[52] On 25 August 2017, Mr Arthur, upon the recommendation of the Corporation's Medical Advisor, Dr Chris Swart, obtained cover for CRPS.

[53] On 24 October 2017, Mr Corne Mackie, Psychologist, reported as follows:

Nat remains disinclined to use analgesia and has not found psychological pain management strategies particularly useful, although he engaged well during sessions. I have encouraged Nat to use the introduced strategies consistently, and these are not going to be helpful if not applied.

He expressed the view that he had come to terms that pain is likely to be part of life going forward and that he would like to return to employment providing this is some outdoors role. He is resistant to office based work, and a focus on this type of work would likely have a limited chance of success. Nat describes good mood, no anxiety, and that he engages in activities including regular walks, and attending the gym and pool. He reported good sleep.

His scores on the hospital anxiety and depression scale remained in the normal range. His scores on pain measures today were in the normal range.

I suggest a more functional focus at this stage, perhaps with occupational therapy input so that Nat can test the limits in terms of activity and work.

[54] On 26 October 2017, Mr Wayne Milicich, Physiotherapist, provided a final report confirming that Mr Arthur had gained a good understanding of posture, that he had good function in relation to his shoulder, that his pain had reduced and that he had a greater tolerance. Mr Milicich advised:

It is my opinion that the some of the symptoms are from his body still adjusting to the surgical interventions of shortening the ulnar and rerouting the median nerve. As his general strength and correct use of his hand/shoulder/breathing patterns change he will continue to improve.

He has been attending the gym and doing a very specific exercise programme that I have given him. I believe he should keep this going so that he further improves the strength and conditioning of his arm/shoulder complex. It is only with time I believe that further change and improvement will come.

I believe he is ready for return to work at light tasks such as driving without the need for heavy repetitious lifting and as time passes and he makes further gains this could be reviewed.

[55] In November 2017, the Corporation contracted Mr Lance Taylor, Vocational Consultant at Ergoworks, to commence a Back to Work Programme with Mr Arthur.

[56] On 2 October 2018, Mr Taylor confirmed that Mr Arthur had completed a pre-employment preparation programme, a curriculum vitae, a class 2 full licence, a

forklift endorsement and OSH operator's certificate, wheels, tracks and rollers endorsements and a P endorsement. Mr Taylor confirmed that Mr Arthur was vocationally work ready for the roles of Stock Clerk, Human Resources Clerk and Recruitment Consultant. Attempts were made to source a work trial, however those attempts were not successful.

[57] On 31 October 2018, Dr Paul Noonan, BMA, concluded that it was likely that Mr Arthur would be able to sustain 30 hours of appropriate work per week.

[58] On 5 November 2018, a Vocational Independence (VI) quality check was undertaken, and Mr Arthur's file was signed off for a VI referral. On 13 November 2018, the Corporation met with Mr Arthur to discuss the VI process.

[59] On 26 November 2018, a VI Occupational Assessment ("VIOA") was undertaken by Ms Caroline Field. Mr Arthur confirmed that he had completed computer training and "learnt quite a bit in this course". Ms Field listed Mr Arthur's 15 years' experience in the workforce. She confirmed that he had good verbal communication skills, an intermediate understanding of word processing, a basic understanding of spreadsheets, experience with databased software and confidence using the internet and emailing systems. Ms Field went on to identify 12 job options as being vocationally suitable. Included in the job options were the roles of Stock Clerk, Order Clerk and Dispatching and Receiving Clerk:

Stock Clerk

Mr Arthur has previously worked as a head chef for 4 years, a chef for 6 years and a chef/animal handler (snakes) for 5 months. Within these roles, he has gained experience in undertaking stock control duties, ordering, purchasing, receiving, handling and storing stock and supplies, stocktaking, maintaining records and maintaining relationships with suppliers. Throughout his employment history, Mr Arthur has demonstrated his detail skills when placing and taking orders and pricing up catering and group menus. Mr Arthur has completed some relevant computer training. He is vocationally ready for this occupation at entry level. ...

Potential earnings for this job recommendation are approximately \$34,320.00 to \$40,000.00 per annum (based on a 40-hour week). This job either provides Mr Arthur with the opportunity to earn an income equal to or greater than his pre-incapacity earnings (\$63,194.00 per annum) or, if potential earnings are lower, then the match to skills and/or training and/or qualifications and/or experience makes this job a good option for possible future vocational independence.

Based on an analysis of data collected for this assessment, if Mr Arthur was employed in this role it is estimated that he could reasonably be expected to earn at or beyond the second quartile (25-50%) of the specified pay range. Progression thereafter would be based on performance and employer policy.

Claimant comments: "No, I want a physical job where I am moving round."

Order Clerk

Mr Arthur has previously worked as ... Within these roles, he has gained experience in taking and placing orders: ordering, purchasing, receiving, handling and storing stock and supplies; undertaking stock control duties; stocktaking; maintaining records and maintaining relationships with suppliers. Throughout his employment history, Mr Arthur has demonstrated his detail skills when pricing up catering and group menus. Mr Arthur has completed some relevant computer training. He is vocationally ready for this occupation at entry-level. ...

Potential earnings for this job recommendation are approximately \$34,320 to \$70,000 per annum (based on a 40-hour-week). This job either provides Mr Arthur with the opportunity to earn an income equal to or greater than his pre-incapacity earnings (\$63,194.00 per annum) or, if potential earnings are lower, then the match to skills and/or training and/or qualifications and/or experience makes this job a good option for possible future vocational independence. Based on an analysis of data collected for this assessment, If Mr Arthur was employed in this role it is estimated that he could reasonably be expected to earn at or beyond the third quartile (50-75%) of the specified pay range. Progression thereafter would be based on performance and employer policy.

Claimant comments: "I would love to but cannot at this point in time."

Dispatching and Receiving Clerk

Mr Arthur has previously worked as ... Within these roles, he has gained experience in receiving, handling and storing stock and supplies; undertaking stock control duties; stocktaking; maintaining records and maintaining relationships with suppliers. Throughout his employment history, Mr Arthur has demonstrated his detail skills when placing and taking orders and pricing up catering and group menus. Mr Arthur has completed some relevant computer training. He is vocationally ready for this occupation at entry-level. ...

Potential earnings for this job recommendation are approximately \$34,320 to \$57,000 per annum (based on a 40-hour-week). This job either provides Mr Arthur with the opportunity to earn an income equal to or greater than his pre-incapacity earnings (\$63,194.00 per annum) or, if potential earnings are lower, then the match to skills and/or training and/or qualifications and/or experience makes this job a good option for possible future vocational Independence. Based on an analysis of data collected for this assessment, If Mr Arthur was employed in this role it is estimated that he could reasonably be expected to earn at or beyond the second quartile (25-50%) of the specified pay range. Progression thereafter would be based on performance and employer policy.

Claimant comments: "Only if it paid well and could physically do it."

[60] On 13 December 2018, a VI Medical assessment (“VIMA”) was completed by Dr Michael Kahan, Occupational Medicine Specialist. He identified the main limitations as gripping, lifting, prolonged keyboarding and writing. He acknowledged that the main ongoing problem was pain, rated at approximately 6 to 7 out of 10 and aggravated by movement such as gripping and lifting. Dr Kahan concluded, notwithstanding Mr Arthur’s ongoing pain, that he was fit to undertake sedentary to light work that allowed flexibility of movement and did not involve heavy lifting. Dr Kahan noted that Mr Arthur had good normal function of his left non-dominant arm. Dr Kahan also considered that Mr Arthur’s rehabilitation was complete and noted that no further treatment was contemplated. Dr Kahan concluded that Mr Arthur was fit for light work, identifying the following job options as suitable:

Stock Clerk

This job is sedentary to light in nature and does involve standing and walking. It does involve repetitive movements on an occasional to frequent basis to allow for opportunity for flexibility of movement. He is also able to use his left non-dominant arm for many tasks. He is capable of sedentary to light work which will allow him opportunity of flexibility of movement. He would not suit work which involved prolonged driving or tasks which involve significant arm vibration.

The physical demands of this role are therefore within his current capabilities. This job is therefore medically sustainable working 30 hours or more per week. There are no significant issues of low mood or fatigue and he keeps himself active during the day. He manages his pain by varying his position and rotating his tasks.

Nat commented “no, not at this point in time”.

Order Clerk

This job is sedentary to light in nature and does involve sitting at a computer workstation as well as repetitive hand movements when operating a computer. However there is opportunity for flexibility of movement. ·

He is capable of sedentary to light work which would allow him opportunity for flexibility of movement. He would not suit work which involved prolonged driving or tasks which involve significant hand-arm vibration.

The physical demands of this role are therefore within his current capabilities. This job is therefore medically sustainable working 30 hours or more per week. There are no significant issues of low mood or fatigue and he keeps himself active during the day. He manages his pain by varying his position and rotating his tasks.

Nat mentioned that he is not qualified for this sort of work.

Dispatch & Receiving Clerk

This Job is sedentary to light in nature and does involve standing and walking as well as sitting at a computer workstation. Repetitive movement is likely to be occasional to frequent. There is opportunity for flexibility of movement.

He is capable of sedentary to light work which would allow him opportunity for flexibility of movement. He would not suit work which involved prolonged driving or tasks which involve significant hand-arm vibration.

The physical demands of this role are therefore within his current capabilities. This job is therefore medically sustainable working 30 hours or more per week. There are no significant issues of low mood or fatigue and he keeps himself active during the day. He manages his pain by varying his position and rotating his tasks.

Nat commented “yes, only if the pay was there”.

[61] On 10 January 2019, the Corporation issued a decision determining that Mr Arthur was able to work for 30 or more hours a week in the following types of work: Stock Clerk; Order Clerk; and Dispatch & Receiving Clerk. The Corporation advised that his weekly compensation would be ended on 9 April 2019. Mr Arthur subsequently filed an application for review against that decision.

[62] On 5 June 2019, review proceedings were held. On 17 June 2019, the Reviewer dismissed the review, on the basis that Mr Arthur had achieved VI.

[63] On 27 September 2019, a Notice of Appeal was lodged.

[64] On 26 August 2022, the Corporation issued a decision noting that deemed cover had been granted for right carpal tunnel syndrome, ulnar nerve compression, cubicle tunnel syndrome and biceps tendinosis, but now advising that the Corporation was revoking deemed cover for those conditions.

[65] In October 2022, Dr Paul Timmings, Neurologist, provided a report in relation to other claim matters, and confirmed Mr Arthur’s primary and ongoing difficulty with his right arm pain, which is dysaesthetic, and hyperalgesic, causing him to have difficulty using the hand or arm for more than a few minutes at a time. Dr Timmings diagnosed a chronic regional pain syndrome or a chronic pain syndrome.

Relevant law

[66] 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.

[67] 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.

[68] Section 110 provides:

- (1) The Corporation must give written notice to a claimant required by the Corporation to participate in an assessment of his or her vocational independence.
- (2) The notice must—
 - (a) state the purpose, nature, and effect of the assessment; and
 - (b) state that the claimant is required to participate in the assessment; and
 - (c) state the consequences of not doing so; and
 - (d) state the claimant's right to be accompanied by another person during the assessment.
- (3) The Corporation must not require the claimant to participate in an assessment—
 - (a) unless the claimant is likely to achieve vocational independence; and
 - (b) until the claimant has completed any vocational rehabilitation that the Corporation was liable to provide under his or her individual rehabilitation plan.

[69] Section 112 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.

[70] Clause 25(1)(a) of Schedule 1 of the Act provides that the occupational assessor may take into account, among other things, the claimant's pre-incapacity earnings.

[71] In *McGrath*,¹ at issue was the pain associated with the appellant's injury and its impact on her ability to attain vocational independence. Elias CJ, in 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.

[72] In *Martin*,² 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.

[73] In *Wildbore*,³ 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.

¹ *McGrath v Accident Compensation Corporation* [2011] 3 NZLR 733, [2011] NZSC 77.

² *Martin v Accident Compensation Corporation*, HC Wellington CIV-2008-485-2617, [2009] 3 NZLR 701.

³ *Wildbore v Accident Compensation Corporation* [2006] NZACC 94.

[74] In *Milne*, Judge McGuire stated:⁴

[60] Reference to the social contract that underpins the ACC system has been referred to and commented on numerous times over the years and in the case of rehabilitating an injured person to a point where he or she is able to take gainful employment once again is rightly regarded as important. It is important for the individual themselves and it is important for their place in society. That is not to say that the pathway back to employment will be a smooth one. There will inevitably be significant challenges ahead for anyone in a similar position to the appellant making that transition to a new and different employment role.

[61] While it is accepted that the appellant is plainly a person much more at home in the sorts of employment roles he carried out prior to his injury, working with his hands in labouring, product assembly, concrete cutting and as a fire sprinkler fitter, his new proposed roles will require a period of adjustment and present as unfamiliar and “outside the appellant’s comfort zone”.

[62] However, I find that the Corporation for its part has carried out its obligations and its role in bringing the appellant to a point of vocational independence as defined by s 6. Whilst the computer course that the appellant successfully completed may have not resulted in the appellant achieving a level of ease and familiarity with computer tasks that would be required in the new roles, I am satisfied that they are adequate for the purposes of his initial entry into one or other of the identified work roles. Accordingly, I am satisfied that the decision by the Corporation of 11 February 2016 determining that the appellant had achieved vocational independence in the two job options of rental sales person (vehicle and general clerk), was correct.

[75] In *Ewart*,⁵ Judge Beattie stated:

[32] This Court has stated on several previous occasions that an appellant’s own self analysis of his physical capabilities would not carry the day when it is set against the advice of specialists, and in particular the medical assessor, who is required by virtue of the provisions of Section 98 of the Act to have certain skills and attributes in the field of Occupational Medicine.

[76] In *Bretherton*,⁶ Judge Beattie stated:

[27] [Dr Antoniadis, the medical assessor’s] assessment report ... makes it clear that he was aware that the main barrier to this appellant’s working was the pain which he suffered and how that would impact on any work-types identified. Contrary to the submission of Mr Nielson, I find that Dr Antoniadis has in full measure considered the pain factor when assessing the appellant’s abilities.

...

[32] In conclusion, therefore, I find that the decision to determine that the appellant had attained vocational independence was a decision made after full consideration of the matters which the Act requires to be considered and that the medical assessment of Dr Antoniadis fully and fairly identified the

⁴ *Milne v Accident Compensation Corporation* [2019] NZACC 99.

⁵ *Ewart v Accident Compensation Corporation* [2002] NZACC 51.

⁶ *Bretherton v Accident Compensation Corporation* [2010] NZACC 15.

appellant's abilities from a medical perspective to sustain the physical demands of the work-types identified. It is also the case that there is in effect no competing medical opinion to suggest otherwise.

[77] In *Splite*,⁷ Cooper J (for the Court of Appeal) stated:

... a determination by the Corporation that the requirements of s 110(3) of the Act have been met is not a decision giving rise to appeal and review rights under pt 5 of the Act.

[78] In *Carr*,⁸ Isac J stated:

[46] As *Splite* makes clear, a challenge to a determination under s 110(3) is not a “decision” amenable to challenge under the Part 5 procedure. It follows that a claimant wishing to bring a challenge must do so by way of judicial review, and should do so before the assessment process is completed. If they do not, the question is rendered moot by the subsequent s 107 decision, which necessarily involves a finding that a claimant has, in fact, achieved vocational independence.

[79] In *Herlihy*,⁹ Judge Ongley stated:

[33] Obtaining employment and achieving vocational independence are associated but different outcomes. Obtaining employment does not necessarily involve full time work. Vocational independence does not guarantee work at all, but is only an assessment that the claimant has work skills and physical capacity to perform categories of work to which he is suited by reason of experience, education, or training. It is possible that he may not be able to get a job because of his age, difficulties caused by his injury, unavailability of suitable work. Vocational independence is concerned with capacity to work, but not with the ability to get a job. Vocational rehabilitation may stop short of equipping a claimant with the qualifications necessary to compete against other job applicants.

[80] In *Collins*,¹⁰ Judge Beattie stated:

[17] That situation does not pertain in the present case and I agree with the submission made by Mr Hlavac that the correctness or otherwise of a determination of vocational independence is not dependent upon a claimant actually being able to obtain employment in any work-type.

[18] I find that the determination of vocational independence is simply an identification that a claimant is a person who has skills and abilities to perform work in certain fields of endeavour and is thereby put in the same category as any other member of the public who is not physically disabled from obtaining employment. The assessment creates a situation where the appellant is again

⁷ *Splite v Accident Compensation Corporation* [2016] NZCA 302 at [53].

⁸ *Carr v Accident Compensation Corporation* [2022] NZHC 2530.

⁹ *Herlihy v Accident Compensation Corporation* [2006] NZACC 196.

¹⁰ *Collins v Accident Compensation Corporation* [2009] NZACC 146.

part of the work-force, albeit probably in a more restricted vein than a person who is not suffering from any physical disability.

[81] In *Gordon*,¹¹ Judge Powell stated:

[19] More importantly however the whole purpose of weekly compensation is to provide a set level of compensation for a job that the claimant is now by reason of personal injury incapacitated from undertaking. This underpins the social contract that the Accident Compensation regime represents. To suggest that a set level of compensation can be terminated notwithstanding the incapacity for his or her original job continues simply because the Corporation determines the claimant can undertake a job at a much lower level irrespective of whether that will mean the claimant is placed in a substantially worse position undermines the safeguard provided by the weekly compensation and in my view such an approach is simply abhorrent.

[82] In *Shand*,¹² Judge Walker stated:

[49] In addition, I accept the submissions of the Corporation that the occupational assessment is not mandatorily required in any event to take into account, among other things, the claimant's earnings before the claimant's incapacity (cl 25 of the schedule).

Discussion

[83] The issue in this case is whether the Corporation correctly determined that Mr Arthur had achieved vocational independence in three job options, namely, Stock Clerk, Order Clerk and Despatch and Receiving Clerk.

[84] Ms Findlater, for Mr Arthur, submits as follows:

- (a) The Corporation did not follow its own guidance to evaluate Mr Arthur's functional capacity, to determine whether he could safely and sustainably work as a store clerk. The Corporation could not therefore have been satisfied that vocational independence was a likely outcome of the process, pursuant to s 110 (3), and it was not in a position to start Mr Arthur in October 2018 on the vocational independence pathway.
- (b) The Corporation knew from Mr Taylor that the type of clerking role did not exist with any of the employers in Matamata as a discrete

¹¹ *Gordon v Accident Compensation Corporation* [2015] NZACC 25.

¹² *Shand v Accident Compensation Corporation* [2018] NZACC 51.

employment opportunity during the vocational independence process. The Corporation knew this because Mr Taylor had advised the case manager that he had three other clients who had been identified as suited to stock clerk-type roles, and no business had a dedicated stock clerk-type role.

- (c) The work roles identified by the Occupational Assessor, Ms Field, included gross income disparities.
- (d) The medical assessment completed by Dr Kahan is flawed because:
 - i. Dr Kahan erroneously decided that Mr Arthur's complex regional pain syndrome had improved on the apparent remission of symptoms he had not been recorded as suffering, meaning that his understanding of Mr Arthur's pain and how that impacted his ability to work sustainably was incorrect. Dr Kahan does not hold the correct speciality to make assertions that Mr Arthur's pain condition has changed. Arriving at a diminution of Mr Arthur's pain condition would require the opinion of a Pain Specialist, not an Occupational Physician.
 - ii. Dr Kahan did not account properly for the pain Mr Arthur's experiences.
 - iii. Dr Kahan noted Mr Arthur's suitability for aspects of the role that occurred "occasionally to frequently", involving use of both dominant and non-dominant arms: it lacks common sense to reach a conclusion about medical suitability when a work role involves "occasional to frequent" performance of a task, and adds an unknowable quotient to the assessment that cannot be ignored.

[85] This Court acknowledges the above submission. However, the Court points to the following considerations.

[86] First, in relation to the Corporation's decision to require Mr Arthur to participate in a vocational independence assessment (under section 110(3)), the Court of Appeal has found that a challenge to such a decision is not a "decision" amenable to challenge under the review and appeal procedure under the Act. The Court of Appeal has established that a claimant wishing to bring a challenge to the Corporation's decision under section 110(3) must do so by way of judicial review, and should do so before the assessment process is completed.¹³ In any event, the conclusion of Dr Paul Noonan, BMA, that it was likely that Mr Arthur would be able to sustain 30 hours of appropriate work per week, appears to have been well founded in light of the reports on Mr Arthur's condition (see above paragraph [57] and preceding paragraphs).

[87] Second, in relation to the alleged absence of employment opportunities (and the Corporation's alleged knowledge of this), it has been established that a determination of vocational independence is concerned with capacity to work, and not with the ability to get a job. Thus, the correctness or otherwise of the Corporation's determination of Mr Arthur's vocational independence is not dependent upon him actually being able to obtain employment in any work-type.¹⁴

[88] Third, in relation to alleged gross income disparities between the work roles identified for Mr Arthur and his previous employment, this Court accepts that an occupational assessor may take into account, among other things, a claimant's pre-incapacity earnings.¹⁵ However, the assessor is not mandatorily required to take into account pre-incapacity earnings, and, where this criterion is taken into account, the Court will look to whether the claimant is placed in a substantially worse position.¹⁶ In Mr Arthur's case, the occupational assessor did take pre-incapacity earnings into account. The assessor advised that the three selected job options either provided Mr Arthur with the opportunity to earn an income equal to or greater than his pre-incapacity earnings or, if potential earnings were lower, then the match to skills and/or training and/or qualifications and/or experience made the jobs a good option for possible future vocational independence.

¹³ See above *Splite*, above note 7, and *Carr*, above note 8.

¹⁴ See above *Herlihy*, above note 9, and *Collins*, above note 10.

¹⁵ Clause 25(1)(a) of Schedule 1 of the Act.


¹⁶ See above *Gordon*, above note 11, at [19], and *Shand*, above note 12, at [49].

[89] Fourth, in relation to Dr Kahan's medical assessment, Dr Kahan expressly acknowledged that Mr Arthur's main ongoing problem was pain, rated at approximately 6 to 7 out of 10, and aggravated by movement such as gripping and lifting. Dr Kahan noted that Mr Arthur had good normal function of his left non-dominant arm. Dr Kahan concluded, notwithstanding Mr Arthur's ongoing pain, that he was fit to undertake sedentary to light work that allowed flexibility of movement and did not involve heavy lifting. Mr Arthur's response, to whether the position of Dispatch and Receiving Clerk was medically sustainable, was "yes, only if the pay was there". This Court observes that no further medical report has been provided by Mr Arthur to counter the medical assessment of Dr Kahan.

Conclusion

[90] In light of the above considerations, the Court finds that the Corporation correctly determined that Mr Arthur had achieved vocational independence in three job options, namely, Stock Clerk, Order Clerk and Despatch and Receiving Clerk. The decision of the Reviewer dated 17 June 2019 is therefore upheld. This appeal is dismissed.

[91] I make no order as to costs.



P R Spiller
District Court Judge

Solicitors for the Appellant: Laura Findlater and Lily Wilkie.
Solicitors for the Respondent: Medico Law.