

Three months ago, he had a further injury while wheeling a wheelbarrow full of mortar. He felt something pop in his shoulder twice in quick succession, producing severe pain in his left shoulder and upper arm. There has been gradual wasting in the shoulder and arm on the left side, with an increase in neck pain and arm pain ...

He has obvious wasting of the left supra and infra spinatus, left deltoid, left triceps and biceps muscles ...

[4] On 8 November 2001, Doctor Jackson reported that nerve conduction studies revealed a recent left suprascapular nerve palsy with denervation and conduction block of the supra and infra spinatus muscles of the left side. The appellant also had a moderate lesion of the left C7 nerve root.

[5] Despite his injury in 2001, Mr Beker continued to work. On 9 October 2007, he presented to his general practitioner, Doctor Williamson, with weakness in his left arm and loss of power of adduction and abduction at the shoulder. She also noted wasting of the shoulder girdle in infraspinatus deltoid and the biceps and triceps.

[6] She noted that he needed to be seen again because of his considerable dysfunction.

[7] Doctor Jackson reported again on 12 December 2008, noting:

Mr Beker has sustained a series of work related neck injuries, two of which have been documented. The latter has left him with left suprascapula nerve palsy and a left C7 neuropathic pain syndrome. His recent presentation with a relatively acute left C5 radiculomyelopathy represents an accumulation of work related repetitive injury to his cervical spine, with progressive cervical spondylosis producing central canal and foraminal stenosis causing spinal cord compression and left C5 nerve route compression.

[8] On 8 March 2011 Mr Beker's GP, Dr Williamson, lodged a treatment injury claim arising from a cervical spine operation performed in 2009.

[9] After investigation ACC accepted the claim for cover for:

“Left C6 nerve root damage secondary to cervical surgery...”

[10] The deemed date of injury was determined to be 6 August 2009 and ACC commenced paying weekly compensation.

[11] On 26 August 2011 ACC obtained an Initial Occupational Assessment on the appellant and on 7 October 2011 Dr Yarnall provided an Initial Medical Assessment. ACC subsequently obtained a further supplementary report in respect of each of these assessments.

[12] On 20 March 2012, ACC wrote to the appellant, stating:

Your treatment provider has provided us with the following additional injury for this claim:

Secondary – SJ57 – suprascapular nerve injury – left:

We're pleased to tell you we have approved cover for this injury and have added it to the following injuries already covered under this claim;

Secondary – S502 – coracohumeral sprain – shoulder (incl Clavicle/blade) – left.

[13] On 17 April 2012 Ms Cope, occupational therapist, provided ACC with a Functional Capacity Evaluation report. Ms Cope noted that Mr Beker's "overall capacity was more within the light range" and that:

Mr Beker's results were also impacted upon his previous left Achilles injury, his left lower back strain, and possibly from his carpal tunnel surgery injury with reduced right grip strength reported as a result ...

[14] In late April 2012 a Comprehensive Pain Assessment report on Mr Beker's presentation was provided to ACC by Mercy Pain Services.

[15] On 21 August 2012, ACC notified Mr Beker that it was commencing the vocational independence assessment process.

[16] On 29 September 2012, ACC advised Mr Beker that it "considers that your individual rehabilitation programme is now complete and plans to assess your vocational independence".

[17] On 16 October 2012, ACC completed a Vocational Independence Occupational Assessment Report Complex.

[18] On 1 November 2012, ACC requested Dr Murray, GP, to carry out a Vocational Independence Medical Assessment.

[19] Mr Beker has a complex claim history including both accident and non-accident injuries and conditions.

[20] In his report of 6 November 2012, Dr Murray reported that he had taken account of:

Interview and examination of the above, together with supplied documentation which was fully reviewed prior to the assessment and felt to be adequate for the purposes of the assessment. Included within this documentation are details of injuries relevant to this assessment, received treatment, time sequence of events and any complication. This information has been taken into account in the preparation of this report although it is based essentially on my own history taking and clinical examination.

[21] Dr Murray included the suprascapular injury in Mr Beker's history of injury and treatment, and Dr Murray's diagnosis recorded that:

He has long standing multi level cervical spondylosis, and nerve conduction and EMG. Studies over the years have shown evidence of some left sided radiculopathy at C5, 6 and 7, with some cord compression at the C5 level noted in 2007. He has also had evidence of previous suprascapular nerve palsy. Clinically, he has some wasting of the left biceps, absent biceps and supinator jerks bilaterally, generally good power of his left arm, although not as strong as his right side. He has limited external rotation of his left shoulder. He describes no sensory loss.

He has had a previous rupture of the right biceps long head.

He has a swollen tender right third MCP joint, presumably due to arthritis. The most likely diagnosis is osteoarthritis, but I have not seen an X-ray report of his hands. Other causes would be possible, e.g. gout, but I presume this has been ruled out by his GP and surgeon in the past.

He has had bilateral carpal tunnel decompression.

He has previously ruptured left Achilles tendon and may have ruptured a tendon around his left elbow at some stage in the past.

[22] Under the heading "Functional Limitations" with regards to the Appellant's Work Capacity, Dr Murray reported that the appellant's neck and radiculopathy limited Mr Beker's ability to use his left upper limb for heavy work. He concluded that Mr Beker could manage sedentary, light and some medium work, but could not cope with heavy work full time. He identified a number of work types in the light/medium categories as being appropriate to Mr Beker.

[23] In his report dated 6 November 2012, Dr Murray considered that 12 job types were sustainable for Mr Beker although heavy full time work was contra-indicated.

[24] Following this, on 19 November 2012, ACC issued its Vocational Independence decision, advising the appellant that his injury no longer prevented him from working full time and his last day for weekly compensation payments would be 19 February 2013.

[25] On 9 February 2017, Mr Beker made a claim for backdated weekly compensation for his suprascapular injury. In his claim, Mr Beker claimed backdated weekly compensation from 9 October 2007. ACC wrote to Mr Beker on 17 May 2017 arranging for an independent medical assessment to “determine your incapacity and entitlements for the period 09/10/2007 – 10/02/2013 (date of vocational independence decision)”.

[26] On 16 June 2017, following a medical case review by occupational and environmental medicine specialist David Hartshorn, ACC declined backdated weekly compensation on the grounds that it considered Mr Beker’s incapacity to be caused by a gradual process for which he did not have cover, rather than as a result of the accident of 27 May 2001.

[27] Mr Beker applied to review ACC’s decision. In a decision dated 3 January 2019, the reviewer quashed ACC’s decision and substituted its finding that “during the period he sought backdated weekly compensation for, Mr Beker was incapacitated by a suprascapular nerve injury”.

[28] Following the review decision, ACC wrote to Mr Beker on 8 May 2019 advising him that:

During the period 16 October 2007 to 19 February 2013, you didn’t receive the full amount of weekly compensation you were entitled to.

[29] It set out the amount it had assessed it owed Mr Beker for that period, including a non-taxable deduction required by Work and Income New Zealand. ACC advised that tax would also be calculated and paid to the Inland Revenue Department.

[30] There was a further adjustment by ACC abating the rate of weekly compensation between 15 October 2007 and 5 April 2010 due to earnings during that period from another source.

[31] On 13 June 2019, Mr Beker applied to review ACC’s decision of 8 May and 14 May challenging:

- (a) The end date of 19 February 2013 for weekly compensation. In this submission, this date was “completely arbitrary and contrary to common sense and the overwhelming tenor of the medical evidence and the conclusions reached ... in the review decision dated 3 January 2019.

[32] Mr Beker’s position was that ACC should have paid him weekly compensation until the 65th birthday on 16 October 2017.

[33] He also challenged the abatements and deductions ACC had made in respect of his entitlement to weekly compensation.

[34] On 25 May 2021, the reviewer dismissed Mr Beker’s applications for review, finding that:

- (b) There was no evidence demonstrating any inaccuracies and ACC’s calculations or deductions.
- (c) In respect of this cessation date of 19 February 2013, Mr Beker was considered vocationally independent as per ACC’s VI decision dated 19 November 2012. In that decision, ACC advised that the last weekly compensation payment would be on 19 February 2013 pursuant to s 112 of the Act.

[35] The reviewer concluded that:

This decision was not reviewed and thus, ACC’s decision stands. Therefore, Mr Beker was not cut short of weekly compensation for four years.

Appellant’s submissions

[36] In his written submissions, Mr Winter says that this is something of a “test case”, and that he had been unable to locate any direct authority precisely on point.

[37] He noted that the reviewer found that Mr Beker was held to be vocationally independent on 19 November 2012, with weekly compensation ceasing on 19 February 2013. He also notes that the reviewer felt that this was fatal to Mr Beker’s claim for weekly compensation beyond the date of 19 February 2013.

[38] Mr Winter submits:

[49] It is unequivocally clear from the medical evidence available that Mr Beker has been continuously incapacitated ... since 9/10/2007 ... onwards.

[50] It is also unequivocally clear from the medical evidence available that Mr Beker's incapacity did not miraculously clear up or abate somehow on 19/2/13.

[39] Mr Winter refers to s 108(3) which provides that the purpose of a vocational independence 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 and reflected in the claimant's individual rehabilitation plan".

[40] Mr Winter refers to s 109(2) which requires that ACC must determine a claimant's vocational independence again:

"if ... (b) the Corporation believes or has reasonable grounds for believing, that the claimant's vocational independence or capacity to work may have deteriorated due to the injuries that were assessed in the previous vocational independence or capacity for work assessment."

[41] He submits that the later review decision by Ms Iosefa dated 3/1/19 has effectively overtaken the vocational independence decision of 19/11/12 and that weekly compensation entitlement past 19/2/13 must now be recognised on the subject claim which was not subject to any vocational independence assessment. He says:

... It is clear that Dr Murray and his VIMA did not assess Mr Beker's /009 claim, other than to mention it very scantily in passing. Why?

[42] Mr Winter further submits:

[60] Secondly, there is no evidence in the report of Dr Murray that he was provided with a crucial early documentation ... by ACC relating to the /009 claim.

[61] Thirdly, at no stage did Dr Murray acknowledge or diagnose Mr Beker's neuropathic pain syndrome, as recognised by Ms Jackson and also in the report of Dr S Ryder-Lewis, occupational physician, dated 12/8/15.

[62] Fourthly, Dr Murray never documented material wasting of the left supraspinatus and infraspinatus muscles, notwithstanding what past (pre 6/11/12) and future (post 6/11/12) specialists documented, all of whom did. (note – Dr Murray is not a registered specialist.)

[63] It is clear that Dr Murray glossed over the significance and impact of Mr Beker's /009 claim and injury and did not have regard to it. It was "out of the equation" effectively.

[43] Mr Winter further submits:

The cancellation of W/C from 19/2/13 onwards on the basis of claim 5992 cannot possibly negate entitlement to backdated W/C on another claim not subject to the prior VI process post that date. The review decision ought to be quashed and W/C paid beyond 19/2/13.

[44] Mr Winter refers to *Cowley*¹ where Judge Henare concluded that in that particular case, the vocational independence process should not have been commenced. In that case, there had been a recommendation by a doctor that there be further orthopaedic opinion diagnosis and management options in relation to Mr Cowley's left and right shoulder, left knee and left hip. These were not carried out and Judge Henare noted:

[27] The amendment to s 109(2) of the 2005 Act provides a reason why all covered injuries need to be considered in the initial medical assessments. The amendment inserted the words "due to the injuries that were assessed in previous vocational independence or capacity for work assessments". In short, if an injury is not included in the final vocational medical assessment, then it cannot be considered in any re-assessment. A common-sense policy consideration underpins the amendment. At the time of that initial medical assessment, a further covered injury may well be secondary in nature, but, as time progresses, it may become a primary difficulty. This would then lead to a situation, if the secondary difficulty was not initially considered, it would not be able to be included in the future in respect to reassessment.

[45] Her Honour also found that the assessing doctor had not adequately addressed the job detail sheets in considering Mr Cowley's functional restrictions.

[46] Mr Winter produced a letter dated 10 June 2014 from consultant neurosurgeon, Professor De Ridder who said this of the appellant:

The suprascapular nerve is innervated predominantly by the C5 nerve and the suprascapular nerve innervates the infra and supraspinatus muscle. These muscles have atrophied as demonstrated both clinically and on an MRI scan of the shoulder which was performed in 2013. The infra and supra spinal atrophy results in a decrease in shoulder abduction and a decrease in external rotation limiting the patient in the physical work he can perform. In view of the fact that the suprascapular nerve injury can be linked to the wheelbarrow also, as attested by Peter Taylor, the subsequent muscle atrophy as well as clinical limitations of the shoulder abduction and external rotation are associated with that injury as well.

¹ *Cowley v Accident Compensation Corporation* [2014] NZACC 197.

[47] Mr Winter refers to Dr Murray's report and says that the doctor does not refer to a scapular nerve injury and its effect. He also says there is no mention of muscle waste and infra and supraspinatus muscle wasting and no mention of shoulder abduction.

[48] He also adds that there is no reference to significant wasting in Dr Murray's report.

[49] Mr Winter refers to reference in the initial medical assessment of 7 October 2011 to marked weakness of the left arm, particularly the left biceps and marked weakness on flexion and also pronation and supination of the left elbow and associated muscle wasting, matters again not included in Dr Murray's report.

[50] He submits that a vocational independence assessment does not preclude ACC from paying compensation at a later date when it recognises that an injury should have been included in the vocational independence assessment.

Respondent's submissions

[51] Mr Gascoigne on behalf of ACC submits that ACC correctly assessed vocational independence of the appellant on 19 November 2012, pursuant to s 112 of the Act.

[52] He submits that vocational independence is a key concept applicable to long term injured claimants and s 107 provides for the Corporation to determine such. The assessment comprises both an occupational assessment and a medical assessment and that the purpose of the medical assessment is:

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

[53] Mr Gascoigne refers to *Millane*² where, in making such an assessment, all injuries for which the claimant has cover must be taken into account. In the absence of manifest flaws, ACC is not entitled to disregard the opinions of qualified assessors.

[54] He notes that the appellant's claim for backdated weekly compensation arose in circumstances where he was determined to be vocationally independent. He submits that, contrary to Mr Winter's submission, the suprascapular injury was considered in the vocational

independence medical assessment. He submits that consideration was substantive and not cursory.

[55] He refers to the letter from Dr Jackson dated 8 November 2001 recording that:

There is evidence of a recent left suprascapular nerve palsy with complete denervation or partial denervation with conduction block of the supra and infraspinatus muscles on the left side.

[56] He refers to a further letter from Dr Jackson dated 5 August 2002 recording that:

... the lesion of the left suprascapular nerve is irremediable through surgery and considering that he is now 14 months post-injury, there did not look to be any evidence of spontaneous recovery. He is going to be left with a permanent disability associated with his left shoulder.

[57] Mr Gascoigne refers to a letter from Dr Jackson dated 17 November 2008 noting that:

He still has obvious wasting in the spinati muscles on the left side since his left suprascapular nerve injury seven years ago.

[58] Mr Gascoigne refers to a letter from Mr Dunbar to Dr Williamson dated 10 November 2011, which:

- (ii) Summarised Dr Jackson's report from 2001 and the results of MRI scans and nerve conduction studies from that same year, as well as relevant medical history from 2001 until 2011.
- (iii) Recorded that "when I saw Mr Beker in November 2011, he had quite marked wasting of the supra and infraspinatus muscles of the left shoulder".
- (iv) Notes that "Mr Beker is 59 and has now had approximately 20 years of pain in his neck and progressive weakness and pain in the left arm to the point now that he is unable to continue his work as a blocklayer."
- (v) Said that "On this occasion, it does seem fairly clear from the history that he suffered a discrete injury to the suprascapular nerve. This occurred outside the cervical spine, in the region of the shoulder, and has had a significant effect on his

left shoulder function, causing paralysis of his supraspinatus and infraspinatus muscles.”

[59] Next, Mr Gascoigne refers to an ACC treatment injury report dated 5 August 2011, recording:

In 2001, he saw a neurosurgeon, Suzanne Jackson, and MRI and nerve conduction studies at that time revealed multilevel spondylotic change in the cervical spine at the C4/5, C5/6 and C6/7 levels and stenosis of the spinal canal. He also had the narrowing of the nerve route exit at these levels mostly on the left side. There was palsy of suprascapular nerve which affected the supraspinatus and infraspinatus muscle on the left and lesion on the C7 nerve route on the left.

[60] Finally, Mr Gascoigne refers to the ACC 194 vocational independence general practitioner questionnaire dated 10 October 2012, which recorded “he does have a history of a left suprascapular nerve injury (accepted claim) which added to the above SP221 – increases his disability”.

[61] Mr Gascoigne submits that drawing on this material, and Dr Murray’s own examination and interview of Mr Beker, the vocational independence medical assessment expressly refers to the 2001 accident, the suprascapular injury and its consequences.

[62] Mr Gascoigne submits that the vocational independence decision applied to all the relevant covered injuries, including the suprascapular injury and its consequences. Pursuant to s 110 of the Act, Mr Beker no longer had incapacity for employment in respect of his covered personal injuries suffered to the point of the vocational independence decision, regardless of whether he otherwise remained incapacitated in respect of his pre-injury employment in terms of s 103(2). In other words, the finding of vocational independence means that it is not relevant that Mr Beker could no longer carry out his pre-injury occupation because the vocational independence decision determined that he was able to undertake the specified work types.

[63] Mr Gascoigne submitted that Dr Murray was supplied with and had regard to the key medical information regarding the suprascapular injury.

[64] He notes that Dr Taylor’s EMG studies were not provided in the referral. However, the results of those studies were referred to in documents provided to Dr Murray, including in

Dr Jackson's report, and in Mr Dunbar's 2011 report (which considered Mr Beker's medical history in respect of the suprascapular injury extensively).

[65] He acknowledges that Dr Jackson's 12 December 2008 report was not provided in the referral. However, Dr Murray was supplied with several documents that referred to the suprascapular injury (including wasting of the left supraspinatus and infraspinatus muscles).

[66] Although Mr Beker's neuropathic pain syndrome was not a condition for which he had cover, Dr Murray was provided with a comprehensive pain assessment report dated 10 May 2012, which diagnosed Mr Beker with a persistent (chronic) pain problem and identified that "his pain is predominantly arising from a neuropathic component".

[67] Mr Gascoigne says that it is clear on the face of the report that the suprascapular injury formed part of the vocational independence medical assessment. Whether or not there were flaws in the assessment underpinning the vocational independence decision (which ACC denies), Mr Beker did not challenge that decision. The vocational independence decision remains in force until superseded by a later decision of the Corporation under s 109. He submits that it is clear that this is the only way Mr Beker could regain entitlement to weekly compensation. Also, ACC has not made a reassessment under s 109 and Mr Beker does not suggest that it should have done.

[32] In conclusion, Mr Gascoigne refers to *Henderson v Henderson*³ and submits that res judicata applies in this case and there are no special circumstances permitting an exception to the doctrine in this case.

Decision

[68] In this case, the appellant claims that his entitlement to weekly compensation should have continued until his retirement in October 2017 and not be ended on 19 January 2013 as ACC determined and as was upheld on review.

[69] His position is that ACC's previous determination that he was vocationally independent from February 2013, the date to which it calculated his entitlement to backdated weekly compensation, has no effect.

³ *Henderson v Henderson* (1843) 3 HARE 100.

[70] In essence, he claims that the vocational independence medical assessment did not apply to the subject injury and the vocational independence determination was superseded by the later determination at review, which determined that his incapacity commenced in 2007.

[71] Mr Beker also challenges the reviewer's decision regarding costs of a case conference.

[72] On 12 August 2019, a case conference took place with the reviewer, ACC's counsel and Mr Winter. Two separate reviews were considered: Review 5602123 and Review 6499257.

[73] Mr Winter notes in the case of *Sutton* where the Court said:⁴

The Regulations are clearly directed at there being one set of the costs for each discrete review application...

[74] On this appeal, no argument has been put forward on behalf of the respondent in support of the position that only one set of costs is payable. Accordingly, following *Sutton*, the appellant is due payment of two sums of \$68.18, not one.

[75] Mr Beker has quite a history of injuries and on 8 May 2019, he was awarded backdated compensation of \$277,796.63 (before tax) by way of backdated weekly compensation for the period from 9 October 2007 until 19 February 2013. The latter date is the date when the appellant's weekly compensation ended, following the provision of a vocational independence occupational assessment dated 16 October 2012 and ACC's advice to the appellant by letter dated 19 November 2012 following that vocational independence assessment decision, which found that he had vocational independence and an ability to work for 30 or more hours a week in the following types of work:

- weighbridge operator
- dispatching and receiving clerk
- stock clerk
- postal delivery officer
- real estate representative
- property manager
- caretaker

⁴ *Sutton v Accident Compensation Corporation* [2014] NZACC 344 at [13].

- maintenance planner
- project builder/manager
- occupational health and safety advisor
- safety inspector
- programme or project administrator

[76] The letter went on:

ACC has determined your vocational independence based on information from your occupational and medical assessments. The occupational assessment reviewed the vocational rehabilitation ACC has provided and looked at the range of types of work options that match your existing skills and those you have gained from experience, education or training. The medical assessment concentrated on how your injury affects your ability to work in each of these types of work. ...

Your last day for weekly compensation payments will be 19 February 2013.

[77] That decision was taken to review and on appeal to this Court.

[78] As a further backdrop to this appeal, the appellant had successfully sought entitlement to backdated weekly compensation for the period between 9 October 2007 and 19 February 2013. The appellant's position is that based on the evidence, weekly compensation should not have stopped on 19 February 2013, given that he was found to have been incapacitated from 2007.

[79] In order to be successful, the appellant needs to prove that the vocational independence determination that resulted in the cessation of weekly compensation on 19 February 2013, was wrong.

[80] Over the years, the appellant worked as a stonemason. He had an accident in 2001 when he sustained a coracohumeral sprain injury to his left shoulder when a concrete filled wheelbarrow tipped over. He was then 48 years old.

[81] At the time he was assessed for that injury, the consultant neurosurgeon, Dr Jackson, found that he had normal cervical lordosis with a full range of movement in his cervical spine. Dr Jackson recorded that there was obvious wasting of the left supraspinatus and infraspinatus, left deltoid, triceps and biceps. Nerve conduction studies undertaken then revealed a recent left suprascapular nerve palsy with denervation and conduction block of the

supra and infraspinatus muscles of the left side. The appellant also had a moderate lesion on the left C7 nerve root.

[82] Despite his injury, Mr Beker continued to work. On 9 October 2007, he presented to his general practitioner with weakness in his left arm and loss of power on abduction and adduction. Dr Williamson described him as suffering from “considerable dysfunction”, in her opinion, because of the wasting in his infraspinatus.

[83] Mr Beker had a complex claims history that included both accident and non-accident injuries and conditions. Many of those claims were inter-related. ACC’s instruction to Dr Murray, GP, who carried out the vocational independence medical assessment report was not limited to his most recent injury, namely a treatment injury. He was asked to undertake a clinical examination of Mr Beker to provide a report on his vocational independence in each of the types of work identified in the occupational assessment, taking into account the effects of personal injury.

[84] Prior to Dr Murray’s vocational independence medical assessment report, an initial occupational assessment report was undertaken. The report issued is dated 26 August 2011. It was undertaken by Veronica Howes. It runs to 29 pages. It contains claimant comment as follows:

Ray said that he can hardly lift anything above his waist. He said that he can get things to his waist, but that is because he is using his back and he is going to end up hurting that. He said that he is not able to lift anything heavy (10kg) and it is almost daily getting less and less. He said that it is quite scary in some ways when he thinks about it.

I just couldn’t be a collar and tie person. There was obviously something out there; it’s just a matter of finding it.

This initial occupational assessment I find to have been professionally prepared and the inference to be taken from it is that there was good communication between the appellant and Ms Howes.

[85] Next followed an initial medical assessment – complex, dated 7 October 2011 completed by Dr Nick Yarnall, occupational medicine specialist.

[86] It is fair to say that in the course of the preparation of this document, Mr Beker had expressed his reservations to Dr Yarnall about ACC, but that after further discussion

Dr Yarnall was happy to continue with the assessment on the basis that the appellant had given his consent to it.

[87] The appellant told the doctor that he had been reviewed by the neurosurgeons, who told him there was nothing more they could now do for him in respect of further surgery.

[88] Dr Yarnall went through the further consultations that the appellant had had. Dr Yarnall noted a “pain score” of between four and eight out of ten. Dr Yarnall carried out a physical examination of the appellant and amongst other findings found a marked weakness of the left arm, particularly the left biceps, with marked weakness of flexion and also pronation and supination of the left elbow with associated muscle wasting.

[89] In summary, Dr Yarnall said:

In summary, Mr Beker has a long and complex history of problems affecting his neck. He suffered a treatment injury associated with a C4/5 and C5/6 anterior cervical discectomy and fusion, which was performed on 5 August 2009 resulting in a marked weakness, principally affecting the flexion and supination and pronation of his left, non-dominant arm.

[90] Dr Yarnall concluded:

It is clear that Mr Beker has a significant C6 neuropathy which, associated with various other medical problems, precludes his return to work as a stonemason. His ongoing symptoms of muscle weakness have to be regarded as permanent and there is no specific treatment that is likely to improve his symptoms. As a result, I think that any further vocational rehabilitation is principally going to be within the sedentary to light range, perhaps with occasional medium demand work that he can do with his right, dominant, arm only.

Although Mr Beker expresses his reservations about the jobs that were assessed as being within his physical capabilities, I think that there are possibilities of work within his physical limitations.

[91] On 11 April 2012, occupational therapist, Marissa Cope, completed a functional capacity evaluation to establish Mr Beker’s safe functional capacity and to provide comment on whether there appears to be a match between functional capacity and the physical demands of previously identified occupations in the initial medical assessment completed by Dr Yarnall.

[92] Ms Cope reached these conclusions:

The functional capacity evaluation indicated that Mr Beker demonstrates capacity in the light to medium range. Whilst Mr Beker was able to carry up to the medium range with his right upper limb, his overall capacity was more within the light range.

Mr Beker's results were impacted on by:

His reluctance to attempt stooping and reaching overhead with these abilities not tested;

Limited ability to maintain safe manual handling and limited desire or ability to alter his technique;

And reduced grip and overall strength in both right and particularly left upper limb affecting lifting and carrying capacity and stability/control of the left upper limb when held in elevation.

Mr Beker's results were also impacted upon by his previous left achilles injury, left lower back strain, and possibly from his carpal tunnel surgery/injury with reduced right grip strength reported as a result.

Mr Beker may also be limited in his ability to complete some work types/tasks due to his reduced range in his left forearm (supination), but this would need to be assessed on a work position basis.

[93] On 17 April 2012, a comprehensive pain assessment report was compiled with the assistance of a medical assessor, a functional assessor, and a psycho-social assessor.

[94] Amongst other things, the report noted that the appellant had little in the way of medical goals, other than to try and keep moving and pacing himself.

[95] Furthermore, there were no rehabilitation goals were identified "although Ray is coming around to Ming's encouragement that yoga would be positive for him to assist with muscle strength, stretching and improved balance."

[96] Ming is the appellant's wife.

[97] On 16 October 2012, a vocational independence occupational assessment report complex was completed. The report includes this:

Vocational:

Ray undertook a work preparation programme which involve the upscaling of MS office systems to enable him to gain further clerical skills in assisting him to enter such work areas as clerical and real estate. Ray only completed three sessions of his computing

programme with limited success. As well as the WPP plan indicated, Ray would be taken through a range of business initiatives, work towards a Certificate in Real Estate and look towards gaining a building practitioner's license.

[98] The work experience assessor's comments included the following:

Ray has a wide range of skills and experience in both practical hands on work from his career, and management and organisation, having been self-employed for the past 23 years. He has also developed sound administration and communication skills.

He has a very sound range of skills and experience and had shown the capacity to develop and move to different industries.

His experience and business project planning and designing, as well as work site safety and safety applications have given him a sound foundation to build on in many alternative work pathways. Seven work types were identified. On 6 November 2012 at Dunstan Hospital, Clyde, a vocational independence medical assessment report was carried out by Dr Keith Murray. Dr Murray had been supplied with 18 documents relating to the appellant's claims history, a range of medical reports and the aforementioned initial occupational assessment, initial medical assessment and the functional capacity evaluation.

[99] In Court, Mr Winter produced a later report of 10 June 2014 from consultant neurosurgeon, Mr De Ridder. As one would from a neurosurgeon, it is focused on nerve damage. For the purposes of this appeal however, the fact that it came into existence over a year after the appellant was found to be vocational independent, limits its value.

[100] Having considered all that has been put before me on this appeal I must conclude that ACC's decision of 19 November 2012 finding that the appellant was vocationally independent and able to work for 30 or more hours a week in a number of types of work was correct in that it was the only reasonable conclusion that ACC could have reached at that time, based on all the evidence that was considered.

[101] The situation in the present case is markedly different from a that in *Cowley*, where Judge Henare said of the report in question:

The fact of passing reference to the covered difficulties in the past history of illness section, suggests he (the doctor) did not understand that Mr Cowley had cover for these difficulties.

[102] In respect of Mr Beker, I am satisfied that the reports that led to the vocational independence decision included all of what was medically known regarding the appellant's presentation at the time, and as is often the case with someone of the appellant's age, the

effects of injury are mixed with natural degeneration. I am satisfied from the reports that I have read that the appellant has not been disadvantaged in this case on account of that challenge.

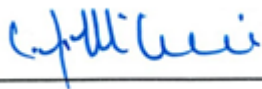
[103] I am reminded that s 3 of the Act lists as one of the purposes of this Act is to ensure that where injuries occur, the Corporation's primary focus is on rehabilitation, with the goal of achieving an appropriate quality of life, to the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation.

[104] Indeed, in this case, the appellant is to be commended for his willingness to buy in to this ethos. It is plain that his occupation as stonemason was his "forever job" until the succession of injuries made that impossible.

[105] Given the findings I have made, I do not consider it necessary to determine in this case whether the matter of res judicata, cause of action estoppel or issue estoppel arise.

[106] Accordingly, save for the claim for the conference fee of \$68.18, which is allowed, the remainder of the appeal is dismissed.

[107] Should there be any issue as to costs, the parties have leave to file memoranda in respect thereof.



CJ McGuire
District Court Judge

Solicitors: Buddle Findlay, Wellington
Stevan Winter, Advocate ACCE Limited, Christchurch