IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 161 **ACR 119/22**

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

Hearing:	5 October 2023
Held at:	Wellington by AVL
Appearances:	The Appellant is self-represented T Lynskey and Mr B Marten for the Accident Compensation Corporation ("the Corporation")
Judgment:	6 October 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Vocational independence - s 109(2)(b),
Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 4 August 2022. The Reviewer dismissed an application for review of the Corporation's decision dated 1 February 2022 declining a reassessment of Mr Wood's vocational independence and declining weekly compensation entitlements.

Background

[2] On 12 July 2007, Mr Wood (then aged 30) had a go-karting accident, in which he suffered rib fracture. At the time of his injury, Mr Wood was employed by Fonterra as a machine operator. Mr Wood was granted cover for "closed fracture rib left", and received weekly compensation.

[3] On 11 April 2008, Mr Wood's weekly compensation ceased, following which he received a WINZ benefit.

[4] On 8 October 2008, Dr Anton Westraad, GP, noted that Mr Wood had continuous pain.

[5] On 25 May 2011, Mr Wood underwent a rib segment excision procedure. On 21 June 2011, he requested backdated weekly compensation following his operation, which was eventually paid by the Corporation.

[6] On 17 December 2011, Dr David Hartshorn, Occupational Medicine Specialist, reported on his review of Mr Wood's "longstanding chest wall pain".

[7] On 12 November 2013, Dr David Ruttenberg, Occupational Medicine Specialist, carried out an initial medical assessment, and his report discussed in detail Mr Wood's persistent pain.

[8] On 17 September 2014, Dr Lorna Fox, Pain Specialist, reported that Mr Wood had neuropathic pain with central sensitisation and associated fatigue, not managed successfully with any medication so far. On 29 April 2015, Dr Fox reported ongoing pain issues.

[9] On 14 October 2015, Dr Nic Boheimer, Consultant Anaesthetist, reported that Mr Wood had post-traumatic regional nerve sensitisation with a subsequent excision of a left rib with no change in his neuropathic pain status.

[10] On 28 September 2016, Dr Nick Yarnall provided a vocational independence medical assessment (VIMA). Dr Yarnall reported that Mr Wood had ongoing

neuropathic pain affecting his left chest wall, which was not well controlled, despite multiple previous pain management interventions. Dr Yarnall assessed that Mr Wood could undertake six work types.

[11] On 21 October 2016, the Corporation issued a decision declaring Mr Wood vocationally independent (VI). He lodged an application to review the VI decision. On 22 January 2017, Mr Wood's weekly compensation ceased.

[12] On 28 March 2017, a Reviewer upheld the Corporation's decision. On 28 July 2020, the District Court dismissed Mr Wood's subsequent appeal.[1]

[13] On 26 August 2020, Dr David Wheater diagnosed that Mr Wood had chronic regional pain syndrome (CRPS).

[14] On 22 September 2020, Dr Westraad confirmed that Mr Wood had CRPS and that this was agreed upon by the Corporation's independent reviewers.

[15] On 18 February 2021, Dr Westraad noted that Mr Wood's CRPS symptoms were relentless.

[16] On 9 April 2021, the Corporation received Mr Wood's claim for cover for CRPS.

[17] On 3 June 2021, Mr Tim Lamb, Registered Nurse, provided a clinical advisor comment for the Corporation. He recommended that it decline the claim for cover as Mr Wood did not meet the Budapest criteria for CRPS and there was no evidence that he had symptoms consistent with CRPS.

[18] On 6 October 2021, Dr Hartshorn responded to Dr Westraad's request for an opinion on whether Mr Wood met the Budapest criteria for CRPS. Dr Hartshorn recorded that Mr Wood had suffered from persisting pain within the left chest wall following his rib fracture in 2007. Dr Hartshorn noted that Mr Wood's condition had "not materially improved following surgical excision and indeed there has been

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1 *Wood v Accident Compensation Corporation* [2020] NZACC 91.

a degree of generalisation of pain". Dr Hartshorn characterised the pain as "post-injury or post-traumatic regional pain disorder". Dr Hartshorn added:

> It appears in Mr Wood's case ... that the onset of disorder sensory neural processing had occurred early within the post-injury course. … once this disordered sensory neural processing has established it can evolve or change over time with potential for deterioration and generalisation but also with some potential for improvement with rehabilitation or treatment intervention. Unfortunately in Mr Wood's case his symptoms have not improved over time or with appropriate evidence based intervention.

[19] On 16 November 2021, Ms Jan Ryan of the Corporation made the following note:

> CLIENT CONTACT: Spoke to Daniel + a friend of his on speakerphone.
>
> I confirmed that I was going to be approving the pain diagnosis on this claim for him – Regional pain syndrome with associated neuropathic pain syndrome.
>
> He requested a copy of that letter + the medical advisors comment to be sent out today which I will do.
>
> This may affect whether he needs to proceed with the formal Review in progress (for CRPS decline decision).
>
> Daniel is not in receipt of any supports from ACC but would like to be looked into again please.
>
> He has ongoing medical cover ever since 2016 when he went through the VI process. He has been in receipt of WINZ assistance since then, has not worked.

[20] On 16 November 2021, Mr Wood was granted cover for regional pain syndrome with associated neuropathic pain. He applied to the Corporation for "financial assistance".

[21] On 24 November 2021, Ms Ryan wrote to Mr Wood as follows:

> …What I'm needing to collect are the GP notes since we last requested them back in April of this year. The period needed is from 15/04/21 to current.
>
> Once your consent is on file & the notes have come through, I'll seek advice from our Technical team about how this new diagnosis may affect your Vocational Independence decision that was issued back in 2016. …

[22] On 24 November 2021, Mr Wood replied as follows:

> Morning Jan
>
> Please find enclosed the requested ACC6300. I look forward to progressing this matter.
>
> Kind regards, Daniel Wood

[23] On 14 December 2021, Mr Wood wrote to Ms Ryan stating he was "Just following up on ACC's decision regarding my financial support". Ms Ryan replied that day stating that there was nothing back yet, but she would monitor it over the Christmas and New Year period.

[24] On 12 January 2022, Dr Warren Happy, GP, provided a clinical comment. He noted that Dr Yarnall's VIMA report had included the diagnosis of ongoing neuropathic pain left chest wall and regional pain syndrome, so the acceptance of the pain diagnosis would not change the VI decision. Dr Happy observed that pain had been documented all along as an issue for Mr Wood, it was unlikely to resolve, and it had been assessed by the occupational medicine specialist in 2016. Dr Happy noted that Dr Hartshorn had recorded that Mr Wood's pain had remained unchanged, so there was no evidence of deterioration. However, the full GP notes would be required to confirm this.

[25] On 18 January 2022, Mr Simon Bates, Technical Specialist, noted:

> …The client appears to believe that ACC providing cover for this condition [opens] the door to entitlements.
>
> He can only regain an entitlement to weekly compensation if there has been a deterioration in his vocational independence…
>
> Dr Happy needs to make a final comment on how the notes obtained from 2016 to date might support deterioration of vocational independence.
>
> If he confirms that these notes do not support deterioration, I would then recommend that ACC declines vocational independence deterioration.

[26] On 1 February 2022, Dr Happy reviewed the full GP notes from 2 November 2015 to 14 April 2021. He concluded:

> There are no notes indicating a deterioration in his symptoms. From the available information his symptoms appear to be the same as his symptoms Dr Yarnall's 28/9/16 report noted.
>
> There is no VI deterioration noted.

[27] On 1 February 2022, Ms Ryan telephoned Mr Wood. Her file note of that conversation records:

> Phone call made to Daniel to deliver decline decision in regards to the deterioration in vocational independence. I explained that his file has now been reviewed by the ACC clinical and Technical Advisors and following a comprehensive review of all relevant information, the Technical and clinical advisors have confirmed that there has been no deterioration in his vocational independence. Daniel was ok with advice but did comment that Dr Yarnall did not take his pain into account in the assessment of 28/9/2016. I advised Daniel that Dr Yarnall's report included a diagnosis of on-going neuropathic pain and regional pain syndrome. Therefore the pain was taken into account. Daniel was ok with advice and has requested the decision letter is emailed to him along with the clinical and technical advisor report. I confirmed I would do this this afternoon.

[28] On 1 February 2022, the Corporation issued a decision declining to reassess Mr Wood, on the basis that the information the Corporation had received did not support a deterioration. As a result, the Corporation was unable to provide Mr Wood with weekly compensation or provide other vocational assistance. Mr Wood applied to review this decision.

[29] On 10 May 2022, review proceedings were held. On 13 June 2022, the Reviewer issued a decision, accepting that Mr Wood's pain condition was not a new injury, but was part of the previously assessed injuries. However, the Reviewer dismissed the review, on the basis that there was insufficient evidence of any deterioration of Mr Wood's vocational independence.

[30] On 12 July 2022, a Notice of Appeal was lodged.

Relevant law

[31] Section 113(1) provides:

> If the Corporation determines under section 109 that a claimant no longer has vocational independence, the claimant regains his or her entitlement to weekly compensation, and the regained entitlement starts from the date of the determination or an earlier date determined by the Corporation.

[32] Section 109 provides:

> (1) The Corporation may determine the claimant's vocational independence at such reasonable intervals as the Corporation considers appropriate.
>
> (2) However, the Corporation must determine the claimant's vocational independence again if—
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> (a) the Corporation has previously determined that the claimant had—
>
> (i) vocational independence under this section; or
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> (ii) a capacity for work under section 89 of the Accident Insurance Act 1998; or
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> (iii) a capacity for work under section 51 of the Accident Rehabilitation and Compensation Insurance Act 1992; and
>
> (b) the Corporation believes, or has reasonable grounds for believing, that the claimant's vocational independence or capacity for work may have deteriorated due to the injuries that were assessed in the previous vocational independence or capacity for work assessment.
>
> (3) The claimant may give the Corporation information to assist the Corporation to reach a belief under subsection (2)(b).

[33] In *Stevenson*,[2] Ongley DCJ stated:

> [24] While the vocational independence medical assessment took pain into account, it would be unfair to decide that the appellant was assessed while she had a pain condition, therefore the presence of that pain condition cannot be a deterioration. The evidence advanced for the appellant is that her general practitioner found that she was genuine in her attempts to work but could not do so. If that were to be established, then it would reflect a deterioration when compared with an earlier vocational independence assessment finding her fit for work. …
>
> [25] On balance, it is a case in which the general practitioner's evidence is credible enough to warrant a further vocational independence enquiry. I find that Dr Shilston's opinion does show that the appellant's capacity for work may have deteriorated due to consequences of her covered injuries.

[34] In *Miller*,[3] Beattie DCJ stated:

> [23] This Court has determined in previous decisions that the provisions of Section 109(2) involve a two-stage consideration. The first stage is whether there is evidence presented to the Corporation that identifies on reasonable grounds that the appellant's vocational independence may have deteriorated. The second step is taken if that requirement can be met, and if so, it requires the respondent to again undertake a Vocational Independence Assessment as provided for in the Act, which Assessment of course requires Occupational and Medical Assessments afresh.

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2 *Stevenson v Accident Compensation Corporation* [2010] NZACC 134.
3 *Miller v Accident Compensation Corporation* [2011] NZACC 12.

[35] In *Taffs*,[4] Beattie DCJ found:

> [31] From the evidence of Dr Waite and Dr Brinn, I find that the appellant was not in fact suffering from clinically significant depression at the date she was assessed by Dr Waite, and that this is a condition which has arisen subsequent to his assessment and to the respondent's decision on vocational independence.
>
> [32] It is clearly the situation as a matter of law that medical conditions which have arisen subsequent to the assessments and the decision in question, cannot be introduced to undermine the validity of that decision. The date of the decision based on vocational independence assessments was a snapshot of time and the correctness or otherwise of the decision must be considered against the evidence that pertained at the time of that snapshot.
>
> [33] Having said that it is clearly the case that some 14 months after the vocational independence decision was issued, there was evidence of the appellant having a mental injury of severe depression arising from her physical injury, and the fact that she has now been granted cover by the respondent in respect of that mental injury would be strong grounds for identifying that the appellant's vocational independence may have deteriorated since the assessment of April 2008. That is not an issue which is before this Court and I simply identify it as being relevant to considerations under Section 109(2)(b) rather than Section 107.

[36] In *Hart*,[5] Ongley DCJ found:

> [35] I find therefore that there was a clear chain of causation with the effect that any deterioration in vocational independence was very probably due to the assessed injury. The facts of the appellant's case fall within the range of circumstances that may reasonably be regarded as a deterioration of vocational independence due to the assessed injury.

[37] In *Young*,[6] Ongley DCJ stated:

> [49] A claimant cannot initiate a new vocational independence assessment except by giving the Corporation notice of a deterioration in his or her vocational independence. The words emphasised by italics in s 109(2)(b) were inserted by a 2005 amendment. They restrict a claimant initiated vocational independence assessment to cases in which the deterioration relates to previously assessed injuries.

Discussion

[38] The issue in this case is the Corporation's decision of 1 February 2022, declining to reassess Mr Wood on the basis that there was no evidence upon which it could be satisfied that his condition may have deteriorated. Section 109(2) of the

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4 *Taffs v Accident Compensation Corporation* [2011] NZACC 73.
5 *Hart v Accident Compensation Corporation* [2013] NZACC 313.
6 *Young v Accident Compensation Corporation* [2015] NZACC 11

Act provides that the Corporation must determine a claimant's vocational independence again if the Corporation has previously determined that the claimant had vocational independence, and the Corporation has reasonable grounds for believing that the claimant's vocational independence may have deteriorated due to the injuries that were assessed in the previous vocational independence assessment.

[39] The Corporation accepts that Mr Wood's pain condition is not a new injury and it can be considered by the Court. However, in essence, the Corporation submits that, in the absence of medical evidence suggesting that Mr Wood's condition may have deteriorated since the Corporation's determination that he had vocational independence, there are no reasonable grounds upon which the Corporation can form the belief required by s 109(2)(b).

[40] This Court acknowledges the Corporation's submission, and accepts that Mr Wood has had an ongoing pain issue since his covered injury of 12 July 2007. However, the Court also points to the following considerations:

[41] First, a five-and-a-half-year interval elapsed between Mr Wood's previous vocational independence medical assessment on 16 September 2016, and the Corporation's decision to decline to reassess Mr Wood. The medical evidence of Dr Wheater and Dr Westraad is that, during this period, Mr Wood developed regional pain syndrome (CRPS).

[42] Second, it has been established that, where a vocational independence medical assessment has taken pain into account, it would be unfair to decide, simply because a claimant had a pain condition at the time of the assessment, that the continued presence of that pain condition cannot be a deterioration.[7]

[43] Third, on 16 November 2021 (over five years after the previous vocational independence medical assessment), Mr Wood was granted cover for regional pain syndrome with associated neuropathic pain. It has been noted that, where some time after a vocational independence decision, there is evidence of a claimant having a further condition arising from a physical injury, and has been granted additional

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7 *Stevenson*, above note 2, at [24].

cover in respect of that condition, there would be strong grounds for identifying that the claimant's vocational independence may have deteriorated since the assessment.[8]

[44] Fourth, there is medical evidence that Mr Wood's vocational independence may have deteriorated due to the injuries that were assessed in the previous vocational independence. On 6 October 2021, Dr Hartshorn, Occupational Medicine Specialist, reported that, following Mr Wood's surgical excision (on 25 May 2011), "there has been a degree of generalisation of pain". Dr Hartshorn added that Mr Wood had developed disorder sensory neural processing early within the post-injury course, and that, "once this disordered sensory neural processing has established, it can evolve or change over time with potential for deterioration and generalisation".

[45] In light of the above considerations, in combination, this Court finds that the Corporation had reasonable grounds for believing that Mr Wood's vocational independence may have deteriorated due to the injuries that were assessed in his previous vocational independence assessment.

Conclusion

[46] For the above reasons, the appeal is allowed, and the review decision dated 4 August 2022 is set aside.

[47] Mr Wood may be entitled to expenses such as disbursements. If these cannot be agreed within one month, I shall determine the issue following the filing of memoranda.

P R Spiller
District Court Judge

Solicitors for the Respondent: Izard Weston.

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8 *Taffs*, above note 4, at [33].