

IN THE DISTRICT COURT
HELD AT WELLINGTON

Decision No. 9 /2006

UNDER

The Injury Prevention, Rehabilitation,
and Compensation Act 2001

IN THE MATTER

of an appeal pursuant to section 149
of the Act

BETWEEN

WILLIAM WYATT of Whangarei

Appellant

(Appeal No. AI 336/05)

AND

ACCIDENT COMPENSATION
CORPORATION a body corporate
duly constituted under the provisions of
the said Act

Respondent

HEARING at Whangarei on 22 August 2005 and 27 October 2005

APPEARANCES/COUNSEL

J Brock for appellant
D. Tui for respondent

RESERVED DECISION OF JUDGE J CADENHEAD

THE COURSE OF THE HEARING

[1] I part heard this appeal on 22 August 2005. It became apparent during the course of the hearing that two of the occupations may have been unsuitable because of the appellant's educational qualifications and skills. It was agreed that the appellant would file an affidavit detailing each of the three occupations, and what his experience and skills were in regard to them. It was further agreed that I would recommence the hearing again in the October sessions of the Whangarei Court

which are expected to be late October, and the sitting was resumed on 27 October 2005.

[2] I had directed that a declaration or affidavit of the appellant was to be filed within 14 days and the respondent advise whether or not cross examination should take place. A declaration was filed by the appellant and the respondent did not desire to cross-examine him.

[3] Since the hearing of the appeal I have received a memorandum on 5 December 2005 from the appellant and a memorandum in reply dated 12 December 2005 from the respondent. The memorandum of the appellant enclosed a copy of a medical report from Mr Lyon dated 17 November 2005, which indicated that the appellant had significant right leg pain and numbness of the lateral aspect of his right foot. As a result of a recent MRI scan it was revealed that the appellant had a large right L5-S1 disc prolapse compressing the S1 root nerve. Surgery was recommended by Mr Lyon.

[4] The respondent in its reply address submitted that the matter is one of deterioration and consequently of no relevance to the issue in this appeal. If there had been a deterioration, the submission was that the appropriate course was for the appellant to apply for a reassessment under the legislation.

ISSUE

[5] At issue is the decision by the Accident Compensation Corporation (“the Corporation”) dated 21 February 2002 determining that the applicant has a vocational independence in three job options.

BACKGROUND OF FACTS

[6] I have substantially set out the background of facts provided by the respondent, as on my perusal it seems accurate.

[7] The appellant suffered a back injury on 19 November 2002 whilst lifting a roll of mig wire in his workplace. The appellant applied for and received weekly compensation from this time.

[8] The appellant was then employed as a fitter/welder with Culham Engineering Company Limited.

[9] In March 2003 the appellant was referred for an initial occupational assessment.

[10] On 19 March 2003 the appellant was certified fit to work for four hours a day, five days a week. On the same date Catherine White of Taskmaster Northland Limited completed an initial occupational assessment. Dr Jim McLeod completed a medical assessment on 31 March 2003 recommending that the appellant undertake an activity based programme. Dr McLeod also recommended that the appellant undertake reduced hours in light work for his pre-accident employer.

[11] On 23 April 2003 Culham Engineering advised the Corporation that it did not have suitable light duties for the appellant.

[12] In May 2003 the Corporation referred the appellant to Town Basin for an activity based programme. An eight week course with Northern Rehab Services Limited was subsequently commenced. A worksite assessment report was prepared on 3 July 2003 by Steve Restieau, of OT Works. Mr Restieau suggested that the appellant required a three to four week period to rebuild his tolerance and general condition before a review could be made as to whether he could return to work. A return to work plan was also subsequently prepared on 8 August 2003.

[13] Dr Kanji prepared an initial medical assessment on 1 October 2003. Dr Kanji advised that the appellant was unable to return to his pre-accident employment. In December 2003 it was agreed that the appellant would undertake a six week Work Preparation Programme (WPP) from 27 January 2004 to 5 March 2004.

[14] The appellant undertook the six week WPP. A progress report was completed on 17 February 2004. A completion report was prepared on 12 March 2004. It was noted in the progress report that the appellant was looking forward to the computer component of that course. In the completion report it was recommended that the appellant undertake a short computer course to gain skills to allow the appellant to cope with possible administrative tasks.

[15] Subsequent to the completion of the WPP a number of referrals were made, including:-

- [a] Referral for another initial occupational assessment;
- [b] Referral for computer training;
- [c] Referral for a further activity based programme.

[16] Susan Anderson completed an initial occupational assessment on 26 March 2004. A three to four week activity based programme was commenced on 30 March 2004. Dr Gollop prepared an initial medical assessment on 26 April 2004.

[17] Step by Step Computer Services Limited completed a report on 30 April 2004 confirming that the appellant had completed a certificate of achievement for computer training.

[18] A completion report for the activity based programme was completed on 31 May 2004 noting an improvement.

[19] Further vocational rehabilitation was provided in the second half of 2004. The appellant was referred to Alpha Consultants for job search assistance from 21 July 2004 to 30 August 2004. The appellant was also provided with one on one computer training by Step by Step Computer Services Limited.

[20] On 9 November 2004 Mr David Lyon, orthopaedic surgeon, who had been treating the appellant since early 2003 wrote to the Corporation to advise that the appellant ought to continue looking for alternative work not involving too much lifting, bending or prolonged sitting. Mr Lyon advised that frequent changes in posture were advisable.

[21] At the end of November 2004 the Corporation commenced the vocational independence process. An occupational assessment was completed on 30 November 2004 by Leanne Wallace of Taskmaster Northland Limited. Ms Wallace identified 12 job options for which the appellant was suited by reason of his training, experience and qualifications.

[22] A medical assessment was undertaken by Dr Gollop on 17 January 2004. Dr Gollop opined that the appellant had a vocational independence in three job options.

[23] A decision was issued by the Corporation on 21 February 2002 determining that the appellant had a vocational independence in the three job options and advising the appellant that his weekly compensation would cease on 21 May 2005.

[24] The appellant applied for a review of ACC's decision on 21 March 2005. The appellant obtained the following reports in support: joint report from Professor Des Gorman and Dr Jon Nelson dated 5 April 2005; and an undated statement by Mark Rasmussen of Regent Training Centre Limited.

[25] The Corporation obtained a response from Dr Gollop dated 11 June 2005.

[26] A review hearing was conducted on 30 June 2005. The reviewer issued a decision on 5 July 2005 dismissing the review.

THE DECLARATION OF THE APPELLANT

[27] In the declaration of the appellant he said that his daily work task was that of a welder. His main job was welding structural and pipeline. He said that sometimes he would show someone with less experience an easier way to weld a joint and that this type of practice was common with all the welders at his employment. His qualifications consist of: Site Safe Passport and Safety Procedures, but this has now expired and in 1982 he gained a pass for welding at Northland Polytechnic. He has a drivers licence for a private vehicle, heavy traffic and fork lift licence. He has obtained 12 hours of basic computer training. He had two years of high school and has no formal qualifications.

[28] Apart from occasionally training people on the job, he has had no other experience and certainly has had no experience or skills in conducting classes, delivering lectures and instructing students. He has had no experience in designing or training courses which is a requirement needed to become an adult tutor. In respect of sales, he has never been employed as a wholesale or a retail buyer in any form.

[29] During the vocational assessment process he inquired at the Regent Training Centre what was involved in the role as an adult tutor. He asked the welding tutor, if he could on a voluntary basis see if he could handle the job of a tutor. This work involved him showing how to weld a joint or butt welds. At no time did he show or help any of these adult students with their class work, which involved NZQA credits or certificates. His transferable skills consist of welding and helping others in a limited way.

[30] The appellant believes that he could be up skilled or trained for a lengthy period of time and he might be able to attain the jobs chosen by the occupational therapist.

EMPLOYMENT PROGRAMME TUTOR 33421

[31] The work tasks involved in this type of occupation are the ability to conduct classes, deliver lectures and provide training for people enrolled in job creation and work placement schemes. There must be an ability to design training courses for specific employment opportunities and supervise groups of individuals in working environments. It is usual to hold a teaching, trade or other relevant qualification and have significant successful industry experience. It is also necessary to complete adult education/tutor training including training in teaching and assessment using NZQA unit standards.

[32] The vocational assessor, amongst other things, stated that the appellant had trained apprentice welders in his working environment and had relevant industry experience and NZQA certificates to qualify him to tutor welding in a private training organisation. He had some training in communication skills required for this role.

[33] The assessor said that the appellant had been going to the Regent Training Centre on a voluntary basis two to three times a week to help with the welding students. He reported that he could only manage an hour some days, but never more than 1 1/2 before he could no longer stand without excruciating pain. He felt he enjoyed this supervisory role and will enjoy this type of work, if he could sustain it.

UNIVERSITY AND HIGHER EDUCATION LECTURER/ TUTOR 23111

[34] The requirement for this type of job was the ability to conduct classes, deliver lectures and instruct students. A person could act as a tutor to individual

students. He would be required to prepare examination papers and mark written exercises and examination papers.

[35] Qualifications ranged from a masters degree or a doctorate at university level to a trade or industry qualification and related experience at a tertiary institute. Usually a person was required to complete an adult teaching diploma or something similar once in the job.

[36] The reasons given by the assessor were that the appellant had trained apprentices at his workplace and had recently been going to the Regent Training Centre two to three times a week and helping with the supervision of the welding students. It was stated he had relevant NZQA units in welding to enable him to tutor in local training organisations.

WHOLESALE AND OR/RETAIL BUYER 33161

[37] This job requires an ability to review business requirements and study trade, manufacturers and market information and literature on the varieties, quantities and prices of goods. It required visits to showrooms and undertook buying missions. It was necessary to work within agreed expenditure levels. An ability was required to negotiate with suppliers on prices, credit terms and discounts for quantity. A person would be responsible for departmental results and accurate annual departmental stocktaking. The person would pay invoices and might price items for resale and maintain and update cost and price information. While no specific qualification was indicated, however, it was recognised that industry experience and knowledge in courses such as marketing would be useful.

[38] The vocational assessor thought that the appellant could work in an engineering company as a buyer, where he was familiar with products relating to welding and engineering. He had recently completed a computer course and now had a basic understanding of computer/keyboard operations. He had planning, decision-making and communication skills gained from his generic life and working experiences.

LEGISLATION AND LEGAL PRINCIPLES

[39] Section 107 of the Injury Prevention Rehabilitation Compensation Act 2001

provides inter alia:-

"107. Corporation to determine vocational independence

- (1) *The Corporation may determine the vocational independence of—*
- (a) *a claimant who is receiving weekly compensation;*
 - (b) *a claimant who may have an entitlement to weekly compensation.*
- (2) *The Corporation determines a claimant's vocational independence by requiring the claimant to participate in an assessment carried out—*
- (a) *for the purpose in subsection (3); and*
 - (b) *in accordance with sections 108 to 110 and clauses 24 to 29 of Schedule 1; and*
 - (c) *at the Corporation's expense.*
- (3) *The purpose of the assessment is to ensure that comprehensive vocational rehabilitation, as identified in a claimant's individual rehabilitation plan, has been completed and that it has focused on the claimant's needs, and addressed any Injury-related barriers, to enable the claimant—*
- (a) *to maintain or obtain employment; or*
 - (b) *to regain or acquire vocational independence."*

[40] Section 108 of the IPRC Act 2001 provides, inter alia:

"108. Assessment of claimant's vocational independence

- (1) *An assessment of a claimant's vocational independence must consist of—*
- (a) *an occupational assessment under clause 25 of Schedule 1; and*
 - (b) *a medical assessment under clause 28 of Schedule 1.*
- (2) *The purpose of an occupational assessment is to—*
- (a) *consider the progress and outcomes of vocational rehabilitation carried out under the claimant's individual rehabilitation plan; and*
 - (b) *consider whether the types of work (whether available or not) identified in the claimant's individual rehabilitation plan are still suitable for the claimant because they match the skills that the claimant has gained through education, training, or experience.*
- (3) *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 and reflected in the claimant's individual rehabilitation plan."*

[41] Section 112 of the IPRC Act 2001 provides, inter alia:

"112. Claimant with vocational independence loses 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."

[42] Section 6 provides, inter alia:

"6. Vocational Independence, 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 35 hours or more a week."

THE SUBMISSIONS OF THE RESPONDENT

[43] Pursuant to section 107(1) the Corporation may determine a claimant's vocational independence where that claimant is in receipt of weekly compensation. Pursuant to subclause (3) the purpose of the assessment is *"to ensure that comprehensive vocational rehabilitation, as identified in a claimant's individual rehabilitation plan, has been completed and that it has focused on the claimant's needs, and addressed any injury related barriers, to enable the claimant"* to either maintain or obtain employment or alternatively to regain or acquire vocational independence.

[44] Section 108 of the 2001 Act provides that a claimant's vocational independence must consist of an occupational assessment undertaken under clause 25 of Schedule 1 and a medical assessment undertaken under clause 28 of Schedule 1.

[45] Section 109 of the 2001 Act provides that the Corporation may determine a claimant's vocational independence at such reasonable intervals as the Corporation considers appropriate.

[46] Pursuant to section 111 of the 2001 Act, a determination that a claimant has a vocational independence is to be regarded, inter alia, as a determination that that claimant is no longer incapacitated. Finally, section 112 provides that a determination of vocational independence under section 107 results in a claimant

losing his or her entitlement to weekly compensation three months after the date upon which that claimant is notified of the determination.

[47] The submission is that the Corporation provided significant rehabilitation for the appellant to assist him back into employment. In March 2003 the appellant was referred for an initial occupational assessment and initial medical assessment. Thereafter, and in line with the recommendations, the Corporation proceeded to provide practical rehabilitation aimed at returning the appellant to employment. The initial rehabilitation was directed at returning the appellant to his pre-accident employment (based on the then medical evidence suggesting that this was possible.)

[48] To this end, the appellant underwent an activity based programme for eight weeks and a work site assessment was undertaken in July 2003. By the end of 2003 it was evident that the appellant could not return to his pre-accident employment and that alternative employment would need to be considered.

[49] At the beginning of 2004 the Corporation arranged for the appellant to undertake a six week intensive work preparation programme. Thereafter the appellant was referred for a new initial occupational assessment and initial medical assessment. Such referrals were complemented with a further activity based programme and referral for computer training as recommended to the Corporation following the work preparation programme.

[50] Following the initial occupational assessment and initial medical assessment further vocational assistance was provided to the appellant, in particular one on one computer training by Step by Step Computer Services Limited and a referral to Alpha Consultants for job search assistance.

[51] The result is that by the time the vocational independence process was commenced in November 2004 the Corporation had provided an extensive activity based programme aimed at strengthening the applicant's work fitness; training in computer operation; and assistance to find employment. There was certainly no suggestion in November 2004 that further rehabilitation was necessary.

[52] It is submitted that the assistance provided to the appellant was significant, comprehensive and directly applicable to his needs having regard to his circumstances.

[53] It is submitted that the occupational assessment was undertaken by Leanne Wallace from Taskmaster Northland Limited on 30 November 2004. Ms Wallace noted the applicant had a 27 year work history. Ms Wallace noted the appellant's qualifications as including a welding certificate from Northland Polytech, Site Safe Passport and Safety Procedures. Ms Wallace also noted that the appellant had a HT Driving License, First Aid Certificate and computer training.

[54] Job details sheets were provided for each of the positions identified as suitable for the appellant. It is submitted that the occupational assessment was reasonable and in accordance with the legislation. The appellant has not provided any evidence to demonstrate that the assessment was flawed.

[55] The appellant relies on a report from Professor Gorman/Dr Nelson dated 5 April 2005. There is discussion in the report regarding the appellant's transferable skills. This is, as the reviewer noted at page 9 of the review decision, outside the expertise of Professor Gorman/Dr Nelson to comment on. It is submitted that the occupational assessor is the expert on these issues and more weight ought to be placed on their opinion – refer *McLoughlan* (228/01) and *Gregory* (287/01).

[56] Dr Gollop prepared the medical assessment on 17 January 2005. Dr Gollop undertook a clinical examination as well as reviewed radiological investigations and previous medical reports. Dr Gollop described the appellant's limitations at page 5 as follows:-

"Given his condition and time course, he can be regarded as permanently unfit for heavy manual work or for his previous occupation as a welder because of the degenerative discs in the lower two segments of the lumbar spine. He is, however, fit for light supervisory or moderate work where he is able to change position on a frequent basis. He is not fit for those occupations where he is in a fixed position or standing position for the majority of the working day."

[57] Dr Gollop proceeded to opine that the appellant had a vocational independence in three of the 12 job options identified by the occupational assessor, namely:-

- [a] Employment Programme Tutor;
- [b] University and High Education Lecturer and/or Tutor;
- [c] Wholesale and/or Retail Buyer.

[58] It is submitted that the report is reasonable and thorough and in accordance with the legislation. Significantly, Dr Gollop's findings are consistent with the contents of Mr Lyon's report dated 9 November 2004 wherein Mr Lyon noted similar limitations, namely:

"My recommendation would be to continue looking at alternative work not involving too much lifting, bending, or prolonged sitting. A job which does involve fairly frequent changes in posture may be suitable."

[59] The appellant has obtained a report from Professor Gorman/Dr Nelson dated 5 April 2005 and an undated statement from Mr Rasmussen. In relation to the report of 5 April 2005 the authors recommend the following:-

[60] A trial of Nortriptyline;

[a] A structured exercise programme;

[b] A referral for accident/clinical psychologist; and

[c] A referral to Dr Reeves for a psychiatric evaluation.

[61] The authors suggest that the further rehabilitation is required before the appellant's vocational independence is considered and also suggest that the appellant *"is not capable of achieving any more than ten hours per week"*.

[62] Finally, the authors suggest that in relation to the 3 job options in question the appellant *"has only limited medical fitness in this context and we note that he has few relevant transferable skills."*

[63] It is submitted that the appellant has already received considerable assistance with activity based programmes. The authors make no reference to these programmes in their report and this raises the concern that the authors were either not aware of the rehabilitation provided or failed to have sufficient regard to this fact and the outcome of the activity based programmes.

[64] With respect to the remaining recommendations, ie a trial of Nortriptyline and referral to a psychiatrist and psychologist, assuming these are appropriate they can be acted on without having any impact on the appellant's vocational rehabilitation and assessment process. Certainly, there has been no suggestion in

earlier medical assessments that such referrals were necessary for the appellant's rehabilitation;

[65] The authors provide no detail or comment on the specific limitations caused by the appellant's disability. The authors simply state, with no reasoning or explanation offered, that the appellant cannot work for more than 10 hours a week. With respect, such a statement requires more than the bare assertion.

[66] The authors then proceed to state that the appellant has no vocational independence in the 3 job options due to the appellant's limited medical fitness "*in this context*". Again, it is respectfully submitted that the comments are too vague and lack particularity. The authors rely on the same basis to exclude each of the three job options.

[67] Vocational suitability. As stated above the authors exceed their expertise here when opining that the appellant has few relevant transferable skills in relation to the 3 job options. This is a matter for a vocational expert not an occupational physician.

[68] In summary, it is evident that the authors have simply taken a broad brush approach to the issue of the appellant's vocational independence in the 3 job options. They have not considered the appellant's ability to undertake the specific task.

[69] Dr Gollop has had an opportunity to consider the report of 5 April 2005. Dr Gollop states on 11 June 2005 that the authors "*history, examination, findings and investigations are in line with my findings of 17/1/05*". Dr Gollop proceeded to confirm his earlier conclusions.

[70] Turning to the undated statement from Mark Rasmussen, welding tutor. It is submitted that the statement offers little assistance in this review. Mr Rasmussen is neither a medical expert nor a vocational expert. Little, if anything, is known of Mr Rasmussen's credentials to offer an opinion on rehabilitation.

[71] Finally, in *Ramsay* (Christchurch Registry, AP 412/14/02) the High Court held that the assessments of physicians qualified pursuant to the legislation, will be preferred unless clear and cogent evidence to the contrary by a duly qualified physician can identify a flaw in that assessment. Hanson J held:-

"[52]...Once the respondent determines to require an insured to undergo the process determining capacity for work, it seems to me, on the clear wording of the provision, both parties are bound by that process. The scheme of the Act does not

envisage a process where the respondent gathers in evidence and reaches a decision by balancing that evidence. That role is given by the legislation to the medical assessor. The assessment can only be carried out by someone who is entitled to, pursuant to s98. Parliament has determined the proper way for such persons to consider all relevant matters is in terms of s99. They have not provided any other method for assessment, and it is certainly not open on the statutory provisions for the work capacity assessment to be disregarded, because the Court, or the respondent, preferred the contrary opinion of another non-qualified person under s98, who in terms of the legislation, cannot make such an assessment...

[53] In my view, s89 does not leave discretion with the insurer to determine capacity after receiving the report from the medical assessor. What it provides is that an insurer can decide to require an insured to be assessed to determine the capacity for work. Once that decision is exercised by the insurer the provisions of the following sections come into play, and all the parties are bound by them.

[54] I concur in Mr Halvac's submission [for the respondent] that something more is needed to set aside a determination that an insured has a capacity for work other than an opinion from another medical professional not qualified under s98. What is required is evidence on which the Court, or the respondent, could say the opinion reached was wrong and consequently the insurer's decision was wrong."

[underlining added]

[72] It is submitted that the evidence for the appellant does not constitute evidence demonstrating a flaw in the report of Dr Gollop.

DECISION

[73] In my view, the issues in this case revolve around whether or not the appellant had received adequate rehabilitation measures, his suitability for the jobs nominated by the vocational assessor, and whether or not he had the physical ability to sustain those jobs for at least 35 hours per week. I agree with the submission of the respondent that the issue of deterioration is not relevant to this appeal. However, that does not mean that the physical ability of the appellant at the time of this appeal cannot be viewed as evidence relating to the physical capabilities of the appellant at the time of the assessments. That is all the evidence that is relevant to analysing at the time of the assessments the capabilities of the appellant in respect to the injury sustained.

[74] In respect to the vocational assessments it is important to analyse in detail the requirements of the jobs nominated against the work experience, qualifications and transferable skills of the appellant. The vocational assessor provides reasons, as well as job descriptions and requirements of the nominated jobs. I have endeavoured to set these objective materials out in considering realistically whether the appellant had the capability of performing the jobs nominated. In my view, the fact that the

appellant had sometimes trained people on the job and had volunteered to assist in welding courses by no stretch of the imagination could objectively provide a basis for the opinion that the appellant could fulfil the requirements of the first two job descriptions. The appellant has provided additional information in his declaration that shows that he has had limited education and there is no evidence that he would be able to design courses he will teach within the descriptions provided by these two categories of jobs. It is clear that he has only very limited basic computer skills. I do not consider that these two job nominations are realistic having regard to the individual background and experience of the appellant.

[75] In respect to the job of a wholesaler/retailer buyer, again, from the declaration of the appellant he has had no experience in this particular field. While it is acknowledged that a qualification is not essential, the job description implies that experience is a useful asset. I would have thought that as part of the rehabilitation of the appellant he would have received some training in respect to this type of occupation, if the occupation was seriously being put forward as being within his capabilities. Realistically, in my view, no employer having regard to the background and experience of the appellant would entertain a job application from him.

[76] In my view, it is important when nominating suitable job alternatives that a vocational assessor analyses with some particularity in a realistic manner the specific requirements against the known background of work experience, education of the appellant against the marketability to a prospective employer. There must be an objective measuring rod against which the opinion can be measured. If that was not the case then any opinion given would be absolute. I am of the view, realistically that the three job options nominated are not realistic. In terms of the legislation I would have thought that suitable rehabilitation would be provided up to a stage to show that the nominated options were realistically within the grasp of the appellant.

[77] Accordingly, I would allow the appeal, and quash the decision and restore the appellant to his entitlements. As a further ground it seems to me having regard to the injuries suffered and the pain experienced that the medical assessor should have provided reasons for his decision that the appellant could work for 35 hours. Subsequent events confirm this view. It seemed that at the work trial the appellant could only work one or two days without experiencing excruciating pain. Where pain is a factor pertaining to a capacity to work then that issue has to be dealt with as it is an important factor concerning the physical capacities of a claimant.

[78] As I have indicated the appeal is allowed. The appellant is entitled to \$1000 costs and disbursements.

DATED at AUCKLAND this 18th day of January 2005



J Cadenhead
District Court Judge