WORKERS COMPENSATION COMMISSION

STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO A MEDICAL DISPUTE

Matter Number:	**M1-2241/19**
Appellant:	**State of New South Wales**
Respondent:	**Lucy Dunn**
Date of Decision:	**30 October 2019**
Citation:	**[2019] NSWWCCMA 156**

Appeal Panel:	
Arbitrator:	**Carolyn Rimmer**
Approved Medical Specialist:	**Dr Mark Burns**
Approved Medical Specialist:	**Dr John Brian Stephenson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 7 August 2019, the State of New South Wales (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The appellant was insured by QBE Insurance Australia as agent for NSW Self Insurance Corporation at the relevant time. The medical dispute was assessed by Dr Robert Kuru, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 17 July 2019.

2. The respondent to the Appeal is Lucy Dunn (Ms Dunn).

3. The appellant relies on the following ground of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the Medical Assessment Certificate (MAC) contains a demonstrable error.

4. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

5. The Workers Compensation Medical Dispute Assessment Guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.

6. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* Edition 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th Edition (AMA 5).

RELEVANT FACTUAL BACKGROUND

7. In these proceedings, Ms Dunn is claiming lump sum compensation in respect of an injury to the cervical spine on 2 April 2015 that occurred in the course of her employment as a practice manager with Central Coast Local Health District. It is alleged that Ms Dunn was attending to her usual duties and walking in a normal manner in the vicinity of her desk in the Headspace Administration area when she tripped over some damaged/defective carpet. As she fell, she managed to grab a nearby partition in an attempt to arrest her fall. Ms Dunn managed to avoid hitting the ground, but she developed immediate head and neck pain following this incident, as well as left arm pain and numbness and tingling to all five digits of her left hand.

8. In a Certificate of Determination – Consent Orders, Arbitrator Douglas remitted the matter to the Registrar for referral to an AMS to assess the medical dispute regarding the degree of permanent impairment of the applicant resulting from the injury on 2 April 2015 to her cervical spine.

9. The matter was referred to the AMS, Dr Kuru, in the Amended Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 11 June 2019 for assessment of whole person impairment (WPI) of the cervical spine, right upper extremity and left upper extremity as a result of the injury on 2 April 2015.

10. The AMS examined Ms Dunn on 25 June 2019. He assessed 27% WPI of the cervical spine and made a deduction of one tenth pursuant to s 323 of the 1998 Act which resulted in a total assessment of 24% WPI.

PRELIMINARY REVIEW

11. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.

12. The appellant did not request that Ms Dunn be re-examined by an AMS, who is a member of the Appeal Panel.

13. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because there was sufficient evidence by way of medical reports and clinical investigations in relation to assessment of the cervical spine on which to make a determination.

EVIDENCE

Documentary evidence

14. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Fresh evidence

15. Section 328(3) of the 1998 Act provides that evidence that is fresh evidence or evidence in additional to or in substitution for the evidence received in relation to a medical assessment appealed against may not be given on an appeal by a party unless the evidence was not available to the party before the medical assessment and could not reasonably have been obtained by the party before that medical assessment.

16. The Ms Dunn seeks to admit the following evidence:

    (a) WorkCover NSW Certificate of Capacity from Dr Fourie dated 8 April 2015;
    (b) Consultation Note by Jason McMinimee dated 02/04/2015 for visit 23/03/2015;
    (c) Consultation Note by Jason McMinimee dated 02/04/2015 for visit 26/03/2015;
    (d) Consultation Note by Jason McMinimee dated 02/04/2015 for visit 27/03/2015;
    (e) Consultation Note by Jason McMinimee dated 02/04/2015 for visit 30/03/2015;
    (f) Consultation Note by Jason McMinimee dated 02/04/2015 for visit 01/04/2015;
    (g) Consultation Note by Jason McMinimee dated 08/04/2015 for visit 08/04/2015;
    (h) Consultation Note by Jason McMinimee dated 10/04/2015 for visit 10/04/2015;
    (i) WorkCover NSW Certificate of Capacity from Dr Fourie dated 25 March 2015, and
    (j) WorkCover NSW Certificate of Capacity from Dr Fourie dated 27 March 2015

17. The Appeal Panel issued a direction following the preliminary review in order to give the parties an opportunity to make submissions regarding the fresh evidence attached to the submissions lodged by the respondent. The Appeal Panel directed the appellant to provide submissions by 1 November 2019 concerning the fresh evidence relied upon by the respondent and attached to the submissions dated 23 August 2019.

18. Ms Dunn's solicitor, Mr Parkin, in submissions dated 23 October 2019 argued that the notes of Jason McMinimee dated 26/03/2015, 27/03/2015, 30/03/2015, 01/04/2015, 08/04/2015 and 10/04/2015 were in evidence as they appeared in the Bateau Bay Medical Centre Records annexed to the Application to Resolve a Dispute (ARD). Mr Parkin stated that the note of Jason McMinimee dated 23/03/2015 did not appear in the Bateau Bay Medical Centre Records that were annexed to the ARD and those records had omitted the 23 March 2015 consultation note and he was not in possession of same until after the examination by the AMS.

19. Mr Parkin stated that the WorkCover Certificates of Capacity dated 8 April 2015, 25 March 2015 and 27 March 2015 were not attached to the ARD or Reply. He submitted that the content of those certificates merely provided context for the corresponding consultation notes of the Bateau Bay Medical Centre Records annexed to the ARD. Mr Parkin submitted that the admission of these documents would not cause prejudice to either party and merely corroborated the contemporaneous complaints made by Ms Dunn to her general practitioner following the two injuries on 18 March 2015 and 2 April 2015.

20. The appellant, in submissions dated 24 October 2019, did not object "to the admission of the additional treating material (new or otherwise)". The appellant did not propose to make any further submissions on the issue.

21. The consultation notes of Mr McMinimee and WorkCover NSW Certificates of Capacity issued by Dr Fourie adduces "additional relevant information" as required by s 327(3)(b) of the 1998 Act (*Petrovic v BC Serv No 14 Pty Ltd and Ors* [2007] NSWSC 1156, *Robertson v Registrar of Workers Compensation Commission & Berry's Joinery Pty Ltd* [2008] NSWSC 918). This information is information of a medical kind or which was directly related to a decision required to be made by the AMS.

22. However, the consultation notes of Mr McMinimee and WorkCover NSW Certificates of Capacity issued by Dr Fourie were certainly available and could reasonably have been obtained before that medical assessment. For those reasons, the WorkCover Certificates of Capacity dated 8 April 2015, 25 March 2015 and 27 March 2015 and the note of Jason McMinimee dated 23 March 2015 shall not be received as fresh evidence. However, the Appeal Panel considered that these are documents of probative value and relevant to its consideration of the appeal. Therefore, these are documents which the Appeal Panel would call upon as additional information in accordance with s 324(1) of the 1998 Act.

Medical Assessment Certificate

23. The parts of the medical certificate given by the AMS that are relevant to the appeal are set out, where relevant, in the body of this decision.

SUBMISSIONS

24. Both parties made written submissions. They are not repeated in full but have been considered by the Panel.

25. The appellant's submissions include the following:
    - The appellant employer submits the MAC contains a demonstrable error within the meaning of s 327(2)(d) by virtue of the AMS' election to apply the one-tenth default deduction pursuant to s 323 which the appellant employer submits is at odds with all of the evidence.

    - The worker elected to rely upon injury occurring on 3 April 2015. Whilst acknowledging the worker suffered two separate and distinct injuries in the course of her employment on 18 March 2015 and on 2 April 2015, the appellant employer submits the worker either afforded the AMS an incorrect history regarding the development of her symptoms or in the alternative, the AMS obtained an incorrect history himself when he recorded that the worker first developed radiculopathy following the events of 3 April 2015.

    - A more contemporaneous and accurate history was obtained by the treating physiotherapist, Jason McMinimee, in his report dated 9 April 2015.

    - It is clear the worker's radicular symptoms, such as were apparent prior to the incident the subject of these proceedings on 3 April 2015, were amply sufficient to justify an assessment of DRE Cervical 3 following the descriptors for that condition set out in Table 15-5 of the AMA 5. In that context, the appellant submits the AMS's determination to apply the one-tenth default deduction pursuant to s 323 was demonstrably wrong in the context of that evidence.

    - Having regard to the contemporaneous evidence, there is no question of the extent of the deduction being difficult or costly to discern as the worker's own contemporaneous self-report of symptoms is sufficient to enable an assessment of the extent of her impairment applying the descriptors in Table 15-5.

    - The appeal panel should revoke the MAC of the AMS and substitute its own Medical Assessment Certificate applying a 50% deduction pursuant to s 323 on account of the worker's pre-existing injury, condition or abnormality of the cervical spine, being evidenced by the pathology and symptoms reported to the treating clinicians prior to 2 April 2015 (specifically bilateral radiculopathy).

26. Ms Dunn's submissions include the following:

    - The injury occurred on 2 April 2015 and not on 3 April 2015 as referred to in paragraphs 3, 4 and 6 of the appellant's submissions.

    - The weight of the evidence supported a deduction of 10% in relation to the pre-existing condition regarding the cervical spine. Dr Bodel and Dr Ferch recorded similar histories of two separate episodes of injury two weeks apart. The AMS was provided with the reports of Dr Bodel and Dr Ferch. The history recorded by the AMS in the MAC was very similar to the histories recorded by Dr Bodel and Dr Ferch.

- The AMS was provided with documents including the clinical records and reports of Bateau Bay Medical Centre where Mr McMinimee worked. The report of Jason McMinimee, Physiotherapist, to which the appellant refers in the submissions, is dated 9 April 2015, but refers as far back as the initial consultation with Ms Dunn on 23 March 2015. There were errors in the history recorded within that report.

- In the consultation notes recorded by Mr McMinimee, the relevant "visit dates" are accurately recorded on each consultation record. However, all consultation notes for the period 23 March 2015-1 April 2015 (inclusive) were recorded by Mr McMinimee on 2 April 2015 (in retrospect). Mr McMinimee only recorded consultation notes for Ms Dunn following her 2 April 2015 incident at work. All entries that pre-dated 2 April 2015 were retrospectively recorded by Mr McMinimee.

- The consultation notes of Dr Fourie (from the same practice) dated 25 March 2015 and 27 March 2015 made no mention of any radicular symptoms or complaints. This was because no complaints were made of any neurological or radicular symptoms until after the 2 April 2015 incident. The first time neurological or radicular symptoms are mentioned by Dr Fourie was in the consultation record dated 8 April 2015 when he reported: "Bilateral Radiculopathy, Cervical" and referred the respondent worker to a neurosurgeon.

- Dr Fourie also issued WorkCover Certificates of Capacity on 25 March 2015 and 27 March 2015. The injury is accurately recorded in both of those certificates where the Doctor states "Muscle sprain left trapezius" attributable to the minor incident on 18 March 2015. Again, there is no mention whatsoever of any radicular symptoms on those certificates, because there was no complaint of any by the respondent worker. Dr Fourie issued a further WorkCover Certificate of Capacity on 8 April 2015 which provides: "She had a trip over carpet that is lifting at work Thursday 2 April and ended up in ER due to pain and had MRI done in ER. She has bilateral pain, worse Rt compared to left at the moment, deer Sensation C5-T1 Rt arm".

- Mr McMinimee made various errors and there are inconsistencies in his reports and notes. These inconsistencies demonstrate that Mr McMinimee did not obtain or record an accurate history of the subject injury. His records are also at odds with the records of Dr Fourie and the Gosford Hospital.

- The appellant submitted that Ms Dunn afforded the AMS an incorrect history or the AMS obtained an incorrect history. It is apparent that Ms Dunn gave and/or the AMS obtained a history that was inconsistent with the vast majority of available evidence.

- The AMS has taken into account all of the available evidence. The AMS adhered to Clause 1.28 of the Guidelines in that the deduction made was on-tenth of the assessed impairment and that deduction is not at odds with the available evidence.

- The assessment must have regard to the evidence as to the actual consequences of the first injury (or pre-existing condition or abnormality) and the extent, if any, that the later impairment was due to the earlier injury (or pre-existing condition or abnormality) must be determined. In this case, the overwhelming weight of the available evidence establishes that:

  (a) There were no radicular symptoms present or complained of by Ms Dunn until after the 2 April 2015 incident.

(b) Ms Dunn continued to work, without requiring days off, and without any radicular symptoms following the 18 March 2015 injury and up to when she sustained the 2 April 2015 injury.

(c) Ms Dunn was promptly admitted to Emergency at Gosford Hospital following the 2 April 2015 incident.

(d) Ms Dunn underwent cervical fusion surgery as a consequence of the 2 April 2015 injury only.

(e) There was no evidence of any restriction in Ms Dunn's activities of daily living prior between the first and second injuries.

- The AMS considered the minor incident that occurred on 18 March 2015 and the available medical evidence in relation to both the 18 March 2015 and 2 April 2015 injuries and allowed for same.
- Contrary to the appellant's submissions, the evidence establishes that there were no radicular symptoms apparent prior to the 2 April 2015 incident.
- The MAC of Dr Robert Kuru dated 17 July 2019 should be confirmed.

FINDINGS AND REASONS

27. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made.

28. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

29. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116 (*Siddik*). The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the section 327(3) heads, if it gives the parties an opportunity to be heard. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation.

30. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, 'the grounds of appeal on which the appeal is made' was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.

31. In this matter, the Registrar has determined that he is satisfied that at least one of the grounds of appeal under s 327(3)(d) is made out, in relation to the AMS's application of s 323 of the 1998 Act.

32. The Appeal Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above. The Panel accepts the findings on examination that the AMS made in the MAC.

Assessment of the cervical spine – s 323 deduction

33. The approach to be taken in assessing the s 323 deduction was considered by the Supreme Court in *Cole v Wenaline Pty Limited* [2010] NSWSC 78 (*Cole*). Schmidt J said:

> "29. …The section is directed to a situation where there is a pre-existing injury, pre-existing condition or abnormality. For a deduction to be made from what has been assessed to have been the level of impairment which resulted from the later injury in question, a conclusion is required, on the evidence, that the pre-existing injury, pre-existing condition or abnormality caused or contributed to that impairment.
>
> 30. Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, 'irrespective of outcome', contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined. The only exception is that provided for in s 323(2), where the required deduction 'will be difficult or costly to determine (because, for example, of the absence of medical evidence)'. In that case, an assumption is provided for, namely that the deduction 'is 10% of the impairment'. Even then, that assumption is displaced, if it is at odds with the available evidence.
>
> 31. …That is a matter of fact to be assessed on the evidence led in each case".

34. In *Pereira v Siemens Ltd* [2015] NSWSC 1133, Garling J said:

> "81. The assessment required by s 323 is one which must be based on fact, not assumptions or hypotheses: *Elcheikh v Diamond Formwork (NSW) Pty Ltd (In Liq)* [2013] NSWSC 365 at [89]; *Matthew Hall Pty Ltd v Smart* [2000] NSWSC 284 at [33]; *Ryder v Sundance Bakehouse* [2015] NSWSC 526 at [40].
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> 82. The process encompassed by s 323 requires the application of each of the following steps before reaching the ultimate conclusion of the existence of a pre-existing injury which has an impact on the assessment of the injury the subject of the worker's claim.
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> 83. The first step requires a finding of fact that the worker has suffered an injury at work which has resulted in a degree of permanent impairment which has been assessed pursuant to s 322 of the 1998 Act: see *Elcheikh* at [125].
>
> 84. The second step which needs to be addressed is, assuming such an injury has been sustained and impairment has resulted, what is the extent of that impairment expressed as a percentage of the whole person: see *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [38]; *Elcheikh* at [126].
>
> 85. The third matter to be addressed is whether the worker had any previous injury, or any pre-existing condition or abnormality. The previous injury does not have to be one in respect of which compensation is payable under the 1998 Act. If the phrase 'pre-existing condition or abnormality' is to be relied upon, then such condition or abnormality must be a diagnosable or established clinical entity: *Fire & Rescue NSW v Clinen* [2013] NSWSC 629.

86. A finding of the existence of a previous injury can be made without the presence of symptoms, but there must be evidence which demonstrates the existence of that pre-existing condition: *Mathew Hall* at [31]-[32].

87. The pre-existing injury or condition must, on the available evidence, have caused or contributed to the assessed whole person impairment: see *Matthew Hall* at [32]; *Cole* at [29]-[31]; *Elcheikh* at [88] and *Ryder* at [42].

88. It cannot be assumed that the mere existence of a pre-existing injury means that it has contributed to the current whole person impairment: *Clinen* at [32]*; Cole* at [30]; *Elcheikh* at [91]. What must occur is that there must be an enquiry into whether there are other causes of the whole person impairment which reflect a difference in the degree of impairment: *Ryder* at [45].

89. Next in dealing with the application of s 323, the extent of the contribution, if any, of the pre-existing condition to the current impairment must be assessed in order to fix the deductible proportion. If the extent of the deductible proportion will be difficult or costly to determine, an assumption is made that the deductible proportion will be fixed at 10%, unless that is at odds with the available evidence: s 323(2) of the 1998 Act.

90. Each of these steps, and considerations, is a necessary element of a determination that an assessed whole person impairment is to be reduced by a deductible proportion by virtue of the application of s 323 of the 1998 Act."

35. The Appeal Panel accepts that s 323 of the 1998 Act requires that a deduction be made "for any proportion of the impairment that is due to any previous injury or that is due to any pre-existing condition or abnormality." The assessor must point to the actual consequences of the pre-existing condition or abnormality on the assessed impairment, and how it contributes to that assessment.

36. The Guidelines at Parts 1.27 and 1.28 provide:

> "1.27. The degree of permanent impairment resulting from pre-existing impairments should not be included in the final calculation of permanent impairment if those impairments are not related to the compensable injury. The assessor needs to take account of all available evidence to calculate the degree of permanent impairment that pre-existed the injury.
>
> 1.28 In assessing the degree of permanent impairment resulting from the compensable injury/condition, the assessor is to indicate the degree of impairment due to any previous injury, pre-existing condition or abnormality. This proportion is known as 'the deductible proportion' and should be deducted from the degree of permanent impairment determined by the assessor. For the injury being assessed, the deduction is 1/10th of the assessed impairment, unless that is at odds with the available evidence. "

37. The Appeal Panel reviewed the evidence in this matter.

38. Under "History relating to the injury", the AMS noted:

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment: Ms Dunn told me she had had 2 injuries to her neck. The first was on 18/03/2015. She was on all fours beneath a desk feeding computer cables. She came out from under the desk. She arose too early and hit her head on the desk. She had some pain in her neck but continued at work. She had some treatment

through physiotherapy consisting of massage. On 02/04/2018, she tripped over a torn carpet just in front of her desk. As she tripped, she reached out, supporting her hands on an office partition. As she did this, she extended her neck and had an immediate sharp pain in her neck radiating down her arm. She said after 60 minutes or so the pain was so intense that she struggled to breathe.

She was taken to Gosford Hospital where an MRI scan was undertaken."

39. Under "Summary", the AMS wrote:

"Ms Dunn had 2 injuries to her neck and went on to develop neck and upper limb symptoms.
These were treated with C5/6, C6/7 anterior cervical discectomy and fusion."

40. In Part 11, the AMS wrote:

"In my opinion the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities:

(i) Cervical spondylosis C5/6.

b. The previous injury, pre-existing condition or abnormality directly contributes to the following matters that were taken into account when assessing the whole person impairment that results from the injury, being the matters taken into account in 10a, and in the following ways:

(i) The injury was an aggravation of pre-existing condition.

c. The extent of the deduction is difficult or costly to determine so in applying the provisions of s.323(2) I assess the deductible proportion as one tenth."

41. The appellant argued that the MAC contained a demonstrable error by virtue of the application of the one-tenth default deduction pursuant to s 323. The appellant submitted that this deduction was at odds with all of the evidence.

42. The appellant argued that Ms Dunn either gave the AMS an incorrect history regarding the development of her symptoms or in the alternative, the AMS obtained an incorrect history himself when he recorded that the worker first developed radiculopathy following the events of 3 April 2015.

43. The appellant submitted that Ms Dunn's radicular symptoms, such as were apparent prior to the incident the subject of these proceedings on 3 April 2015, were sufficient to justify an assessment of DRE Cervical 3 and the AMS's determination to apply the one-tenth default deduction pursuant to s 323 was demonstrably wrong in the context of that evidence.

44. The Appeal Panel reviewed the evidence. It is clear that the AMS made a deduction pursuant to s 323 for a pre-existing condition, namely cervical spondylosis C5/6. The Panel accepted that no deduction was made in respect of the earlier frank injury on 18 March 2015.

45. It was clear that the AMS did not consider whether any impairment arose from the earlier injury on 18 March 2015. The AMS merely said that Ms Dunn had two injuries to her neck and went on to develop neck and upper limb symptoms. The Appeal Panel was satisfied that failure to consider whether any impairment arose from first or previous injury on 18 March 2015 was an error.

46. The Appeal Panel reviewed evidence.

47. Jason McMinimee, in his report of 9 April 2015, wrote:

> “Mrs Dunn works as a practice manager for Headspace which is part of the Central Coast Area Health Service. The DOI was 18 March 2015 with Mrs Dunn presenting for her initial physiotherapy assessment on 23 March 2015. She has been experiencing regular cervicogenic headaches largely during work hours whilst sitting at her computer. On initial assessment however, she presented with no motor, sensory or reflex changes.
> On initial assessment Mrs Dunn presented with a very painful guarded posture.
> She has found all active cervical movements particularly painful and restrictive. Any cervical rotation, flexion, extension or side flexion has exacerbated her symptoms. Her symptoms were largely left sided with tenderness over the left facet joints +++, a very restrictive upper quadrant and intermittent left sided pain radiating down to her second and third digits especially on attempted left cervical rotation.
> Mrs Dunn states that during her work hours on Wednesday, 25th March upon attempting to answer a colleague's question Mrs Dunn turned to her left again hearing an audible "crunch" in her neck and immediately states she developed bilateral symptoms into both arms and both left and right digits.”

48. The Appellant submitted that the physiotherapist obtained a more accurate history than that recorded in the MAC. However, it appears that there are errors and some inconsistencies in Jason McMinimee’s consultation records. For example, in the consultation note for Thursday 26 March 2015 (but recorded on 2 April 2015) he stated: "Pt C/sp responded well to treatment on Tuesday. Had relief at work until rotating awkwardly to left again yesterday afternoon to respond to a work colleague. Pt heard audible ‘crunch’ and developed mild bilateral radiculopathy to left and right 3rd and 4th digits". The consultation note for Wednesday 8 April 2015 (recorded on 8 April 2015 by Jason McMinimee) stated:

> "Pt admitted to GDH on Friday 3rd April for pain and bilateral radiculopathy C5/C6. Sent for an MRI. Discharged on Saturday 4th of April. Has had pounding headache all weekend. Pt states bilateral neurological signs in both arms, R>L after turning her neck awkwardly at work Wednesday 1st April, hearing an audible crunch. Neurological signs developed not long after”.

It was not clear from those notes whether the incident where Ms Dunn rotated her neck awkwardly to left to respond to a work colleague and then developed mild bilateral radiculopathy to left and right 3rd and 4th digits occurred on 25 March 2015 or 1 April 2015. Sections of the consultation notes were copied and added into each entry and this made the history confusing, and the Appeal Panel therefore placed little weight on the history obtained by Mr McMinimee.

49. Dr Bodel, in a report dated 4 March 2019 wrote:

> “This lady had two separate episodes of injury, two weeks apart and the first occurred on 18 March 2015. She indicates that she was on her hands and knees at that time and underneath one of the doctor's desks in order to fix a cable on the printer for the computer. As she came out she stood up a little too quickly and she hit her occipital region of the skull on the table above her. She states that this caused a jarring injury to the neck. She was not rendered unconscious but she did have pain in the occipital region and in the neck and managed to complete the day. She developed increasing headache and she went to see a physiotherapist, the C5/6 level and also at C6/7. She had been unaware of that pre-existing degenerative change prior to this event.
> The second injury occurred on 02 April 2015. She tripped over some damaged carpet near her desk and as she was falling she grabbed a nearby partition to stop herself from falling. She managed to do so but again jarred the neck. On that occasion she developed increasing head and neck pain and left arm pain and numbness and tingling to all five digits of the left hand.

She was seen at Gosford Hospital and an MRI scan was done. This was on 02 April 2015 showing the degenerative disc disease at CS/6 and bilateral narrowing of the neural exit foramina particularly on the left hand side. There was also central bulging of the C5/6 level as well.

This lady suffered a disc injury of the cervical spine at C5/6 and C6/7 principally as a result of the injury on 02 April 2015. There is a direct causal link between the episode of injury on 02 April 2015 and her ongoing complaints. The earlier episode in March was a relatively minor injury without the left arm radiculopathy. There is no indication clinically of any pre-existing abnormality or condition and no basis for a deduction for pre-existing impairment.

50. Dr Tame, Pain Management Physician, in a report dated 8 November 2016 noted that Ms Dunn injured herself in March 2015 when working as a medical practice manager. He wrote: “Initially Lucy injured herself when she was underneath a desk attending to some cables. On the way up, she hit her head on the undersurface of the desk injuring her neck. She had a second Injury at work where she tipped(sic) over which exacerbated her symptoms.”

51. In the Discharge Referral from Gosford Hospital dated 7 April 2015 Dr Olivia Beesley wrote:

> “Lucy Dunn a 52 year old female to be discharged on 02/04/2015 from Emergency OP GOS at Gosford Hospital. Lucy Dunn presented to this facility with pain, neck… Presented today with neck pain and bilateral arm pain after stumbling on the pavement. Incidentally reports an injury to the back of her head two weeks ago.”

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52. Dr Ferch, in his report dated 6 April 2018, wrote:

> “Ms Dunn initially developed neck pain and headaches on 18/03/2015. She was tracing a printer cable while on her hands and knees under a desk when she struck the back of her head against her desk precipitating neck pain. Ms Dunn experienced some persistent neck pain following this and she was investigated with an x-ray. On 02/04/2015 she tripped on some carpet near her desk causing her to full. This precipitated more severe pain which radiated down Ms Dunn’s left arm. Her symptoms failed to settle and she consulted Dr Parkinson.”

53. Dr Ferch considered that Ms Dunn qualified for a 10% deduction on the basis of pre-existing spondyitic change.

54. Dr Fourie in the WorkCover NSW Certificate of Capacity dated 25 March 2015 made a diagnosis of “muscle strain L trapezius” and certified Ms Dunn as having the capacity to work full hours with some restrictions in lifting and carrying. In the clinical notes dated 8 April 2015 Dr Fourie noted: “Bilateral radiculopathy, cervical” and referred Ms Dunn to Dr Marc Couglan.

55. Ms Dunn in her statement dated 20 February 2017 said:

> “On 18 March 2015, during the course of my employment for the Employer, I was speaking to someone from the IT department within the Employer on the telephone in a bid to get a printer configured and active for one of the Doctors at the Practice (GP Clinic Room 2).
>
> At this time, I was Instructed by the IT employee to get underneath a desk on my hands and knees, for the purpose of tracing a printer cable. After I did this, and as I was getting up from underneath the desk, I hit the back of my head on the underside of the desk. I was not rendered unconscious but I did have some pain to my head and neck. I continued working and finished my normal work day.

Over the next few days, the pain in my neck got worse and I consulted my General Practitioner, Dr Fourie based at Bateau Bay Medical Practice. Dr Fourie referred me for physiotherapy, which I underwent through Jason McMinimee. My first session with the physiotherapist was on 23 March 2015. I underwent an x-ray of my cervical spine on 27 March 2015. I understand that the x-rays showed some evidence of degenerative change at the C5/6 level and also at C6/7. I had been unaware of any of the pre-existing change in my neck prior to the incident and did not feel the same pain or discomfort in my neck prior to this incident.

In any event, I continued working my full-time hours for the Employer. Between 23 March 2015 and 2 April 2015, the physiotherapy and pain medication helped me with my neck pain and discomfort and I was able to continue to work.

On 2 April 2015, in the course of my employment for the Employer, I tripped over some damaged/defective carpet near my desk. As I was falling, I grabbed a nearby partition in an attempt to arrest my fall. I managed to not hit the ground but I did acutely jar my neck in a whiplash type fashion. The Incident was witnessed by a fellow employee, Cathy Crosswell, Practice Support Officer/Receptionist.

I developed immediate increased head and neck pain following this incident, as well as left arm pain and numbness and tingling to all five digits of my left hand. As I was due to attend a meeting, I wanted to stay at work for the meeting. After five minutes or so, the pain in my neck and left arm were Increasingly severe and I had to leave work. I rapidly developed a severe headache and pins and needles down both arms. Given the severity of pain and symptoms, I was taken by ambulance to Gosford Hospital Emergency Department.

In early 2014, I started to notice an intermittent loss of sensation in my hands as well. I was referred by my General Practitioner to get a CT Scan and MRI Scan done on my Cervical Spine in late December 2013/early January 2014. This radiology showed mild to moderate degenerative changes within the cervical spine."

56. Dr Bodel and Dr Ferch recorded very similar histories regarding the subject injuries in their medico-legal reports dated 4 March 2019 and 6 April 2018, respectively. These histories taken by Dr Bodel and Dr Ferch were quite detailed compared to the histories taken by treating doctors. The Appeal Panel was satisfied that the first incident on 18 March 2015 caused a jarring injury to Ms Dunn's neck. She had pain in the occipital region and neck but managed to complete the day at work. She developed increasing pain and she went to see her general practitioner and a physiotherapist. Ms Dunn continued working full-time between 23 March 2015 and 2 April 2015. The Appeal Panel was satisfied that on 2 April 2015 there was a second injury, which is the subject of this claim, and on that occasion Ms Dunn developed increasing head and neck pain and left arm pain and numbness and tingling to all five digits of the left hand. She was taken by ambulance to Gosford Hospital.

57. The Appeal Panel considered the question of the deduction to be made for any proportion of the impairment that is due to any previous injury or that is due to any pre-existing condition or abnormality.

58. The pre-existing injury or condition must, on the available evidence, have caused or contributed to the assessed WPI.. The Appeal Panel agreed with the 10% deduction made by the AMS for a pre-existing condition, namely, cervical spondylosis at C5/6.

59. The Appeal Panel then considered whether the first injury on 18 March 2015 caused or contributed to the assessed WPI. The Appeal Panel noted that there was some treatment after first injury. Ms Dunn saw the physiotherapist for a few sessions and saw her general practitioner. The second injury, the subject of this claim, occurred about two weeks after the first injury on 18 March 2015.

60. The two week period, in the Appeal Panel's opinion, while insufficient to allow the aggravation of a pre-existing underlying degenerative change caused in the injury on 18 March 2015 to settle, was a sufficient period for radicular signs to have appeared if they had been caused as a result of the first injury on 18 March 2015. The Appeal Panel were of the view that the symptoms caused in the first injury on 18 March 2015 had improved with treatment and would have continued to improve but for the second injury.

61. The Appeal Panel was satisfied that Ms Dunn had no radicular signs until after the second injury on 2 April 2015. The Appeal Panel considered that Ms Dunn had sustained significant injury in the second incident on 2 April 2015 and then underwent surgery to treat symptoms that arose following the injury on 2 April 2015. The Appeal Panel was satisfied that none of the impairment assessed was caused or contributed to by the injury on 18 March 2015.

62. The Panel was satisfied and agreed with the AMS that a one-tenth deduction was applicable to the assessment in respect of the cervical spine.

63. In summary, the assessment of total WPI by the Panel was the same as that made by the AMS. In those circumstances the Panel will confirm the MAC as the review has not led to a different result and should not be interfered with (*Robinson v Riley* [1971] 1 NSWLR 403).

64. For these reasons, the Appeal Panel has determined that the MAC issued on 17 July 2019 should be confirmed.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar