WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1234/19**
Appellant:	**Russell Lewin**
Respondent:	**Secretary, Department of Communities and Justice**
Date of Decision:	**11 November 2019**
Citation:	**[2019] NSWWCCMA 163**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Mark Burns**
Approved Medical Specialist:	**Dr Brian Noll**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 18 July 2019, Russell Lewin, the appellant, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Yiu-Key Ho, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 3 July 2019.

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

    - the assessment was made on the basis of incorrect criteria
    - the MAC contains a demonstrable error.

3. 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.

4. The WorkCover Medical 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 WorkCover Medical Assessment Guidelines.

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

RELEVANT FACTUAL BACKGROUND

6. Onn 24 June 2019 an amended referral was made by a delegate of the Registrar to the AMS for an assessment, following a defended hearing before an Arbitrator in the Commission. The AMS was asked to assess WPI caused to the:

    - Right lower extremity (foot)
    - Right lower extremity (hip) - consequential injury
    - Left lower extremity (hip) – consequential injury
    - Scaring (TEMSKI)

7. The amended referral also contained in addition to the evidence a reference to a copy of a Certificate of Determination by the Arbitrator dated 30 May 2019.

8. Mr Lewin was employed by the Department of Family & Community Services as a Disabilities Support Worker when on 2 February 2013 he slipped and fell suffering an inversion injury to his right ankle. He fractured the right fifth metatarsal in what the AMS described as a chronic Jones fracture. Because the injury had a poor prognosis for slow healing, he was referred to Dr Stackpool, Orthopaedic Surgeon, and came to surgery for internal fixation on 21 February 2013. For six weeks Mr Lewin was non-weight bearing on the left foot and walking with two crutches. After that time, he started full weight bearing and returned to work on light duties, graduating to full duties by the middle of May 2013.

9. In early October 2013 Mr Lewin began to complain about left hip pain. He saw Dr Stackpool in that regard and an x-ray showed osteoarthritic changes in the left and right hips which were relatively mild, but the left hip pathology was complicated because there had been an injury to the left hip region. This involved heterotopic ossification in the left ischium area which had been probably caused when Mr Lewin was about 15 years old.

10. On 25 November 2013 Dr Stackpool removed the implant due to a complaint about the prominent screw. Unfortunately, once the screw was removed the injury caused more pain and it was noticed that Mr Lewin had a non-union of the previous Jones fracture.

11. On 16 June 2014 Mr Lewin came to further surgery with Dr Anthony Cadden, Foot and Ankle Specialist. He had a plate put in and a local bone graft in that procedure. Mr Lewin mobilised with the help of a scooter. This meant that although he had no weight on his foot, his knee was taking all of the weight on the scooter.

12. Dr Stackpool continued to manage the hip condition and Mr Lewin came to a total left hip replacement on 16 October 2014.

13. On 21 August 2017 a right hip replacement was performed.

PRELIMINARY REVIEW

14. 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.

15. Mr Lewin did not request a re-examination by a Panel AMS and, as the demonstrable error identified in this matter was not concerned with the results of a re-examination, a re-examination was not held.

EVIDENCE

Documentary evidence

16. 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.

Medical Assessment Certificate

17. 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

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

FINDINGS AND REASONS

19. 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.

20. 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.

21. Mr Lewin's first ground of appeal was that the AMS has fallen into error by applying incorrect criteria. We were referred to *Jaffarie v Quality Castings Pty Ltd*[1] as authority for the proposition that the Commission had exclusive jurisdiction under the Compensation Acts save for medical disputes pursuant to s 319 of the 1998 Act.

22. In assessing the matters referred, the AMS said, in giving his reasons for assessment[2]:

> "…..I must admit I can accept permanent impairment in relation to the right foot due to the fracture but I find it difficult to accept all the problems in the two hips as a consequential injury. The whole period of time during the management of this Jones fracture which he could not put weight on the left side was only six weeks. All the other time he was putting weight on and although may not be full weight, it would be difficult to attribute the hip problems relating to the right foot fracture."

23. In explaining his calculations at 10[b][3] he said further:

> "As explained above, I really do not think they [the hip conditions] are consequential to the injury to the foot because altogether he only has six weeks not able to weight bear and there is obviously pre-existing degenerative changes on both hips on radiological examination. I believe there should be total deduction and completely not related to the work injury."

24. In his formal MAC[4], the AMS assessed 15% WPI in relation to each hip but deducted the whole amount pursuant to s 323. He found 3% WPI in relation to the right foot injury and a further 1% for the surgical scarring, giving a combined table value of 4%.

SUBMISSIONS

25. Mr Lewin submitted that the incorrect criteria that the AMS has applied was a factual determination that was "both at odds with the factual determination of the Commission and was determination that not within the AMS's jurisdiction [sic]".

26. We would observe in passing that such an allegation does not constitute an application of incorrect criteria, which is concerned with the misapplication of the Guidelines.[5]

27. Mr Lewin also submitted that by ignoring the terms of the amended referral the AMS had made a demonstrable error.

---

[1] [2018] NSWCA 88 *(Jaffarie*).
[2] Appeal papers page 23 MAC 10[a].
[3] Appeal papers page 24.
[4] Appeal papers page 26.
[5] *Marina Pitsonis v Registrar of the Workers Compensation Commission* [2008] NSWCA 88 at [40-42].

28. The respondent submitted that no error had been made. We were referred to Practice Direction No. 11 dated 1 January 2019 in respect of which it was alleged that there were two paths if the issue of liability was unresolved, being either an Arbitrator to determine the dispute in accordance with the evidence, or a referral of the matter by an Arbitrator to an AMS.

29. This Practice Note, it was submitted, enabled the respondent to submit that it was the Arbitrator that had erred in finding that the bilateral hip conditions were consequential to the subject injury.

30. Submissions were then made as to the respective merits of the evidence that had been adduced before both the AMS and the Arbitrator.

31. We were referred to *Mahenthirarasa v State Rail Authority of New South Wales & Ors*[6].

DISCUSSION

The AMS made a demonstrable error

32. The submissions of the appellant must be accepted. In *Jaffarie* White JA (agreeing with Leeming and MacFarlan JA) said at [80]:

> "In any event, the jurisdiction of the Senior Arbitrator to determine the nature of the injury sustained in the course of Mr Jaffarie's employment on 12 June 2009 is resolved by the terms of the order made by this Court on 29 October 2015. As noted by Leeming JA at [6] the matter was remitted for re-determination by a different arbitrator 'in accordance with the reasons and the Deputy President's judgment of 9 December 2014 as varied by this judgment.' Deputy President Roche in his judgment of 9 December 2014 (*Jaffarie v Quality Castings Pty Ltd* [2014] NSWWCCPD 79) analysed in detail the reasons of this Court in *Bindah*[7] and concluded as follows:
>
> > '[249] Notwithstanding the different approach by Emmett JA and Meagher JA, it is my view that the following principles apply to proceedings in the Commission:
> >
> > (a) questions of causation are not foreign to medical disputes within the meaning of that term when used in the 1998 Act. Assessing the degree of permanent impairment "as a result of an injury", and whether any proportion of permanent impairment is "due" to any previous injury or pre-existing condition or abnormality, both call for a determination of a causal connection (*Bindah* at [110]);
> >
> > (b) it is for the Commission to determine whether a worker has received an injury within the meaning of s 4 of the 1987 Act and whether there are any disentitling provisions, such that compensation is not payable for that injury (*Bindah* at [111] and s 105 of the 1998 Act);
> >
> > (c) the Commission's jurisdiction is restricted by s 65(3) of the 1987 Act, which precludes the Commission (an Arbitrator or a Presidential member) from awarding permanent impairment compensation if there is a dispute about the degree of permanent impairment, unless the degree of impairment has been assessed by an AMS (*Bindah* at [111]);

---

[6] [2007] NSWSC 22.

[7] *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd* [2014] NSWCA 264.

(d) the determination of the degree of permanent impairment that results from an injury is a matter wholly within the jurisdiction of the AMS or, on appeal, the Appeal Panel and is not a matter for determination by an Arbitrator (*Bindah* at [112]);

(e) a finding made by a person without jurisdiction cannot bind a person or persons who have jurisdiction (*Haroun* at [16] and [19]–[21]), and

(f) it is desirable to avoid drawing a rigid distinction between jurisdiction to decide issues of liability and jurisdiction to decide medical issues (*Bindah* at [110]; *Tolevski* at [35]).

...

[255] The only matters that are 'conclusively presumed to be correct' are those matters listed in s 326(1). They are:

"(a) the degree of permanent impairment of the worker as a result of an injury,

(b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,

(c) the nature and extent of loss of hearing suffered by a worker,

(d) whether impairment is permanent,

(e) whether the degree of permanent impairment is fully ascertainable."

[256] It follows that, since "the nature of the injury" (or the "condition" or "aetiology of the condition") is not a matter on which an assessment in a MAC is conclusively presumed to be correct, the opinions of an AMS on such matters do not bind the Commission. This follows from s 326(2), which states that "[a]s to any other matter, the assessment certified is evidence (but not conclusive evidence) in any such proceedings". This conclusion is reinforced when one considers s 319(e), which defines medical dispute to include "the nature and extent of loss of hearing suffered by a worker", and s 326(c), which states that an assessment in a MAC is conclusively presumed to be correct as to "the nature and extent of loss of hearing suffered by a worker" (*McGowan v Secretary, Department of Education and Communities* [2014] NSWWCCPD 51 (*McGowan*)). In other words, if the injury is a loss, or further loss, of hearing an AMS determines the "injury" issue. That is an exception to the norm.

[257] The absence of any similar provisions for "the nature of the injury" points strongly to the conclusion that "the nature of the injury" is a matter for the Commission to determine. This is consistent with Emmett JA's statement at [111] that it is for the Commission "to determine whether a worker has suffered an injury within the meaning of s 4 of the [1987] Act" and his Honour's later statement (at [118]) that only "certain matters of causation" (emphasis added) are within the exclusive jurisdiction of an AMS.'"

33. At [81] White JA approved the dicta of Deputy President Roche.

34. The question as to whether an injury is consequential or not is clearly a matter that falls outside the terms of s 326(1) as explained in the above extract at [255].

35. The learned Deputy President's reference at [256] to the nature of the injury is a reference to s 319(a) of the 1998 Act. S 319 provides:

> **"319 Definitions**
> In this Act:
>
> **'approved medical specialist'** means a medical practitioner appointed under this Part as an approved medical specialist.
>
> **'medical dispute'** means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim:
>
> (a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),
>
> (b) the worker's fitness for employment,
>
> (c) the degree of permanent impairment of the worker as a result of an injury,
>
> (d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,
>
> (e) the nature and extent of loss of hearing suffered by a worker,
>
> (f) whether impairment is permanent,
>
> (g) whether the degree of permanent impairment of the injured worker is fully ascertainable."

Practice Direction 11

36. The reliance on the relevant provisions of Practice Direction 11 by the respondent was misconceived. Paragraph 9 provides:

> "9. There are two pathways for resolution of permanent impairment disputes:
>
> (a) disputes regarding permanent impairment referred to an AMS, and
> (b) disputes regarding permanent impairment referred to an Arbitrator."

37. Practice Direction 11 was issued following the commencement of the amendments to s 321 and the insertion of s 321A into the 1998 Act on 1 January 2019. *The Workers Compensation Legislative Amendment Act 2018* no. 62 repealed s 321(3) and (4), which provided relevantly:

> "(3) The Commission may not refer for assessment under this Part a medical dispute concerning permanent impairment… of an injured worker.
>
> (4) The Registrar may not refer for assessment under this Part:
>
> (a) a medical dispute concerning permanent impairment...of an injured worker where liability is in dispute and has not been determined by the Commission, or
> (b) …"

38. The amending Act inserted s 321A into the 1998 Act. It provides:

> "(1) The regulations may make provision for or with respect to –
>
> (a) the circumstances in which a medical dispute concerning permanent impairment of an injured worker is authorised, required or not permitted to be referred for assessment under this Part, and
>
> (b) the giving of notice of a referral to the parties to the dispute.
>
> (2) Without limiting subsection (1), the regulations may provide that a medical dispute may not be referred for assessment under this Part if the dispute concerns permanent impairment of an injured worker where liability is in issue and has not been determined by the Commission.
>
> (3) A medical dispute concerning permanent impairment of an injured worker that is authorised or required by the regulations to be referred for assessment under this Part may be referred by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute".

39. It can be seen that the effect of ss (1) has been to envisage situations (to be covered by regulation) in which a medical dispute about WPI might not be referred for assessment to an AMS ("under this Part"). Section (2) appears to envisage a continuation of the former policy, where a WPI dispute cannot be referred to an AMS where liability is disputed. No regulations have as yet been promulgated.

40. Whilst the terms of Practice Direction 11 provide for two alternative pathways for a permanent impairment claim to be determined, the relevant pathway in this matter has been that pursuant to Practice Direction (9)(a). The question of the nature of the injury and the respondent's liability therefore was determined by the Arbitrator, who then referred the matter to the AMS for determination of the degree of WPI.

41. No submissions were made as to how the provisions of the Practice Direction resulted in the desired outcome by the respondent, that is to say, that an AMS thereby has the power to overrule a determination as to liability by an Arbitrator. This ground is accordingly rejected.

The MAC is revoked

42. It follows that the MAC issued on 3 July 2019 must be revoked. The next question is as to the terms of the fresh certificate. It is necessary to refer back to the evidence in order to re-evaluate Mr Lewin's entitlement.

43. Accepting that Mr Lewin suffered consequential conditions in his hips as a result of the subject injury in accordance with the findings of the Arbitrator, it is necessary to determine whether and/or to what extent any deduction should be made pursuant to the provisions of s 323 of the 1998 Act.

Section 323 of the 1998 Act

44. Section 323 provides relevantly:

> "(1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.
>
> (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence."

45. In his Certificate, the AMS found that there should be a 10/10 deduction relating to the impairment to the hips.[8] This appears to have been simply a stratagem used by the AMS to pay lip service to his requirement to make an assessment of the hips, notwithstanding his erroneous finding regarding causation.

The evidence

46. Mr Lewin's injury occurred on 2 February 2013. The first complaint of left hip pain was made to his general practitioner, Dr Figueiredo, on 10 October 2013 when Mr Lewin complained of left hip pain when carrying his daughter, by which time he was already seeing a chiropractor (described by Dr Figueiredo as a "quiropractor"). [9] No evidence was lodged by any chiropractor, but the entry demonstrates that within a comparatively short time after the injury, Mr Lewin developed left hip pain. Dr Figueiredo referred Mr Lewin for an x-ray of both hips, which took place on 13 October 2013.

47. The findings on x-ray were:[10]

> "A large focus of hypertrophic bone is identified lying adjacent to the inferior pubic ramus on the left. There is mild narrowing of the bilateral hip joint spaces.
>
> There are sclerotic bone changes seen in the weight-bearing portions of both acetabular rims.
>
> The visualised femurs are unremarkable. The femoral head cortices are intact bilaterally. There are no significant degenerative changes seen in the bilateral S1 joints.
>
> Comment: there is a focus of hypertrophic bone identified in the left groin region. This may reflect myositis ossificans. Has there been a history of trauma in this region? Further evaluation with a CT and ultrasound is recommended."

48. The AMS enquired about the trauma and was told by Mr Lewin that it was probably some sort of dancing injury around the age of 15 years.

49. On 5 February 2014, Dr Stackpool recorded that Mr Lewin had increased pain over the fracture site associated with increased weight bearing. He noted that Mr Lewin walked with a "very mild limp".

---

[8] Appeal papers page 26.
[9] Appeal papers page 169.
[10] Appeal papers page 63.

50. On 26 March 2014, Dr Stackpool reported that Mr Lewin was complaining of increasing left groin and thigh pain over the previous six months. This may have been aggravated, Mr Lewin was recorded as saying, by his altered gait pattern during his foot fracture and recovery.

51. With regard to the right hip, the first entry in Dr Figueiredo's notes was 22 September 2014. She wrote:

> "significant right hip pain, difficult to determine if hip interfere with foot pain and foot pain interferes with left hip pain."

52. The AMS noted on reviewing the x-rays of the hips and pelvis from 2014:

> "There was OA changes which I consider to be mild on the right side and mild to moderate on the left side in May 2014."

53. The reasoning as to causation by the AMS reflected the opinion of Dr Sham Deshpande Orthopaedic Surgeon, of 11 April 2019, who said on behalf of the respondent that the bilateral hip condition was constitutional in nature, ie osteoarthritis, and was not work-related. However, Dr James Bodel, Orthopaedic Surgeon, on behalf of the applicant found that there was such a connection because of Mr Lewin's altered gait. The Arbitrator accepted Dr Bodel's opinion and rejected that of Dr Deshpande.

54. The Panel Specialists note that, notwithstanding the description of the x-ray results as showing mild or mild to moderate osteoarthritic changes in both hips, nonetheless the development of symptoms in the left hip was first reported on 10 October 2013, eight months following the subject injury on 2 February 2013. The Panel Specialists also note that Mr Lewin was non-weight-bearing on the right foot following the surgery on 21 February 2013 and walking with two crutches for six weeks only. Thereafter Mr Lewin returned to work on light duties, graduating to full duties by the middle of May 2013.

55. The treating surgeon noted, without comment, the complaint by Mr Lewin on 26 March 2014 that his altered gait had caused the onset of his condition. The altered gait was described as a "very mild limp."

56. The Panel Specialists accordingly have some reservations as to whether that first recovery would have caused the onset of Mr Lewin's left hip pain, had it not been for the pre-existing condition demonstrated by the x-ray of 13 October 2013. That pre-existing condition appears to have been caused or at least contributed to by a childhood injury.

57. Similarly, following further surgery on 16 June 2014 with Dr Cadden, Mr Lewin mobilised with the use of a scooter, so that there was no weight on his foot during his recovery. By 16 October 2014 Mr Lewin's left hip condition had deteriorated to the point where a total hip replacement was needed. Again, the Panel Specialists are satisfied that the condition of the left hip at the time of the subject injury, although asymptomatic, was in such an advanced state of degeneration that its contribution to the impairment caused by the injury was significant.

58. With regard to the right hip, the evidence of any pre-existing condition is of a mild to moderate osteoarthritic condition, as evidenced in the x-ray dated 16 October 2013. The connection with the subject injury is somewhat more tenuous, both because the total hip replacement itself did not occur until 21 August 2017, and because no complaint was made about right hip symptoms until 22 September 2014. It is germane that by 17 February 2016, the treating surgeon reported that Mr Lewin had a normal gait.

59. Dr Bodel took a history that, because of the prolonged healing process with his ankle, Mr Lewin developed a "significant" long-term limp.[11] Dr Bodel noted that the imaging of both hips and pelvis on 16 October 2013 showed arthritic change in the hip joints, the left hip being more severely arthritic than the right. "As a result," Dr Bodel said, Mr Lewin's condition slowly deteriorated until he came to the total hip replacement on the left side in October 2014. Dr Bodel made no comment about the temporal delay between the subject injury in February 2013 and the right hip total replacement in August 2017, contenting himself to say that the right hip replacement surgery "also has helped." His report of a significant long-term limp was also not consistent with the contemporaneous evidence to which we have referred.

60. Dr Bodel considered the question of a deduction pursuant to s 323. He said:[12]

> “Clearly he did have some pre-existing degenerative change in the hip, but the ‘injury’ is the aggravation, acceleration, exacerbation and deterioration of that disease process leading to the total hip replacements. There is therefore no basis for a deduction for pre-existing impairment.”

61. With respect to Dr Bodel, we are unable to follow his reasoning. In the first place, the impairment to the hips has been caused by a consequential condition and the “injury” is in fact that sustained to the right ankle. Secondly, there is no legal principle that holds that because an injury is claimed as the aggravation, exacerbation, acceleration or deterioration of a disease process, that it is therefore not amenable to the application of the provisions of s 323. It is in cases where the disease provisions are claimed that the question of whether the condition was pre-existing and the extent of the impairment thereby caused is often considered. Thirdly, in the case of the left hip, we are satisfied that its condition was also affected by the injury in Mr Lewin’s childhood, which event constitutes a “prior injury” in terms of s 323.

The Statement of Reasons

62. In considering the causal nexus between the injury to Mr Lewin’s ankle and the onset of the bilateral hip condition, the Arbitrator in her Statement of Reasons said at [52]:[13]

> “Dr Stackpool did not directly say that the condition in Mr Lewin’s hips was related to his right foot fracture. His focus was on treatment of Mr Lewin’s condition. However, Dr Stackpool set out the complaints Mr Lewin made in respect of his hip and the history of an altered gait. In particular, Dr Stackpool noted an increase in pain when Mr Lewin placed weight through his left leg. With respect to Mr Lewin’s right hip, Dr Stackpool recorded that he suffered ‘increased pain on heavy activity days’.”

63. This latter quote came from a report dated 17 February 2016 from Dr Stackpool to Mr Lewin's general practitioner, then Dr Sharif. During that examination he found that Mr Lewin "walked with a normal gait".[14] Dr Stackpool's summary in that report was that Mr Lewin presented with "some increasing right hip osteoarthritic symptoms." Dr Stackpool said that if the symptoms deteriorated significantly and were poorly controlled, he would consider a “potential” hip replacement. Dr Stackpool also noted the results of a CT scan of the right hip which confirmed moderate osteoarthritic damage with an anterior lateral femoral head cyst measuring 19 ×15 mm.

---

[11] Appeal papers page 146.
[12] Appeal papers page 357.
[13] Appeal papers page 34.
[14] Appeal papers page 99.

64. At [53], the Arbitrator said that the reports of Dr Stackpool combined with the statement of Mr Lewin provided the basis for the acceptance of Dr Bodel's opinion that the altered gait had been causally responsible for the aggravation and acceleration of Mr Lewin's pre-existing degenerative disease.

65. At [14] the Arbitrator set out the portion of Mr Lewin's statement that she relied on:[15]

> "Mr Lewin said:
>
> > 'Within about four to six months of the injury to my right foot, I began to develop pain in my left knee and left hip. I also had pain, but to a lesser degree in my right hip. From time to time my left hip would give way and would have to stop myself from falling by grabbing a chair or holding onto a table. I spoke to my general practitioner about my left hip condition and was referred to Dr Stackpool. Dr Stackpool examined both my hips and recommended that I proceed to left total hip replacement. At that time he did not consider that my right hip condition was as serious as my left hip. I believe that my left hip pain developed as a result of the injury to my right foot, and the additional pressure (i.e. total weight bearing) I had to place on my left leg'."

Re-assessment

66. The degree to which the aggravation and acceleration found by the Arbitrator contributed to the overall impairment caused by the subject injury to the right foot is of course a matter for an AMS or, in this case, the Medical Appeal Panel.

Left hip

67. The condition of the left hip at the time of the subject accident can be taken to have been similar to that revealed in the x-ray of 13 October 2013. It was common ground that the pathology revealed in that x-ray pre-existed the subject injury. The reporting radiologist thought that there might have been some earlier trauma caused to the left hip, and that suspicion was confirmed by Mr Lewin to the AMS at consultation. We note particularly that the radiologist reported mild joint space narrowing and sclerotic bone changes in the weight-bearing portions of both acetabular rims. We are satisfied with regard to the left hip that the pre-existing injury and condition had a contribution to play in considering the impairment caused by the subject injury. The evidence is at odds with a conclusion that the statutory 1/10th deduction would be appropriate pursuant to s 323(2).

68. We are of the view that an 8/10 deduction should be made.

Right hip

69. With regard to the right hip, again the x-ray of 13 October 2013 showed the presence of pre-existing degenerative condition in the form of moderate osteoarthritic changes which included joint space narrowing and sclerotic bone changes in the weight-bearing portions of the acetabular rim.

70. Although there had been a complaint on 22 September 2014 of pain in the right hip, the comment by Dr Figueiredo which we have reproduced above leaves some doubt as to the immediacy of the causal connection.

71. Dr Stackpool's diagnosis, as the treating Orthopaedic Surgeon for both Mr Lewin's right foot condition and his bilateral hip condition was of some significance. Dr Stackpool simply noted that Mr Lewin was suffering from "some increasing right hip osteoarthritic symptoms".

---

[15] Appeal papers page 30.

72. Whereas Dr Stackpool had recorded Mr Lewin's complaint that his altered gate at the time had caused the problems with his left hip, no such record was made in relation to the right hip some two years later. Bearing in mind the dangers of reading too much into the records of health professionals[16], nonetheless we find it significant that Dr Stackpool recorded a normal gait on examination on 17 February 2016. Mr Lewin's condition did not deteriorate sufficiently to warrant a total hip replacement until 21 August 2017. We regard therefore the contribution by the pre-existing osteoarthritis to the eventual need for a total right hip replacement as being of more significance than the left, as any altered gait had long since resolved.

73. We consider therefore that a 9/10 deduction is appropriate to reflect the evidence before us.

74. For these reasons, the Appeal Panel has determined that the MAC issued on 3 July 2019 be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

[16] See generally *Mason v Demasi* [2009] NSWCA 227.

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1234/19**
Applicant: **Russell Lewin**
Respondent: **Secretary, Department of Communities and Justice**

This Certificate is issued pursuant to s 328(5) of the *Workplace Injury Management and Workers Compensation Act* 1998.

The Appeal Panel revokes the Medical Assessment Certificate of Dr Yiu-Key Ho, and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Table - Whole Person Impairment (WPI)

Body Part or system	Date of Injury	Chapter, page and paragraph number in WorkCover Guides	Chapter, page, paragraph, figure and table numbers in AMA 5 Guides	% WPI	Proportion of permanent impairment due to pre-existing injury, abnormality or condition	Sub-total/s % WPI (after any deductions in column 6)
Right lower extremity (foot)	2/2/2013		Table 17-12, 17-37	3%	Nil	3%
Right lower extremity (hip)	2/2/2013		Table 17-33, 17-34	15%	9/10	1.5% rounded up to 2%
Left lower extremity (hip)	2/2/2013		Table 17-33, 17-34	15%	8/10	3%
Temski Scale				1%	Nil	1%
Total % WPI (the Combined Table values of all sub-totals)					**9%**	

John Wynyard
Arbitrator

Dr Mark Burns
Approved Medical Specialist

Dr Brian Noll
Approved Medical Specialist

11 November 2019

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

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar