WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1167/19**
Appellant:	**Kempsey Shire Council**
Respondent:	**Cecil Patrick Delforce**
Date of Decision:	**22 November 2019**
Date of Amendment:	**4 December 2019**
Citation:	**[2019] NSWWCCMA 179**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr Drew Dixon**
Approved Medical Specialist:	**Dr Mark Burns**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 16 August 2019, Kempsey Shire Council (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 19 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 grounds 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).

RELEVANT FACTUAL BACKGROUND

6. Cecil Patrick Delforce (Mr Delforce/the respondent) suffered a number of injuries in the course of his employment as a plant operator with the appellant since about 1981. On 4 December 2002 Mr Delforce was driving a vehicle loading mulch when the vehicle hit a stump and Mr Delforce was thrown about and suffered the onset of severe neck pain. He continued to work with restrictions but continued to suffer neck pain. In January 2004 Mr Delforce underwent surgery to his cervical spine. He attempted to return to work but was not able to continue with his preinjury duties.

7. In 2006, Mr Delforce made a claim in respect of injury to his cervical spine and agreement was reached for the payment of lump sum compensation in respect of 16% whole person impairment (WPI). In July 2014 agreement was reached for payment of lump sum compensation in respect of a further 2% WPI arising from injury to the cervical spine with the date of injury recorded as 4 December 2002.

8. In 2014, Mr Delforce made a claim for lump-sum compensation in respect of injury to his back, left leg at or above the knee, right leg at or above the knee attributable to the nature and conditions of his employment between 1 July 1987 and 31 December 2001. In addition, Mr Delforce claimed lump sum compensation in respect of injury to his lumbar spine attributable to the nature and conditions of employment from 1 January 2002 up to 4 December 2002. He was assessed by an AMS, Dr David O'Keefe, as suffering 10% permanent impairment of the back, 10% loss of efficient use of the right leg at or above the knee and 20% loss of efficient use of the left leg at or above the knee attributable to the injury resulting from the nature and conditions of work from 1 July 1987 to 31 December 2001. He was further assessed as having 6% WPI as result of injury to his lumbar spine resulting from the nature and conditions of employment from 1 January 2002 to 4 December 2002.

9. In March 2019, Mr Delforce's solicitors filed an application for assessment as to whether the degree of permanent impairment is more than 20% for the purposes of s 39 of the *Workers Compensation Act 1987* (the 1987 Act). The application detailed two injuries. The first was alleged as injury to the back and left leg at or above the knee, due to work tasks performed while driving plant and equipment over rough and uneven surfaces between 1 July 1987 and 31 December 2001. The second injury alleged was injury to the cervical spine and lumbar spine on 4 December 2002 asserted to be due to:

> "the nature of the applicant's duties, driving plants [sic] on rough and uneven ground and working in a cramped position, along with his physical duties has caused an aggravation, acceleration and exacerbation of pre-existing condition, cervical and lumbar condition as well as injury on 4 December 2002 when the plant struck a stump, causing further severe cervical pain with symptoms to both arms."

10. In proceedings in the Commission in respect of those claims, agreement was reached and consent orders made as follows:

> "1. The Application for Assessment by an Approved Medical Specialist (the Application) is amended in Part 4 by:
>
> a) Deleting the first claim for injury to the back an (sic) left leg caused by the nature of the applicants (sic) work duties from 01.07.1987 to 31.12.2001; and
>
> b) For the second injury, by deleting any claim for injury to the back, and any injury based on the nature of the applicant's work duties.
>
> 2. The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) for assessment or (sic) whole person impairment (for 39 threshold purposes) according to the following:
>
> a) As a result of injuries as follows:
>
> i) Injury on 04.12 .2002 – Cervical Spine
>
> b) Documents to be provided to AMS (with attachments unless excluded):
>
> i) The Application
>
> ii) The Reply filed on behalf of State cover
>
> 3. The Reply by GIO should not be provided to the AMS."

11. The dispute was referred for assessment to the AMS, Dr Tim Anderson, in the following terms:

> "Date of injury: 4 December 2002
>
> Body part/s referred: Cervical Spine
>
> Method of assessment: WHOLE PERSON IMPAIRMENT"

12. On 19 July 2019, the AMS issued a MAC assessing Mr Delforce as suffering 27% WPI in respect of the cervical spine. The AMS deducted one tenth for pre-existing injury, condition or abnormality pursuant to s 323 of the 1998 Act resulting in an assessment of 24% WPI in respect of injury on 4 December 2002.

PRELIMINARY REVIEW

13. 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.

14. 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 material available to the Panel to permit review of the assessment.

EVIDENCE

Documentary evidence

15. 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

16. The AMS recorded the following history:

> "Mr Delforce advised that since the 1980s, he had been driving a large Massey Ferguson tractor which towed a grid roller which was used for crunching rocks he (sic) the road construction. The device shook terribly, and he was always being jarred about inside the cab. He had to do a lot of reversing and in order to do this, he had to twist around in his seat including twisting his neck to look to the rear. His neck has been hurting for years.
>
> He was then changed to working on front end loaders where he worked for 15 years. There was no suspension. The condition of his neck deteriorated badly.
>
> He was unable to give me specific details of an event which occurred on 04/12/02 but did extensively advise on the severe jarring and shaking which he experienced, and which resulted in progressive pain and deterioration of his neck."

17. The AMS noted that Mr Delforce had sought chiropractic assistance and had ultimately come under the care of an orthopaedic surgeon, Dr Ghabriel, who performed fusion at the C6/7 level in 2004. The AMS noted that Mr Delforce had not been able to return to work as a plant operator following the surgery and his employment had been terminated in mid-2005.

18. The AMS noted the results of his physical examination and the radiological investigations. The AMS addressed the "Summary of injuries and diagnoses" as follows:

> "Mr Delforce gives a history of many years operating heavy plant in adverse circumstances during road construction and maintenance. Many of these devices had poor suspension and he was shaken badly while carrying out this job. His postural position also left much to be desired, particularly when he was reversing which was a frequent activity.
>
> As a result, he has experienced extensive accelerated degenerative changes.
>
> There is also a history of further injury associated with an event which is described to have occurred on 4/12/02. Unfortunately, Mr Delforce was unable to give me any specific detail about this occasion."

19. The AMS assessed that a proportion of the impairment was due to previous injury, pre-existing condition or abnormality. He said, "There is evidence of pre-existing degenerative change in the cervical spine."

20. The AMS assessed Mr Delforce as suffering 27% WPI in respect of the cervical spine. He explained that the assessment was made in accordance with the criteria in the Guidelines at paragraph 4.37 placing Mr Delforce in DRE Cervical Category IV, warranting an assessment of 25% with an additional 2% assessed respect of interference with activities of daily living.

21. The AMS said that in making that assessment he had taken account of the following matters:

> "There is a long history of deterioration of his cervical spine [? over] many years. This has necessitated a surgical procedure. The radiological investigations demonstrate dysfunction at the C6/7 articulation. The detailed clinical examination demonstrates significant dysfunction of the cervical spine but without radiculopathy."

22. The AMS noted that Dr Hopcroft, independent medical expert qualified on behalf of Mr Delforce and Dr Powell, independent medical expert qualified on behalf of the appellant, had both assessed Mr Delforce as falling within DRE Category IV. He noted that Dr Hopcroft had made his assessment on the basis of presence of radiculopathy whereas the AMS had not identified the presence of radiculopathy. Dr Powell had assessed Mr Delforce as having 21% WPI in respect of the cervical spine but deducting one tenth to give 19%.

23. The AMS agreed that a one tenth deduction "would be appropriate for the pre-existing circumstances of Mr Delforce's condition."

SUBMISSIONS

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

25. In summary, the appellant submits that the AMS applied incorrect criteria as specified in the Guidelines and fell into demonstrable error with respect to the assessment of a deduction s 323 of the 1998 Act at one tenth of the assessed WPI.

26. The AMS had not turned his mind to the effects of the incident in 2007 when Mr Delforce had suffered an injury while carrying out maintenance on a motor vehicle which rolled against him.

27. The appellant submitted that the AMS had included impairment attributable to the pre-injury nature and conditions of employment driving plant and equipment and had failed to take into account the effects of a subsequent injury to the cervical spine in 2007. A deduction of one tenth in respect of previous injury, pre-existing condition or abnormality was not open to the AMS on the whole of the evidence.

28. In reply, the respondent submits that the appellant had previously (agreement dated 17 August 2006) accepted a date of injury to the cervical spine as 4 December 2002 and had paid lump-sum compensation pursuant to s 66 of the 1987 Act in respect of 16% WPI arising from injury to the cervical spine. Subsequently a further 2% had been paid in respect of that date of injury.

29. The respondent submitted that the insurer had accepted injury to the cervical spine on 4 December 2002 for the purpose of compensation pursuant to s 66 and "the appellant should not now be entitled to resile from its earlier positions". The AMS had correctly applied s 323 in the light of the evidence.

30. The subsequent injury involving a motor vehicle had not, on the evidence available to the AMS, resulted in an impairment to the cervical spine which required to be taken into account.

FINDINGS AND REASONS

31. 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.

32. 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.

33. The Panel accepts that the ground of demonstrable error is made out in respect of the approach to assessment adopted by the AMS which, as set out above, included the effects of the work tasks performed by Mr Delforce prior to 4 December 2002 as forming part of the "injury" on that date which was the subject of the referral.

34. The AMS noted that:

> "Mr Delforce gives a history of many years operating heavy plant in adverse circumstances during road construction and maintenance. Many of these devices had poor suspension and he was shaken badly while carrying out this job. His postural position also left much to be desired, particularly when he was reversing which was a frequent activity.
>
> As a result, he has experienced extensive accelerated degenerative changes.
>
> There is also a history of further injury associated with an event which is described to have occurred on 4/12/02. Unfortunately, Mr Delforce was unable to give me any specific detail about this occasion."

35. Although Mr Delforce was unable to provide an explanation of what occurred on 4 December 2002 to the AMS, there was evidence before the AMS which it appears was not taken into account in assessing the mechanism of injury and which the Panel accepts. In his report dated 20 April 2005 Dr Hopcroft, treating orthopaedic surgeon, recorded a history of "a severe increase in neck pain on 4 December 2002 after undertaking some heavy machinery operating duties". He noted that on this occasion Mr Delforce "was loading mulch in December 2002 hitting a major stump underneath it and throwing himself violently against the windscreen striking his head."

36. Dr Hopcroft reported:

> "I believe this patient was suffering from some pre-existent cervical spondylitic change when he suffered a severe head injury against the windscreen of his vehicle at work on 4/12/02. I believe that led to the significant listhesis at the C6/7 level with a marked aggravation of his C6/7 nerve root irritation symptoms mainly on the left side, correlating to the changes on the MRI scan."

37. Dr Powell, who examined Mr Delforce at the request of the appellant's solicitors in September 2018, reported:

> "Mr Delforce confirmed that he was injured in a workplace incident on that day (4 December 2002) when he missed a step while getting off his front-end loader and fell onto his back landing on his left hip. I was unsure if he injured his cervical spine. He also referred to another incident, possibly occurring on the same day, when the machinery he was operating struck a tree stump while distributing mulch, causing him to be thrown forward in the cabin of the machine, striking his head against the windscreen, injuring his neck."

38. Dr Powell noted that this was consistent with the history provided to Dr Hopcroft, Dr Shadwell and Dr Bornstein but also noted that Mr Delforce was "not a good historian".

39. The reasons set out in the MAC suggest that AMS concluded that there was no particular incident on 4 December 2002 and the impairment to be assessed was attributable to a long history of deterioration of Mr Delforce's cervical spine over many years which had necessitated a surgical procedure.

40. It is clear from the consent orders and the terms of the referral that the parties had agreed that impairment due to work tasks performed prior to the date of the subject injury, 4 December 2002, was to be excluded from the injury to be assessed by the AMS and that the impairment to be assessed was that resulting from the incident on 4 December 2002 when the vehicle driven by Mr Delforce had struck a stump while distributing mulch, causing him to be thrown forward against the windscreen of the vehicle he was operating.

41. In conflating the injury sustained on 4 December 2002 with pathology attributable to work tasks performed in the course of employment prior to that date, the AMS fell into error apparent on the face of the MAC. The terms of the referral made it clear that pathology attributable to work tasks performed by Mr Delforce prior to 4 December 2002 should be the subject of a deduction pursuant to s 323 the 1998 Act if that pathology contributed to the extent of WPI in the cervical spine.

42. The ground of appeal of "demonstrable error" has been made out and it is necessary to review the evidence to assess the extent of impairment attributable to the subject injury.

43. There is no dispute between the parties and the clinical evidence supports the assessment of Mr Delforce as falling within DRE Cervical Category IV warranting an assessment of 25% WPI. That assessment is supported by the nature of injury, the radiological reports and the fact of surgery in the absence of verifiable radiculopathy.

44. Mr Delforce's statement and the history provided to Dr Hopcroft and the AMS in relation to activities of daily living support the assessment of an additional 2% in respect of interference with activities of daily living. The total assessed WPI in respect of the cervical spine is appropriately assessed at 27%.

45. The incident in 2007 when Mr Delforce was working on a motor vehicle which struck him when it escaped down the ramp does not appear to have played any part in aggravating the cervical symptoms. Mr Delforce described that "his legs were force flexed at the hips and were pushed hard up into his chest." There is no suggestion of any change in the level of pathology in the cervical spine as a result of that incident.

46. Section 323 of the 1998 Act provides:

> "323 DEDUCTION FOR PREVIOUS INJURY OR PRE-EXISTING CONDITION OR ABNORMALITY
>
> (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 (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.
>
> Note : So, if the degree of permanent impairment is assessed as 30% and sub (2) operates to require a 10% reduction in that impairment to be assumed, the degree of permanent impairment is reduced from 30% to 27% (a reduction of 10%).
>
> (3) The reference in sub (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter.
>
> (4) The Workers Compensation Guidelines may make provision for or with respect to the determination of the deduction required by this ."

47. In *Cole v Wenaline Pty Ltd*[1] (*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.

[1] [2010] NSWSC 78

[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."

48. In *Vitaz v Westform (NSW) Pty Ltd*[2], Basten JA said (at [43]) (McColl JA and Handley AJA agreeing):

> "The resulting principle is that if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury. In the absence of any medical evidence establishing a contest as to whether the pre-existing condition did contribute to the level of impairment, the complaint about a failure to give reasons must fail. An approved medical specialist is entitled to reach conclusions, no doubt partly on an intuitive basis, and no reasons are required in circumstances where the alternative conclusion is not presented by the evidence and is not shown to be necessarily available."

49. There is no evidence of any previous injury, pre-existing condition or abnormality in Mr Delforce's cervical spine prior to the commencement of his employment by the appellant in about 1981. From that time on Mr Delforce was engaged in tasks which, on the balance of probabilities, would have given rise to pathology in his cervical spine. The report of Dr Fernihough dated 9 November 1993 refers to complaints of cervical pain "due to neck activity" and there is reference to investigation showing "moderate disc narrowing at C6/7".

50. The Panel is satisfied that, at the time of injury on 4 December 2002 the applicant had a "previous injury". That is established by the applicant's complaints of neck symptoms prior to the subject injury, the report of Dr Fernihough noting the radiological finding at C6/7 and the radiological investigations carried out after the subject injury which disclosed degenerative changes.

51. It is then necessary to establish the extent to which that pre-existing injury contributed to the WPI assessed, based on the evidence.

52. Mr Delforce had symptoms of neck pain prior to the subject injury but was able to carry out work tasks that required turning of the head and which were carried out in a provocative environment within the cabin of plant and equipment where he experienced shaking and jarring on a regular basis.

53. The subject injury on 4 December 2002 led to a substantial change in the level of symptoms. Dr Hopcroft a in his report dated 16 November 2005, expressed the opinion that the subject injury "precipitated a major left cervical nerve root irritation problem" which he felt was "superimposed on those previous work induced changes".

54. Degenerative changes are noted in the CT and MRI scans carried out in 2003. It is not possible to assess the extent of those changes but they were sufficiently mild to permit the applicant to continue work until the subject injury.

[2] [2011] NSWCA 254

55. Dr Powell attributed one half of Mr Delforce's impairment to the work tasks performed up to the date of the subject injury. The Panel does not accept that assessment. Mr Delforce was able to perform physically demanding work up to the time of the subject injury. There is no evidence of any treatment or complaint of cervical symptoms between the time when Dr Fernihough reported in 1993 and December 2002.

56. In the light of the significant change in the level of symptomatology attendant upon the injury on 4 December 2002, the Panel accepts that the contribution of previous injury and any pre-existing condition as at the date of the subject injury was relatively minor in comparison to the level of impairment flowing from the subject injury which led to surgery.

57. In the absence of any radiological investigations between 1993 and 2002, it is difficult to assess the extent of the appropriate deduction and it is appropriate in the circumstances to attribute one tenth of the level of impairment to the pre-existing pathology in the cervical spine. Given the extent of the increase in the level of symptoms that assessment is not at odds with the available evidence.

58. Ultimately then, the Panel is of the opinion that the overall assessment by the AMS of 27% WPI, reduced pursuant to s323 by one tenth to 24% WPI (after rounding) is appropriate given the relatively modest contribution of the pre-existing pathology.

59. For these reasons, the Appeal Panel has determined that the MAC issued on 19 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*.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar