

# WORKERS COMPENSATION COMMISSION

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

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<b>Matter Number:</b>	<b>M1-2220/18</b>
<b>Appellant:</b>	<b>Noelle Bosch</b>
<b>Respondent:</b>	<b>McCain Foods (Australia) Pty Ltd</b>
<b>Date of Decision:</b>	<b>30 March 2020</b>
<b>Citation:</b>	<b>[2020] NSWCCMA 64</b>

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<b>Appeal Panel:</b>	
<b>Arbitrator:</b>	<b>Catherine McDonald</b>
<b>Approved Medical Specialist:</b>	<b>Prof John Carter</b>
<b>Approved Medical Specialist:</b>	<b>Dr John Garvey</b>

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 20 August 2018, Noelle Bosch lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Michael Rochford and Dr Mark Burns, each of whom is an Approved Medical Specialist. Dr Rochford issued a Lead Assessor Medical Assessment Certificate (MAC) on 26 July 2018.
2. Ms Bosch relied on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) in respect of the decision of Dr Rochford (the AMS) only:
  - the assessment was made on the basis of incorrect criteria,
  - the MAC contains a demonstrable error.
3. The Registrar was satisfied that, on the face of the application, at least one ground of appeal has been made out. The matter was referred to an Appeal Panel who issued a decision on 23 November 2018.
4. The decision of the Appeal Panel was the subject of an application for judicial review which was determined by Her Honour Acting Justice Simpson on 15 October 2019<sup>1</sup>. Her Honour determined that both the MAC and the Appeal Panel decision were vitiated by jurisdictional error and quashed the determination of the Appeal Panel. The matter was remitted to this Appeal Panel.
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.

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<sup>1</sup> *Bosch v McCain Foods (Australia) Pty Ltd* [2019] NSWSC 1390.

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

## RELEVANT FACTUAL BACKGROUND

7. Ms Bosch was employed by McCain Foods (Australia) Pty Ltd (McCain) as a production worker. On 24 March 2015, she lifted a box of pies and felt pain in her back and her pelvic region. She was referred to Dr Jane Manning, urogynaecologist, who diagnosed vaginal prolapse and bladder hypersensitivity. Dr Manning recommended surgery. Ms Bosch underwent a repair of the prolapse and a hysterectomy.
8. On 12 September 2016, a Commission arbitrator gave an ex tempore decision in which he ordered McCain to “pay for the cost of the surgical treatment proposed by Dr Jane Manning in her report of 21 March 2016.”
9. As set out below, Dr Manning did not recommend surgery in her report dated 21 March 2016. Dr Manning set out the surgery she proposed in her report dated 2 September 2015 and a financial consent dated 24 October 2016. As a result of the decision of the arbitrator, the surgery was undertaken on 3 November 2016.
10. Ms Bosch commenced proceedings on 26 May 2018 seeking permanent impairment compensation in respect of an injury to her back and a vaginal prolapse. The impairment relied on as a result of the prolapse was a result of infertility under Table 7.5 of the Guidelines.
11. The AMS appointed to assess Ms Bosch’s Urinary and Reproductive system issued the MAC on 10 July 2018. He assessed 1% whole person impairment (WPI) under Table 7.2 with respect to the bladder because Ms Bosch reported occasional post-micturition incontinence. He did not accept loss of fertility as a result of the hysterectomy as a problem for assessment.
12. The MAC was the subject of an appeal and the first appeal panel upheld the MAC on 23 November 2018. Ms Bosch sought judicial review of the decision of the first appeal panel.

## THE SUPREME COURT DECISION

13. Simpson AJ delivered her decision on 15 October 2019. Her Honour set out the factual background and said it was inherent in the determination of the arbitrator that the surgery proposed was reasonably necessary as a result of the injury.<sup>2</sup> Her Honour considered the procedural history and said<sup>3</sup>:

“The issues involved in the plaintiff’s claim were narrow. Her claim was for assessment of the degree (not the fact) of permanent impairment. That she had lost fertility was not, and could not have been, in dispute. The immediate cause of the infertility was the hysterectomy. Nor could there have been any serious dispute that the assessment would have exceeded 10%, and, for the purposes of s 151H, exceed 15%. That follows from the application of the Permanent Impairment Guidelines, which call for assessment of loss of fertility as between 26% and 35%. The sole remaining question was whether the hysterectomy, and hence the permanent impairment, resulted from the work injury.”

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<sup>2</sup> At [26].

<sup>3</sup> At [30].

14. Her Honour considered the reasons of the AMS and said:

“However, he did not accept that the loss of fertility was ‘a problem for assessment’. By this he appears to have intended to convey that the loss of fertility did not result from the work injury. This was because he considered that the hysterectomy was ‘elective’.”

15. When considering the reasons of the first appeal panel, Simpson AJ said:

“The Appeal Panel placed significant weight on the manner in which the Arbitrator’s finding was expressed, in particular his order that McCain Foods pay ‘for the cost of surgical treatment as proposed by Dr Jane Manning in her report of 21 March 2016’, noting that no recommendation for hysterectomy had been made in that report. The Appeal Panel expressly found that the lifting of the box of pies on 24 March 2015 caused the vaginal prolapse, but was not satisfied that the subsequent hysterectomy which, in turn, resulted in infertility, ‘only occurred because of the compensable injury’. The Appeal Panel referred extensively to the findings and observations of the AMS.”<sup>4</sup>

16. Her Honour noted that the submissions made to the Appeal Panel:

“assumed, in effect, a chain of causation – that the permanent impairment (infertility) resulted from the hysterectomy, which resulted from the prolapse surgery which in turn resulted from the work injury. Put in reverse, the work injury resulted in the need for prolapse surgery which resulted in the performance of the hysterectomy which in turn resulted in permanent impairment (infertility).

The main thrust of the argument put to the Appeal Panel was that neither the AMS nor the Appeal Panel had jurisdiction to determine causation, that issue having been concluded in the orders of the Arbitrator. It was submitted that:

‘the legal and factual matters had been appropriately determined by the Arbitrator’.

and that all that remained for the AMS, and the Appeal Panel, was to determine the degree of permanent impairment.”<sup>5</sup>

17. That argument was not pursued in the Supreme Court and Her Honour noted that it is contrary to authority<sup>6</sup>. Her Honour said:

“In *Bindah* Emmett JA, with the concurrence of Ward JA, held that neither the AMS nor the Appeal Panel was bound by the causation decision of the Arbitrator. That decision is binding on me”<sup>7</sup>.

18. It was clear that the date in the arbitrator’s order was a mistake and that he intended to order McCain’s insurer to pay for the surgery set out in the report dated 2 September 2015 and had found that surgery was reasonably necessary as a result of the injury. However, the issue of causation was not closed and:

“the question of causation of the plaintiff’s permanent impairment (as well as its degree) was a live issue for the AMS and for the Appeal Panel. Leaving aside the effect of the Arbitrator’s orders on that determination, it nevertheless remained necessary for each to grapple with the arguments advanced by the parties on the

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<sup>4</sup> At [43].

<sup>5</sup> At [60]-[61].

<sup>6</sup> At [62].

<sup>7</sup> At [70], referring to *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd* [2014] NSWCA 264; (2014) 13 DDCR 156.

question of causation. On behalf of the plaintiff it was put to the Appeal Panel that the AMS misunderstood the task he was to perform, as indicated by his use of the word 'elective', and that he misunderstood the legal concept of causation and the test to be applied in determining whether a permanent impairment 'results from' a work injury."<sup>8</sup>

19. Her Honour identified three "difficulties" with the AMS's reasons. The first was that the AMS used the observation that "if preservation of fertility was a priority, prolapse repair without hysterectomy was an option" to Ms Bosch's detriment.<sup>9</sup> Second, the AMS speculated that heavy menstrual periods with clots and Ms Bosch's age might have been factors in the decision to undergo a hysterectomy but there is no evidence that was a factor, nor was it raised with Ms Bosch.<sup>10</sup> Third that the AMS did not accept that the loss of fertility was a "problem for assessment" but assessed WPI of 1%.<sup>11</sup>
20. This Appeal Panel notes that the assessment made by the AMS was, as set out above, not with respect to the female reproductive organs but with respect to the bladder. The same assessment was made by Dr Schmidt.
21. Her Honour said:

"It may be accepted that the evidence linking the hysterectomy with the work injury was relatively slight. It was that Dr Manning had advised the plaintiff (i) that performing the hysterectomy would achieve a 'better operative result' for the prolapse surgery; and that (ii) the hysterectomy would be likely to reduce the risk of recurrence of the prolapse."

22. Her Honour identified a significant error with respect to the MAC:

"To establish the necessary causal link, it was not sufficient, as was submitted to the Appeal Panel, that the plaintiff would not have undergone a hysterectomy but for the work injury, nor that she would not have had the hysterectomy had she not suffered the work injury and vaginal prolapse. But it may well have been sufficient if the plaintiff established, to the satisfaction of the AMS or the Appeal Panel, that undergoing the hysterectomy was likely to have improved the outcome of the vaginal prolapse surgery and reduced the risk of recurrence. Neither the AMS nor the Appeal Panel directed any attention to these considerations."<sup>12</sup>

23. Her Honour said that the "but for" test of causation was inapt in this case because it oversimplified the issue and could produce a wrong outcome. Her Honour supposed the following facts:

- the lifting incident at work caused the plaintiff's prolapse;
- by reason of the prolapse, repair surgery was necessary;
- the plaintiff's medical specialist advised that, since abdominal surgery was to be undertaken, the plaintiff ought consider taking the opportunity of surgery in that part of the body to undergo, also, hysterectomy;
- hysterectomy was not otherwise indicated and was not connected with the prolapse surgery;
- the plaintiff accepted the advice and had the hysterectomy in tandem with the necessary vaginal repair.

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<sup>8</sup> At [71].

<sup>9</sup> At [72].

<sup>10</sup> At [73].

<sup>11</sup> At [74].

<sup>12</sup> At [79].

In those circumstances, it could properly be said that 'but for' the prolapse surgery, the plaintiff would not have undergone hysterectomy. It would be difficult, however, causally to relate the hysterectomy to the prolapse surgery, and, more particularly, to the work injury. Rather, the conclusion would be that the hysterectomy was coincidental with the prolapse surgery, and otherwise unrelated to the work injury. It must be borne in mind that the necessary causal connection is between the work injury and the hysterectomy. Some of the submissions made on behalf of the plaintiff to the Appeal Panel may be taken as arguing for a causal connection of the kind I consider to be unsustainable on the factual scenario I have outlined. In those circumstances rejection of the plaintiff's case on causation would be correct."<sup>13</sup>

24. Her Honour said:<sup>14</sup>

"...True it is that, on the evidence, it was unlikely that the plaintiff would have undergone hysterectomy at the time she did had it not been for the need for the prolapse surgery. But her case was more complex than that. On her evidence, her decision to undergo hysterectomy was more than coincidental with the need for prolapse surgery; it gained its necessary causal connection from the advice given by Dr Manning of the potential benefits to the outcome of the prolapse surgery of including the hysterectomy. It was this that neither the AMS nor the Appeal Panel addressed.

The plaintiff's case at all times was that the decision to undergo the hysterectomy resulted from her now undoubted need to undergo the vaginal repair surgery. Dr Manning's reports and advice constituted evidence of the causal connection, to which neither the AMS nor the Appeal Panel paid adequate attention. Rather, they categorised the surgery as 'elective' (which they appeared to regard as decisive), and considered other hypothetical reasons for the plaintiff's decision, reasons which had no basis in the evidence.

Nowhere in the 'Findings and Reasons' is there any discussion of the plaintiff's contention that the hysterectomy and consequent permanent impairment 'resulted from' the work injury. The statement at [53] that the Appeal Panel was unable to accept that the need for the hysterectomy only occurred because of the compensable injury is nothing but a conclusion, lacking any reasoned explanation. The Appeal Panel was obliged, in the execution of its task, to grapple with the plaintiff's contentions and, if it rejected them, to explain why. The Appeal Panel made no reference, for example, to the statements attributed to Dr Manning that performing the hysterectomy would give a 'better operative result' for the prolapse surgery, and that it would reduce the risk of recurrence of prolapse. Although mentioned in passing, these were significant considerations on the question of causation, warranting due attention. They were not given that due attention."

25. Simpson AJ held that the MAC was vitiated by jurisdictional error and that the decision of the first appeal panel was vitiated by jurisdictional error and error of law on the face of the record. Her Honour ordered that the appeal from the decision of the AMS be remitted to the Commission for determination according to law.

## **PRELIMINARY REVIEW AND SUBSEQUENT PROCEDURAL HISTORY**

26. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

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<sup>13</sup> At [84]-[85].

<sup>14</sup> At [86]-[88].

27. 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 information in the file to determine the appeal, subject to the provision of further material from Ms Bosch's treating doctors.
28. The Appeal Panel directed, relying on s 324 of the 1998 Act, that the following medical records not already before it being:
  - (a) Complete clinical notes of Dr Jane Manning;
  - (b) Clinical notes of any previous or concurrent general practitioner from 2010 to the date of injury;
  - (c) The histopathology report following surgery on 3 November 2016 (if not contained in Dr Manning's notes), and
  - (d) The report of the MRI scan for which approval was sought between June and September 2015 and referred to in the notes of Wyong Doctors (or confirmation that any MRI scan was in respect of Ms Bosch's lumbar spine).
29. Those notes were necessary to consider the question of causation and whether the hysterectomy was likely to have improved the outcome of the vaginal prolapse surgery or reduced the risk of recurrence of the prolapse.
30. The Appeal Panel directed that submissions in respect of the material in those documents be provided.
31. There was a significant delay in the provision of the documents and an extension was provided. Contrary to the direction, Ms Bosch's representatives sought to substitute new submissions. The submissions for McCain dealt with the material set out at paragraph 16. In order to allow procedural fairness, McCain was invited to respond to the further submissions filed for Ms Bosch. Unfortunately there was a delay in that direction being conveyed to the parties.

## **EVIDENCE**

32. 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, together with the documents supplied in accordance with our direction.
33. Because of the Supreme Court decision it is not necessary to quote at length from the MAC. With respect to Dr Manning's advice, the AMS recorded:

"Mrs Bosch was found to have a vaginal prolapse. The discussion with Dr Manning was as to whether she should undergo a vaginal repair of the cystocele and the rectocele or it should be combined with a hysterectomy which she was told would reduce the chance of recurrence. Mrs Bosch decided to proceed with the advice of having a hysterectomy. Her initial application for operation was rejected and subsequently a hysterectomy and vaginal repair were performed on 3 November 2016. Post-operatively her urinary symptoms of urge settled."
34. In his summary of injuries and diagnoses, the AMS said:

"Mrs Bosch sustained a vaginal prolapse as a result of a lifting accident in the workplace. This was an isolated incident in lifting a mass of approximately 15 kg."

Other factors that would have been contributing would be that Mrs Bosch has had two full-term pregnancies and with normal deliveries. She underwent an elective hysterectomy plus repair rather than just the anterior and posterior vaginal repair to cure the prolapse.”

35. The AMS said in response to Dr Patrick’s assessment based on infertility was:

“If preservation of fertility was a priority, then a repair of her prolapse by anterior and posterior repair without hysterectomy was an option. Ms Bosch states that Dr Manning did discuss this option indicating that the hysterectomy in conjunction with vaginal repair gave a better operative result.

Also, from the GP notes (May 14 2015) Ms Bosch was having heavy menstrual periods with clots (menorrhagia) in the weeks prior to her initial assessment by Dr Manning. This problem plus her age group may have been factors in the ultimate decision to undergo vaginal repair plus hysterectomy.

I cannot accept the loss of fertility as problem for assessment.”

### **Ms Bosch’s statement**

36. In her statement, Ms Bosch said that she saw Dr Manning for the first time in May 2015 when a pessary ring was provided. She saw Dr Manning again on 2 June 2015 and 18 August 2015. On that occasion she “wanted to discuss the surgical options as conservative treatment was not helping. Dr Manning explained that the surgery would correct the prolapse that I suffer.” Her statement did not set out any advice she received from Dr Manning as to whether or why a hysterectomy was required.

### **Dr Manning’s reports in the file**

37. There are a number of reports from Dr Manning in the Application to Resolve a Dispute (the ARD). Many of them post-date the surgery and shed no light on the question of causation that we are required to determine.

38. On 2 September 2015, Dr Manning wrote to McCain’s insurer and described the surgery to be undertaken, including hysterectomy. She noted that the correction of the prolapse would not allow Ms Bosch to return to her previous duties which involved heavy lifting. The report appears to be in response to a series of questions which are not reproduced. With respect to the causation of the prolapse, Dr Manning said:

“Noelle has had two vaginal deliveries which is traditionally one of the main risk factor for prolapse. Obesity, heavy lifting, cigarette smoking, chronic constipation and other congenital and acquired factors are other factors that contribute.

There is the fact however that she states that she felt something tear and give way and was immediately aware of the prolapse at the moment of her injury. Given that we know that rises in abdominal pressure cause prolapse, it would seem, from her history that this would have been the major cause of her prolapse.”

39. Dr Manning did not say anything in that report about the reason for the hysterectomy.

40. On 21 March 2016, Dr Manning wrote to Ms Bosch’s solicitor. She provided her opinion and to the occurrence of the prolapse. With respect to treatment she said:

“There may well be a need for long term medical therapy for bladder hypersensitivity and urinary urgency. This is difficult to predict.

Prolapse surgery may have lasting success if she can maintain normal BMI, avoid heavy lifting in any context, continue pelvic floor exercises, refrain from smoking and avoid constipation. Further prolapse surgery might be required overtime regardless. An anterior repair without mesh has a 30% lifetime risk of recurrence statistically.”

41. There is no reference to hysterectomy in that report.
42. Dr Manning provided a financial consent with respect to surgery, including hysterectomy, on 24 October 2016. She prepared an operation report dated 3 November 2016.

#### **Dr Manning’s clinical notes**

43. The Appeal Panel called for Dr Manning’s notes because they did not all appear in the file. A report prepared in May 2015 referred to by Dr Patrick does not appear in the file.
44. Dr Manning’s notes were necessary to attempt to understand the reasoning behind the statement attributed to her that combining a hysterectomy with the surgery to repair the prolapse would provide a better result.
45. On 26 May 2015, Dr Manning wrote to Dr Firth, Ms Bosch’s general practitioner. Her management suggestion was:

“It is unclear whether her bladder irritation relates to her injury, was it a long standing problem exacerbated by the injury or whether the prolapse has obstructed the bladder neck and caused this to occur. I sent her away with a 68 ring pessary. She will come back in one week to review this. I have asked her to observe whether her urgency improves with the pessary in place alone. I have also given her a sample of oxytrol patch to trial but she will start this after she has checked the effect of the pessary alone. Response to anticholinergics is idiosyncratic. She might need to try quite a few different medications to improve her urgency symptoms which are fairly disabling. She has an information sheet on the different treatment options. She would do very well with some formal bladder training and I have referred her to see the pelvic physiotherapists at Wyong hospital. She is currently avoiding any lifting at work and this would seem to be sensible over the long term. If the pessary is effective she could continue along with this or she could have a surgical repair of the prolapse. She may need to use the medications for her urge over the long term. With regard to her periods, if she has a prolapse repair ultimately she could exchange the implanon for a mirena device. She could consider endometrial ablation or hysterectomy is one possibility where a prolapse repair could be combined. She would need to have this done as a public patient at Gosford hospital most likely unless this is considered a workers compensation claim.”

46. On 18 August 2015, Dr Manning recorded that the “informed consent process had been gone through.” She wrote to Dr Firth and said:

“I reviewed Noelle today she would like to have her prolapse repaired. It is significantly bothersome. She is not able to use the ring pessary because it was uncomfortable. Sometimes this predicts more discomfort with surgery. We went over an anterior repair, posterior repair, sacrospinous colpopexy, cystoscopy and pudendal block. She would like a hysterectomy because her periods are heavy and painful and have always been so and she is about 10 years away from menopause. She has an implanon device but it does not work perfectly. We discussed the pros and cons of this. We talked about different approaches - abdominal and vaginal; for prolapse repair. We talked about the use of mesh, the use of animal fascia to reinforce repairs. I mentioned the 30% risk of recurrence of an anterior wall prolapse after repair over time. We went over the specific risks and benefits of prolapse surgery with an informed consent process. She has seen the pelvic physiotherapists at Gosford. They felt that it was unlikely that the prolapse would resolve with exercises. She should however strive however to improve her pelvic floor.”



47. On 13 October 2016, Dr Manning wrote to Dr Firth again:

“I reviewed Noelle today. We discussed forthcoming prolapse surgery. She has been practising pelvic floor exercises and has strengthened her pelvic floor to 3/5 at the moment. She would like the prolapse repaired, it remains bothersome and she has difficulty holding Ben-Wah balls insitu. She was to have a hysterectomy but will think about this as her periods are not so painful since the implanon device was removed. She has an irregular 30 day cycle and bleeds for 5 days. She is not using any contraception at present and a pregnancy test will be done prior to her surgery. She discussed with me the benefits and risks of a hysterectomy with her prolapse repair. We talked about an anterior/posterior repair, anterior reinforcement of the repair with SIS fascia, a sacrospinous hysteropexy or colpopexy, cystoscopy and a pudendal block. The hysterectomy has no affect on bladder, bowel or sexual function. It does not make any difference to the success of the repair. She will think about the hysterectomy and discuss it with her husband and let me know what she would like to do. She has information sheets on the repair.”

48. The histopathology report following surgery in Dr Manning’s file confirm that Ms Bosch had suffered a prolapse.

### **General practitioners’ notes**

49. Ms Bosch’s general practitioner’s notes in the ARD provide further confirmation of the matters in Dr Manning’s reports. Those are the notes of Dr E Lim and Dr K Firth of Wyong Doctors.

50. On 20 April 2015, Ms Bosch saw both Dr Lim and Dr Firth. Dr Firth diagnosed a uterine prolapse. On 14 May 2015 Dr Firth discussed “results” which appear to be those of a pelvic ultrasound and recorded “vaginal prolapse symptoms resolved after her period stopped. Is having heavy periods with clots.”

51. On 12 August 2015, Dr Tung noted “she’s absolutely convinced every time she has hormonal OCP or implanon her cholesterol goes up. Might have hysterectomy this year.”

52. On 18 August 2015, Dr Lim recorded that she “has decided on the hysterectomy.”

53. The notes from Kanwal Village Medical Centre and Absolute Medical Services of Lisarow, produced in response to our direction, do not provide any assistance on the question to be determined.

### **Medico-legal reports**

54. The assessment of permanent impairment as a result of infertility was made by Dr WGD Patrick who was qualified by Ms Bosch’s solicitors. He recorded that Ms Bosch feels very strongly about her loss of fertility. He did not undertake a pelvic examination.

55. He made a deduction of one-tenth of his assessment of Ms Bosch’s urinary and reproductive systems without explaining why.

56. Dr J Schmidt, gynaecologist, was qualified for McCain. In his report dated 20 September 2015 he agreed that Ms Bosch required surgery to repair a genital floor prolapse but did not agree it was related to the injury at work. He noted that the proposed treatment included hysterectomy but did not specifically consider the relationship of that surgery to the work injury. Dr Schmidt saw Ms Bosch again and reported on 6 March 2018. He noted that Ms Bosch was “basically asymptomatic in relation to urinary symptomatology” and assessed 1% WPI as a result. He did not consider the role of the hysterectomy.

## SUBMISSIONS

57. Both parties made written submissions. They are not repeated in full, but have been considered by the Appeal Panel.
58. The submissions prepared for Ms Bosch on the appeal were extensively dealt with by Simpson AJ. Contrary to the direction made by this Appeal Panel, Ms Bosch's representatives sought to substitute new submissions for those previously relied on.
59. Ms Bosch's original submissions on the appeal were the subject of some criticism by Simpson AJ. They stressed that the AMS had misunderstood his role and the concept of causation and that the arbitrator had already determined that the hysterectomy resulted from the work injury.
60. The grounds of appeal relied on were solely related to the assessment by the AMS with respect to the loss of fertility occasioned by the hysterectomy.
61. In the further submissions dated 21 February 2020, counsel for Ms Bosch submitted that the AMS made a demonstrable error by asking if part of the surgery was elective rather than asking if the procedure which included the hysterectomy was causally related to the work injury, relying on the test in *Kooragang Cement Pty Ltd v Bates*<sup>15</sup>
62. McCain's original submissions said that the AMS had disclosed his path of reasoning and it was reasonable for the AMS to attribute the applicant's loss of fertility to non-work related factors. The argument made on behalf of Ms Bosch relied on a difference of opinion between the AMS and Dr Patrick.
63. McCain provided submissions about the documents produced in accordance with the Appeal Panel's direction. It submitted that Dr Manning's clinical notes confirmed that Ms Bosch was considering hysterectomy because of long-standing dysfunctional uterine bleeding issues and that she was advised that it would not assist the symptoms associated with her injury in any meaningful way.
64. McCain prepared further submissions dated 19 March 2020. It noted that it had provided submissions in accordance with the Appeal Panel's direction and that Ms Bosch's representatives had provided new submissions, contrary to our direction. McCain said that Ms Bosch's submissions were the same as those on the original appeal – that the issue of causation had already been determined by the arbitrator, which is clearly incorrect.

## FINDINGS AND REASONS

65. 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.
66. 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.
67. The only question to be determined by this Appeal Panel is whether Ms Bosch's loss of fertility occasioned by the hysterectomy resulted from the work injury.

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<sup>15</sup> (1994) 35 NSWLR 452; 10 NSWCCR.

68. Ms Bosch claims compensation in respect of infertility under Table 7.5 of the Guidelines which applies to fallopian tube and ovarian disease. Female infertility is defined in paragraph 7.14 as:
- “A woman in the childbearing age is infertile when she is unable to conceive naturally. This may be due to anovulation, tubal blockage, cervical or vaginal blocking or impairment of the uterus.”
69. At [82] to [84] of her Honour’s decision, set out at [22] above, Simpson JA set out a series of assumed facts which might result in a finding that the hysterectomy was related to the work injury on the application of the “but for” test of causation. Her Honour said that on the basis of those assumed facts, it would be difficult to causally relate the hysterectomy to the prolapse surgery and thus the work injury. The hysterectomy would be coincidental but otherwise unrelated to the work injury.
70. The evidence that Dr Manning said that hysterectomy would reduce the chance of recurrence of the prolapse and provide a better result is only contained in the MAC. We could not find any written confirmation of this advice and, in particular, it is neither in Ms Bosch’s statement nor in any of Dr Manning’s reports in the ARD.
71. Our review of a complete copy of Dr Manning’s reports shows that her opinion was in fact the opposite – that Ms Bosch had sought advice about heavy periods and that “the hysterectomy has no affect on bladder, bowel or sexual function. It does not make any difference to the success of the repair”, as set out in Dr Manning’s letter to Dr Firth dated 13 October 2016. If it does not make any difference to the success of the repair, it follows that it has no role in reducing the prospect of recurrence.
72. The facts posited by Simpson JA are what happened and the argument for a causal connection between the work injury and the hysterectomy is, as Her Honour said, unsustainable.
73. Dr Manning’s report dated 2 September 2015 did set out the surgery proposed but she did not provide any explanation of the need for the hysterectomy – it was merely listed as a component of the surgery to be undertaken.
74. The surgery which Ms Bosch underwent to repair the prolapse is not rateable other than in respect of the bladder, as assessed by the AMS.
75. The submission that the Arbitrator determined that the hysterectomy resulted from the work injury cannot be accepted for the reasons set out in the Supreme Court decision.
76. The comment by the AMS that heavy periods with clots plus Ms Bosch’s age group may have been factors in her decision to undergo a hysterectomy was speculative on the material he had. His assessment of permanent impairment, however, is correct.
77. For these reasons, the Appeal Panel has determined that the MAC issued on 26 July 2018 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*.

R Gray

**Robert Gray**  
**Dispute Services Officer**  
As delegate of the Registrar

