WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-6229/19**
Appellant:	**Kandasamy Pradeep**
Respondent:	**P & M Quality Smallgoods Pty Ltd**
Date of Decision:	**24 April 2020**
Citation:	**[2020] NSWWCCMA 77**

Appeal Panel:	
Arbitrator:	**Catherine McDonald**
Approved Medical Specialist:	**Dr David Crocker**
Approved Medical Specialist:	**Dr Brian Noll**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 21 February 2020, Kandasamy Pradeep lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Robert Kuru, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 11 February 2020.

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, being that in s 327(3)(b). 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 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.

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. Mr Pradeep was employed by P & M Quality Smallgoods Pty Ltd (P & M) when he suffered an injury to his back on 25 August 2014 when lifting boxes. He saw Dr A Kam, neurosurgeon, who undertook surgery for an L1-2 disc protrusion on 2 February 2016.

7. The AMS assessed Mr Pradeep in DRE Lumbar Category III adding 2% for the impact of the injury on his activities of daily living and 3% for residual symptoms and radiculopathy, resulting in an assessment of 15%. He deducted one tenth under s 323 of the 1998 Act because of pre-existing degenerative disease. He concluded that the scarring resulted in 0% whole person impairment (WPI).

PRELIMINARY REVIEW

8. 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.

9. 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 is no error in the assessment by the AMS and there is sufficient information in the file to determine the appeal.

EVIDENCE

10. 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.

11. 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

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

13. In summary, Mr Pradeep submitted that the AMS should have made an assessment for scarring under the TEMSKI as Dr Conrad did, because he was conscious of the scar, some parts of it contrasted with surrounding skin and he was able to locate it.

14. Mr Pradeep submitted that the AMS should not have made a deduction under s 323 in respect of his back because his general practitioner's records do not record any complaint of back pain nor any incapacity as a result of back pain before the injury.

15. In reply, P & M submitted that the AMS had not erred in making no assessment for scarring, referring to paragraph 14.6 of the Guidelines and that the AMS had applied the TEMSKI in his examination of Mr Pradeep.

16. With respect to s 323 of the 1998 Act, P & M submitted that a pre-existing condition need not have been symptomatic to attract a deduction. The AMS noted that Mr Pradeep suffered from degenerative disease of his spine which had contributed to his level of impairment. The AMS had explained his reasoning for making the deduction.

FINDINGS AND REASONS

17. 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.

18. 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.

The MAC

19. The AMS set out the history he obtained and his findings on examination. He noted that:

> "There was a midline scar at the surgical level which was well healed and consistent with an L1/2 decompression."

20. The AMS reviewed "limited imaging". He said:

> "Mr Pradeep developed non-specific back pain and underwent imaging demonstrating a disc protrusion at L1/2. He underwent a decompressive surgery, which was not helpful for his symptoms."

21. The AMS assessed 15% WPI in respect of Mr Pradeep's lumbar spine and 0% for scarring. He explained his calculations:

> "Mr Pradeep has undergone an L1/2 decompression. According to SIRA Guidelines page 29, paragraph 4.37, surgical decompression of a spinal stenosis is DRE Category III (AMA 5 Table 15.3). According to paragraph 4.34, there is a further 2% whole person impairment due to restrictions of ADLs.
>
> According to Table 4.2, I assess a further 3% WPI as Mr Pradeep has had spinal surgery with residual symptoms and radiculopathy. His radiculopathy is defined by mild weakness of extensor hallucis longus on the left with imaging findings suggestive of some lateral recess stenosis at L4/5.
>
> 12% WPI combined with 3% WPI gives a total of 15% WPI.
>
> I have awarded 0% WPI on the basis of scarring (TEMSKI), as the scar is consistent with the surgery that he has had. It has good colour match with surrounding skin and is not easily distinguishable. There are no trophic changes in the scar, nor are staples or suture lines visible. Mr Pradeep did not report any concerns with his scar."

22. The AMS considered medical reports from independent medical examiners qualified by the parties and said:

> "With respect to the assessment undertaken by Dr Conrad on 4 June 2019, I agree with his WPI assessment of the lumbar spine. For the reasons above, I have not awarded a further impairment for scarring.
>
> With respect to the report by Dr Panjratan dated 7 August 2019, he agrees Mr Pradeep should be assessed as DRE Lumbar Category III and also adds a further 2% WPI for restriction of activities of daily living. Whilst he notes that Mr Pradeep has pain in his left leg. he does not attribute any further impairment due to persistence of pain and radiculopathy, which I have assessed according to Table 4.2 of the SIRA Guidelines at 3%. I agree with the 10% deduction for pre-existing pathology and in Dr Kam's letter of 13 May 2015, it is documented that Mr Pradeep had had pain in his back "for nearly two years now".

Other medical evidence

23. The medical evidence from Mr Pradeep's treating doctors is sparse.

24. An x-ray report dated 5 September 2014 was reported as showing end plate degenerative changes predominant at L1/2 with loss of disc height at the same level. An MRI scan report of the same date noted a:

> "[d]egenerate L 1/2 disc with a broad based right paracentral disc herniation causing moderate to severe canal stenosis compressing the cauda equina. "

25. His general practitioner, Dr Shinwari referred him to Dr Kam on 10 September 2014 but Mr Pradeep did not see him until a second referral was made in early 2015. Dr Kam reported on 13 May 2015 and said that Mr Pradeep "had back symptoms for nearly 2 years now and in 2014 had a major flare up." Dr Kam advised a conservative approach for as long as possible but that surgery should be considered if he experienced urinary and faecal issues.

26. There are no other reports in the file from Dr Kam.

27. In late 2015, Mr Pradeep was referred to Dr T Steel, neurosurgeon, who reported on 8 October 2015, Dr Steel recommended minimally invasive decompression of Mr Pradeep's lumbar canal stenosis at L1-2. Dr Steel operated on 2 February 2016 and his operation report appears in the Reply.

28. On 24 March 2016, Dr Steel noted that Mr Pradeep noted improvement in sensation in his feet following surgery but increased back pain localised to the area around L4-S1. Dr Steel said that the pre-operative MRI scan did not show pathology in the lumbo-sacral area.

29. Dr Steel said that an MRI scan on 12 April 2016:

> "shows there is now CSF signal around the nerve root elements at the LI-2 level. There is no longer high grade cauda equina compression. There is a broadbased disc protrusion at the L4-5 level which compresses the origin of the left LS nerve root. This may be responsible for his recent symptoms. His preoperative MRI scan did not show this disc protrusion and it is likely that this is now causing symptoms."

30. Dr Steel recommended a left L4-5 foraminal steroid injection and on his next review on 29 June 2015 noted that Mr Pradeep had no pain for two weeks after the injection but had since developed sciatic pain in the L5 distribution. He suggested a left L4-5 microdiscectomy if the symptoms did not settle.

31. There is no evidence that further surgery has been undertaken or proposed.

32. Mr Pradeep's solicitors qualified Dr P Conrad who reported on 4 June 2019 in respect of the injury in 2014 and an unrelated knee injury in 2012. Dr Conrad said:

> "By way of background he said that he developed some mild back pain for about a year or two prior to his major flare-up, which occurred on or about the 25th August 2014."

33. Dr Conrad observed "a heavily pigmented 4cm scar at L1/2 level." Dr Conrad did not explain his assessment other than in a table. He assessed Mr Pradeep in DRE Lumbar Category II at 10%, allowing a 2% modifier for his restriction in doing housework. He assessed 3% for the effects of surgery in the presence of radiculopathy.

34. Dr V Panjratan, orthopaedic surgeon, reported to P & M's solicitors on 7 August 2019. He observed a "well-healed surgical scar in the lumbar midline centered at L1/2" which is "not causing any problems." He did not make an assessment in respect of scarring because it was only the standard surgical scar.

35. Dr Panjratan assessed 11% WPI with respect to Mr Pradeep's lumbar spine comprised of 10% for DRE Lumbar Category III with 2% for the impact on the activities of daily living but reduced by one-tenth because the documentation indicated a previous back problem.

Consideration

36. The assessment made by the AMS was an appropriate exercise of his clinical judgement on the date of the examination.[1]

37. The AMS provided his reasons for awarding 0% under the TEMSKI with respect to Mr Pradeep's scar. Paragraph 14.6 of the Guidelines provides that a scar may be present and rated at 0% and that uncomplicated scars for standard surgical procedures do not necessarily rate an impairment. The AMS noted that the scar was consistent with the surgery undertaken.

38. The AMS went on to consider the criteria in the TEMSKI and determined that the scar rated 0%. That assessment was appropriate. It is consistent with the fact that neither Dr Steel nor Mr Pradeep's general practitioner noted any issue with the site of the scar and with the assessment of Dr Panjratan.

39. The deduction made by the AMS under s 323 was also an appropriate exercise of his clinical judgement, though his reasons could have been more clearly spelt out.

40. Mr Pradeep relied only on the incident on 25 August 2014 as causing the injury. The MRI scan dated 5 September 2014, less than two weeks after the injury, showed degenerative changes at L1/2. Those changes were too advanced to have been caused by the injury and would have contributed to his condition.

41. Dr Kam recorded that Mr Pradeep had suffered back pain for two years and that the incident on 25 August 2014 was a "major flare up." Dr Conrad also recorded that Mr Pradeep had mild back pain for a year or two before the incident.

42. In *Vitaz v Westform (NSW) Pty Ltd* Basten JA said[2]:

> "That opinion contained a legal assumption which is inconsistent with the approach adopted by this court in, for example, *D'Aleo v Ambulance Service of New South Wales* (NSWCA, 12 December 1996, unrep) (quoted by Giles JA, Mason P and Powell JA agreeing, in *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284 ; 21 NSWCCR 34 at [30]–[32] and, more recently, by Schmidt J in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [13]). 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."

[1] Guidelines paragraph 1.6.
[2] [2011] NSWCA 254 at [43]

43. In *Ryder v Sundance Bakehouse*[3], Campbell J said:

> "What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the degree of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the degree of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to the pre-existing abnormality. To put it another way, the Panel must be satisfied that but for the pre-existing abnormality, the degree of impairment resulting from the work injury would not have been as great."

44. In Mr Pradeep's case, and contrary to the submissions prepared for him, the evidence showed that he had complained of back pain before the injury. The fact that he had not been incapacitated for work by the condition is immaterial.

45. The MRI scan shows that degenerative change was established in Mr Pradeep's lumbar spine before the injury on 25 August 2014. Those changes are most notable at L1/2. The degeneration of the L1/2 disc contributed to the outcome. Because the extent of the contribution would be difficult or costly to determine, the appropriate deduction is one-tenth in accordance with s 323(2).

46. For these reasons, the Appeal Panel has determined that the MAC issued on 11 February 2020 should be confirmed.

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

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

[3] [2015] NSWSC 526 at [45].