WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1977/19**
Appellant:	**Trevor Rice**
Respondent:	**Petatok Pty Ltd ATF Margaret Peterson Family Trust (Deregistered)**
Date of Decision:	**23 October 2019**
Citation:	**[2019] NSWWCCMA 149**

Appeal Panel:	
Arbitrator:	**Catherine McDonald**
Approved Medical Specialist:	**Dr Gregory McGroder**
Approved Medical Specialist:	**Dr J Brian Stephenson**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 12 July 2019 Trevor Rice lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Frank Machart, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 14 June 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, being that in s 327(3)(d). 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 Rice said in his statement that in 1994, he "commenced working for Area Wholesale Foods who later became Petatok." He was employed as a truck driver and storeman. In March 1999 he suffered an injury to his neck for which he underwent surgery. He did not make a claim for compensation though his employer paid his wages. On his return to work,

his duties changed in that he was no longer required to drive a heavy rigid truck. He continued to perform the same duties until he began to suffer back pain in 2012. He resigned in 2014.

7. The date of injury is pleaded as 31 October 2012 as a result of the nature and conditions of work with "the respondent." A reply was filed by Petatok's insurer, indicating that the assessment of whole person impairment (WPI) was disputed and did not meet the threshold. It said that "GIO can find no record of Mr Rice's prior injuries occurring while employed by Petatok Pty Ltd" and requested that the Registrar appoint an AMS to assess WPI.

8. The AMS assessed 25% WPI in respect of the cervical spine injury but made a deduction of 100% under s 323 on the basis that the injury occurred before the relevant period of employment. The AMS assessed 7% WPI in respect of the lumbar spine and deducted one quarter on the basis that Mr Rice suffered degenerative changes shown on radiology in 1999 and had suffered some football injuries "over the years".

PRELIMINARY REVIEW

9. 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.

10. 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 enough information in the file to determine the appeal.

EVIDENCE

11. 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.

12. 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

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

14. In summary, Mr Rice submitted through his solicitors, that the AMS applied incorrect criteria by making a s 323 deduction for symptoms in the lumbar spine before the date of injury when the claim was pleaded as a nature and conditions claim with a deemed date of injury of 31 October 2012. By making a deduction based on findings on two CT scans in 1998 and 2009, the AMS applied incorrect criteria when he treated the nature and conditions claim as frank injury.

15. Mr Rice submitted that the AMS made a demonstrable error by stating that he suffered an injury to his cervical spine while working at Arnotts before 1998, leading to surgery in 1999. The incorrect history led the AMS to assume that the cervical spine injury was suffered before the nature and conditions period. Mr Rice submitted that the evidence clearly showed that the cervical spine injury was suffered during the relevant period of employment.

16. In reply, Petatok, though its solicitors, submitted that the claim form completed on 18 November 2015 stated that the injury to Mr Rice's back was suffered in the period "approx. 10/12 -1/9/14, symptoms started in Oct 12." It submitted that the period of employment "is not otherwise identified." It also noted that neither party opposed the referral.

17. Petatok submitted that it was open to the AMS to make a deduction under s 323 because the MRI scan report dated 8 April 1999 showed that there were multi-level disc degenerative changes and the report of Dr Tuck dated 25 January 1999 recorded that Mr Rice had suffered a number of football injuries. Petatok submitted that it was open to the AMS to accept the history in respect of the period 31 October 2012 to September 2014 when Mr Rice has not identified the period of employment relied on.

18. With respect to the cervical spine injury, Petatok submitted that the AMS was requested to assess Mr Rice's cervical and lumbar spines attributable to the date of injury of 31 October 2012. Petatok said it was significant that Mr Rice did not identify when "Area Wholesale Food became Petatok." The AMS confirmed that Mr Rice commenced work with Petatok after 2011.

19. Petatok submitted that the Reply stated there was no record of injuries while employed at Petatok and that there was no complaint of cervical spine injury until the permanent impairment claim form dated 28 November 2017. It submitted that, as found by the AMS, Mr Rice did not commence employment until after the cervical fusion in 1999. It said that this history was correct and it was appropriate for the AMS to make a deduction.

FINDINGS AND REASONS

20. 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.

21. In *Campbelltown City Council v Vegan*[1] 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.

22. There is no dispute as to the assessment of permanent impairment in DRE cervical category IV and DRE lumbar category II. The only issue raised on the appeal is the extent of the s 323 deduction in respect of each assessment.

The MAC

23. The AMS recorded the date of injury as "31/10/12, nature and conditions of employment." He also recorded that Mr Rice had been employed by Petatok from 2011 to 2014. With respect to Mr Rice's cervical spine, the AMS wrote:

> "The symptoms started in 1998, Mr Rice put this down to his prior employment at Arnott's when he was driving, a job that he finished in 1997. He did not suffer any symptoms before 1998 when employed by Arnott's."

24. With respect to the lumbar spine, the AMS recorded:

> "Mr Rice worked for Food Services Central as a manager, full time, without restrictions. He developed pain in the lumbar spine on 31/10/2012 during the course of the day, at that time lifting heavy boxes, not as a single lift but during days' work. The onset was when he was coming out of the freezer. The lower lumbar pain was associated with pins and needles in the right thigh anteriorly and on the outer aspect of the right calf. He saw a doctor, he took analgesics, he had a CT. He was diagnosed as suffering

[1] [2006] NSWCA 284

nerve impingement. He had a cortisone injection and hydrotherapy. He used a walking frame for 1 month. The symptoms improved and not resolved completely. He went on light duties. He continued light duties until 2014. He has not worked since. He was certified as fit for light duties. No light duties were available.
…
I asked Mr Rice as to why there were CT scans of the lumbar spine pre-2012, in 1998 and 2009. He explained that he may have suffered occasional back pain, and that this was nothing serious. He thought that the predominant reason for these investigations was the leg symptoms in relation to the cervical injury."

25. Under the heading work history, the AMS wrote:

> "This is outlined under paragraph "Brief History". The work before commencing employment at Food Services Central, between 1997 and 2011, was physical and similar, and included lifting up to 20 kg. He suffered no symptoms during that time. He suffered cervical symptoms when employed by Arnott's, allegedly as a result of work for Gosletts Fruit and Veggies, causing the need for cervical fusion in 1999 as outlined above. Stiffness present since that time, not changed, no disabling symptoms and no pain."

26. The AMS made the following assessment:

> **Lumbar Spine**
> DRE II category, baseline 5%. Impact on ADLs 2%. Subtotal **7% WPI.**
>
> **Cervical Spine**
> DRE IV category, presence cervical fusion at 25%. Pre-existing fusion not contributing to DOI WPI. DOI clinical feature DRE I, which rates at **0% WPI.**

27. The AMS explained the deductions he made:

> **1) Lumbar Spine**
> Deductions for the lumbar spine are applicable. Mr Rice reported that there were no symptoms in the lumbar spine prior to the DOI. There is evidence by virtue of 2 CTs of the lumbar spine in 1998 and 2009, and pathology evident on those CTs. The index injury is aggravation of pre-existing condition. The preexisting condition can be assessed and default 1/10 for conditions too difficult or too expensive to determine otherwise does not apply. I assess one-quarter deduction as appropriate for the pre-existing condition in the lumbar spine at 2%.
> **2) Cervical Spine**
> No deduction on the subject of DOI. Alternatively it could be argued that there is DRE IV category 25% for cervical fusion, which predated DOI, and full deduction 25% is then applicable for the pre-existing condition, clinical features not different to pre-injury."

Cervical spine

28. The pleadings and thus the referral to the AMS were unclear. While "nature and conditions" is not a term of art, the phrase is generally used to denote injury as a result of a series of micro-traumata suffered by performing work over a period. It is conventional to plead both a start date and an end date and the failure to plead a start date has caused considerable confusion in the assessment of Mr Rice's injuries.

29. Despite that lack of clarity, Petatok's insurer stated in the Reply that the matter could be referred to an AMS because the extent of permanent impairment was in dispute. It did not raise any issue about the date of injury.

30. Mr Rice said in his statement:

> "In 1994 I commenced working for Area Wholesale Foods who later became Petatok. I was employed as a truck driver and storeman. Two days per week I would drive the truck and deliver product. The other three days I would do storeman duties. For 5-6 hours per day whilst performing my storeman duties I was required to load and unload pallets of various items weighing up to 25kg. The heaviest items were sugar and flour bags. The work was performed in dry area (normal temperature), coolroom (4 degrees) and the freezer (-4 degrees). There was also lifting involved in my truck duties when transferring product from the truck to the customer."

31. He said:

> "I didn't have any problems with my neck or legs until early 1999. I cannot recall the precise date my symptoms came on but it would have been about 3-4 months before I came to the . neck fusion with Dr Chandran. After I performed my lifting duties or drove the rigid truck I would go and sit down but couldn't get up due to loss of power in both legs. The seat in the rigid truck did not have suspension so you would get bounced around on the rigid seat whilst driving.
> …
> After the operation Area Wholesale told me that I was not required to drive the heavy rigid truck any longer as this was the most likely cause of my injury."

32. Mr Rice described his employment as one continuous period and did not mention the date or circumstances in which the identity of his employer changed. He resigned from that employment by agreement with Petatok in 2014.

33. In his claim form dated 18 November 2015, Mr Rice said that his back and right leg condition had resulted from heavy lifting in the period October 2012 to 1 September 2014. He said that he had reported the injury in October 2012. He said that he had injured his neck in 1999 driving trucks and that he "didn't go through workers comp." In response to the question "when did you start working for this employer?" Mr Rice said:

> "started Area Wholesale Food about 17 years ago and Food Service Central took over in March 2011."

34. Mr Rice's general practitioner, Dr N Kennedy, said in his report dated 3 September 2015 that "Trevor's job involved repetitive heavy lifting over many years." A medical certificate dated 24 September 2015 described the lumbar spine injury as:

> "acute on chronic injury with repetitive heavy lifting contributing to facet joint degeneration then disc bulge in the course of normal duties unloading pallet in freezer on 31/10/2012."

35. The history recorded by Dr P Giblin, who examined Mr Rice at the request of his solicitors, in his report dated 31 October 2016 is:

> "For 17 years he was a warehouse manager. This was a combination of hands-on work including bending, lifting and twisting as well as doing office duties."

36. Dr Giblin did not assess Mr Rice's cervical spine in his first report. On 20 September 2017, he replied to a letter from Mr Rice's solicitors which does not appear in the file. Dr Giblin noted that Mr Rice had undergone a cervical fusion in 1998 and made an assessment of permanent impairment.

37. Dr R Pillemer examined Mr Rice for Petatok's insurer and reported on 15 March 2016. He obtained a history that Mr Rice "had been employed by the Family Trust April 2011 and was terminated in September 2014". His report dealt only with the injury to Mr Rice's lumbar spine. He was not asked to make an assessment of permanent impairment and his report dealt with questions of causation and capacity for work.

38. In his permanent impairment claim form dated 28 November 2017, Mr Rice nominated the date of injury as 31 October 2012 and said "worker alleges the nature and conditions of work caused a back and neck injury." The claim for compensation was made by a letter dated 28 November 2017 enclosing the permanent impairment claim form and Dr Giblin's reports.

39. Dr Pillemer prepared a further report dated 13 June 2018 in which he said:

> "As noted in your referral letter you have indicated that Mr Rice is claiming injury to his cervical spine. He informs me that he saw an orthopaedic surgeon for his solicitor who suggested that in his opinion the problems with his neck were due to his work and that he should be covered for this as he was going to have problems in the future.
>
> On specific questioning Mr Rice informs me that he first noticed onset of discomfort in both legs in approximately 1994 while working for Area Wholesale Food. He had worked there for 20 years on a full time basis and the company was simply taken over by Petatok Pty Ltd in about 2011."

40. Dr Pillemer declined to assess permanent impairment in respect of Mr Rice's cervical spine. He said:

> "He would fit into DRE Category IV of his cervical spine because of the fusion, but in my opinion this would not be related to the nature and conditions of his work. Importantly in this regard it is noted that AMA 5 indicates quite clearly that before a person can be placed into DRE Category II of any region of the spine, there has to be 'clinical history and examination findings compatible with a specific injury .. .'. This applies to DRE Category II and would certainly obviously apply to the other DRE Categories. As noted Mr Rice has no history of any particular injury."

41. There is ample evidence in the file to determine that Mr Rice did suffer an injury to his cervical spine as a result of truck driving and Dr Pillemer's conclusion cannot be accepted.

42. Petatok's insurer did not issue a dispute notice in respect of the claim. It responded to the permanent impairment claim by a letter dated 5 July 2018 in which it declined to make an offer, on the basis of Dr Pillemer's report, because the assessment did not meet the minimum threshold for lump sum compensation.

43. Despite the claim in respect of the cervical spine condition, Petatok's insurer did not raise any dispute about cervical spine injury or the extent of the nature and conditions period. Even though it failed to issue a dispute notice, Petatok's insurer had the opportunity to seek to raise either or both of those disputes on the filing of the Application to Resolve a Dispute (ARD) under s 289A(4) of the 1998 Act. It did not do so.

44. The referral to the AMS clearly stated that the AMS was to be asked to assess Mr Rice's cervical and lumbar spines. It is the practice of the Commission to provide parties with the opportunity to comment on the form of referral to the AMS. By its inaction, Petatok's insurer consented to the referral with respect to the cervical and lumbar spines. The failure to raise those disputes earlier precludes Petatok from raising them now.

45. The only evidence with respect to Mr Rice's employment is that he worked in the same place performing essentially the same tasks for about 20 years for Area Wholesale Foods and Petatok. The business was taken over by Petatok in 2011. There is no evidence from Petatok to suggest that his employment was not transferred to it. If there was a dispute about that question, Petatok had the opportunity to raise it when disputing the claim or on the filing of the ARD. It did not.

46. Mr Rice's solicitors should have nominated the commencement of the nature and conditions period. However, the failure of the insurer to raise a dispute required the AMS to assess the impairment in respect of the whole period with Area Wholesale Foods and Petatok.

47. The AMS purported to make a determination as to the date of injury. That is not the task of the AMS. He was required to assess the medical dispute referred to him being the degree of permanent impairment suffered as a result of an injury (paragraph (c) of the definition of medical dispute in s 319 of the 1998 Act) and whether any proportion of that impairment was due to any previous injury or pre-existing condition or abnormality (paragraph (d) of the definition.)

48. In *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd*[2] Emmett JA said:

> "It is for the Commission to determine whether a worker has suffered an injury within the meaning of s 4 of the Compensation Act. The Commission must also determine whether there are any disentitling provisions, such that compensation is not payable in respect of that injury. It is also the function of the Commission to determine by whom any compensation is payable. Jurisdiction is conferred on the Commission by s 105 of the Management Act. However, that jurisdiction is subject to the restriction contained in s 65(3) of the Compensation Act, which precludes the Commission from awarding permanent impairment compensation if there is a dispute about the degree of impairment, unless the degree of impairment has been assessed by an approved medical specialist."

49. The Commission, in the context of the legislation and that decision, means an arbitrator or a Presidential member.

50. The AMS wrongly recorded Mr Rice's work history. If the history he obtained at examination was different from Mr Rice's statement, it was appropriate for the AMS to question Mr Rice about that. The evidence as a whole shows that Mr Rice commenced working as a warehouse manager in 1994. He suffered an injury to his cervical spine in 1998 and underwent surgery. His evidence is that as a result of that injury he was no longer required to drive the heavy rigid truck.

51. It was not appropriate to make any deduction under s 323 in respect of the cervical spine injury. The appropriate assessment is that Mr Rice suffered 25% WPI as a result of that injury.

Lumbar spine

52. The AMS made a deduction from the assessment of Mr Rice's lumbar spine because CT scans were undertaken in 1998 and 2009 and pathology was evident on those scans. The comments made above with respect to the extent of the nature and conditions period apply also to this assessment. The AMS failed to take into account that the investigations were undertaken during the nature and conditions period.

53. The AMS did not provide any reasons for allowing a deduction of one quarter. Both of those failures constitute demonstrable errors.

[2] [2014] NSWCA 264 at [111].

54. Mr Rice said in his statement that in about early 1999 he suffered a loss of power in his legs after lifting or driving the rigid truck. He provided that history to Dr R Tuck, neurologist, who recorded it in his report dated 25 January 1999. He also noted that Mr Rice had suffered football injuries. On 8 March 1999, Mr Rice underwent an MRI scan of his cervical, thoracic and lumbar spines. That was an appropriate investigation for his complaints. The significant finding was compression of the spinal cord at C4/5.

55. Mr Rice was referred to Dr Chandran, neurosurgeon, who noted in his report dated 9 March 1999 that Mr Rice was "initially thought to have problems in his back because of some pain and predominant symptoms in his leg." That explains the radiological investigations in 1998 and 1999.

56. Dr Kennedy's report dated 3 September 2015 explains the context of the CT scan in 2009. He said that "Trevor first presented to me in 2009 with an episode of back pain with associated right leg pain. This was managed conservatively and settled."

57. Dr Pillemer considered that Mr Rice had degenerative changes in his lumbar spine which had been present for many years. While Dr Pillemer considered that employment was a substantial contributing factor to the aggravation of his underlying condition on 31 October 2012, he considered the aggravation had ceased by the time of his examination on 15 March 2016. On that basis he assessed Mr Rice in DRE lumbar category II but attributed all of the impairment to underlying degenerative changes. That conclusion is inappropriate in light of the history of Mr Rice's employment.

58. The reference to football injuries in Dr Tuck's report in 1999 is an insufficient to make a deduction under s 323 in respect of Mr Rice's lumbar spine when his evidence is that he performed heavy lifting throughout his employment and drove a rigid truck without suspension until 1999.

59. While there were some degenerative changes shown on radiology in 1999, that does not necessarily mean that a deduction under s 323 was required. In *Cole v Wenaline Pty Ltd*[3], Schmidt J said:

> "Section 323 requires that a conclusion be reached as to whether or not any proportion of permanent impairment assessed resulted from an earlier injury, pre-existing condition or abnormality. In a case such as this, that conclusion must be reached on the evidence led as to the actual consequences of the earlier and later injuries, unless the assumption provided in s 323(2) applies."

60. The changes observed in 1999 were not severe. The subsequent scans show a progression. Given that Mr Rice performed heavy work for about 20 years, it was not appropriate to make a deduction in respect of the impairment of the lumbar spine.

61. For these reasons, the Appeal Panel has determined that the MAC issued on 14 June 2019 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

[3] [2010] NSWSC 78 at 33.

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

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1977/19**
Applicant: **Trevor Rice**
Respondent: **Petatok Pty Ltd ATF Margaret Peterson Family Trust (Deregistered)**

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 Frank Machart 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 the Guidelines**	**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)**
1.Lumbar spine	31 October 2012	Chapter 4	Table 15-5	7	0	7%
2.Cervical spine	31 October 2012	Chapter 4	Table 15-3	25	0	25%
Total % WPI (the Combined Table values of all sub-totals)					**30%**	

The above assessment is made in accordance with the Guidelines for the Evaluation of Permanent Impairment for injuries received after 1 January 2002

Catherine McDonald
Arbitrator

Dr Gregory McGroder
Approved Medical Specialist

Dr J Brian Stephenson
Approved Medical Specialist

23 October 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar