WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-3023/19**
Appellant:	**Randstad Pty Limited**
Respondent:	**David Joseph Silva**
Date of Decision:	**17 December 2019**
Citation:	**[2019] NSWWCCMA 190**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr Brian J Stephenson**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 17 September 2019, Randstad Pty Ltd lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr George Weisz, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 20 August 2019.

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

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

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The 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. It is convenient to extract the history reported by the AMS at Part 4 of the MAC,

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:
>
> Mr Silva described the accident he sustained while working as storeman and forklift driver:
>
> from a standing position he had to bend down to the ground in order to lift an object weighing about 20 Kg to a table level. He experienced sharp pain on the left side of his neck, shooting to his "triceps". He ceased work, attended his family practitioner the same day and remained out of work since. After several paramedical attempts and oral medications, he was consulted by a neurosurgeon and the need for one-disc replacement at the cervical spine level was established. The surgery was performed in February 2017, but regrettably to no benefit. He remained with pain shooting to his left hand, and numbness in all 5 fingers on the left side, at both dorsal and palmar side. He was subsequently exposed to a second operation, namely posterior decompressive laminectomy at the same level. No benefit was obtained from the second operation. He subsequently was diagnosed with carpal tunnel syndrome, whilst presenting symptoms in both hands, but surgery was performed only on the left side.
> His current condition is unchanged, despite several surgical procedures. He requires strong, opiate medication (Endone)."

PRELIMINARY REVIEW

7. 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.

8. 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 for the reasons given below.

EVIDENCE

Documentary evidence

9. 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

10. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

SUBMISSIONS

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

12. The appeal concerns only the assessment of the cervical spine. The scarring assessment is not appealed.

Appellant

13. In summary, the appellant employer submits that the AMS has erred in failing to apply a deduction to the assessment under s 323 of the 1998 Act. There is evidence of pre-existing degenerative changes not referred to by the AMS when discussing this element. This is found in the MRI report of 30 August 2016 which describes extensive multilevel degenerative changes.

14. Dr R Breit found the symptoms were overwhelmingly due to this degenerative and pre-existing change. Dr Breit deducted 4/5 of his assessment under s 323 of the 1998 Act. Dr T Silva applied a 1/10 deduction for the pre-existing degenerative changes.

15. There is no requirement for pre-existing change to be symptomatic prior to injury for a deduction to be indicated (*Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25).

16. The AMS should have addressed the MRI of 30 August 2016 or at least explained why a deduction was not applicable. The MAC should be revoked, and an appropriate deduction applied taking account of the evidence of pre-existing degenerative change.

Respondent

17. The respondent worker submits that the AMS did in fact refer at Part 9 to the evidence before him, which included the MRI of 30 August 2016. It is common for workers to have scan evidence of degenerative change but to be asymptomatic before injury. Pre-existing degenerative change is not determinative of a deduction being applicable.

18. Because a scan report is not referred to specifically by the AMS does not imply error (*Golijan v Motor Accidents Authority (NSW)* [2012] NSWSC 1106. There must be evidence that a pre-existing condition contributes to the impairment (*Fire & Rescue NSW v Clinen* [2013] NSWSC 629).

19. The reasoning of the AMS does not establish a pre-existing condition and therefore s 323 is not applicable. In the alternative, the authorities dictate that a 4/5 deduction as made by Dr Breit is not indicated, and any deduction made should be no more than 1/10 as applied by Dr Silva.

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* [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.

Discussion and findings

22. For a deduction to be properly made under s 323 there must be evidence that there is a pre-existing injury; condition; or abnormality and that this element contributes to the impairment[1] and "assumption will not suffice".[2]

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[1] *Cole v Wenaline Pty Ltd* (2010) NSWSC 78.

23. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526 Campbell J explained the requirement (emphasis in original),

> "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."

24. A pre-existing condition can be asymptomatic before the injury providing the evidence establishes that it existed before the injury and that it forms part of the impairment.[3]

25. The AMS reports at Part 6 on the "Details and dates of special investigations",

> "No pre-operative films were presented. The CT scan of the thoraco-lumbar spine showed early signs of DISH syndrome, with anterior longitudinal ligaments' calcifications (12.2017).
> A bone scan dated 2018 showed several levels of arthritic signs.
> Of importance was the postoperative lateral plain x-rays showing a disc replacement at C5/6 level of the spine, in good position. No bony fusion was visible (5.2017).

26. At Part 8.e. the AMS says there is no proportion due to pre-existing elements and confirms this view at Part 11. At Part 10.c. he notes Dr Breit's report,

> "Dr. Breit orthopaedic surgeon's detailed report, with respect I differ with the deductible proportion (2.2019)"

27. The Panel is of the view that the MRI of 30 August 2016 is of significance on the issue of s 323. This imaging was taken soon after the injury and it is incontrovertible that the degenerative changes reported were present before the injury.

28. As the respondent submits, it is certainly true that an AMS does not necessarily need to refer to every piece of evidence, but in this matter when the MRI of 30 August 2016 revealed extensive asymptomatic changes present before the injury, this evidence should have been addressed and an explanation given as to why the AMS concluded that there was no pre-existing condition and no contribution by it to the assessment. That it was not addressed is a demonstrable error on the face of the Certificate.

Findings

29. If a ground of appeal is successfully made out and an error identified, the Panel must correct the error or errors found "applying the WorkCover Guides fully" (see *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499).[4] The Panel is able to make the assessment and correct the error in regard to the deduction under s 323 without recourse to further examination of Mr Silva.

30. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement. There is no subsequent injury.

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[2] *Fire & Rescue NSW v Clinen* [2013] NSWSC 629.

[3] *Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25

[4] See also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792.

31. The Panel finds on the evidence, including the MRI of 30 August 2016 and the reports of the other assessors, that there was a pre-existing condition of degenerative change in the cervical spine.

32. The next step is to assess whether these changes contribute to the current impairment. The Panel is of the view that the extent of the degenerative changes makes it certain that some of the impairment is now due to those previously asymptomatic changes.

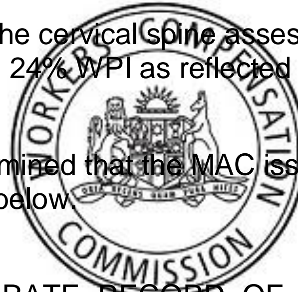
33. The Panel notes that Dr T Silva applied a deduction of 1/10 whereas Dr Breit applied 4/5. The Panel considers there is no evidentiary basis to establish a proportion of 4/5, particularly when Mr Silva was asymptomatic before the injury. In the medical circumstances of this matter it is difficult to identify the proportion of the current impairment due to the pre-existing changes.

34. This engages s 323(2) and the preliminary application of 1/10 deduction, provided this is not at odds with the evidence.

35. Given the condition was asymptomatic prior to the injury, and the difficulty of establishing on the evidence the precise pathological involvement of the changes in the impairment, 1/10 is not at odds with the evidence in this matter. The picture is too uncertain to establish a specific proportion greater than 1/10. Therefore s 323(2) is applicable.

36. Applying a 1/10 deduction to the 27% WPI for the cervical spine assessed by the AMS, which was not appealed, gives 24.3 rounded to 24% WPI as reflected in the Panel's new Certificate below

37. For these reasons, the Appeal Panel has determined that the MAC issued on 20 August 2019 is revoked. A new Certificate is provided below.



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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Matter Number: **3023/19**
Appellant: **Randstad Pty Limited**
Respondent: **David Joseph Silva**

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 George Weisz 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 NSW Workers Compensation Guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**WPI deductions pursuant to s 323 for pre-existing injury, condition or abnormality** (expressed as a fraction)	**Sub-total/s % WPI** (after any deductions in column 6)
Cervical spine	11.08.2016	Ch 4, (pg. 24); Table 4.2 (pg. 29)	Ch 15.6, pg 392 Table 15-5	27	1/10	24.3 rounded to 24
Scarring (TEMSKI)	11.08.2016	Skin (pg.73) TEMSKI Table 14.2 (pg 74)		0	n/a	0
Total % WPI (the Combined Table values of all sub-totals)					**24%**	

Ross Bell
Arbitrator

Dr Brian J Stephenson
Approved Medical Specialist

Dr Tommasino Mastroianni
Approved Medical Specialist

16 December 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar