

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-3113/19
Appellant:	Vera Civkaroska
Respondent:	State of New South Wales
Date of Decision:	2 March 2020
Citation:	[2020] NSWCCMA 34

Appeal Panel:	
Arbitrator:	R J Perrignon
Approved Medical Specialist:	Dr John Brian Stephenson
Approved Medical Specialist:	Dr Philippa Harvey-Sutton

BACKGROUND TO THE APPLICATION TO APPEAL

1. The appellant worker, Ms Civkaroska, appeals from the Medical Assessment Certificate of approved medical specialist Associate Professor Hope dated 5 December 2019.
2. On 23 October 2019, Arbitrator Wynyard found that the nature and conditions of her employment over 30 years as a cleaner had aggravated, exacerbated and caused to deteriorate pre-existing degenerative conditions in her right knee, right hip and lumbar spine.
3. In accordance with that determination, the Registrar referred the worker to the approved medical specialist for assessment of whole person impairment in respect of the right knee, right hip and lumbar spine, as a result of injury on 15 May 2010 (deemed date). That date of injury was deemed by operation of section 16 of the *Workers Compensation Act 1987*, which – except in cases of death - deems injuries by way of aggravation, exacerbation, acceleration or deterioration of a disease to have occurred on the date of incapacity or the date of claim.
4. By a Medical Assessment Certificate dated 5 December 2019, Associate Professor Hope assessed 14% whole person impairment (7% lumbar spine; 8% right hip; 0% right knee). In doing so, he noted that the right knee had not been injured on 10 May 2010 when the worker injured her right hip and lumbar spine while wringing out a mop.
5. Ms Civkaroska appeals from the assessment of the right knee only, on the bases that the approved medical specialist:
 - (a) exceeded his power by finding (contrary to the arbitrator's determination) that the right knee had not been injured,
 - (b) failed to take account of the radiological evidence concerning the right knee and the symptoms noted by him on examination, and the deemed date of injury, and
 - (c) failed to make an allowance for the effects of the knee injury on daily living.
6. On 28 January 2020, the Registrar by his delegate was satisfied that the ground of demonstrable error was made out in respect of the assessment of the right knee, and referred the matter to this Appeal Panel for determination.

7. On 26 February 2020, the Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (4th edition) (the Guidelines). Having identified certain error of the kind asserted by the appellant, it was not necessary to refer her for further examination by a member of the panel, as the error was capable of correction without further examination.

Submissions

8. The Appeal Panel has had regard to the written submissions filed by both parties. It is unnecessary to set them out here in full, but appropriate to summarise them as follows.
9. The appellant worker submits that the Medical Assessment Certificate demonstrates error in respect of the right knee assessment only, for the following reasons:
 - (a) It was not open to the approved medical specialist to find that the worker's right knee had not been injured, contrary to the determination of the arbitrator.
 - (b) It was his task to assess the right knee, having regard among other things to the deemed date of injury and to the evidence, including scans and medical reports, the applicant's own statement and his findings on examination of the right knee. He failed to have regard to the deemed date of injury – concentrating instead on a frank injury occurring on 10 May 2010 – and to have regard to the evidence.
 - (c) In assessing the right knee at 0% whole person impairment, he failed to make an allowance for the effects of injury on daily living, as the *Guidelines* required.
10. The respondent has filed a Notice of Opposition, but makes no submissions in support of the approved medical specialist's assessment of the right knee.

Reasoning of the Approved Medical Specialist

11. Associate Professor Hope examined the worker on 29 November 2019. He noted that the lumbar spine, right hip and right knee had been referred for assessment of whole person impairment as a result of injury on 15 May 2010 (deemed date).
12. He took a history of injury to the lumbar spine and right hip knee on 10 May 2010, 'while ringing [sic] out a mop through rollers on a bucket' [4]. He noted that no work has been undertaken since, that pain had continued despite physiotherapy and hydrotherapy, that the worker came to injection into the right hip without benefit, and that lumbar spine and right hip pain had increased.
13. From the worker in respect of the right knee, he elicited at [4] that there was moderate pain and weakness, and that kneeling and squatting were impossible. He recorded, 'Performance of home cleaning is not possible.'
14. On examination of the right knee, he found moderate medial tenderness and flexion to 90 degrees at [5].
15. He noted at [6] reports of scans, including an x-ray of the right knee performed on 8 July 2015 demonstrating mild arthritis and an MRI of 18 October 2013 demonstrating mild arthritis with medial meniscal tear.

16. He made the following findings at [7]:

“This 59-year-old cleaner had **no symptomatic pre-existing disease in the lumbar spine, right hip or right knee**. On 10.05.10 right hip and lumbar pain began whilst ringing out a mop through rollers on a bucket. **The right knee was not injured in this event and is therefore not work related**. Non-operative treatment for the lumbar spine and right hip conditions resulted in continuing symptoms.

Today, 9 years after the injury, **there is lumbar, right hip and right knee pain, stiffness and weakness causing a moderate functional loss**. Lumbar examination shows tenderness and asymmetric stiffness. Right hip examination reveals weakness, a painful walking pattern and stiffness. **Right knee examination shows tenderness and stiffness**. Lumbar, right hip and **right knee investigations confirm the clinical diagnoses of lumbar spondylosis, right hip osteoarthritis and right knee osteoarthritis**. **The right knee osteoarthritis is not work-related**. The permanent aggravations of lumbar spondylosis and right hip osteoarthritis are work-related.”

17. In summary, the approved medical specialist found:

- (a) that the right knee was not injured on 10 May 2015, and
- (b) that there was osteoarthritis in the right knee, with stiffness, weakness and moderate functional loss, but
- (c) that the osteoarthritis was not ‘work-related’.

18. He explained his reasons for assessing a 0% whole person impairment (right knee) as follows, at [10a]:

“The right knee osteoarthritis is not work-related as it was not injured in the original incident and therefore attracts 0% WPI.”

19. At [10c] he indicated agreement with the opinion expressed by Dr Robinson in his report of 9 October 2018, that ‘the right knee condition is not work-related’.

Consideration and findings

20. As indicated, the Arbitrator determined that the right knee was injured on 15 May 2015 (deemed date). He found that a pre-existing degenerative condition of the knee was aggravated, exacerbated and made worse by the nature and conditions of employment as a cleaner over 30 years. It is not clear from the documents before us whether the transcript of the arbitrator’s oral reasons were furnished to the approved medical specialist.
21. In any event, the Registrar referred the worker for assessment of whole person impairment as a result of injury on that deemed date. The approved medical specialist acknowledged this deemed date of injury in the Medical Assessment Certificate at [1] in respect of all body parts referred, and in the Table at its conclusion in respect of the right hip and lumbar spine.
22. The approved medical specialist proceeded to assess whole person impairment in respect of the right knee as a result of a different injury – that is, a frank injury on 10 May 2015. No referral had been made for assessment of whole person impairment as a result of a frank injury on 10 May 2015.
23. In one of her statements referred to in the Arbitrator’s reasons, the worker had given evidence of wringing out her mop on 10 May 2015. That satisfies us that the reference in the Medical Assessment Certificate to 10 May 2015 is not a mere typographical error, but was intended to reflect (accurately) the history taken by the approved medical specialist.

24. The power of the approved medical specialist to make an assessment was circumscribed by the terms of the Registrar's referral. In assessing impairment as a result of frank injury to the right knee on 10 May 2015, the approved medical specialist assessed impairment which had not been referred to him for assessment, and exceeded his powers. In failing to assess impairment as a result of injury to the right knee on 15 May 2015 (deemed date), the approved medical specialist failed to assess impairment in accordance with the Registrar's referral, and thereby failed to exercise his jurisdiction.
25. Both the assessment of impairment as a result of an injury different from that specified in the Registrar's referral, and the failure to assess impairment as a result of the injury specified by the Registrar, constituted demonstrable error. The Medical Assessment Certificate must be set aside.

Disposition

26. As indicated, on examination, the approved medical specialist measured right knee flexion to 90 degrees. On the evidence which was before the approved medical specialist, we are satisfied that this impairment results from injury on 15 May 2015 (deemed date).
27. Applying Table 17-10 in the *American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th edition* (AMA 5), that range of motion yields a 4% whole person impairment (right knee). Combined with the existing assessments of 7% (lumbar spine) and 8% (right hip) which are not the subject of appeal, this yields a 17% whole person impairment as a result of injury on 15 May 2015 (deemed date).

Remaining grounds

28. As the appellant has succeeded in her appeal, it is strictly unnecessary to determine the remaining grounds. However, for completeness we observe that the approved medical specialist did not fail to have regard to the scans of the right knee, as he mentioned them specifically, and that no allowance for effects of knee injury on daily living is permitted by the *Guidelines*. An allowance for them is permissible under the *Guidelines* in assessing the lumbar spine, and such an allowance was properly made by the approved medical specialist when he assessed the lumbar spine. We identify no error in that regard.

Replacement Medical Assessment Certificate

29. The fact that the date of injury is deemed to be 15 May 2015 by operation of section 16 necessarily implies – consistently with the Arbitrator's determination – that there was a pre-existing condition of the right knee. The approved medical specialist determined that the pre-existing condition was asymptomatic arthritis, which was consistent with the evidence before him.
30. No submission was made by either party to the effect that a deduction was appropriate to take account of previously asymptomatic arthritis in the right knee. The approved medical specialist made no such deduction.
31. Such a deduction could only be made after a finding that the pre-existing condition itself, as distinct from its aggravation, exacerbation and deterioration as a result of the nature and conditions of employment as a cleaner over a period of 30 years, currently contributes to impairment. On the evidence before us, we cannot not be satisfied that it does, and have therefore made no deduction.

Conclusion

32. For the reasons given, the appeal is allowed. The Medical Assessment Certificate of Associate Professor Hope dated 5 December 2019 is set aside and replaced with the attached Medical Assessment Certificate.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 3113/19
Applicant: Vera Civkaroska
Respondent: State of New South Wales

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 Associate Professor Hope and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Body Part or system	Date of Injury	Chapter, page and paragraph number in SIRA 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)
Lumbar spine	15 May 2010 (deemed date)	Chapter 4, page 24, par 4.5	Chapter 15, page 384, Table 15.3	7	nil	7
Right lower extremity - hip	15 May 2010 (deemed date)	Chapter 3, page 15, par 3.16	Chapter 17, page 537, Table 17.9	8	nil	8
Right lower extremity - knee	15 May 2010 (deemed date)	Chapter 3, page 16, par 3.23	Table 17-10	4	nil	4
Total % WPI (the Combined Table values of all sub-totals)						17%

R J Perrignon
Arbitrator

Dr John Brian Stephenson
Approved Medical Specialist

Dr Philippa Harvey-Sutton
Approved Medical Specialist

2 March 2020

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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar

