WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-7609/12**
Appellant:	**Stephen Robinson**
First Respondent:	**CSR Limited**
Second Respondent:	**GJ & MJ Elliot & Sons Pty Ltd**
Date of Decision:	**31 March 2020**
Citation:	**[2020] NSWWCCMA 65**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Brian Stephenson**
Approved Medical Specialist:	**Dr Greg McGroder**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 27 November 2019, Stephen Robinson, the appellant, lodged an Application to Appeal against the decision of an 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 18 November 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 WorkCover Medical 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 WorkCover Medical 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 Guides) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). "WPI" is reference to whole person impairment. "MAC" is a reference to the Medical Assessment Certificate.

RELEVANT FACTUAL BACKGROUND

6. It can be seen from the matter number that this case has a complex history. It was decided on 1 August 2013 by Arbitrator Sweeney, following a defended hearing in which four respondents were named. Relevantly, the learned Arbitrator found the present two respondents liable, and apportioned liability as to 2/3rds to the first respondent, CRS Ltd, and 1/3rd to the second respondent, GJ & MJ Elliott & sons Pty Ltd.

7. Thus, although the referral nominated four respondents, only the above two are now involved. The first respondent bore liability for the frank injury on 3 November 1999 and the second respondent was on risk on the deemed date of injury 1 November 2008.

8. The matter was also remitted on 1 August 2013 to the Registrar for referral to an AMS, who was the present AMS, Dr Frank Machart. The AMS issued a MAC on 9 January 2014, finding that maximum medical improvement had not then occurred. The Registrar then issued a Certificate of Determination on 13 February 2014 granting leave to restore when maximum medical improvement had occurred.

9. By matter 3222/19 the applicant sought payment of weekly compensation and the restoration of the referral. On 23 September 2019 an Arbitrator made orders, inter alia, restoring the referral and consolidating matter 3222/19 into the present matter number, 7609/12.

10. Accordingly, on 24 September 2019, the delegate of the Registrar referred this matter for an assessment of three separate injuries. The first injury was dated 3 November 1999 and the AMS was asked to assess the right leg at or above the knee (right knee) and the left leg above the knee (left hip) using the Table of Disabilities. (1st injury).

11. A second injury referred to a deemed date of injury, 1 November 2008. It was described as:

> "right lower extremity (right knee) as a result of injury which notionally occurred on 1 November 2008 as a consequence of the applicant's work with the second and first respondents prior to August 2004". (2nd injury)

12. The third injury contained the same date of injury, that is to say a deemed date of 1 November 2008, and sought a WPI assessment to:

> "left lower extremity (hip) as a result of favouring the right lower limb consequent upon the above injury". (3rd injury)

13. The face of the referral requested the AMS to refer to the Certificate of Determination by Arbitrator Paul Sweeney dated 1 August 2013 and the AMS was also asked to refer to a further Certificate of Determination from Arbitrator Paul Sweeney dated 4 December 2013. The Certificate also noted a previous award in matter number 7650/2002 in respect of:

> "12.75% right leg at or above the knee dated 16 October 2003 – refer page 139 of the Amended ARD".

14. Mr Robinson has a long history of difficulties with his right knee. They commenced on 3 November 1999 when Mr Robinson stepped on timber and overbalanced, feeling a "snap" in the knee.

15. He has had a number of arthroscopies to the knee culminating in a right knee replacement in November 2008.

16. He has also undergone a left hip replacement in 2015 following the onset of symptoms from around 2003 or 2004.

17. The AMS assessed 40% WPI in relation to each injury in relation to the 1st injury, from which he deducted 1/4 in respect to the injury to the right leg, leaving a 30% loss of efficient use of the right leg at or above the knee. This is further apportioned as 2/3rds of the total assessed regarding the three injuries at 20%.

18. In relation to the left leg, the AMS deducted 1/2 leaving 20% which again was apportioned at 2/3rds, giving a total of 14%.

19. With regard to the 2nd and 3rd injuries, the AMS found there to be a 20% WPI, from which 1/4 was deducted pursuant to s 323 of the 1988 Act, leaving 15% which was apportioned at 1/3, leaving a total of 5%.

20. In relation to the left lower extremity the AMS again apportioned a 20% WPI, from which he deducted ½, leaving 10% which he apportioned at 1/3rd leaving an entitlement of 3%.

21. The AMS then combined both the second and third injuries to give a total of 8% WPI.

PRELIMINARY REVIEW

22. 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.

23. The appellant did not seek a re-examination and, as the matter concerns the application of s 323 of the 1998 Act, the Panel had all relevant evidence before it.

EVIDENCE

Documentary evidence

24. 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

25. 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

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

FINDINGS AND REASONS

27. 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.

28. 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.

29. The AMS made the following findings regarding diagnosis[1]:

> **"7. SUMMARY**
> • **summary of injuries and diagnoses:**
> **- Right knee. Osteoarthritis.** Causally related to the incident in 1999. It is not clear but suspected that there was osteoarthritis evident at the time of the injury, not symptomatic before the injury in 1999. Gradual deterioration of osteoarthritis took place over the subsequent several years, and accepted as injury through the 4 respondents outlined. TKR right knee. Product of injury and pre-existing meniscal loss.

[1] Appeal papers page 13.

- Left hip. Accepted as aggravation of pre-existing osteoarthritis, symptomatically evident since period of abnormal weight transfer protecting the right knee symptoms, assessed as product of the right knee injury favouring, causing symptoms of osteoarthritis. Hip replacement in 2015. Residual symptoms evident.

• consistency of presentation
There was some inconsistency, response to clinical examination appeared to be hypersensitive, pain reported with every movement, not consistent with gait observed, and reasonably comfortable sitting posture at the time of my assessment."

30. The survey of the medical opinion before the AMS was comprehensive: He said:

"**Comment on Medicals:**
- The history prior to 1999 is more florid than what was indicated by Mr Robinson, knee affected by osteoarthritis, gout, and 2 arthroscopies, including partial meniscectomy, removing the posterior horn of the medial meniscus in 1991 and 1992.

- The arthroscopy conducted by Dr David Wood in 1999 suggested that there was a split in the peripheral remnant of the medial meniscus, not indicative that this involved a substantial part of the body of the meniscus.

- It is known that arthritis follows injury and follows meniscectomy. It would appear that the majority of the meniscus was removed in 1991 and 1992. Operation on the remnant was conducted by Dr Wood. There is a significant proportion of the aetiology of osteoarthritis related to condition of the knee before 1999.

- Following the injury in 1999, that there was relentless progression of the osteoarthritis, culminating in joint replacement in 2008.

- The severity of the right lower limb extremity pathology increased after the time of previous determination 12.75%, right leg at or above the knee 16/10/2003. This statement asked me to relate to S66 determination on page 139 of amended ARD, which stipulated that there was 12.75% loss of use of the right leg at or above the knee. I did not see the formula on which this was based. Liability suggests pre-existing right knee injury in 2001-2002, and during 1999, and 4 respondents at [risk]. Settlement in 2003 may be used for the purposes of a starting point, principle of deduction used in that assessment may be a useful tool.

- Injury was recognized by the Worker's Compensation Commission as attributable to respondents 1, 2, 3 and 4. Mr Robinson worked subsequent to that as a boilermaker in WA. I did not see evidence of additional injury in that employment, deterioration of osteoarthritis affecting the right knee and the left hip, and therefore contrary to Dr Millon's assessment I do not believe that apportionment for employment in WA was appropriate.

- None of the assessors had access to the more recent deterioration which placed Mr Robinson in need of right knee and left hip replacements."

SUBMISSIONS

31. Mr Robinson submitted that the AMS had fallen into error in the deductions made pursuant to s 323 of the 1998 Act for both second and third injuries.

32. Mr Robinson disputed that any deduction should have been made or alternatively that it was excessive and was accordingly made to incorrect criteria or consisted of a demonstrable error.

33. We found parts of the appellant's submissions difficult to follow. Reference was made to the orders of Arbitrator Sweeney in matter number 3222/19. Mr Robinson referred to orders 1, 2, 3, 5, 6 and 12 of those orders. This created some confusion with the Panel, as the orders made in matter number 3222/19 were made by a different Arbitrator and only four orders were made. It would appear that the worker may have been referring to matter 7690/12, and the orders issued on 1 August 2013. The orders referred to were:

> "1. That the applicant suffered injury to his right knee arising out of and in the course of his employment with the first respondent on 3 November 1999.
> 2. That as a result of that injury the applicant suffered a consequential medical condition of his left hip namely aggravation of a pre-existing arthritic condition.
> 3. That the applicant suffered an exacerbation or aggravation of arthritis in the right knee in the course of his employment with the second and fourth respondents.
> 4. …..
> 5. That this injury notionally occurred on 1 November 2008, the first date of incapacity.
> 6. That as a result of that injury the applicant suffered a consequential medical condition of his left hip namely further aggravation of a pre-existing arthritic condition.
> 7. ….
> 8. ….
> 9. ….
> 10. ….
> 11. ….
> 12. Remit the matter to the registrar for referral to an Approved Medical Specialist to certify:
>
> (a) the permanent loss of efficient use of the applicant's right leg at or above the knee as a result of injury to the right knee on 3 November 1999.
> (b) the permanent loss of efficient use of the applicant's left leg, if any, at or above the knee as a consequence of an aggravation of pre-existing arthritis as a result of favouring the right leg consequent upon the injury of 3 November 2009.
> (c) the whole person impairment, if any, of the right lower limb (right knee) as a result of injury which notionally occurred on 1 November 2008 as a consequence of the applicant' work with the second and fourth respondents prior to August 2004.
> (d) The whole person impairment, if any, of the left lower limb (hip) as a result of favouring the right lower limb consequent upon the above injury.
>
> 13. ….
> 14. ….
> 15. …."

34. It was submitted that the result of the relevant orders was that the injury to the right knee was by way of an aggravation to a pre-existing arthritic condition. It was submitted that "in addition" there was an exacerbation and/or aggravation of arthritis in the right knee in the course of employment with the second respondent.

35. It was on that basis that it was said the injury notionally occurred on the deemed date of 1 November 2008. Reference was also made to the secondary condition in the left hip which was said to be aggravation and/or further aggravation of a pre-existing arthritic condition.

36. The gravamen of the appellant's submissions appeared to be set out in paragraph 8:[2]

> "It is submitted that on the basis that the injuries/ secondary condition referred that any deduction given that the nature of the injuries by way of an arthritic condition and aggravation of an arthritic condition, that any deduction made by the AMS demonstrates an incorrect criteria and/or demonstrable error."

37. Mr Robinson then referred to previous agreed settlements with regard to the right knee in 1999 and 2003. It was argued that the error made by the AMS was that "there was no indication in those prior proceedings of any deduction".

38. Mr Robinson submitted that the initiating injury of 3 November 1999 "set off right knee symptoms and arthritic condition of the right knee [sic]." As a result of the altered gait it also set off "the secondary condition to the asymptomatic left hip." The AMS had indicated "uncertainty regarding the starting point," and yet had made a significant s 323 deduction.

39. Mr Robinson contended that whilst the AMS correctly referred to the nature of the injuries to be assessed as "right knee, osteoarthritis causally related to the incident in 1999", his comment that he "suspected" that osteoarthritis was evident at the time, was based on speculation and assumption. Similarly the acceptance of the consequential left hip condition as being caused by the aggravation of pre-existing osteoarthritic changes related to Mr Robinson's altered gait also made s 323 inapplicable.

40. Mr Robinson submitted that any deduction made by the AMS was on the basis of an incorrect criteria and/or demonstrable error because the nature of the injuries was based on the presence of an arthritic condition and aggravation of that condition.

41. In the alternative, Mr Robinson submitted that the deductions were excessive.

42. Mr Robinson then referred to the reasons given by the AMS in the MAC regarding the other opinions that were before him, arguing that the AMS ignored important opinions. Mr Robinson also referred to the comment made by the AMS regarding the removal of the majority of the meniscus in 1991.

43. It was submitted that the AMS was also relying on speculation and assumption when he commented that he was unaware of any formula as to how the WPI was assessed in earlier settlements.

44. The appellant submitted that the AMS then fell into error by making a significant deduction when there was no indication "in those prior proceedings" that any deduction had been made.

45. Mr Robinson referred to the summary of injury and diagnoses which we have reproduced above. It was submitted that the AMS thereby conceded that there is "speculation and assumptions made". Reference was made to the consequential condition of the left hip which was accepted, it was alleged, as an aggravation of a pre-existing osteoarthritis. It was alleged that because the AMS accepted that the right knee injury had caused favouring which in turn caused symptoms of osteoarthritis, the AMS had fallen into error in making a deduction.

[2] Appeal papers page 26.

46. Mr Robinson referred to the conclusions by the AMS that the significant portion of the osteoarthritis related to the condition of the knee before 1999, and referred to his comment which we have produced above that the majority of the meniscus would appear to have been removed in 1991.

47. Mr Robinson said "The worker relies on the twisting incident of 3 November 1999 as causing symptoms sufficient for a need for" the subsequent surgical procedures which culminated in the total knee replacement.

48. Mr Robinson submitted that the AMS had relied on "speculation and assumptions" to arrive at the deductions being made.

49. We were referred to the well-known case of *Cole v Wenaline Pty Ltd*[3] and the principles therein set out by Schmidt J, which have been universally applied in consideration of s 323. We were referred to later cases confirming those principles that deductions need to be made on evidence, and that assumption and/or hypothesis will not suffice.

50. Mr Robinson submitted that the weight of the evidence "purported no deduction" or in the alternative that the provisions of clause 1.6 of the Guides should be applied.

51. The respondent made submissions seeking to support the findings by the AMS**.**

DISCUSSION

52. It is not inappropriate for the Panel in the circumstances of this case to record our appreciation of the quality and detail of the reasoning shown by the AMS. We note this was a case involving 1859 pages of evidence which contained seven orders from both the Compensation Court and the Commission in matters numbered 7650/2002, 7609/2012, 7699/2008, 2414/210. There were two Multiple Respondents coversheets contained within the material before the AMS, one pertaining to matter number 7609/2012 and the other to 3222/19.

53. Section 323 of the 1998 provides relevantly:

> **"323 Deduction for previous injury or pre-existing condition or abnormality**
>
> (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury(whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.
>
> (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence."

54. The gravamen of Mr Robinson's appeal is that the AMS erred in making the deduction of 1/4 in relation to injury to the right knee and 1/2 in relation to the consequential condition to the left hip.

---

[3] [2010] NSWSC 78 (*Cole*).

55. The alleged error was that there was no evidence upon which the AMS could have made the deductions that he did, and that accordingly he had acted in contravention of the principles in *Cole* by applying speculation and assumption. In *Broadspectrum (Australia) Pty Ltd v Fiona Louise Wills*[4] Harrison As J reviewed the leading authorities regarding s 323, and at [56] cited Schmidt J's principles in *Cole*, which included the following:

> "30 Section 323 does not permit that assessment to be made on the basis of an assumption or hypothesis, that once a particular injury has occurred, it will always, 'irrespective of outcome', contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality."

56. More relevantly, an AMS is entitled to make a deduction, even if the pre-existing condition were asymptomatic. In *Pereira v Siemens Ltd*[5] Garling J said at [86]:

> "86 A finding of the existence of a previous injury can be made without the presence of symptoms, but there must be evidence which demonstrates the existence of that pre-existing condition: *Mathew Hall* at [31]-[32]. "

57. His Honour's finding is also apposite to a pre-existing condition.[6]

58. It is uncontroversial that an AMS is required to assess the impairment caused by a work injury, then to enquire as to whether any part of that impairment has been caused by a previous injury, pre-existing condition or abnormality, and then to assess that prior impairment and deduct it from the impairment caused by the workplace injury. In *Broadspectrum* Harrison AsJ said at [65]:

> "Both parties referred to *Ryder v Sundance Bakehouse Pty Ltd* [2015] NSWSC 526 … where Campbell J stated at [45]:
>
> '5 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'."

59. We note Mr Robinson's summation of Arbitrator Sweeny's orders. As can be seen, the summary was accurate. However we were unable to follow Mr Robinson's argument that a s 323 deduction was not applicable as a result. Mr Robinson appeared to submit that where findings of arthritis or an aggravation thereof, were made, an AMS would fall into error if he/she applied the terms of s 323. No authority was cited for that proposition, and we reject it as being unfounded in law or practice.

---

[4] [2018] NSWSC 1320 (*Broadspectrum*).
[5] [2015] NSWSC 1133 (*Pereira*).
[6] See *Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25.

60. Mr Robinson also made submissions as to the effect of the prior proceedings, contending that the AMS had erred because there was no indication in the settlement of those earlier proceedings that any s 323 deduction had been made. This argument is misconceived, with respect. The fact of earlier proceedings is routinely mentioned in the referral document, as it was here. However the result of those proceedings is not binding on an AMS, whose task it is to assess a claimant as he/she presents on the day of the assessment.[7]

61. The comment by the AMS that the 2003 settlement could be used as a starting point was part of a paragraph which acknowledged the reference to the settlement of 16 October 2003 within the referral document. The existence of prior settlements is an evidentiary fact which may or may not be relevant to the assessment the AMS is required to undertake. The AMS acknowledged the previous settlement, but his observation that there was no indication as to what "formula" was used rendered that fact of little evidential weight. Without knowing the "formula", he could not use the 2003 settlement as a "starting point" because he did not have the "useful tool" of knowing what "principle of deduction" had been used.

Right knee

62. The comment by the AMS that it was "not clear but suspected that there was osteoarthritis evident" which was asymptomatic prior to the injury of 1999, appeared to an expression of assumption and hypothesis. It accordingly would offend the principles we have referred to in *Cole*.

63. However, these comments must be seen in the context of his extensive review of the opinions before him. The AMS was aware of the menisectomy in 1991, and was also cognisant of the fact that such a procedure inevitably causes arthritis – which the medical specialists on the Panel confirm. The alleged assumptions in his summary have to be read in the context of his comments whilst considering other opinions. We find no error in his comment that a significant proportion of the aetiology of Mr Robinson's arthritis pre-existed the subject injury of 1999. In that regard we note the following additional evidence that was before the AMS.

64. Firstly, Arbitrator Sweeney referred to that evidence in his ex tempore reasons given on 31 July 2013[8]. He said:

> "……. it is important to record that the applicant had previous problems with his right knee and probably in his both *his* knees in the early 1990s for which he was treated by Dr Van Der Rijt. Dr Van Der Rijt first saw the worker on 25 March 1991 at which time he complained that he had "some difficulty with the right knee in over 20 years".
>
> Dr Van Der Rijt thought that the history of recent complaint was highly suggestive of a medial meniscal tear and he ultimately performed an arthroscopy on the applicant's right knee for that condition at Calvary Hospital in Wagga. At that time, gout was also diagnosed in the applicant's right knee and probably in his left 30 knee. The applicant continued to complain of pain in his right knee and saw Dr Van Der Rijt again in March 1992.
>
> Dr Van Der Rijt thought that he may have had a further tear of his right medial meniscus and booked him in for further surgery. Dr Van Der Rijt reports on 20 March 1992 that the applicant was booked in for an arthroscopy on 18 March but it was deferred due to the fact that his father died."

[7] Guides Chapter 1.6, pages 3-4.
[8] Appeal papers page 1098.

65. We note the complaint in the notes of Dr Van Der Rijt of 3 May 1993. The entry noted that both knees ache, right more than left. (We do not purport to give an extensive analysis of all of the clinical notes in this material).

66. In his report of 29 July 2003, Dr W.G.D. Patrick, Surgeon, the medico-legal referee then retained for Mr Robinson said[9]:

> "He also has a prior history of some arthroscopy to both right and left knees in about 1992 by Mr Adrian Van der Rijt, orthopaedic surgeon in Wagga Wagga. There was some possibility of gout (? Or pseudo-gout) raised. Nevertheless Mr Robinson had no further significant troubles with his knees until the work injury of November 1999 and was able to carry out quite physical work until the work injury of November 1999."

67. We also note that Dr Roger Rowe, Orthopaedic Surgeon on 26 February 2010 took a history[10]:

> "Reference to the file indicates ….. Mr Robinson would appear to have had bilateral arthroscopic surgery on his knees around 1985 or 1992. I was unable to obtain from the file or Mr Robinson any detail in regard to this initial arthroscopic surgery. …."

68. In a report of 17 December 2001, Dr Jim Rowe noted[11]:

> "I note he had an arthroscopy in the early 1990s but I am unsure if that was work related. However he said he recovered from that and was able to continue working for a number of years without restriction".

69. On 2 February 2016, Dr John Beer reported[12]:

> **"PAST HEALTH:**
> Right knee:
> There is a history in the notes of being treated by Dr Adrienne van der Rijt at Wagga in 1992- a long history of gout. Dr. Rijt had been treating the worker for a painful right knee and gout. There is a record by Dr Rijt of a report of Dr Cunningham 23/7/1992 'that the worker developed pain in the right knee after pushing a heavy trolley at work. The doctor diagnosed established gouty degenerative changes in both knees revealed at arthroscopy."

70. On the same page Dr Beer noted under "General Health":

> "There is a history of Dr van der Rijt carrying out an arthroscopy revealing gout on 27.5.1991. I note no report of any gouty lesions were observed by Dr Wood in his arthroscopy investigation but on 23.12.1999 he reported: '*Evidence of previous partial medial meniscectomy……'."*

71. The Panel medical specialists concur with the AMS that it is a scientific fact that a meniscectomy inevitably leads to the development of arthritic change where the meniscus is being debrided.

72. There is thus ample evidence to justify the assumption made by the AMS that there was osteoarthritis evident at the time of the injury. It follows that whilst Mr Robinson had a good result from his menisectomy, and was asymptomatic when he suffered his 1999 injury, nonetheless his osteoarthritis was well in train and rendered inevitable following the menisectomy of 1991.

---

[9] Appeal papers page 116.
[10] Appeal papers page 416.
[11] Appeal papers page 131.
[12] Appeal papers page 1398.

73. At least a one half deduction would have been attributable to the osteoarthritis set in train by the menisectomy, but for the fact that it had been asymptomatic at the time of the 1999 injury. This was a relevant fact in assessing the amount of the deduction, and such a large deduction would accordingly have been inappropriate.[13] We are satisfied that the deduction of one quarter reflects the totality of the evidence in this regard.

74. The deduction is accordingly confirmed in relation to the right knee.

Left hip

75. Arbitrator Sweeney found[14]:

> "..The left hip is reasonable clear cut. Dr Kwong, in his evidence which I've just referred to, opines in his report that as a consequence of favouring the right knee, the applicant suffered a symptomatic aggravation of the arthritis in *his* left hip. Once again, that opinion is 15 mirrored by Dr Millons who specifically addresses it and says this 'Mr Robinson does have clinical evidence of degenerate changes in the left hip which are clearly constitutional based. However, with hi~ altered gait pattern as a result of a painful stiff right knee following on his past history of injury and only a modest result from a total right knee replacement, more demands will be placed on the left hip and that may be causing some substantial aggravation and degenerative change there.'
>
> ……. Once it is established that the applicant's left hip condition has been affected, the extent of the aggravation, the deduction applicable to Section 323 and other matters, whether the aggravation is transient, whether it is continuing are really matters for an Approved Medical Specialist."

76. With regard to the left hip Dr Alexander Burns, who carried out the left total hip replacement on 22 September 2015[15] reported earlier on 12 August 2015[16] that the x-rays showed a full thickness cartilage loss on the left hip with a large Cam lesion.

77. The Panel medical specialists would observe that a Cam lesion is a constitutional condition which produces a pincer effect, leading to abnormal motion and articular cartilage stress. It is also a sign of advanced arthritis at the time of the surgery.

78. We note that as early as 29 July 2003 Dr Patrick noted on examination a "markedly diminished internal location at the left hip,"[17] which indicated that the left hip condition was of longstanding.

79. Accordingly, there was evidence to justify the longstanding presence of a constitutional condition in the left hip, which was aggravated by Mr Robinson's altered gait.

80. The Cam lesion itself was a significant pre-existing condition which we are satisfied would also have contributed to the development of osteoarthritis.

81. Whilst minds might differ as to the appropriateness of the deduction of 1/2, the AMS has made no error in coming to that determination. It is within an acceptable range, having regard to the seriousness of the Cam lesion.

82. For these reasons, the Appeal Panel has determined that the MAC issued on 18 November 2019 should be confirmed.

---

[13] See *Elcheikh v Diamond Formwork (NSW) Pty Ltd (In Liq*) [2013] NSWSC 365 @ [94].
[14] Appeal papers page 1106.
[15] Appeal papers page 1232.
[16] Appeal papers page 1254.
[17] Appeal papers page 117.

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*.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar