

# WORKERS COMPENSATION COMMISSION

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

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**Matter Number:** M1-5468/19  
**Appellant:** Wingham Beef Exports Pty Limited  
**Respondent:** Jacob Barwick  
**Date of Decision:** 9 April 2020  
**Citation:** [2020] NSWCCMA 71

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**Appeal Panel:**  
**Arbitrator:** Ross Bell  
**Approved Medical Specialist:** Dr Brian Noll  
**Approved Medical Specialist:** Dr Michael Fearnside

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### BACKGROUND TO THE APPLICATION TO APPEAL

1. On 17 February 2020 Wingham Beef Exports Pty Limited, the appellant, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Ross Mellick, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 5 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. 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, 4<sup>th</sup> ed* 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> ed* (AMA 5).

### RELEVANT FACTUAL BACKGROUND

6. The referral to the AMS was for the assessment of: Lumbar Spine (including corticospinal tract impairments - station and gait disorder, neurologic disorder, neurologic impairment of bladder, neurological anorectal impairment, neurologic sexual impairment) and Nervous System, Scarring (TEMSKI).
7. It is convenient to extract the following background from that recorded 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 Barwick was injured when he was working in an abattoir near a chute, down which came bones. He said the chute, which was movable, was not properly lined up. He pushed it in order to correct its position and experienced severe pain in the back, sufficient such that he dropped to the floor. He said that he also experienced pain in the legs below the knees and a cold burning sensation at approximately the same time in the distal lower extremities. He could not stand and had to be assisted.

He was taken to hospital and could not walk without support under each armpit. On arrival at the Mayo Hospital in Taree, a wheelchair was used to have him ambulate into the Emergency Department.

He continued to experience pain in the lower back, in both buttocks and particularly in the distal lower extremity bilaterally and said that he was also aware of some difficulty with bladder and bowel function on the day of the incident.

He has had four surgical procedures performed on his lumbar spine, one using an anterior approach, the first operation being in 2016 and the last in 2019.”

## **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 WorkCover Medical 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 for the reasons given below.

## **EVIDENCE**

### **Documentary 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.

### **Medical Assessment Certificate**

11. The parts of the medical certificate given by the AMS 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. The appeal concerns the assessment of the lumbar spine.

### **Appellant**

14. In summary, the appellant employer submits that the AMS has erred in failing to apply a deduction pursuant to s 323 of the 1998 Act for a pre-existing injury, condition, or abnormality.
15. The AMS has not provided procedural fairness, with a lack of reasons given for no deduction. Dr Harrington notes significant structural abnormalities in the worker’s spine. Dr Minitier found a deduction of 50% was applicable.

16. The Panel should find that approximately 1/2 deduction is appropriate. The MAC should be revoked.
17. In its submissions in reply the appellant employer addresses the respondent worker's submissions regarding there being no symptoms in the lumbar spine before the injury. The appellant points to authorities applying the principle that an asymptomatic condition may still contribute to the impairment following injury.
18. The respondent's own evidence is that there was a pre-existing condition and the evidence supports a finding that the pre-existing pathology contributes to the impairment.

### **Respondent**

19. The respondent submits that the AMS has not erred in making no deduction given the worker was 26 years of age at the time of injury and there was no history of back pain before the injury. The respondent worker was unaware of the congenital condition and had been able to work in heavy work up to the time of injury.
20. The AMS was aware of the congenital condition of spondylolisthesis and pars defects which is apparent from the investigations before him, and he refers to it in the MAC. Neither Dr Hopcroft nor Dr O'Sullivan apply any deduction under s 323.
21. The authorities do not allow for an assumption to be made about a contribution to impairment by a pre-existing condition. There must be evidence that the condition contributes to the impairment before a deduction can be applied.
22. The MAC should be confirmed.

### **FINDINGS AND REASONS**

23. 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.
24. 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**

#### ***Ground of appeal – s 323 of the 1998 Act – no deduction for pre-existing injury, condition, or abnormality.***

25. The AMS says at Part 4, under the heading "Details of any previous or subsequent accidents, injuries or condition", "No subsequent accident or relevant medical or surgical past history".
26. At Part 8.e. and 8.f., regarding previous injury of conditions, the AMS says, "N/A".
27. At Part 11, concerning the question of any s 323 deduction, the AMS says, "There is no deductible proportion".
28. The Panel notes the opinions of Dr Harrington and Dr Minter, referred to by the appellant.

29. The respondent relies on authorities generally reflecting the principles that 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<sup>1</sup> and “assumption will not suffice”.<sup>2</sup>
30. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526, relied on by the appellant, 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. 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.”
31. A condition can be asymptomatic before the injury providing the evidence establishes that it was pre-existing and establishes that it forms part of the impairment.<sup>3</sup>
32. The Panel is of the view that there was an asymptomatic pre-existing condition/abnormality involving some pars defects, but the abnormality did not constitute particularly significant spondylolisthesis.
33. Nevertheless, given the discovery of the condition before the surgery performed after the injury, the AMS should have addressed the condition and explained why he considered it did not contribute to the current impairment. There is no great onus on an AMS to give extensive reasons, particularly where a finding is uncontroversial. It is the Panel’s view however that in the circumstances of this matter the lack of explanation given the large deduction made by Dr Minter is a demonstrable error on the face of the Certificate.

## Findings

34. 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).
35. The Panel can correct the error regarding the application of s 323 without recourse to further examination of Mr Barwick.
36. The Panel is satisfied that the impairment is permanent, and the injury has reached maximum medical improvement. There is no subsequent injury.
37. The Panel finds that there was a pre-existing constitutional condition of spondylolisthesis with pars defects that, while asymptomatic up to the time of the injury, does contribute to the impairment assessed by the AMS. The condition was apparent in the imaging before surgery. Contrary to the submissions for the appellant, the Panel does not agree with Dr Minter that a deduction of 1/2 should be applied. Dr Minter says,

“One has to make a clear deduction for pre-existing pathology. As I mentioned in the earlier part of my report, I could not understand how this gentleman who is

<sup>1</sup> *Cole v Wenaline Pty Ltd* (2010) NSWSC 78.

<sup>2</sup> *Fire & Rescue NSW v Clinen* [2013] NSWSC 629.

<sup>3</sup> *Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25.

entirely asymptomatic, and not in a loaded position or performing any onerous activity, could suddenly become symptomatic for a segment which was clearly a longstanding problem radiologically. I would therefore make a 50% deduction, this leading to a total of 12% Whole Person Impairment.”

38. This explanation does not provide a medical analysis of how the evidence leads to a deduction of 1/2. Dr Minter is sceptical about Mr Barwick being asymptomatic before the injury. However, there is no evidence of any problems with the back prior and Mr Barwick had been working for some 11 years in heavy labour. The abnormality was discovered only before surgery to alleviate the symptoms following the injury. There is no apparent basis for making a deduction of 1/2. The appellant does not make any other submission relying on evidence which dictates such a deduction.
39. In the circumstances of this matter s 323 (2) must be considered. It is difficult to establish the degree of the contribution of the pre-existing condition, and 1/10 is not at odds with the evidence, including the imaging and the history of there being no back symptoms before the injury.
40. Applying the 1/10 deduction to the assessment of the AMS of 26% whole person impairment (WPI), which is not appealed, gives 23.4 rounded to 23% WPI. Combined with the impairments for the other body parts, 23 + 5 = 27; +5 =31; + 5 = 34; + 5 = 37; +1 (scarring) = 38% WPI, as reflected in the Panel’s Certificate.
41. For these reasons, the Appeal Panel has determined that the MAC issued on 5 February 2020 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*.

G Bhasin

**Gurmeet Bhasin**  
**Dispute Services Officer**  
As delegate of the Registrar



# WORKERS COMPENSATION COMMISSION

## APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

**Matter Number:** 5468/19  
**Appellant:** Wingham Beef Exports Pty Limited  
**Respondent:** Jacob Barwick

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 Ross Mellick 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)
Lumbar Spine	03.08.2015	Chapter 4 Para 4.26, 4.28, 4.29, 4.30; 4.34. Table 4.2	Chapter 15 Pages 379-429 Table 15-3 or DRE IV	26	1/10	23.4 rounded to 23
Nervous system - station & gait	03.08.2015	Chap 5 Para 5.3; 5.9	Ch 15 Table 15.6(c)	5	nil	5
Nervous system – bladder	03.08.2015		Table 15.6.(d)	5	nil	5
Nervous system - anorectal impairment	03.08.2015		Table 15.6(e)	5	nil	5
Nervous system – sexual function	03.08.2015		Table 15.6(f)	5	nil	5
Scarring - TEMSKI	03.08.2015	Table 14.1 Page 74		1	nil	1
<b>Total % WPI (the Combined Table values of all sub-totals)</b>						<b>38%</b>

**Ross Bell**  
Arbitrator

**Dr Brian Noll**  
Approved Medical Specialist

**Dr Michael Fearnside**  
Approved Medical Specialist

**9 April 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*.

*G Bhasin*

Gurmeet Bhasin  
Dispute Services Officer  
**As delegate of the Registrar**

