WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **475/20**
Applicant: **Lynda Townsend**
Respondent: **Sebastian Consulting & Technical Services Pty Ltd**
Date of Direction: **11 May 2020**
Date of Amendment: **18 May 2020**
Citation: **[2020] NSWWCC 153**

The Commission determines:

Finding

1. The applicant has 21% whole person impairment resulting from injury on 20 March 2009.

Order

2. The respondent pays the applicant compensation pursuant to s 66 of the *Workers Compensation Act 1987* in the sum of $33,000.

3. The respondent have credit for the payment made under the prior s 66 award.

JOHN HARRIS
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Lynda Townsend (the applicant) was employed by the Sebastian Consulting & Technical Services Pty Ltd (the respondent) and sustained a compensable injury to the right knee on 20 March 2009 and a consequential condition to the right foot.

2. The applicant commenced proceedings claiming permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). The body parts for assessment are the right lower extremity and the skin.

3. The matter was listed for telephone conference on 6 May 2020, when Mr Krantz appeared for the applicant and Mr Patterson appeared for the respondent. The parties then agreed that the assessment issue be determined consistent with the decision of the President of the Workers Compensation Commission (Commission) in *Etherton v ISS Properties Services Pty Ltd*[1] (*Etherton*).

4. The parties agreed that the applicant suffered the following whole person impairment (WPI) as a result of injury on 20 March 2009:

    - 20% WPI of the right lower extremity in respect of the knee;
    - 4% WPI of the right lower extremity in respect of the ankle/foot, and
    - 1% for the skin.

5. The only issue is the extent of any deduction pursuant to s 323 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

6. The documentation admitted into evidence without objection was:

    (a) Application to Resolve a Dispute and attachments (Application), and
    (b) Reply and attachments (Reply).

7. There was no application by either party to adduce any further evidence.

8. The parties were given the opportunity to make oral submissions. The legal representatives declined this invitation save as to a brief submission made by the applicant which is referred to later in the Reasons.

EVIDENCE

Applicant's evidence

9. The applicant provided two statements. Given the agreement on WPI it is unnecessary to refer to these in any detail. The applicant stated that she was asymptomatic prior to injury and set out in detail the nature of her medical treatment and residual difficulties.

Radiology

10. Dr Chaitowitz reported that a right knee ultrasound dated 6 April 2009 revealed no abnormality.[2]

[1] [2019] NSWWCCPD 53.
[2] Application, p 67.

11. A right ankle plain x-ray dated 10 February 2011 is reported by Dr John Dreverman as showing no abnormal osteoarthritic change.[3]

12. Bilateral knee x-rays dated 17 January 2013 are reported by Dr Luke Baker as showing osteoarthritic change in the medial femorotibial compartments in both knees with joint space loss and subchondral sclerosis.[4]

13. An MRI scan of the right foot/ankle dated 13 September 2017 is reported by Dr Ron Shnier as showing abnormal stress and degenerative changes in the cuboid, lateral cuneiform and the navicular.[5]

14. An MRI scan of the right knee dated 15 January 2018 is reported by Dr Yadav as showing chondromalacia patella with no meniscal or collateral ligament pathology.

15. An x-ray of the right knee is reported by Dr Robinson on 7 February 2018 as showing mild narrowing of the joint space in the medial aspect of the patellofemoral compartment and in the medial compartment with slight subchondral sclerosis.

16. An x-ray of the right knee dated 19 April 2018 is reported by Dr Marks as showing the tricompartmental prosthesis with no complicating features.

Treating medical reports

17. The applicant underwent surgery to the right knee by way of arthroscopic chondroplasty on 17 May 2009. Dr Sorrenti noted grade IV chondral damage patella and grade III chondral damage of the lateral tibial plateau.[6]

18. Dr Dustin Roe, in a report dated 17 September 2013 noted that the applicant has undergone two previous surgeries to the right knee by Dr Sorrenti. The doctor did not recommend further knee surgery.

19. Dr Fred Nouh provided a series of reports in 2018.[7] His initial report[8] noted problems with the right knee and ankle since the 2009 work injury with two arthroscopies performed by Dr Sorrenti. Subsequent history was of deteriorating knee pain, particularly in the anterior compartment. Recent MRI scan showed advanced arthritis involving the patellofemoral compartment and repeat x-rays showed moderate arthritic changes in the medial compartment and advanced arthritis in the lateral compartment of the right knee.

20. On 19 April 2018, Dr Nouh performed a total right knee replacement. Subsequent examinations with Dr Nouh showed the applicant progressing well following surgery.

Qualified opinions

21. Dr Peter Giblin, Orthopaedic Surgeon, was qualified by the applicant and provided two reports dated 23 January 2019 and 17 July 2019. Dr Giblin recorded a history of no prior symptoms or injuries. The doctor diagnosed soft tissue injury to the right knee as a result of injury on 20 March 2009 and progressive deterioration of the right foot intertarsal arthritis consequent upon an altered gait pattern from the right knee injury. The doctor made no deduction under s 323 “on the basis that she had no previous history of the symptoms, injuries or impairments.”[9]

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[3] Application, p 65.
[4] Application, p 64.
[5] Application, p 56.
[6] Application, p 66.
[7] Application, pp 40-49.
[8] Application, p 44.
[9] Application, p 29.

22. Dr Giblin provided a further report addressing issues of capacity. He then opined that the applicant was suffering from pre-existing disease particularly in the patellofemoral joint which was aggravated by the subsequent work injury.

23. Dr Thomas Silva provided a report dated 18 March 2019.[10] The doctor referred to the MRI of the right foot and ankle reported by Dr Shnier dated 13 September 2017 and opined that the injury aggravated pre-existing osteoarthritic changes in the right foot as described in Dr Shnier's report together with aggravating patellofemoral and medial compartment osteoarthritis.[11]

24. Dr Silva otherwise referred to the 2013 plain x-rays of the right and left knee which showed medial compartment osteoarthritis.

25. After assessing the overall WPI in identical terms to the parties' agreement, Dr Silva observed[12]:

> "However, bearing in mind that she almost certainly had medial compartment osteoarthritis of the right knee as shown in the left knee as well as under table 17-31, medial compartment osteoarthritis attracts 3% WPI under table 17-31 and therefore a deduction is indicated of 3% WPI from the 21%. Therefore, 21% minus 3% equals 18% WPI for the right knee.
>
> As far as the right ankle and right foot are concerned, I am persuaded that although the mobility was full in the right ankle and the right foot and there was no wasting, there had been some aggravation of pre-existing osteoarthritis and again table 17-31 applies and a total 4% WPI for the talonavicular joint is indicated but half of that, that is 4% minus 2% of 2% WPI is attributable to the aggravation of 20 March 2009."

26. The table at the conclusion of Dr Silva's report shows the right knee as being 21% less a one-seventh deduction totalling 18% and the right ankle/foot as 4% less a one-half deduction. It is implicit in the doctor's reasoning that he has combined the WPI for the total knee replacement (20%) with the 1% assessment of the skin.

REASONS

27. The assessment of WPI is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[13] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth edition guidelines prevail.[14]

28. Given the parties' agreement, the only issue is the extent of the s 323 deduction. It is otherwise necessary to produce a combined assessment of WPI in accordance with AMA 5 and the fourth edition guidelines.

[10] Reply, p 22.
[11] Reply, p 25..
[12] Reply, p 27
[13] The 4th edition guidelines are issued pursuant to s 376 of the 1998 Act.
[14] Clause 1.1 of the fourth edition guidelines.

29. Section 323 relevantly provides:

> "(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."

30. It is necessary to set out the relevant legal principles because the doctors' reasoning for the extent of the s 323 deduction generally do not accord with legal principles.

31. A deduction pursuant to s 323 of the 1998 Act is required if a proportion of the permanent impairment is due to previous injury or due to pre-existing condition or abnormality: *Vitaz v Westform (NSW) Pty Ltd (Vitaz)*[15]; *Ryder v Sundance Bakehouse* (*Ryder*)[16]; *Cole v Wenaline Pty Ltd* (*Cole*).[17]

32. In *Vannini v Worldwide Demolitions Pty Ltd,*[18] Gleeson JA stated that an Appeal Panel, when considering the reasoning of an Approved Medical Specialist on the question of causation under s 323, was required to determine "whether any proportion of the impairment was due to any previous injury, or pre-existing condition or abnormality" and if so, "what was that proportion".[19]

33. The onus of proof in establishing the s 323 defence lies on the respondent. In *Asbestos Remover & Demolition Contractors Pty Ltd v Kruse* [2017] NSWWCCMA 51, a Medical Panel concluded that the onus of proof was on the employer to establish a non-compensable cause in industrial deafness cases.[20] Reference was made by that Panel to the observations of Barwick CJ in *Sadler v Commissioner for Railways* (1969) 123 CLR 216 and Garling J in *Pereira v Siemens Ltd* [2015] NSWSC 1133.

34. In *Matthew Hall Pty Ltd v Smart*[21] (*Smart*), Giles JA accepted the employer's concession that it bore the onus in establishing a deduction under s 68A (the statutory predecessor to s 323).[22]

35. Section 323 applies only to an apportionment for an earlier injury or pre-existing condition of abnormality. It has no operation with respect to a subsequent injury or condition: *Secretary, Department of Education v Johnson*.[23]

36. The applicant submitted that she was asymptomatic prior to injury and therefore there was no s 323 deduction. Dr Giblin otherwise expressed this opinion.

37. The applicant's submission is rejected. A deduction pursuant to s 323 can be made despite the fact that the worker is asymptomatic prior to injury. In *Vitaz* Basten JA stated:[24]

> "42. The appeal to the Appeal Panel did not expressly identify an erroneous failure to give reasons. Rather, the submissions on the appeal, which appear to set out the grounds of challenge, complained that there can be no deduction under s 323, as a matter of law, in the absence of a pre-existing physical impairment.

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[15] [2011] NSWCA 254.
[16] [2015] NSWSC 526 (*Ryder*) at [54].
[17] [2010] NSWSC 78 at [29]-[30].
[18] [2018] NSWCA 324 (*Vannini*) at [90].
[19] At [90].
[20] At [52]-[54].
[21] [2000] NSWCA 284 at [32], Mason P and Powell JA agreeing.
[22] At [37].
[23] [2019] NSWCA 321 at [119] per Simpson AJA, Emmett JA agreeing.
[24] At [42]-[43], McColl JA and Handley AJA agreeing.

It was further submitted, by reference to the opinion of three medical commentators in a local publication:

> 'If a worker develops permanent pain and symptoms due to work consistent with spondylosis in the neck region, that condition might be assessed at DRE II. Although the spondylosis is likely to have been degenerative, if there were no symptoms in the period prior to the work-related complaint, then there was no rateable impairment at that time. So nothing would be subtracted from the current impairment.'

43. That opinion contained a legal assumption which is inconsistent with the approach adopted by this Court in, for example, *D'Aleo v Ambulance Service of New South Wales* (NSWCA, 12 December 1996, unrep) (quoted by Giles JA, Mason P and Powell JA agreeing, in *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284; 21 NSWCCR 34 at [30]-[32] and, more recently, by Schmidt J in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [13]). The resulting principle is that if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury."

38. Basten JA referred to the reasoning of other Court of Appeal decisions including the decision in *Smart.*[25] In *Smart* Giles JA stated:

> "The same, in my view, must be said as to the current s 68A(1). It does not matter that the pre-existing condition was asymptomatic, and if the loss is to some extent due to the pre-existing condition there must be deduction of the deductible proportion for that loss. But it is necessary that the pre-existing condition was a contributing factor causing the loss. And, of course, it is necessary that there was a pre-existing condition."

39. There are otherwise problems with the analysis of the s 323 deduction undertaken by Dr Silva. Dr Silva stated that he based the s 323 deduction on the pre-existing impairment due to medial compartment osteoarthritis as assessed under Table 17-31 of AMA 5.

40. The deduction under s 323 applies to a pre-existing condition or abnormality or previous injury. It is an error to apply the deduction based on pre-existing "impairment".

41. Despite that observation, I accept that the doctor's opinion is based on the findings by Dr Sorrenti during the arthroscopic procedure in 2009 which showed significant pre-existing degeneration. The ultimate recommendation by Dr Nouh for a total knee replacement is that the applicant had substantial degeneration in the knee. Accordingly, the pre-existing degeneration contributed to the need for a total knee replacement and the eventual WPI.

42. The applicant now has a 20% WPI from an agreed "fair" outcome from the total right knee replacement.

43. With some reservations, I apply the deduction made by Dr Silva in respect of the s 323 deduction of one-seventh for the right knee. That assessment, whilst applying an incorrect legal test, is based on evidence showing a contemporaneous pre-existing condition. As I mentioned, Dr Giblin is incorrect when he opined that the absence of prior symptoms means that s 323 has no application.

[25] [2000] NSWCA 284 at [32], Mason P and Powell JA agreeing.

44. Dr Silva otherwise opined that the s 323 deduction for the right foot/ankle was 50%. His reasoning is based on a 2017 MRI scan and a deduction based on an assessable impairment of arthritis.

45. As previously noted, the deduction based on pre-existing "impairment" is wrong at law because it is inconsistent with the terms of s 323. The other deficiency with the doctor's opinion is that it is based on a 2017 MRI scan when a 2011 right ankle x-ray was reported by Dr Dreverman as showing "no abnormal osteo-arthritic change detected". The inconsistency between the two reports is likely explained, on the basis that the applicant's degenerative condition was progressing over time.[26]

46. The parties' agreement expressed in the consent orders was that the applicant sustained a consequential condition of the right ankle/foot due to the right knee injury. That agreement is consistent with the applicant having a right ankle x-ray in 2011.

47. Dr Silva's opinion of a one-half deduction for the right ankle/foot is expressed to be based on arthritic change shown in the 2017 MRI scan. The doctor does not explain the absence of osteo-arthritic change in the 2011 x-ray and affects the weight to be attributed to the opinion.[27] I otherwise note that these matters were raised at the telephone conference.

48. The medical opinion lacks a proper analysis and appears to proceed on a further incorrect basis of assessing the deduction in terms of overall degeneration many years later. If the doctor has concluded that the degeneration shown in 2017 represents the basis for the one-half deduction then the analysis is incorrect and inconsistent with the recent observations of the Court of Appeal in *Johnson*[28] and otherwise inconsistent with the discussion by Beech-Jones J in *Cullen v Woodbrae Holdings Pty Ltd* (*Cullen*)[29] when his Honour stated:[30]

> "Overall, the approach of the MAP was to treat a pre-existing condition as a condition that existed outside the course of employment whereas in this case it had to be a condition that existed prior to Mr Cullen's employment."

49. I reject Dr Silva's opinion that there should be a one-half deduction for the assessment of the right ankle/foot because he has incorrectly applied a test based on pre-existing "impairment" and otherwise based his opinion on degenerative changes shown in 2017 when there was a 2011 x-ray report showing no osteoarthritic change. If the doctor attributed the one-half deduction to the degeneration shown in 2017 then he has applied a subsequent change in condition which is legally incorrect and contrary to *Johnson*. If the doctor meant to say that the 2017 scan depicted the pre-existing condition then he has not explained how the 2011 x-ray, which showed minimal if non-existent arthritis, was inconsistent with that conclusion.

50. A statutory deduction of one-tenth is prescribed by s 323(2) which relevantly provides:

> "(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.
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> (3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter."

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[26] See for example the reference to Dr Nouh's opinion at paragraph 19 herein.
[27] *Hancock v East Coast Timber Products Pty Ltd* [2011] NSWCA 11 at [82]-[83], Giles & Tobias JJA agreeing.
[28] See paragraph 35 herein.
[29] [2015] NSWSC 1416.
[30] At [57].

51. Section 323(3) of the 1998 Act provides meaning to the reference in s 323(2) of "available evidence". I do not accept Dr Silva's opinion that the s 323 deduction should be one-half. Accordingly, I do not accept that a one-tenth deduction "is at odds with the available evidence" as I do not accept Dr Silva's opinion.

52. I am prepared to accept that there was some degeneration in the ankle/foot although the extent of such degeneration is unclear because there is no acceptable medical opinion commenting on the degree of the pre-existing condition prior to injury.

53. In these circumstances, the assessment is difficult to determine because of the absence of medical evidence properly addressing the requirements of the section. In these circumstances I apply the statutory deduction pursuant to s 323(2) of one-tenth to the assessment of the right ankle/foot.

54. The skin assessment is due to the total right knee replacement. Accordingly, the s 323 deduction of one-seventh deduction for the right knee also applies to the skin assessment.

55. The applicant has a 20% WPI of the right lower extremity for the right knee with a one-seventh deduction which totals 17% WPI after rounding, a 4% WPI of the left lower extremity with a one-tenth deduction totalling 4% WPI after rounding, and a 1% WPI for the skin less a one-seventh deduction. The assessment of the skin is rounded up to 1% WPI.[31]

56. The impairment of the right lower extremity is 20% WPI in accordance with the combined tables. This figure is then combined with the assessment of the skin to total 21% WPI.

CONCLUSION

57. The findings and orders are set out in the Certificate of Determination.

[31] Paragraph 1.26 of the fourth edition guidelines.