WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-6775/19**
Appellant:	**Jose Plaza**
Respondent:	**Bluescope Steel Limited**
Date of Decision:	**25 June 2020**
Citation:	**[2020] NSWWCCMA 114**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr Gregory McGroder**
Approved Medical Specialist:	**Dr Drew Dixon**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 24 April 2020, Jose Plaza (the appellant / Mr Plaza) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Farhan Shahzad, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 30 March 2020.

2. The appellant relies on the following grounds of appeal under section 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (the 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 grounds 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 Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. Mr Plaza commenced employment with the Port Kembla Steelworks in 1978 performing labouring work in various departments of the works. He was initially employed by BHP and subsequently by BlueScope Steel Limited (the respondent).

7. As a steelworker, Mr Plaza performed arduous tasks which included standing on hard surfaces, walking and climbing and descending stairs. He began to notice pain in his knees and by May 2017 he was having problems in walking.

8. Mr Plaza consulted his general practitioner and was initially treated conservatively. Following radiological examination he ultimately underwent bilateral knee replacement in August 2017.

9. The respondent accepted that injury to the knees had been caused by the work tasks performed by Mr Plaza in the course of his employment at the steelworks with a deemed date of injury, 9 May 2017 (the subject injury).

10. Mr Plaza was examined by an orthopaedic surgeon, Dr Bodel on 18 October 2018 for the purposes of a claim for lump-sum compensation in respect of the subject injury. Dr Bodel assessed Mr Plaza as having a "fair" outcome from total knee replacement bilaterally and assessed 20% whole person impairment (WPI) in respect of each leg. He assessed a further 1% WPI with respect to scarring yielding a combined assessment of 37% WPI.

11. Dr Bodel made no deduction in respect of any pre-existing condition or abnormality or in respect of any previous injury pursuant to section 323 of the 1998 Act.

12. Mr Plaza was reviewed by an orthopaedic surgeon, Dr Stephen Rimmer, at the request of the respondent. Dr Rimmer had previously examined Mr Plaza but had concluded that the problems with the knees did not result from employment. Dr Rimmer maintained that view in a report dated 29 January 2019 that assessed Mr Plaza as having had a good result from surgery, warranting an assessment of 15% WPI in respect of both knees. He deducted the entire assessment as due to "pre-existing degenerative osteoarthritis". He assessed scarring at 0% WPI.

13. On 12 February 2020, the parties reached agreement as to injury and the dispute as to the extent of impairment was referred to the AMS to assess:

> "• the degree of permanent impairment of the worker as a result of an injury (section 319 (c))
>
> • whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and extent of that portion (section 319 (d))
>
> • whether impairment is permanent (section 319 (f))
>
> • whether the degree of permanent impairment of the injured worker is fully ascertainable (section 319 (g))"

in respect of injury "due to nature and conditions of employment for the period up to 9 May 2017."

14. The AMS assessed Mr Plaza as having 20% WPI in respect of each knee and 1% WPI in respect of scarring. The AMS deducted one half of the assessed impairment in the knees yielding an assessment of 20% WPI in total.

PRELIMINARY REVIEW

15. 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.

16. 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 because there was sufficient material available to enable the Panel to perform its review. The nature of the dispute was not such as to be clarified by a further examination.

EVIDENCE

Documentary evidence

17. 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

18. The AMS assessed Mr Plaza as having a "fair" result as from the bilateral knee replacement. With respect to assessment of the right knee he said:

> "Table 17-33 page 547, 50 points is a fair result with 20% whole person impairment for the right total knee replacement.
>
> There is a 1/10 deduction due to pre-existing arthritis leaving remaining 2% impairment of 18%."

The AMS similarly assessed 20% WPI for the left knee which he reduced to 18% "following deduction". He added 1% WPI for scarring. He said:

> "The overall whole person impairment is determined by combining 18% of the right lower extremity, 18% of the left lower extremity and 1% for scarring which combines to give a total whole person impairment rating of 34% whole person impairment overall."

The AMS commented: "My opinion on clinical examination is more consistent with Dr Rimmer but I agree with Dr Bodel but closer to Dr Bodel's whole person impairment assessment. I do not agree with Dr Rimmer that a 100% deduction would be applicable."

19. The AMS certified impairment as permanent and fully ascertainable.

20. The AMS reported at paragraph 11 "Deduction (if any) for the proportion of the impairment that is due to previous injury or pre-existing condition or abnormality":

> "a. In my opinion the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities:
>
> (i) He suffers from morbid obesity for a prolonged period and also suffered a mild arthritis. In my opinion 50% deduction is applicable in regard to both these conditions.
>
> b. The previous injury, pre-existing condition or abnormality directly contributes to the following matters that were taken into account when assessing the whole person impairment that results from the injury, being the matters taken into account in 10a, and in the following ways:
>
> (i) This including loading noted on the knees with the nature and condition because of his morbid obesity, which he has had for several years. There is applicable nature and condition of his current presentation of increasing morbid obesity. And there is ongoing contribution from arthritis.
>
> c. In my opinion the deductible proportion is applicable for the following reasons:
>
> A 50% deduction is applicable in regard to his pre-existing knee conditions and his morbid obesity."

21. Under the heading “Evaluation of Permanent Impairment” the AMS was asked to consider:

> “Is any proportion of loss of efficient use or impairment or whole person impairment, due to previous injury pre-existing condition or abnormality?” The AMS responded “No.”[1]

SUBMISSIONS

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

23. In summary, the appellant submits that the AMS failed to consider the appropriate point in time when he was to consider whether there was any pre-existing condition or abnormality or any previous injury.

24. In reply, the respondent submits that:

> “The AMS elected to provide a deduction of 50% under section 323 on the basis he believed the appellant had suffered from morbid obesity for a prolonged period of time, as well as mild arthritis. This ground of appeal only relates to the AMS’s deduction in respect of the appellant’s morbid obesity”

and hence the respondent submitted that the evidence supported the deduction made by the AMS.

FINDINGS AND REASONS

25. 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.

26. 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.

27. The Panel is satisfied that the ground of demonstrable error is made out. The nature of the injury was that of a disease process of gradual onset commencing in 1978 when the appellant commenced his employment at the age of 19.

28. The Panel accepts that the injurious process commenced in 1978 and then continued throughout the employment, becoming symptomatic many years later. Accordingly, the relevant point in time for consideration as to whether there was a pre-existing condition or abnormality or whether there was a previous injury, is at the commencement of employment in 1978.

29. The submissions of the respondent addressed contribution to the overall assessed impairment upon examination by the AMS by way of obesity and arthritis. The respondent pointed to the opinion of Dr Bodel to the effect that obesity contributed to the overall level of impairment found upon examination.

[1] MAC para 8 e.

30. Section 323 of the 1998 Act provides:

> "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.
>
> Note: So if the degree of permanent impairment is assessed as 30% and subsection (2) operates to require a 10% reduction in that impairment to be assumed, the degree of permanent impairment is reduced from 30% to 27% (a reduction of 10%).
>
> (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.
>
> (4) The Workers Compensation Guidelines may make provision for or with respect to the determination of the deduction required by this section.
>
> Note: Section 68B of the 1987 Act makes provision for how this section applies for the purpose of calculating workers compensation lump sum benefits for permanent impairment and associated pain and suffering in cases to which section 15, 16, 17 or 22 of the 1987 Act applies."

31. The error identified in the present appeal is similar to that identified in *Cullen v Woodbrae Holdings Pty Ltd*[2] (*Cullen*) where Beech-Jones J said:

> "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. As noted, Mr Blount repeatedly asserted that there was evidence to support such a finding. However that contention travels nowhere as the MAP did not make such a finding. Instead, the MAP concluded that once it was established that Mr Cullen had osteoarthritis that had a 'constitutional pathology' then it automatically followed that it was a pre-existing condition. In this case that approach was erroneous in law and constitutes an error of law on the face of the record (and that is the case irrespective of whether the condition had to pre-date the commencement of his employment or some later time)."

32. Applying that reasoning in the present appeal, there needs to be a finding of a pre-existing condition or abnormality or previous injury in existence at the time of the commencement of employment in 1978**.** There is no such evidence and the AMS was correct in his opinion (at paragraph 8 e of the MAC) when he said that there was no proportion of loss of efficient use or impairment or whole person impairment due to a previous injury, pre-existing condition or abnormality.

[2] [2015] NSWSC 1416.

33. The AMS in paragraph 10 reported that it was appropriate to deduct 1/10 from the assessment of impairment in the knees due to pre-existing arthritis. If that proposed deduction was intended to be required pursuant to section 323 then the AMS fell into error as there was no evidence of any pre-existing arthritis at the commencement of employment in 1978.

34. Subsequently at paragraph 11c the AMS reported that it was appropriate to deduct 50% "in regard to his pre-existing knee conditions and his morbid obesity." To the extent that the AMS believed the obesity and pre-existing knee conditions were present prior to commencement of employment, that finding was not open on the evidence and constituted demonstrable error.

35. Although the AMS in the Certificate issued pursuant to section 325 of the 1998 Act recorded a deduction of 50% from the assessment of each knee pursuant to section 323, given his opinion that there was no pre-existing condition or abnormality nor any previous injury, it is likely that the AMS made this deduction in respect of contribution to the overall level of impairment from conditions apart from employment which occurred contemporaneously with the contribution the impairment caused by the performance of activities at work.

36. The approach to the assessment of WPI where that impairment is attributable to more than one cause was discussed by the Court of Appeal in *Secretary, Department of Education v Johnson*[3] (*Johnson*). Emmett AJA (Macfarlan JA and Simpson AJA agreeing) noted (at [12]) that while, section 323 of the 1998 Act required a deduction for any proportion of the impairment that is due to any previous injury there was no requirement for apportionment "where there is an injury subsequent to the injury that is the subject of a claim". His Honour concluded (at [14]): "That is to say, it must be possible to demonstrate that there is a causal connection between the compensable injury and the impairment."

37. Referring to the decision in *State Government Insurance Commission v Oakley*[4] (*Oakley*) Emmett AJA noted:

> "There are three possible categories where an earlier injury is followed by a later injury, as follows:
>
> Where the later injury results from the subsequent accident that would not have occurred had the victim not been in the physical condition caused by the earlier accident, the second injury should be treated as having a causal connection with the earlier accident.
>
> Where an earlier injury is exacerbated by subsequent injury, there will be a causal connection between the original injury and the subsequent damage unless it can be shown that some part of the subsequent damage would have been occasioned even if the original injury had not occurred.
>
> Where a victim, who had previously suffered an injury, suffers a subsequent injury and the subsequent injury would have occurred whether or not the victim had suffered the original injury and the damage sustained by reason of the subsequent injury includes no element of aggravation of the earlier injury, there will be no causal connection between the original injury and the damage subsequently sustained."[5]

38. The parties do not dispute that the AMS properly assessed the overall level of impairment at the time of his examination of Mr Plaza. The AMS however did not explain how the deduction of 50% should be applied consistently with the reasoning in *Johnson*.

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[3] [2019] NSWCA 321.
[4] (1990) 10 MVR 570; [1990] Aust Torts Reports 81-003.
[5] Per Emmett AJA at [70].

39. Although the decision in *Johnson* refers to a subsequent injury which breaks the causal nexus, the reasoning is equally applicable to other contemporaneous causes which contribute to the overall level of impairment but which do not break the causal nexus with the subject injury.

40. There is no dispute that the subject injury was caused by a gradual process to which employment was the main contributing factor. The decision in *Johnson* is authority for the proposition that a deduction from the assessed level of impairment is only authorised when the impairment assessed is not causally related to the subject injury or there is a deduction to be assessed pursuant to section 323 of the 1998 Act.

41. The Panel is satisfied that impairment assessed by the AMS at the time of his examination resulted from the injury to the knees caused by the workplace activities of Mr Plaza between 1978 and 9 May 2017 as well as other contemporaneous factors. Those factors did not break the causal chain and accordingly no deduction is authorised.

42. In accordance with the decisions in *Cullen* and *Johnson*, the Panel is satisfied that no deduction is warranted pursuant to section 323 of the 1998 Act and no deduction is to be made in respect of factors that contributed at the same time as the appellant was carrying out his employment duties.

43. Whether it is considered that the deduction made by the AMS was made pursuant to section 323 or as due to subsequent additional factors, the deduction was made in error which is apparent from the MAC, given the evidence that the work activities relied upon commenced in 1978.

44. Having found demonstrable error, it is necessary to make a further assessment of incapacity. The Panel is satisfied that the assessment by the AMS of the level of incapacity at the time of his examination was appropriate and in accordance with the Guidelines and the Panel is satisfied that Mr Plaza, as a result of the subject injury, suffered 20% WPI in respect of the right lower extremity (knee) and 20% WPI in respect of the left lower extremity (knee) with an additional 1% attributable to scarring (TEMSKI).

45. There is no basis for a deduction pursuant to section 323 of the 1998 Act and no grounds for deduction for any subsequent contributing factors in accordance with *Johnson*.

46. For these reasons, the Appeal Panel has determined that the MAC issued on 30 March 2020 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **6775/19**
Applicant: **Jose Plaza**
Respondent: **Bluescope Steel Limited**

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 Farhan Shahzad 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 WorkCover Guides**	**Chapter, page, paragraph, figure and table numbers in AMA 5 Guides**	**% WPI**	**Proportion of permanent impairment due to pre-existing injury, abnormality or condition**	**Sub-total/s % WPI (after any deductions in column 6)**
1. Right lower extremity (knee)	9/05/2017	Chapter 3, p.21, Table 17-35	Chapter 17, p. 547 Table 17-33	20%	0%	20%
2. Left lower extremity (knee)	9/05/2017	Chapter 3, p.21, Table 17-35	Chapter 17, p. 547 Table 17-33	20%	0%	20%
3. Scarring (TEMSKI)	9/05/17	Chapter 14 14.7, 14.8 Table 14.1		1%	0%	1%
Total % WPI (the Combined Table values of all sub-totals)					**37%**	

Mr William Dalley
Arbitrator

Dr Gregory McGroder
Approved Medical Specialist

Dr Drew Dixon
Approved Medical Specialist

25 June 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*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar