WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1175/19**
Appellant:	**Greater Hume Shire Council**
Respondent:	**Anthony Johnstone**
Date of Decision:	**25 July 2019**
Citation:	**[2019] NSWWCCMA 100**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr Philippa Harvey-Sutton**
Approved Medical Specialist:	**Dr Drew Dixon**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 20 March 2019, Greater Hume Shire Council lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 30 April 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 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, 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. It is convenient to extract the history reported by the AMS at Part 4 of the MAC,

   "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:

(1) Mr Johnstone related that on 23/10/12 he was driving a water tanker. This was used for keeping the dust down. The tanker had to be filled up from a dam using a portable pump. The tanker was an old milk tanker. It would carry about 12 tonnes of water.

(2) On the way to the dam with the pump, he inadvertently stepped into a hole with his left leg, wrenching the left knee and hurting his lower back. He reported the situation at the depot. He saw his Doctor. Later, he was referred to Specialist Orthopaedic Surgeon, Dr Elie Khoury. An arthroscopic procedure was conducted on the knee in December 2012. Unfortunately, the knee continued to deteriorate, and it was eventually decided that he needed a knee joint replacement which was conducted also by Dr Khoury nearly two years later in mid-October 2014. This has given him quite a good improvement.

(3) He was more aware of deterioration of his lower back after he returned to work following the knee joint replacement. He was subsequently referred to Specialist Neuro-surgeon, Dr John McMahon. It was recommended that he should have an extensive laminectomy and discectomy procedure throughout the lumbar spine. This was not approved for financial support. He was therefore placed on the public list. His name came up for this surgery which was carried out by Dr McMahon in mid-May 2016. This also seems to have given him a fairly reasonable result. He was able to return to work in August 2016 and since then has only had minor modifications to his normal occupation."

PRELIMINARY REVIEW

7. 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.

8. 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 the errors found regarding the assessment could be corrected from the materials before the Panel, as explained in the reasons below.

EVIDENCE

Documentary evidence

9. 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

10. 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

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

Appellant

12. In summary, the appellant submits that the AMS has erred in failing to apply a deduction pursuant to s 323 of the 1998 Act given the evidence of extensive pre-existing degenerative change in the left knee such as that reported by Dr Khoury at the arthroscopy two months after the work injury. The AMS also refers to an MRI of 6 November 2012 two weeks after the injury the report of which referred to "widespread cartilage loss". There is evidence supporting a deduction of greater than 1/10, and the Panel should apply such a deduction.

Respondent

13. The respondent submits that there are no pre-existing elements to the injury that contribute to the impairment and relies on *D'Aleo v Ambulance Service of New South Wales* (1996) 14 NSWCCR 139 in this regard. The MAC should be confirmed.

FINDINGS AND REASONS

14. 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.

15. 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.

Section 323 of the 1998 Act deduction

16. The only part of the assessment appealed is that of the left lower extremity (knee); with the grounds relating only to the consideration of a deduction under s 323 of the 1998 Act. The assessment of the lumbar spine and of scarring are not appealed.

17. For a deduction to be properly made under s 323 there must be evidence that there is a pre-existing abnormality; condition; or previous injury and that this element contributes to the impairment[1]; "assumption will not suffice".[2]

18. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526 Campbell J explained the requirement as follows:

> "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."

19. The pre-existing element can be asymptomatic before the injury as long as the evidence establishes that it forms part of the impairment.

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[1] *Cole v Wenaline Pty Ltd* (2010) NSWSC 78;

[2] *Fire & Rescue NSW v Clinen* [2013] NSWSC 629

20. The AMS refers to the history with the left knee at Part 4.d., “There is no history of any pre-existing condition with the left knee.”

21. At Part 8.f. The AMS notes, “There are some degenerative changes in the left knee although there is no history of any pre-existing condition.”

22. The AMS says at Part 11,

> “Although there were degenerative changes in the left knee, there is no history of any pre-existing condition of the left knee and he was able to carry out his previous occupation which was quite arduous without any difficulty. I am therefore persuaded that there is no assessable deduction for the condition of the knee.”

23. The AMS was no doubt referring above to the fact there was no diagnosis of a condition in the left knee before the injury. However, there was degenerative osteoarthritis with grade 4 loss of joint space apparent in the imaging soon after the injury in 2012, together with an oedema flare associated with the injury.

24. As noted above, the authorities allow that an asymptomatic condition can constitute part of the impairment if there is evidence showing this. The Panel notes that Dr Panjratan in his report of 26 November 2018 applied a deduction of 1/10 for the asymptomatic pre-existing degenerative change. Dr Gehr found no pre-existing element forming part of the impairment.

25. The degenerative changes identified by the imaging and by Dr Khoury at the time of the arthroscopy soon after the injury, including grade 4 chondral defects, were clearly pre-existing and significant. The AMS states in the MAC that there were degenerative changes but no pre-existing condition. This is incorrect and against the evidence of pre-existing osteoarthritis. That the AMS has not considered s 323 in relation to the osteoarthritis that pre-existed the injury being assessed also constitutes a demonstrable error on the face of the Certificate.

26. 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).[3] The Panel is able to make the assessment and correct the errors in regard to the assessment of the left lower extremity without recourse to further examination of Mr Johnstone.

Findings

27. As noted above, there was asymptomatic pre-existing degenerative osteoarthritis, with grade 4 chondral defects. The Panel is of the view that the degenerative changes contribute to the impairment. The extent of the contribution is difficult to ascertain, not least because Mr Johnstone had a TKR in May 2016. This invokes s 323(2) of the 1998 Act. The resulting deduction of 1/10 is not at odds with the evidence.

28. Applying this deduction of 1/10 to the assessment of 20% WPI for the left lower extremity gives 18% WPI. Combined with the lumbar spine assessment of 12% WPI gives a total of 28% WPI as shown in the Panel’s Certificate.

29. For these reasons, the Appeal Panel has determined that the MAC issued on 30 April 2019 should be revoked. A new Certificate of the Panel is provided below.

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[3] See also *NSW Police Force v Registrar of the Workers Compensation Commission of NSW* [2013] NSWSC 1792

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*.

Robert Gray
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Matter Number: ~~M1~~-1175/18
Appellant: Greater Hume Shire Council
Respondent: Anthony Johnstone

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 Tim Anderson 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 S323 for pre-existing injury, condition or abnormality** (expressed as a fraction)	**Sub-total/s % WPI** (after any deductions in column 6)
Left lower extremity (knee)	23/10/12	Chap 3 P 13; P 21; T 17-35 (modified)	P 547; T 17-33	20	1/10	18
Lumbar spine	23/10/12	Chap 4 P 24; P 29; T 4.2	P 384; T15-03	13	1/10	12
Scarring	23/10/12	P 74 T 14.1		0	0	0
Total % WPI (the Combined Table values of all sub-totals)					**28%**	

Ross Bell
Arbitrator

Dr Philippa Harvey-Sutton
Approved Medical Specialist

Dr Drew Dixon
Approved Medical Specialist

25 July 2019

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*.

Robert Gray
Dispute Services Officer
As delegate of the Registrar