WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-950/19**
Appellant:	**Armidale Regional Council**
Respondent:	**Matthew Morgan Richardson**
Date of Decision:	**20 November 2019**
Citation:	**[2019] NSWWCCMA 170**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr Mark Burns**
Approved Medical Specialist:	**Dr John Ashwell**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 18 September 2019 Armidale Regional Council lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Faithful, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 21 August 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. The AMS was asked to assess the worker's permanent impairment in relation to the back in respect of an injury on 19 July 2001, and whole person impairment (WPI) in respect of the lumbar spine for injuries dated 9 August 2004, 24 to 28 August 2007 and 10 September 2007.

7. The AMS assessed nil impairment of the back in relation to the injury on 19 July 2001 and a combined 22% WPI (lumbar spine) in relation to the injuries on 9 August 2004, 28 August 2007 and 10 September 2007. Dr Garvey on the same date issued another MAC in respect of the worker's whole person impairment in relation to the upper and lower digestive tracts in respect of the injury on 10 September 2007.

8. The appellant only appeals against the MAC of Dr Faithfull dated 21 August 2019.

PRELIMINARY REVIEW

9. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.

10. 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 no request was made, and we consider that we have sufficient evidence before us to enable us to determine the issue raised on appeal.

EVIDENCE

Documentary evidence

11. 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.

SUBMISSIONS

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

13. In summary, the appellant submits that the AMS erred in failing to make a deduction for previous injury, pre-existing condition or abnormality under section 323 of the 1998 Act. In assessing whether a deduction under section 323 was appropriate the AMS proceeded on the basis the respondent had recovered from the injuries suffered prior to 10 September 2007 which was inconsistent with all the evidence.

14. In reply, the respondent submits that no errors were made.

FINDINGS AND REASONS

15. 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

16. 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.

17. The terms of the referral to the AMS are set out above.

18. The only issue in dispute is whether the AMS ought to have made a deduction in respect of his WPI pursuant to the terms of section 323 of the 1998 Act.

19. Both parties have made detailed submissions with respect to the extensive evidence in this case in support of their respective positions.

20. The AMS obtained the following history in relation to the various incidents:

> "**Injury 1: 19/07/2001:** I note from the injury at work, Mr Richardson fell over moving a welder which was not secured to the trolley. He felt sudden low back pain. He was able to finish the day…He saw a doctor the next day and was given a certificate for off work for 2 weeks. He was then on light duties for 2-3 weeks. He had some chiropractic treatment on 6 occasions…He said he also had some non-steroidal anti-inflammatories and analgesics. Mr Richardson said eventually he made a full recovery and returned to heavy labouring.
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> **Injury 2: 09/08/2004:** Mr Richardson was moving some 44 gallon drums and one of the drums toppled and while trying to stop it, he felt sudden low back pain. He was able to finish the work that day, had 2 weeks off work and then Mr Richardson said he made a full recovery.
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> On 24/08/2007, Mr Richardson told me was at the Armidale Council Chambers. He was carrying some supplies up the steps, the load slipped and in attempting to correct the fall, Mr Richardson twisted his back. Mr Richardson did a verbal report that day and then had light duties for the rest of the day. There was no time off work and he said his back made a full recovery.
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> Mr Richardson said he cannot recall anything happening between 25 and 28/08/2007.
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> On 10/09/2007, Mr Richardson said that he was moving a mobile stair case…He was lifting it up onto the stage when he suddenly felt a sharp stab in the low back. He...remained on light duties for the rest of the night. Mr Richardson said that he had a very bad night with increasing low back pain so the following day he reported to his local GP, Dr Luke Bookallil. He was given a work certificate for time off for 3 weeks. He then returned to light duties. Dr Bookallil ordered a CT of the lumbosacral spine on 15/10/2007. This was reported by Dr Khandelwal as 'Diffuse posterior disc bulge is evident without any significant spinal canal narrowing or neural exit foraminal stenosis. Mild degenerative change is also evident in bilateral sacroiliac joints.'
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> Mr Richardson was referred to Dr Rodney Allan, Neurosurgeon, who ordered an MRI of his lumbar spine. This investigation was carried out on 14/11/2007 and was reported by Dr Parker as 'There are posterolateral disc protrusions at L4/5 and L5/S1. At both levels disc material lies adjacent to the emerging nerve roots being left L4 and left L5 respectively. Nerve root irritation cannot be excluded although there does not appear to be a significant degree of neural compression. Bilateral L5 pars interarticularis defects.'
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> Mr Richardson had low back pain going into his left leg and down as far as his foot. He said he had some physiotherapy and 2 lumbar spine injections which Mr Richardson said did not help much. In Dr Allan's report dated 24/06/2008…[he] noted 'I am pleased to report this provided him with reasonable relief of his symptoms but unfortunately the pain has returned.'
>
> Dr Allan recommended that Mr Richardson should undertake a lumbar foramenotomy. I note an operation was carried out by Dr Allan on 30/09/2008… 'Left L4 rhizolysis (minimal access) with lamino-foraminotomy and placement of fat graft and installation of epidural morphine/Celestone.'
>
> I note Mr Richardson was seen by Dr Allan on 11/11/2008 when Dr Allan stated 'Mathew had done quite well initially after his surgery but unfortunately he has suffered some recurrence of his symptoms. The buttock pain has returned somewhat but he does report some pain free days which was not the situation previously.'

Dr Allan saw Mr Richardson again on 19/06/2009….Dr Allan had organised a new MRI which confirmed 'At L4/L5 there is a new far lateral disc prolapse that was not present previously' and Dr Allan felt this was causing his current symptoms.

Dr Allan felt that Mr Richardson would be a candidate for decompression again at this new level, given that he has new pathology but he would like to add a fusion to the surgery. When Dr Allan reviewed Mr Richardson again in August 2010, he noted that Mr Richardson continued to be troubled by left leg pain and that he had also lost his job…

Because of increasing pain in his left leg which was becoming unbearable, Dr Allan operated on Mr Richardson…on 23/11/2010. He carried out an L4/5 and L5/S1 lumbar decompression and minimally invasive lumbar fusion with segmental instrumentation, interbody fusion, discectomy at both levels, posterolateral fusion, placement of fat graft, and installation of epidural Celestone.

Mr Richardson progressed very slowly initially. When seen by Dr Allan in July of 2011, it was noted that unfortunately he really has not improved to any degree which was one of the concerns discussed prior to surgery…"

21. The AMS then set out a summary of three medico-legal opinions and an investigative report. Relevant to the issue in dispute, he said:

"Medicolegal report Dr Vijay Panjratan, Orthopaedic Surgeon, dated 09/04/2013. Dr Panjratan gave a very complete history of Mr Richardson's back injuries and treatment. He made a final whole person impairment of a DRE Lumbar Category IV for spinal fusion to which he added another 2% loading for limitation of activities of daily living, coming to a total of 22% whole person impairment. I note Dr Panjratan has made a supplementary report on 08/05/2013 in which he deducted 10% because of the CT scan findings in October 2007 revealing some degenerative change. I disagree with that deduction because Mr Richardson was doing heavy labouring work up until 24/08/2007 when he suffered the low back pain while at work. For this reason, although there were pre-existing degenerative changes, this should not be deducted. In addition, there was an injury at work in 2001 requiring some time off work, but he then returned to heavy labouring, full duties."

22. He then documented the respondent's present treatment, symptoms, general health and the effects of his injuries on his activities of daily living.

23. Findings on physical examination were reported as follows:

"Mr Richardson measured 185cm tall and weighed more than 140kg. (The scales in my rooms only go to 140 kg and have reached the limit once Mr Richardson was weighed). He walked with an antalgic gait due to pain in both legs. Three surgical scars well healed but slightly stretched, 11cm, 7cm and 4cm. Minimal flexion and extension, side to side flexion equal. Lateral side left thigh and calf showed no weakness. Knee and ankle reflexes present and equal bilaterally. Straight leg raising 90 degrees bilateral when seated."

24. The AMS then summarised a number of radiological investigations to which we will refer in more detail shortly.

25. The AMS summarised the injuries as follows:

"19/07/2001 Low back strain soft tissue injury.

09/08/2004 Low back strain soft tissue injury.

24-28/08/2007 Low back strain soft tissue injury.

10/09/2007 Disc herniation L4/L5."

26. When asked the question: “Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality?” the AMS said “No.”

27. In making his assessment of 22% WPI, the AMS said:

> “Mr Richardson suffered a herniated disc at the L4/5 and L5/S1 levels. He underwent an operation for 2 levels of arthrodesis in 2009. Mr Richardson still has low back pain but no radiculopathy and in my physical examination it was my opinion that he best fits a DRE Category IV.”

28. As regards the 2001 injury, the AMS assessed 0% impairment, adding:

> “Mr Richardson said to me that he had made a full recovery from the injury that occurred in 2001 and had returned to heavy labouring work. Under those circumstances, I believe that the Table of Disabilities assessment would be 0%.”

29. The AMS then commented upon other medical opinions as follows:

> “In the medicolegal report, 18/12/2012, Dr Casikar accepted that Mr Richardson best fitted into a DRE Category IV giving 20% and 2% for impairment of activities of daily living. He agreed with Dr Allan’s assessment of whole person impairment of 22%.
>
> It was Dr Casikar’s opinion that he agreed with Dr Allan, Mr Richardson’s Neurosurgeon, that Mr Richardson was suffering from mechanical back pain with no radiculopathy. There is morbid obesity and for this reason Dr Casikar opined that Mr Richardson’s condition is not in any way related to his employment. This is purely due to a constitutional problem…
>
> Mr Richardson said to me that he had made a full recovery from the injury that occurred in 2001 and had returned to heavy labouring work. Under those circumstances, I believe that the Table of Disabilities assessment would be 0%. Because the assessment for the injury occurring in 2001 in my opinion is 0%, I do not believe any deduction is required from the current whole person impairment tables.
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> Medicolegal report Dr Vijay Panjratan, Orthopaedic Surgeon, 18/08/2015. Dr Panjratan noted that Dr Allan had carried out a surgery on 30/09/2008 consisting of a rhizolysis. He also noted that on 23/11/2010 Dr Allan had performed an L4/5/S1 lumbar decompression and fusion…Dr Panjratan discussed Mr Richardson’s ability to undertake work. According to that report, Dr Panjratan refers to a previous report where he gave a whole person impairment but I do not have that previous report.
>
> Medicolegal report Dr James Bodel, 27/11/2013. Dr Bodel noted that Mr Richardson had a complex history of recurring episodes of injuries involving his back associated with his work…
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> Dr Bodel assessed Mr Richardson using the WorkCover Guidelines and that Mr Richardson best fitted a DRE Lumbar Category IV to which he added another 2% because his activities of daily living had been moderately compromised. On the basis of a 5% permanent impairment of function due to the injuries in 1997 and July 2001, he used this to deduct one tenth. Dr Bodel had the view that the episode of injury on 28/08/2007 did attract approximately one tenth of the total which is again a 2% whole person impairment for that date of injury, leaving a 16% whole person impairment overall for the main injury which is the episode on 10/09/2007.
>
> It is my opinion from the discussion with Mr Richardson that he made a full recovery from the July 2001 injury and in fact returned to heavy work so I would not assess any impairment from that injury.

I also obtained the history from Mr Richardson that the episodes in 2004 and August 2007 were minor episodes treated successfully with conservative care and from which he made a good recovery, so I would not deduct one tenth for those injuries.

Medicolegal report Dr Rodney Allan, Neurosurgeon, 26/11/2011…He assessed Mr Richardson at 22% whole person impairment because he felt he best fitted a DRE Lumbar Category IV with 2% for impairment due to ADLs. Dr Allan did not believe that there was any deductions for pre-existing condition as he had no symptoms prior to his original back injury.

Medicolegal report Dr Ron Grant, GP, 07/08/2001. Mr Richardson explained the various injuries that had occurred to his lumbar spine. Mr Richardson was still complaining of low back pain but no leg pain. It was noted that Mr Richardson had a full flexion in his lumbar spine, painless full extension, lateral flexion was full on both left and right sides and straight leg raising was normal at 90° bilaterally. The diagnosis was mechanical low back pain in an overweight male.

Dr Pell, Neurosurgeon, 29/07/2008. Dr Pell noted Mr Richardson had initially injured his back some 12 years ago with attacks of pain which usually settle in a month. The present attack had been bothering him for 11 months and had been treated conservatively. On examination there was marked restriction of lumbar movements but no focal motor or sensory deficit. Reflexes were present. Dr Pell agreed that surgery is indicated and he would recommend an L4/5 discectomy so as to avoid the need for fusion."

30. The appellant's submissions set out in considerable detail the evidence is believes justifies a deduction pursuant to section 323. Numerous individual examples are given, such as the history reported by Dr Panjratan of "intermittent" symptoms since the 1997 incident of back pain, and the statement by the respondent that he changed jobs in about 2005 because, it is submitted, "at the time he made the change he had in the past had problems with his back…some days he had problems but plenty of times he would have no problems at all."

31. Other examples from those submissions are as follows:

"[The] report of Dr Grant 7 August 2001…The NTD records a history that some 3 - 4 years ago the respondent was moving a 44 gallon drum at work and developed increasing back pain and a ruptured disc was diagnosed. There was some early morning stiffness and occasional soreness when he first gets up. The lower back pain has never really got completely better. Two - three weeks ago he was pulling a welder at work when he fell backwards landing on his bottom and then on his back. He developed pain in the upper lumbar area and pins and needles in both legs…

[A] report of Dr Allan 19 November 2007…The respondent suffered an initial back injury approximately 10 years ago. Over the ensuing interval he had had intermittent lower back pain…"

32. The radiology reports and the reports of Dr Bodel were also addressed.

33. In summary, the appellant submits:

"In assessing whether a deduction under section 323 was appropriate the AMS proceeded on the basis the respondent had recovered from the injuries suffered prior to 10 September 2007.

In reaching the above conclusion the AMS failed to have regard to evidence before him to the effect that the respondent was not symptom free at the time of the injury on 10 September 2007. That evidence included the following:

i. The respondent's statement dated 4 July 2013 that as at 9 February 2005 when he changed job to facilities caretaker on some days, he had problems with his back.

ii. The history recorded by Dr Grant in his report dated 7 August 2001 that after injury 3 to 4 years ago the respondent's pain never really got completely better.

iii. The history recorded by Dr Allan in his report dated 19 November 2007 that the respondent initially injured his back some 10 years ago and over the ensuing period he had intermittent lower back pain.

iv. The history recorded by Dr Panjratan in his report dated 9 April 2013 that following the 1997 injury the respondent still had intermittent pain.

v. The history recorded by Dr Panjratan in his report dated 9 April 2013 that after the injury on 28 August 2007 the respondent still had intermittent pain which continued at the time of the injury on 10 September 2007."

34. The appellant concluded:

> "The AMS failed to have proper regard to the existence of pre-existing constitutional pars intra-articularis defects which Dr Bodel and Dr Panjratan considered should give rise to a deduction under section 323 of the 1998 Act."

35. The respondent's submissions include the following:

> "What is very clear is that those statements [by the appellant] are totally consistent with the history as recorded by the AMS, namely:
>
> (a) There were some minor work-related incidences prior to 10 September 2007;
>
> (b) There was no significant medical interventional or management prior to 10 September 2007;
>
> (c) After each incident the Worker was again engaging in heavy duties up to 10 September 2007;
>
> (d) Significant medical intervention really only began after the incident of 10 September 2007 involving the staircase, as well as significant periods of incapacity...
>
> The scans, apart from showing pre-existing degenerative processes, supported the conclusion reached that there had been a disc herniation.[after the 10 September 2007 injury]. It was that condition which led to the multiple surgeries.
>
> The AMS clearly specifically considers the alternative reasoning regarding any deductible amount from fellow medical practitioners and forms his own opinion.
>
> The AMS was clearly on notice of the radiological evidence and did not consider it to be overwhelming when he was reviewing the actual history of symptoms, treatment and history taken in conference, as well as the provided medical materials.
>
> There is no presumption the mere existence of a pre- existing condition is a contributing factor to the cause of any permanent impairment."

36. At the outset, we accept that there is contradictory evidence as to whether the respondent did indeed "fully recover" after the various incidents prior to that of 10 September 2007, including that of an injury in 1997 noted by Dr Allan.

37. In his initial statement dated 15 July 2013, the respondent said:

> "When I went to work with Facilities my supervisor was Andrew Strudwick and I know I had in the past some problems with my back. There is no doubt about that, but it was a case where some days I had problems but plenty of times I would have no problems at all.
>
> I did not believe that the work was beyond me physically in relation to my back but I did have two incidents that I reported to him. One occurred on 27 August 2007 or thereabouts… I reported that incident as it had hurt my back, but I stayed at work and continued to do my normal duties. There was a strong focus on reporting even minor injuries… so whilst I did not think this incident was a big deal at the time, I did report it.
>
> The next Incident of 10 September 2007 which I regard as being very relevant to my situation involved manually moving wooden stairs…"

38. In a subsequent statement dated 27 November 2013, the respondent said:

> "For myself, with that first incident in 1997…it did hurt and I did go and see he doctor but as I recall I was not even referred for an x-ray…. before the 11 September 2007 incident, I cannot recall ever having been referred to see a specialist regarding my back. After the 1997 incident I returned to full duties…"

39. The initial statement suggests to us that he had not in fact fully recovered from any earlier injuries, but his later statement suggests otherwise.

40. Such conflicting statements do not assist us greatly in determining the issue in dispute, so that it is necessary to carefully consider the findings of the AMS and all the evidence before him to determine if he erred in failing to make any deduction pursuant to section 323.

41. It is clear that the respondent had a number of injuries or incidents affecting his back prior to that on 10 September 2007, hence the terms of the referral.

42. But the question for us to consider is whether those injuries or incidents contributed to the impairment found by the AMS.

43. Section 323 of the 1998 Act provides that "there is to be a deduction for any proportion of the impairment that is due to any previous injury…"

44. *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 (*Cole*) is the perennially cited authority on the construction and application of section 323. In summary, Schmidt J said that the section "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…contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences (our emphasis) of the earlier injury…"

45. Conversely, *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254 (*Vitaz*) is cited as authority for the principle that "if a pre-existing condition is a contributing factor causing permanent impairment, (our emphasis) a deduction is required, even though the pre-existing condition had been asymptomatic prior to the injury."

46. We have carefully considered the MAC and all the evidence before us, and we are not persuaded that the AMS erred for reasons that follow.

47. The MAC was thorough and detailed, with carefully explained reasons why no deduction was appropriate. It is true that the AMS obtained a history that the respondent had fully recovered from earlier injuries, but as we said, there was conflicting evidence from the respondent on this issue.

48. Of more significance to us is the lack of evidence of significant pathology prior to the injury on 10 September 2007. An x-ray in 1998 did not reveal any significant damage. The radiological investigations after the September 2007 injury showed significant disc damage with evidence of radiculopathy which was not present prior to that date.

49. There was no evidence of any significant and lasting leg symptoms prior to September 2007. If there had been a prior CT scan or MRI showing any significant damage, we may well have considered that a deduction was warranted.

50. It is also not unusual for a worker such as Mr Richardson, engaged in heavy and physically demanding work to experience back pain from time to time, but that of itself does not justify a deduction. In short, "good and bad days" may be expected.

51. There must be evidence that any prior injury or condition was a contributing factor "causing permanent impairment". In our view, there is an absence of such evidence.

52. Similarly, the "actual consequences" of the earlier injuries suggest to us that they were of no great significance. As the AMS explained, he regarded them as "soft tissue injuries" and there was no evidence of any significant medical intervention prior to the September 2007 injury. Also, of note is the fact that the respondent continued at work.

53. Moreover, the radiological evidence post- dating the September 2007 injury referred to "minor" degenerative changes, consistent in our view with the Mr Richardson's age and the nature of his duties over the years.

54. It was the extent of the injury on 10 September 2007 that led to the various surgical procedures which in turn led to permanent impairment.

55. We should also point out that the respondent changed his duties in 2005 as a result of perceived bullying in the workplace by his then supervisor. The appellant's submissions on this point have been taken out of context.

56. The appellant's reliance on reports of "intermittent pain" over the years does not in our view satisfy the requirement that such symptoms or pain were contributing factors causing permanent impairment.

57. For these reasons, the Appeal Panel has determined that the MAC issued on 21 August 2019 should be confirmed.

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*.

J Burdekin

Jenni Burdekin
Dispute Services Officer
As delegate of the Registrar