WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-5931/19**
Appellant:	**Tracey Lee Dionysius**
Respondent:	**Tweedcom Pty Ltd**
Date of Decision:	**29 May 2020**
Citation:	**[2020] NSWWCCMA 95**

Appeal Panel:	
Arbitrator:	**John Wynyard**
Approved Medical Specialist:	**Dr Mark Burns**
Approved Medical Specialist:	**Dr James Bodel**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 4 March 2020, Tracey Lee Dionysius, the appellant, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Robin O'Toole, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 12 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 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 Guides) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5). "WPI" is reference to whole person impairment.

RELEVANT FACTUAL BACKGROUND

6. On 18 December 2019, following the issue of Consent Orders on 12 December 2019 the delegate of the Registrar referred this matter to an AMS for a whole person impairment of the lumbar spine caused by injury on 10 January 2010. The face of the referral noted a Complying Agreement dated 1 June 2020 in relation to the same injury.

7. Ms Dionysius was employed as a shop assistant and whilst working at the photolab noted increasing pain in her lower back. After about one week she ceased work and consulted her GP.

8. Imaging of her lumbar spine showed degenerative lumbar disease. She attempted CT guided L3 nerve root block injections and was referred to Dr R Campbell, Neurosurgeon in March 2010. She also underwent an EMG study which demonstrated a loss of the common perineal nerve at the level of the fibular head.

9. She was referred to a pain physician and underwent a pain management programme in 2003.

10. She trialled a spinal cord stimulator without success and she finally came under the care of Dr Lauren McEntee, Spinal Surgeon. He recommended surgery which was initially refused but then approved so that on 18 April 2018 Ms Dionysius underwent surgery to her lumbar spine in the form of a lumbar fusion.

11. The AMS assessed at 19% WPI.

PRELIMINARY REVIEW

12. 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.

13. The appellant did not request a re-examination by a Panel AMS. For the reasons given below no re-examination was necessary as no demonstrable error was made.

EVIDENCE

Documentary evidence

14. 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

15. 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

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

FINDINGS AND REASONS

17. 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.

18. 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.

19. The appellant submitted that the MAC should be revoked on the following grounds:

- That the AMS fell into error in assessing an entitlement to 1% WPI for the restrictions her injury has caused on restrictions of daily living (ADLS). It was submitted that the appropriate finding should have been a 2% WPI.
- The AMS failed to properly apply the provisions of Table 4.2 of the Guides[1]. In two respects:
    - It was submitted that Ms Dionysius is entitled to a further 1% WPI as she had undergone surgery on her lumbar spine at two levels.
    - A further error was alleged in the application of Table 4.2 by the AMS as the appellant submitted that the removal of the spinal cord stimulator and its battery on 20 November 2018 constituted a "second operation" in terms of Table 4.2 and that therefore another 2% WPI should have been assessed.
- The AMS failed to give adequate reasons for the deduction he made pursuant to s 323 of the 1998 Act.

ADLS

20. The AMS made the following findings in regard to this assessment:[2]

> "With respect to her activities of daily living Ms Dionysius reported the following:
>
> ***Self-Care:*** Able to perform activities of self-care without assistance, but with simple [3]accommodation, specifically putting on underwear and pants. She has to sit to achieve this, but can do it without assistance. She prefers to wear sarongs.
>
> ***Household duties:*** Able to perform activities of household duties without assistance, but with simple accommodation, specifically performing housework in general, which she stated that she 'can do all of that, but in small bursts'. She breaks up activities and has made minor accommodations in the manner in which she performs the tasks.
>
> ***Hobbies:*** Unable to perform some outdoor duties or recreational activities. She wants to play golf, tennis and squash, but was not playing these at the time of the injury, so has not lost the ability to do them."

21. In explaining his calculations the AMS said:[4]

> "…… Ms Dionysius is unable to undertake her usual hobbies or recreational activities, which attracts an additional 1% Whole Person Impairment. Though she has pain and difficulty performing activities of household chores, and self-care, these are still achieved by Ms Dionysius without assistance, though through accommodations in how they are performed. As such, there is no additional impairment from these categories of ADL".

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[1] Guides page 29.
[2] Appeal papers page 29-30.
[3] Appeal papers page 47.
[4] Appeal papers page 32.

22. Ms Dionysius made a statement on 2 October 2019. At [43] she set out the restrictions she was encountering. She said:[5]

> "43. I am unable to jog or run and avoid any movements involving bending or twisting. If traversing stairs I am continued to require to hold onto the railing and do not feel confident. I have difficulty with a number of activities of my daily living including:-
>
> (a) difficulty showering;
> (b) inability to undertake many of my normal household chores;
> (c) I can manage to get between 2 and 4 hours sleep on most nights. This is causing me to feel exhausted throughout the day;
> (d) I am unable to drive for periods greater than 25 minutes;
> (e) my intimate life with my husband has been extremely compromised and our sexual activity is virtually non-existent. This in turn has created stress on our marriage."

23. We were referred to the observations made by Dr John McKee dated 10 May 2019. Dr McKee was the applicant's Medico-Legal expert and he recorded the limitations of activities of daily living that were reported to him at that time[6]:

> "**Activities of Daily Living**
> ***Self-Care***
> ·While she is largely independent of toileting and grooming, she continues to sit down to dress and undress and she mostly wears a simple sarong when at home. She also experiences difficulty when showering.
> ***House Care***
> ·As previously observed on 8 December 2017, she has a severe incapacity to undertake any household chores. She believes her husband continues to undertake 90% of the household chores, but she can occasionally do the shopping, although she is only capable of lifting and carrying light purchases.
> ***Garden Care***
> ·As observed previously, she undertakes only minimal garden care and virtually all of the garden and lawn maintenance is undertaken by her husband.
> ***Sleep***
> ·Her sleep continues to be broken because of pain. Previously she had only been able to manage two hours a night, she can now sleep between two and four hours on most nights.
> ***Recreation***
> ·She had not played any sport including golf for many years but she does have an above-ground pool at home. About twice a week she attends a local pool but otherwise her main recreational activities involve reading, doing patchwork and crochet.
> ***Vehicle***
> ·Her sedan is fitted with automatic transmission and power steering and she is still able to drive the vehicle for between 20 and 25 minutes.
> ***Sexual Relations***
> ·She continues to avoid sexual relations because of known pain exacerbation."

24. We were referred also to the opinion of the medico-legal referee retained by the respondent, Dr Paul Robinson, Orthopaedic Surgeon. In his report of 8 August 2019[7] he recorded the appellant's complaints regarding activities of daily living. He said:[8]

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[5] Appeal papers page 53.
[6] Appeal papers page 78.
[7] Appeal papers page 418.
[8] At page 420.

“Activities of Daily Living

She has not returned to any work and does not believe she would be able to do so. She now sleeps approximately four hours before she wakes and sleeps in a separate room to her husband because of this disturbance of sleep.

She remains on WorkCover payments. She has had a reduction in her capacity to perform household chores undertaking minor activities but all the heavy work being performed by her husband. Cooking also is assisted by her husband and she only performed short episodes of cooking using mainly frozen food. A small amount gardening is possible. She drives an automatic motor vehicle small distances.

Her sporting pursuits have been markedly curtailed - she swims approximately twice a week as far as possible. She walks 5,000 steps a day as measured by pedometer. She has had a marked decrease in her sexual activities.”

25. Dr Robinson and Dr McKee assessed 2% WPI for ADLS.

Submissions

26. The appellant submitted that the AMS had not “properly” taken into account the opinions of the two medico-legal specialists on either side of the record, or Ms Dionysius’ statement.

27. Ms Dionysius also submitted the AMS failed to explain what he meant by the term “accommodation”. Ms Dionysius submitted that the use of the term implied that there was some form of restriction in relation to those ADLs described by the AMS.

28. Consideration of the provisions of the guidelines relating to ALDs accordingly would demonstrate an error in the assessment of 1%. The evidence showed that a correct assessment was 2% as Ms Dionysius suffered from a restriction in her ability to perform household duties.

29. The respondent referred to the wording of Chapter 4.35 of the Guides as to the interpretation of the entitlement to additional WPI for this topic. The respondent submitted that the explanation given by the AMS was adequate and encompassed the provisions of the Guides. It submitted that the “accommodation” referred to by the AMS were noted to be “minor” and it followed that the AMS was satisfied that Ms Dionysius was able to “cope with” her homecare duties.

30. The respondent submitted that there was no factual basis for the submission made by Ms Dionysius that the AMS had not had regard to the opinions that she relied upon.

Discussion

31. We concur with the submission of the respondent that there is no evidence that the AMS had failed to have regard to the opinions of the two medico-legal experts. In this regard an AMS has the benefit of the presumption of regularity that, in fulfilment of this administrative task he would have read the material that was sent to him.[9] His decision as to what was relevant and what was not was a matter for him/her.

32. Ms Dionysius relied upon the language of Chapter 3.5 of the Guides as demonstrating that the AMS has fallen into error.

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[9] See *Jones v The Registrar WCC* [2010] NSWSC 481 at [36] per James J., citing *Bojko v ICM Property Service Pty Ltd* [2009] NSWCA 175.

33. Chapter 3.5 provides:[10]

> "In the assessment process, the evaluation giving the highest impairment rating is selected. That may be a combined impairment in some cases, in accordance with the AMA5 Table 17-2 'Guide to the appropriate combination of evaluation methods', using the Combined Values Chart on pp 604–06 of AMA5."

34. It can be noted that Chapter 3 of the Guides is concerned with injuries to the lower extremity. The Guides relating to ADLs are contained in Chapter 4.

35. Chapter 4.33, 4.34 and 4.35 provide:

> "4.33 **Impact of ADL**. Tables 15-3, 15-4 and 15-5 of AMA5 give an impairment range for DREs II to V. Within the range, 0%, 1%, 2% or 3% WPI may be assessed using paragraphs 4.34 and 4.35 below. An assessment of the effect of the injury on ADL is not solely dependent on self-reporting, but is an assessment based on all clinical findings and other reports.
>
> 4.34 The following diagram should be used **as a guide** to determine whether 0%, 1%, 2% or 3% WPI should be added to the bottom of the appropriate impairment range. This is only to be added if there is a difference in activity level as recorded and compared to the worker's status prior to the injury.
>
> YARD/GARDEN/SPORT/RECREATION 1%
> HOME CARE 2%
> SELF CARE 3%"
> [The diagram is omitted, as its effect is described below]

36. It can be seen therefore that the criteria set out in chapter 4.35 have to be considered in the context of the overall discretion given to an AMS by virtue of the expression, in bold, "as a guide" in Chapter 5.34. It follows that the examples described in Chapter 5.35 are not intended to be read as strict criteria, but are simply examples to assist the AMS.

37. Ms Dionysius has made thorough submissions as to how a reasonable interpretation of the AMS's use of the word "accommodation" would raise an inference that Ms Dionysius was indeed restricted in her usual household tasks. She could complete them by making adjustments to the way she did them, but such adjustments carried a plain inference that they were made because Ms Dionysius was restricted. The appellant submitted the criteria for a 2% whole person impairment assessment under chapter 4.35 is that she be 'restricted', which was the upshot of the findings by the AMS.

38. We do not agree with that interpretation, with respect. The AMS is tasked with assessing a claimant as she/he presents before him on the date of the assessment.[11] Whilst he is able to accept or reject various opinions that are part of the evidence which he has to consider, he is not obliged to accept or reject any particular view. This is true where the assessments on both sides of the record have come to the same view, as Dr McKee and Dr Robinson have in the present case, that there is a 2% modifier pursuant to chapter 4.35.

39. It is preferable where such a circumstance arises for an AMS to explain his reasons for not agreeing with the unanimous view before him, but we do not think when dealing with the question of ADLs that the failure to do so constitutes a demonstrable error, nor the application of incorrect criteria.

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[10] Guides page 13.
[11] Guides, Chapter 1.6a page 3

40. The AMS is not bound by strict criteria when assessing the level of ADLs. He is entitled to form his judgment based upon his discussion with Ms Dionysius, informed as it may have been by the evidence of other practitioners and indeed her statement. He has a discretion, and whilst other minds might have reached a different conclusion, his assessment is within the scope allowed to him by the Guides.

Table 4.2 of the guides

Two level surgery

41. We note that the respondent has quite properly conceded that the AMS fell into error in refusing to give a further 1% for surgery on 2 levels because both levels were operated on in the one procedure.

42. The AMS was incorrect in coming to that view and we accordingly revoke his assessment in that regard.

Second operation?

43. The AMS in explaining his calculations said:[12]

> "… With respect to the Spinal cord stimulator, Section 4.41 of NSW GEPI 4th Edition applies, namely 'Spinal cord stimulator or similar device: The insertion of such devices does not warrant any additional Whole Person Impairment.' As the insertion does not warrant additional impairment, then neither does its removal. As such, there is no uplift from this category of Table 4.2."

44. The spinal stimulator was inserted in October 2015 by Dr Tadros. No report was lodged in that regard, but it was referred to by Dr Paul Robinson in his report of 8 August 2019[13].

45. Table 4.2 provides:

> "Table 4.2: Modifiers for DRE categories following surgery
>
> Procedures Cervical Thoracic Lumbar Spinal surgery with residual symptoms and radiculopathy (refer to 4.27 in the Guidelines) 3% 2% 3%
>
> Second and further levels 1% each additional level 1% each additional level 1% each additional level
>
> Second operation 2% 2% 2%
>
> Third and subsequent operations 1% each 1% each 1% each
>
> In summary, to calculate whole person impairment (WPI) for persisting radiculopathy (as per definition) following surgery:
>
> •• Select the appropriate DRE category from Table 15-3, 15-4, or 15-5;
>
> •• Determine a WPI value within the allowed range in Table 15-3, 15-4 or 15-5 according to the impact on the worker's ADL
>
> •• Combine this value with the appropriate additional amount from Table 4.2 to determine the final WPI."

[12] Appeal papers page 33-34.
[13] Appeal papers page 405.

46. A surgical procedure such as the insertion of a spinal cord stimulator is excluded by Chapter 5.41 from the definition of the WPI entitlement set out by Table 4.2. Chapter 5.41 states:

> "**Spinal cord stimulator or similar device:** The insertion of such devices does not warrant any additional WPI."

Submissions

Appellant

47. Ms Dionysius conceded that Chapter 4.41 excluded the insertion of a spinal cord stimulator from any additional WPI . However the Guides were silent as to whether any procedure for the removal of such device was also exempt from additional WPI.

48. This created an ambiguity within the Guides which should be solved by the application of an interpretation which was beneficial due to the nature of the scheme. We were referred to *Trustees of the Roman Catholic Church for the Diocese of Lismore (wrongly sued* as *Catholic Education Office) v Susanne Kay Smith*[14]*.*The removal of the stimulator accordingly entitled Ms Dionysius to a further 2% WPI, it was argued.

Respondent

49. The respondent referred to Chapter 4.41 of the Guides. The respondent submitted (presumably on a common sense basis) that there is no entitlement to additional WPI as insertion of a spinal cord stimulator would equally anticipate its removal. The respondent submitted that there would be an inconsistent application of the Guides to allow an additional WPI for the removal of a device which was explicitly excluded from additional WPI by the Guides themselves.

Discussion

50. Whilst it is correct that Chapter 4.41 is silent on the question of whether additional WPI should be excluded for the removal of a spinal cord stimulator, and the removal of the device is accordingly not technically included in the exclusion, we do not accept that such an entitlement may therefore be inferred.

51. When interpreting an ambiguous legislative instrument it is appropriate to apply the principle that a beneficial construction should be applied where that ambiguity occurs.

52. We were referred to matter no: M1-00424/10 *Roman Catholic Church for the Diocese of Lismore (wrongly sued* as *Catholic Education Office) v Susanne Kay Smith* [2010] NSWWCCMA 39, At paragraph [30] of that decision the Panel said:

> "30. There is therefore some ambiguity in the nature of the Guideline. Although not strictly speaking 'legislation' it is reasonable to apply the principles applicable to the interpretation of ambiguous provisions in legislation which is beneficial. In interpreting beneficial legislation any ambiguity in the provisions should be construed beneficially, and resolve in favour of the intended beneficiary; *Bull v AG* (NSW) (1913) 17 CLR 370; 14 SR (NSW) 179. *Bull* was cited *in Kajic v Hawker De Havilland Aerospace Pty Ltd* [2009] NSW WCC PD 136. President Judge Keating was in that case considering the WorkCover Guidelines For the Provision of Domestic Assistance, made pursuant to s.60AA(3) of the 1987 Act. At paragraph 34 he said:-

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[14] [2010] NSWWCCMA 39, at [30] - [33]

> ‘In my view the issue concerning the construction of the statutory provision and the subordinate legislation constituted by the relevant WorkCover Guidelines is both novel and complex, and in the absence of any prior authority on the issue it is appropriate that leave be given to refer the question of law.’

31. At paragraph 66 his Honour said:-

> ‘Workers compensation legislation has long been regarded as beneficial in nature. In beneficial legislation where any ambiguity exists it is to be construed beneficially. True significance of the provision should not be strained or exceeded, but it should be construed so as to give the fullest relief which the fair reading of its language will allow’.”

53. Whilst the Panel has considered that opinion, we find no ambiguity in Chapter 4.41. It would be non-sensical to interpret the guideline as intending to bestow an additional whole person impairment on the removal of a spinal cord stimulator when its insertion was explicitly excluded. A common sense interpretation giving meaning to the intention of the authors of the Guides is that not only the insertion but the removal of such devices was intended to be excluded.

SECTION 323

54. The AMS said in explaining his calculations[15]:

> “Ms Dionysius has degeneration of the lumbar spine that predated the injury from January 2010. In accordance with Section 1.28 of NSW GEPI 4th Edition, one-tenth is apportioned (2.1%) which results in 18.9%WPI, which is rounded to 19% Whole Person Impairment.”

55. “GEPI” is the AMS’s reference to the title of the Guides, “Guidelines for the Evaluation of Permanent Impairment.” Regarding the opinions of Drs McKee and Robinson, the AMS commented that the difference between the two assessments was the deductible proportion. Dr Robinson found 27% WPI and deducted 1/10th therefrom, whereas Dr McKee did not make any deduction to his total of 27% WPI.

Submissions

Appellant

56. Ms Dionysius referred to the assessments made by other medical practitioners in the case. It was submitted that Dr Ashwell did not make any deduction in his opinion of 12 January 2012, and whilst Dr McKee considered that there were pre-existing degenerative changes, he did not identify any s 323 deduction in his report of 21 December 2017.

57. Dr McEntee recorded that Ms Dionysius had been asymptomatic in his report of 18 May 2017.

58. Dr Robinson in his report of 6 August 2017 made a deduction of 10% based on degenerative change at T11/12.

59. We were referred to reasons given by the AMS for making his deduction. Ms Dionysius relied on the authority of *Cole v Wenaline Ptv Ltd*[16] to establish that the error made by the AMS was to act on hypothesis and conjecture to justify his assessment, rather than the evidence before him.

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[15] Appeal papers page 34.
[16] [2010] NSWSC 78 (*Cole*)

Respondent

60. The respondent submitted that the mere fact that a pre-existing condition was asymptomatic did not exclude that condition contributing to the impairment caused by the subject injury. We were referred to *Vitaz v Westform (NSW) Pty Limited*[17].

61. We were referred to the diagnosis by the AMS which was "exacerbation of a lumbar degeneration managed with Disc Replacement Surgical fusion at L4/5 and L5/S1"[18].

62. The respondent referred to some investigation results, all of which post-dated the date of injury, and which confirmed degenerative disc disease from L3/S1 with a posterolateral annular tear, a disc protrusion at L3/4, and a small central disc protrusion at L5/S1.[19]

63. It was submitted that the reasons given for the deductions made by the AMS were adequate in the circumstances.

Discussion

64. Section 323 of the 1998 Act provides relevantly:

> "(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."

65. The passage relied upon by the respondent in *Vitaz* was by Basten JA, McColl JA and Handley AJA agreeing, at [43]:

> "….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. In the absence of any medical evidence establishing a contest as to whether the pre-existing condition did contribute to the level of impairment, the complaint about a failure to give reasons must fail. An approved medical specialist is entitled to reach conclusions, no doubt partly on an intuitive basis, and no reasons are required in circumstances where the alternative conclusion is not presented by the evidence and is not all shown to be necessarily available."

66. In *Ryder v Sundance Bakehouse*[20] Campbell J said at [45]:

> "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

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[17] [2011] NSWCA 25 (*Vitaz*)
[18] Appeal papers page 32.
[19] MRI of lumbar spine 15 August 2011 - Appeal papers page 31.
[20] [2015] NSWSC 526 (*Ryder).*

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."

67. This dicta was adopted by Harrison AsJ in *Broadspectrum (Australia) Pty Ltd v Fiona Louise Wills*[21] at [65].

68. The passage in *Vitaz* acknowledges that an AMS can, sometimes on an intuitive basis, find that the asymptomatic pre-existing condition did contribute to the impairment caused by the subject injury. However, reasons are required to be given where an alternative conclusion is presented by the evidence and was necessarily available.

69. Campbell J found in *Ryder* that the relevant question was whether the pre-existing abnormality could be said to have contributed to the impairment caused by the subject injury. If the pre-existing condition or abnormality made a difference to the outcome in terms of the degree of impairment that was being assessed, then it was deductible. The question thus becomes as to whether we are satisfied that, but for the degenerative condition of the spine, the degree of impairment resulting from Ms Dionysius's injury of 10 January 2010 would not have been as great. This exercise requires a consideration of all of the relevant evidence, amongst which the asymptomatic condition of the back needs to be looked at in context of the type of work Ms Dionysius was doing.

70. Ms Dionysius was 43 years old when she suffered her injury and she stated that she never suffered any injury to her lower back prior to 10 January 2010, nor had she ever consulted a GP for back pain. The work she was doing she described in her statement[22]. She started work for the respondent in November 2007. At the time of her injury she said that her work had involved a lot of twisting and bending throughout the day without a break. She was required to bend to change photo magazines and paper for printing in the photolab department. The photo magazines that had to be changed weighted between 10 – 15 kg, and had to be replenished constantly throughout the day.

71. Ms Dionysius also had to change chemicals in the printing machines and collect and carry water 30 metres to do so. The water was carried in a bucket that weighed between 5 – 10 kg. She said that the machines required constant maintenance throughout the day especially when the shop was busy when a lot of people were ordering photographs.

72. In relying on *Cole,* the appellant submitted that the reasons given for the deduction were inadequate. The mere fact that radiological investigations taken after the injury showed that there was a degenerative condition in the lumbar spine was not enough, without more, to explain why the AMS thought that that degeneration had contributed to the degree of impairment that had been caused by the subject injury.

73. Ms Dionysius was working at a reasonably intensive job that required a lot of bending and twisting, and she had been working there for some three years at the time of her injury. She had not had any back problems before the subject injury.

74. The case is similar to the case of *Elcheikh v Diamond Formwork (NSW) Pty Ltd (in liquidation)*[23] where the worker began work as a labourer at age 20 and after performing arduous heavy duties began to experience back problems when he was 34. He underwent surgery, having been diagnosed to be suffering an underlying condition Scheuermanns disease. The AMS made a deduction of one half pursuant to s 323 because of that pre-existing condition. Schimdt J found that amongst relevant factors was that the worker had suffered no symptoms at all, notwithstanding that he was doing heavy work for some years.

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[21] [2018] NSWSC 1320 (*Broadspectrum*).

[22] Appeal papers page 47.

[23] [2013] NSWSC 365.

The AMS in that case had failed to consider all of the evidence, as had the Appeal Panel, and the findings were quashed.

75. The explanation in this case given by the AMS did not engage with the length of time Ms Dionysius had been asymptomatic, or the heavy nature of the work that she was required to do for the respondent.

76. We are not satisfied on the evidence before us that the pre-existing condition, which only came to light when investigations were undertaken following the injury, contributed to the degree of WPI caused by the subject injury.

77. The investigations themselves also place in doubt the assumption made by the AMS that Ms Dionysius's degeneration in the lumbar spine predated the subject injury. The respondent failed to refer to the first radiological investigation that took place. It was taken on 1 April 2010, just 12 weeks or so after the incident.[24]

78. It was reproduced by the AMS:[25]

> "MRI lumbar spine, dated 01/04/2010 - L3/4 level, there is no schwannoma or neurofibroma present in the neural foramina. On MR no disc herniation, no lateral disc herniation and no specific sequestered disc fragment could be identified. L4/5 Level there is no disc herniation or foraminal stenosis. L5/S1 level there is mild loss of hydration of the disc which is not necessarily abnormal. There is a very small central bulge with no compression of the thecal sac and no compromise of the exiting nerves."

79. The results of that MRI scan showed very little by way of abnormality. We note the radiologist's comment regarding the mild loss of hydration at L5/S1, and we are satisfied that the very small central bulge, with no compression in the thecal sac and no compromise of the existing nerves, is also normal - or at least not necessarily abnormal. What that investigation does show is that the appellant was not suffering from any degenerative change, which was first noted over a year later in the CT scan of 29 April 2011.

80. Accordingly the assessment by the AMS pursuant to s 323 is revoked, and we find that there is no deduction applicable.

Summary

81. We therefore find that the appellant has not succeeded in her appeal against the assessment regarding the restrictions in her activity of daily living, nor her challenge to the assessment regarding the removal of the spinal stimulator. However, she has succeeded in her appeal against the refusal by the AMS to apply the modifiers in Table 4.2 regarding the two level nature of her surgery, and she has succeeded in her challenge to the deduction made pursuant to s 323.

82. She is accordingly entitled to a further 3.1% WPI: - 1% for the surgery on two levels of her spine, and a further 2.1% for the deduction made by the AMS.

83. For these reasons, the Appeal Panel has determined that the MAC issued on 12 February 2020 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

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[24] Appeal papers page 475.
[25] Appeal papers page 31.

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **5931/19**
Applicant: **Tracey Lee Dionysius**
Respondent: **Tweedcom Pty Ltd**

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 Robin O'Toole 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)**
Lumbar Spine	10/1/2010	Chapter 4 Pages 26-29 Tables 4.1 and 4.2	Chapter 15 Page 384 Table 15-3	22%	Nil	22%
Total % WPI (the Combined Table values of all sub-totals)					**22%**	

John Wynyard
Arbitrator

Dr Mark Burns
Approved Medical Specialist

Dr James Bodel
Approved Medical Specialist

27 May 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*.

L Funnell

Leo Funnell
Dispute Services Officer
As delegate of the Registrar