WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-2461/19**
Appellant:	**Robert Thomas Brooker**
Respondent:	**Toll Group Pty Ltd**
Date of Decision:	**16 June 2020**
Citation:	**[2020] NSWWCCMA 105**

Appeal Panel:	
Arbitrator:	**Ms Deborah Moore**
Approved Medical Specialist:	**Dr J Brian Stephenson**
Approved Medical Specialist:	**Dr Gregory McGroder**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 27 March 2020, Robert Thomas Brooker lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Peter Giblin, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 5 March 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 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).

6. **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 Workers compensation medical dispute 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, notwithstanding the appellant’s request, we consider that we have sufficient evidence before us to enable us to determine the appeal.

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.

SUBMISSIONS

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

11. In summary, the appellant submits that the initial MAC of the AMS dated dated 28 August 2019 was correct, but that the "revised" MAC dated 5 March 2020 contained an error in that the AMS then made a deduction pursuant to section 323 of the 1998 Act which was inconsistent with all the evidence.

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

FINDINGS AND REASONS

13. 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.

14. 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.

15. The appellant was referred to the AMS for assessment of whole person impairment (WPI) in respect of the lumbar spine and scarring (Temski) resulting from a deemed date of injury of 14 October 2015.

16. In his initial MAC, the AMS obtained the following history:

> "He was 10 years in the job…
>
> He sustained a soft tissue injury to his low back when he was lifting a roller door on a truck on 27 January 2011. He sought medical advice and had some x-rays followed by a spine injection together with some physiotherapy. He did light duties for six months and had no time off work.
>
> He said he made a full recovery, or nearly.
>
> Later on that year he aggravated his back when he tripped and fell on the floor at work. There was no time off work and he just soldiered on, as he viewed it as a temporary aggravation. He was able to continue with full time normal duties.
>
> However, by mid-2015 his low back pain had crept back and increased and he went and saw his doctor. A steroid injection was administered on 5 June 2015.

When he was at work on 14 October 2015, he noticed pain in his right buttock, which had worsened and went down his right leg. He woke up the next day with severe disabling right leg pain preventing him from walking properly so he went to a nearby public hospital, at Campbelltown. They gave him some pain killers and sent him home. The pain was so severe in his back and right leg that the next day the ambulance took him back to the same hospital. He had a more steroid injections without much relief. On 30 October 2015, he saw a neurosurgeon who advised him to have an MRI scan that diagnosed a right sided disc protrusion at L4/5 impinging on the right L5 nerve root. For six weeks he was in a wheelchair until he had surgery on 14 November 2015 in the form of a right sided L4/5 discectomy.
For six months he remained off work and then he went back on suitable duties with an automatic truck and a back support and a different delivery run which did not involve a lot of heavy lifting.
He ceased that job in 2018 and became self-employed driving a cement truck as an owner-operator. All the chutes are aluminium and he said it is a very light work environment compared to his former job."

17. After documenting the appellant's present treatment and symptoms, the AMS then noted details of prior injuries as follows:

    "He sustained a soft tissue injury to his low back while he was working at Linfox as a forklift driver. It was about 1998, and they used to have to make up orders by hand. He had moved about 1500 cartons of beer on the shift and he developed pain in the upper part of his back. He had a few sessions of physiotherapy and a few days off work and he said he made a full recovery getting back to unrestricted normal duties."

18. As regards "social activities/ADL's" the AMS said:

    "He lives in a single storey, three bedroom and one bathroom house with his wife, who is a full time office manager at TOLL, and his 4 year old son."

19. The AMS then set out his findings on physical examination.

20. He then noted the various radiological reports he had, stating as follows:

    "3/2/2011 MRI scan lumbar spine – report only. Noting multi-level spondylitic changes at L4/5 and L5/S1 with a protrusion encroaching on the right S1 nerve root with some displacement. There is mild straightening of the lumbar lordosis.

    27/5/2015 CT scan lumbar spine – report only. Noting multi-level spondylitic changes throughout the lumbar spine. There is calcification in the disc at L3/4 with moderate facet joint changes and there is a moderate disc bulge partially calcified at L4/5 just indenting the thecal sac and the origin of the right aL5 nerve root. There is moderate spondylitic changes on the right side at L5/S1 with some displacement of the right S1 nerve root.

    16/10/2015 CT scan lumbar spine – report only. Notes multi-level spondylitic changes more pronounced at L4/5 and L5/S1. There is a right sided bias of the disc bulge at L4/5.

    21/10/2015 MRI scan lumbar spine– report only. Notes multi-level spondylitic changes. At L4/5 there is a bias towards the right side but no comments pertaining to the L5 nerve root. There is some contact of the right S1 nerve root. Moderate facet arthropathy is noted throughout the lumbar spine."

21. In summarising the injuries and diagnoses, the AMS said:

> "This gentleman presents with a specific history of recurrent low back symptomatology occurring in the course of his duties from 2011 with a deemed date 14 October 2015 and then undergoing subsequent surgery for a frank right sciatica.
>
> Throughout today's physical examination and history taking, Mr Brooker was entirely cooperative and credible."

22. When asked the question: "Is any proportion of loss of efficient use or impairment or whole person impairment, due to a pre-existing injury, abnormality or condition?" the AMS replied "Nil."

23. The AMS assessed 15% WPI in respect of the lumbar spine, and made no assessment with respect to scarring.

24. The AMS concluded:

> "I then turned my attention to the considerations of Section 323.
>
> Firstly, I had no radiological investigations which I could appraise. I had to rely on the reports only, on which I would not be entirely satisfied to make a deduction decision.
>
> I am assuming, that from 2011, there was an application of the deemed date of injury.
>
> Prior to 2011, he had the best part of 15 years of an asymptomatic lumbar spine in which he had no restrictions in terms of heavy physical work.
> For these reasons, I have not made any deduction under Section 323."

25. In the revised MAC dated 5 March 2020 (the subject of the appeal), the AMS confirmed that he had now been provided with the reports of Dr Shatwell dated 5 and 15 August 2019.

26. The AMS repeated many of his earlier comments, particularly as to the history and subsequent progress of the appellant.

27. He also had the films of the CT scan performed on 27 May 2015. He commented:

> "Noting multi-level spondylitic changes throughout the lumbar spine. There is calcification in the disc at L3/4 with moderate facet joint changes and there is a moderate disc bulge partially calcified at L4/5 just indenting the thecal sac and the origin of the right L5 nerve root. There is moderate spondylitic changes on the right side at L5/S1 with some displacement of the right S1 nerve root.
> *I have seen these films, and the spondylitic changes in the upper lumbar spine at L3/4 and L4/5 should be classified as very minor. The changes at L5/S1 are definitely moderate and there is clear evidence of impingement of a nerve root."*

28. The other radiological material was as reported previously.

29. On this occasion when asked the question: "Is any proportion of loss of efficient use or impairment or whole person impairment, due to a pre-existing injury, abnormality or condition?" the AMS replied: "Yes."

30. He then said:

> "I then turned my attention to the considerations of Section 323.
>
> Firstly, apart from the plain x-rays of his pelvis and the CT scan of the lumbar spine 27/5/2015, there were no radiological investigations physically available that were relevant to 2011 particularly the MRI scan lumbar spine 3/2/2011. He tells me it was lost on the train.

Prior to that date he had the best part of 15 years of asymptomatic lumbar spine in which he had no restrictions that I was able to ascertain, in terms of heavy work or any other activities. (I note that he has always been a keen motor cycle rider)."

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

> "I have read a copy of the report of Dr Shatwell dated 5 August 2019.
>
> Page 2, last two paragraphs, notes the history of the injury in early January 2011 is followed up by reference to the MRI scan 3 February 2011 and the subsequent epidural steroid injection on 31 March 2011. It is not clear from Dr Shatwell's report whether he actually viewed the physical MRI scan of 3/2/2011.
>
> Page 3, 1st paragraph notes the history of being on selected duties for 9 months and then gets
> back to full pain free duties for four years…
>
> Dr Shatwell makes a deduction of 1/10th under Section 323 due to pre-existing impairment of a degenerative nature present at the time of the injury 14 October 2015.
>
> I have read a copy of the report of Dr Blum dated 16 December 2015.
>
> On page 29 Dr Blum makes reference to the MRI scan dated 3 February 2011 and makes the comment, 'there does not appear to be any underlying degenerative disease which is present as stated in 3/2/2011'. 'They were not clinically obvious'. Then he goes on to say, 'there were no other related conditions bar the degenerative spinal disease'. Dr Blum again says 'the changes of the MRI scan are seen in most heavy workers eventually'…
>
> In summary, Dr Blum's opinions are that there was pre-existing asymptomatic degenerative changes in the lumbar spine in 2011 and that it continued to deteriorate up until 2015.
>
> That is a reasonable opinion with which I would agree.
>
> In reference to the *Cole v Wenaline* case, given that the deemed sate of injury is 14 October 2015, and noting that I have seen the CT scan 27 May 2015, together with the antecedent history from 2011 through to 2015, I would make a deduction of 1/10th under Section 322.
>
> Therefore, I would agree with the general thrust of the opinions of Dr Shatwell and Dr Blum in that regard.
>
> My only area of reservation is that I did not have the radiological investigations of 3/2/2011 to perform a comparative analysis."

32. As the appellant correctly points out, the AMS obtained a history of "a soft tissue injury to his low back while he was working at Linfox" in about 1998. The AMS then said: "He developed pain in the upper part of his back. He had a few sessions of physiotherapy and a few days off work and he said he made a full recovery getting back to unrestricted normal duties."

33. Thereafter, there does not appear to be any history or clinical record of the appellant then experiencing low back symptoms until 27 January 2011 when he injured his back again in the employ of the respondent.

34. Again, the AMS recorded that "he made a full recovery, or nearly." He had some symptoms from time to time but managed these with exercise, and he remained at work.

35. The appellant then began to experience increasing back symptoms in 2015, which became severe on 14 October 2015.

36. Shortly thereafter, he had surgery.

37. The terms of the referral to the AMS noted a deemed date of injury of 14 October 2015. This is consistent with the pleaded injury which was said to have occurred as a result of "the nature and conditions" of his employment with the respondent from 2007 to 14 October 2015.

38. Consent Orders to this effect were apparently made in June 2019.

39. In his initial MAC, the AMS said:

> "I am assuming that from 2011, there was an application of the deemed date of injury. Prior to 2011, he had the best part of 15 years of an asymptomatic lumbar spine in which he had no restrictions in terms of heavy physical work. For these reasons, I have not made any deduction under Section 323."

40. In the revised MAC, the AMS simply said:

> "In reference to the *Cole v Wenaline* case, given that the deemed sate of injury is 14 October 2015, and noting that I have seen the CT scan 27 May 2015, together with the antecedent history from 2011 through to 2015, I would make a deduction of 1/10th under Section 322."

41. The AMS, with respect, has failed to provide any analysis of the evidence as regards any pre-existing condition, and appears to have based his decision to make a deduction solely on the CT scan of 27 May 2015. His comments are also inconsistent with his earlier remarks in the initial MAC that "Prior to 2011, he had the best part of 15 years of an asymptomatic lumbar spine in which he had no restrictions in terms of heavy physical work."

42. He also appears to have misunderstood the nature of the referral in terms of the duration of the employment with the respondent which of course included the period "from 2011 through to 2015."

43. Of significance in our view is the radiological material in October 2015.

44. The CT scan performed on 16 October 2015 was reported as follows:

> "There is a mild diffuse disc bulge at L3-4 causing minor anterior impression on the thecal sac but no significant nerve root compression is seen at this level. At L4-5 there is a right paracentral and foramina! disc herniation. This appears to abut the right L5 nerve root in the lateral recess but does not appear to compromise the right L4 intervertebral foramen. L5-S1 there is a further central and right paracentral disc herniation with some marginal calcification which appears to efface the right S1 nerve root in the lateral recess."

45. In a report to the respondent dated 30 October 2015, Dr Parkinson, the treating neurosurgeon, wrote:

> "I have reviewed Mr Brooker today in my clinic. He has a history of acute right sided sciatica over the last 2 weeks from an injury whilst closing the door of his truck having been loading large cartons into the truck. He has had severe sciatica with right leg numbness and weakness since over the anterolateral shin and medial great toe. Clinically he has some weakness in the foot dorsiflextion and eversion.
>
> The MRI of 21.10.15 shows an acute right posterolateral disc herniation with compression of the right L5 nerve root. I note the history of back injury 4 years ago and I also note *he did not have sciatica at that stage*. (our emphasis). I have no doubt that this is a work related injury.

I would recommend urgent admission to hospital for a right L4/5 Microdiscectomy due to the nerve root compression symptoms. If there is a long delay in his treatment he runs the risk of having permanent nerve damage."

46. In short, the appellant had sustained an acute disc lesion with a swollen right L5 nerve root requiring urgent treatment.

47. No such acute findings were described in the scans performed in 2011, nor in the CT scan of May 2015.

48. Importantly also is the opinion of Dr Blum in his report of 6 January 2016 where he said:

> "There is reference of degenerative changes in an earlier MRI dated 03.02.2011…
>
> There is certainly underlying, pre-existing degenerative spinal disease and related condition that did appear to be present in the MRI findings dated 03.02.2011. The likely aetiology of the MRI findings of that date seems to be basically the result of his eight years with Toll where he had the two incidents, one in 2011 and the second in 2015.
> There does not appear to be any underlying degenerative disease which is present as stated in 03.02.2011, findings but they were not clinically obvious.
> There were no other related. conditions bar the degenerative spinal disease.
>
> The likely aetiology remains a chronic progressive degenerative situation of his spine and basically this was not evident until 2011 but certainly was present earlier than 2011 and was not clinically a problem.
> I think that the work as a Toll driver is a substantial contributing factor to his current low back injury.
>
> I consider Toll Holdings Limited should accept all liability in respect of Mr Brooker's claimed 14.10.2015, lower back injury because he had no problems from 2011 until the incident on 14.10.2015."

49. In our view, Dr Shatwell has not adequately explained his reasoning behind the deduction he made. He simply said:

> "Because of pre-existing impairment due to degenerative change at the time of the injury of 14 October 2015, a 10% deduction is made as no more accurate assessment can be made on the information available."

50. He also has failed to appreciate the nature of the injury, namely a back injury resulting from the appellant's employment with the respondent from 2007 to 14 October 2015.

51. In short, neither the AMS or Dr Shatwell seem to have appreciated that for a section 323 deduction to be made in cases where the injury arose as a result of employment over a period of time, the "pre-existing condition or abnormality" has to pre-exist the commencement of the employment activity.

52. As the appellant correctly points out,

> "The AMS made an error of law by failing to apply the law as determined in *Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416, in that he made a s.323 deduction for a condition that was not found to pre-exist the commencement of the relevant employment activity."

53. The appellant's submissions contain extensive references to a number of authorities which we have considered but do not intend to fully repeat here.

54. *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 is authority for the proposition that “the fact that there was a previously assessable impairment does not give rise to a deductible proportion unless it can be shown that that impairment contributes to the current impairment.”

55. There is nothing in the evidence that suggests that the injury in about 1998 with Linfox gave rise to any assessable impairment.

56. Thus, the only relevant employment is that with the respondent from 2007 to October 2015 and there is no evidence that minor degenerative changes noted on the scans in 2011 resulted in some degree of impairment.

57. As the appellant correctly stated:

> “For a deduction to be made pursuant to s.323, it has to be concluded the pre-existing condition was present before the relevant employment activity commenced. The AMS has made a deduction without making such a finding.”

58. For these reasons, the Appeal Panel has determined that the MAC issued on 5 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*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **2461/19**
Applicant: **Robert Thomas Brooker**
Respondent: **Toll Group 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 Peter Giblin 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 the Guidelines**	**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. Lumbar spine	14/10/2015 - Deemed	Chapter 4 Page 26 Paragraph 4.2 Page 29 – 3%	Page 384 Table 15.3 DRE 3 category – 10% ADLs – 2%	15%	Nil	15%
2. Scarring -TEMSKI	14/10/2015 - Deemed	Page 178 Table 8.2 Class 1		0%	0%	0%
3.						
4.						
5.						
6.						
Total % WPI (the Combined Table values of all sub-totals)					**15%**	

WORKERS COMPENSATION COMMISSION

Deborah Moore
Arbitrator

Dr J Brian Stephenson
Approved Medical Specialist

Dr Gregory McGroder
Approved Medical Specialist

16 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*.

T Ng

Tina Ng
Dispute Services Officer
As delegate of the Registrar