WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-594/20**
Appellant:	**Matthew John Cornally**
Respondent:	**Secretary, Department of Education**
Date of Decision:	**24 June 2020**
Citation:	**[2020] NSWWCCMA 112**

Appeal Panel:	
Arbitrator:	**Carolyn Rimmer**
Approved Medical Specialist:	**Dr Frank Bors**
Approved Medical Specialist:	**Dr Ian Wechsler**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 17 April 2020 Matthew John Cornally (the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Michael Steiner, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 19 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 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 in this matter 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,* 4th ed (AMA 4).

RELEVANT FACTUAL BACKGROUND

6. The appellant was employed by the respondent as a special needs teacher at Tomaree Public School where he contracted chicken pox as a result of exposure to the virus at the school. The chicken pox caused a visual disturbance and the development of an acute right retinal necrosis secondary to a varicella zoster virus infection. This resulted in a loss of vision in the right eye. The appellant is now virtually totally blind as the vision in his left eye has been virtually blind since childhood due to retinopathy of prematurity.

7. A medical dispute arose between the parties regarding the degree of the appellant's permanent impairment. The appellant commenced these proceedings in the Commission seeking determination of his claim for lump sum compensation in respect of an injury to the visual system that occurred on 5 February 2017.

8. The matter was referred to the AMS, Dr Steiner, in the Referral for Assessment of Permanent Impairment to Approved Medical Specialist dated 2 March 2020 for assessment of whole person impairment (WPI) in respect of the visual system as a result of the injury on 5 February 2017.

9. The AMS examined the appellant on 16 March 2020. He assessed 100% loss of vision in the left eye and 100% loss of vision in the right eye with an overall WPI of 85%. The AMS then deducted 69% WPI pursuant to s 323, which resulted in a total assessment of 16% WPI in respect of the injury on 5 February 2017.

PRELIMINARY REVIEW

10. 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.

11. The appellant did not request that he be re-examined by an AMS, who is a member of the Appeal Panel.

12. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the appellant to undergo a further medical examination because there was sufficient evidence by way of medical reports and clinical investigations in relation to assessment of the loss of vision on which to make a determination.

FRESH EVIDENCE

13. The appellant attached a report from Dr Michael Delaney dated 29 March 2020 to the Form 10 - Appeal Against a Decision of Approved Medical Specialist and the appellant's submissions. The appellant in the Form 10- Appeal Against a Decision of Approved Medical Specialist under the section headed "Supporting Documentation" answered "No" to the question " Do you seek to rely on the availability of additional relevant information that was not available before the medical assessment or that could not reasonably have been obtained before the medical assessment?". The Appeal Panel, therefore, assumed that the appellant was not seeking to rely on Dr Delaney's report of 29 March 2020 as fresh evidence. The Appeal Panel determined not to admit Dr Delaney's report as fresh evidence. However, the Appeal Panel regarded Dr Delaney's report dated 29 March 2020 as part of the appellant's submissions.

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.

17. The appellant's submissions include the following:

(a) After carrying out an examination, the AMS concluded that the appellant, before the work injury, had a previously blind left eye and only moderate vision in the right eye where he has had cataract surgery and laser in the past. The appellant has developed varicella retinitis in the right eye and was left with two blind eyes. The AMS accepted that there was a 100% loss of vision in the left eye and a 100% loss of vision in the right eye and assessed the overall whole person impairment as 85% WPI. This part of the assessment was the same as that made by Dr Delaney and Dr Stern and the appellant has no issue with that part of the determination by the AMS.

(b) The AMS made a deduction of 69% WPI pursuant to s 323 and in so doing made a demonstrable error and applied incorrect criteria.

(c) The approach adopted by the AMS was to make an assessment of what he considered to be the impairment that existed prior to the work injury. The AMS considered that there was a 58% visual impairment in the right eye due to visual acuity loss and also a 15% visual impairment due to field loss. The AMS combined these figures to produce an overall impairment of the right eye of 64%. Using Table 7, this equated to an impairment of 75% of the visual system, which equated to 69% whole person impairment. The AMS simply proceeded to deduct the previous impairment from the impairment that existed after the injury.

(d) The AMS assumed that because there was a pre-existing impairment that there should be a deduction of an amount equal to that impairment.

(e) A deduction pursuant to s323 must be made on the evidence that the pre-existing condition caused or contributed to the impairment and an assessment must have regard to the evidence of the actual consequences of the earlier injury, pre-existing condition or abnormality (*Cole v Wenaline Pty Ltd* [2010] NSWSC 78 (*Cole*)). In this matter the AMS did not embark upon the line of inquiry as described by Schmidt J in *Cole* and there is nothing in the reasons of the AMS which considers the cause of the current impairment and considers or explains how it is that the pre-existing impairment in fact contributes to the current impairment.

(f) The AMS erred by not engaging in that test. At no stage did the AMS consider the consequences of the work injury and ask the relevant question which is whether the impairment resulting from the work injury has been made greater because of the pre-existing impairment.

(g) A proper examination of the medical material shows that the impairment, at least in the right eye, would be the same whether or not there was a pre-existing impairment.

(h) The injury suffered by the appellant was initially contracting chicken pox as a result of exposure at school. Unfortunately, the chicken pox caused a visual disturbance and caused the development of varicella retinitis. It was that condition which caused loss of vision in the right eye amounting to 100% blindness.

(i) Dr Delaney saw the appellant at the request of his instructing solicitors on 6 June 2019. Dr Delaney records that the discharge summary from Sydney Eye Hospital, dated 2 March 2017, diagnosed the appellant's condition as acute right retinal necrosis, secondary to a varicella-zoster virus infection. It was the necrosis which caused the blindness in the right eye. Dr Delaney considered that the appellant's current loss of vision was due directly to the acute retinal necrosis and detachment and its other complications. Given the nature of the condition, it was clear that even if the appellant had a pre-existing 6/6 vision, his injury would have nonetheless resulted in a total loss of vision in the right eye. In other words, the appellant's current impairment would be the same regardless of the level of any impairment existing prior to the work injury.

(j) Applying the words of Campbell J, it follows that the pre-existing condition has not resulted in a greater impairment than would otherwise have been the case. Accordingly, at least in respect of the right eye, there was no basis for making a s 323 deduction.

(k) The appellant was seen by Dr Stern at the request of the respondent on 22 August 2019. In his report dated 9 September 2019, Dr Stern opined that the exposure to chickenpox infection has caused his varicella zoster acute retinitis and the chain of complications ending in blindness in the right eye. Dr Stern's opinion was also consistent with the conclusion that the work injury, being the chicken pox infection, resulted in total blindness in the right eye and that outcome was unaffected by the pre-existing restrictions in visual acuity. In other words, the consequence of the chicken pox infection was total blindness in the eye and this would have been the case regardless of the pre-existing impairment.

(l) The proper conclusion is that the injury has resulted in a total loss of vision in his only eye. This has resulted in an 85% whole person impairment.

(m) The chicken pox infection would also have resulted in total loss of vision in the left eye as well. This was not considered by the medical practitioners, but it must follow given the nature of the infection and the consequences for the right eye.

(n) For the reasons set out above, the AMS has made a demonstrable error by not applying the terms of the legislation. When the legislation is properly considered, the correct conclusion is that there should be no deduction.

18. The respondent’s submissions include the following:

(a) In respect of the submission that the assessment was made on the basis of incorrect criteria, the matters raised by the appellant do not provide a basis for this ground of appeal as there is no clear submission that the AMS failed to address the Guidelines.

(b) Dr Delaney, in his report of 29 March 2020, specifically conceded that the AMS had strictly applied the relevant guidelines in accordance with AMA 4 Chapter 8.

(c) In respect to the submission that the assessment contains a demonstrable error the matters raised by the appellant did not provide a basis for this ground of appeal.

(d) There was no express opinion from any of Dr Delaney, Dr Stern or Dr Steiner that in the absence of the pre-existing conditions affecting the left and right eyes that the workplace injury would necessarily have resulted in a 100% loss of vision in both the left and right eyes.

(e) So far as the left eye is concerned there was no evidence that the left eye was affected by the contraction of the chicken pox infection. Therefore, the submission that the chicken pox infection would have also resulted in a total loss of vision in the left eye is mere speculation.

(f) It was determined that the 100% loss of vision in the left eye and the 100% loss of vision in the right eye has resulted in a WPI of 85%. As matter of logic the pre-existing loss of vision in the left eye has necessarily contributed to the WPI assessment made by the AMS and, therefore, the WPI assessed subsequent to the workplace injury is necessarily made greater and therefore contributed to by the pre-existing loss of vision in the left eye.

(g) In respect of the right eye the AMS has not 'simply proceeded to deduct the previous impairment from the impairment that existed after the injury'.

(h) In answer to the specific 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 answered 'yes'.

(i) On the face of the certificate the AMS expressly found that the pre-existing impairment assessed relative to the right eye had in fact contributed to the whole person impairment assessment made after the workplace injury.

(j) Both Dr Stern and Dr Delaney accepted that there is a contribution, although of varying degree, by the pre-existing impairment in the right eye to the impairment assessed subsequent to the workplace injury.

(k) The assessment was correct and should be confirmed.

FINDINGS AND REASONS

19. 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.

20. 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.

21. The role of the Medical Appeal Panel was considered by the Court of Appeal in the case of *Siddik v WorkCover Authority of NSW* [2008] NSWCA 116. The Court held that while prima facie the Appeal Panel is confined to the grounds the Registrar has let through the gateway, it can consider other grounds capable of coming within one or other of the section 327(3) heads, if it gives the parties an opportunity to be heard. An appeal by way of review may, depending upon the circumstances, involve either a hearing de novo or a rehearing. Such a flexible model assists the objectives of the legislation.

22. Section 327(2) was amended with the effect that while the appeal was to be by way of review, all appeals as at 1 February 2011 were limited to the ground(s) upon which the appeal was made. In *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] SC 1792 Davies J considered that the form of the words used in s 328(2) of the 1998 Act being, 'the grounds of appeal on which the appeal is made' was intended to mean that the appeal is confined to those particular demonstrable errors identified by a party in its submissions.

23. In this matter, the Registrar has determined that he is satisfied that a ground of appeal under s 327(3 (d) is made out in relation to the AMS's application of s 323 of the 1998 Act.

24. The Appeal Panel reviewed the history recorded by the AMS, his findings on examination, and the reasons for his conclusions as well as the evidence referred to above. The Panel accepted the findings on examination that the AMS made in the MAC.

Assessment of the visual system and deduction pursuant to s 323

25. The AMS on page 2 of the MAC under "Details of any previous or subsequent accidents. injuries or condition" wrote:

> "He was a premature baby having been born at 26 weeks and developed significant retinopathy of prematurity. The left eye has always been totally blind. On the right he had a shallow anterior chamber and has had a laser iridotomy for this. He also developed a cataract and has had cataract surgery with placement of an intra ocular lens.
> Subsequently he has developed neovascular glaucoma and has had placement of a tube shunt in the right eye."

26. The AMS on page 6 of the MAC under "summary of injuries and diagnoses" wrote:

> "He had a previously blind left eye and only moderate vision in the right eye where he's had cataract surgery and laser in the past. He's developed varicella retinitis in the right eye and is left with two blind eyes."

27. The AMS on page 3 of the MAC under "Evaluation of permanent impairment" wrote:

> "e. Is any proportion of loss of efficient use or impairment or whole person impairment, due to a previous injury, pre-existing condition or abnormality? Yes.
> f. If so, please indicate which body part/system is affected by the previous injury, pre-existing condition or abnormality. The visual system is affected by a pre-existing condition as he'd had retinopathy of prematurity with a blind left eye and also had had stable field defects in the right eye. He'd had cataract surgery in the right eye."

28. The AMS on page 4 of the MAC under "Reasons for Assessment" wrote:

> "The whole person impairment is 16%.
> In making that assessment I have taken account of the following matters:-
> He had had a field defect in the right eye which had been stable and noted on several occasions by Dr Manning his Ophthalmologist. He'd also had cataract surgery in the right eye and the left had always been blind.
> b. An explanation of my calculations (if applicable)
> There is 100% loss of vision in the left eye. There is also 100% loss of vision in the right eye.
> Prior to the development of the retinitis he had had cataract surgery to the right eye and had vision that had been variously assessed at between 6/12 and 6/18.
> He'd also had stable field defects. In view of this the total whole person impairment is 85%.

Prior to the injury the right eye had had an implant in place and there was 58% impairment due to the visual acuity. There is also 15% impairment due to the field loss. Using the Combined Values Chart this gives an overall impairment of the right eye of 64%. Using Table 7 this equates to a pre-existing impairment of 75% of the visual system which equates to 69% whole person impairment. Therefore the whole person impairment is 85% minus 69% giving an overall whole person impairment of 16%."

29. In commenting on the other medical opinions, the AMS wrote:

> "The impairment I have calculated is significantly less than that calculated by Dr Delaney and Dr Stern. Dr Delaney ignores the left eye as this has always been blind however it is part of the visual system and I don't understand why this should be done. Dr Stern ignores the fact that the right eye has had cataract surgery and has an implant because this is not related to the incident; it is however pre-existing and in my opinion needs to be taken into account."

30. The AMS on page 5 of the MAC concluded that the appellant suffered from a relevant pre-existing condition, namely, retinopathy of prematurity with blind left eye and previous cataract surgery in the right eye and previous field loss in the right eye.

31. Section 323 of the 1998 Act provides:

> "323 **Deduction for previous injury or pre-existing condition or abnormality**
> (1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act} or that is due to any pre-existing condition or abnormality.
> (2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence."

32. Part 10 of the Guidelines provides:

> "AMA 4 Chapter 8 (p 209) applies to the assessment of permanent impairment of the visual system, subject to the modifications set out below. Before undertaking an impairment assessment, users of the Guidelines must be familiar with:
>
> - the Introduction in the Guidelines
> - chapters 1 and 2 of AMA5
> - the appropriate chapter(s) of the Guidelines for the body system they are assessing
> - the appropriate chapter(s) of AMA4 for the body system they are assessing.
>
> The Guidelines take precedence over AMA4 and AMA5."

33. AMA 5 at 1.6b under “Apportionment Analysis” provides:

> “Apportionment analysis in workers’ compensation represents a distribution or allocation of causation among multiple factors that caused or significantly contributed to the injury or disease and resulting impairment. The factor could be a pre-existing injury, illness, or impairment. In some instances, the physician may be asked to apportion or distribute a permanent impairment rating between the impact of the current injury and the prior impairment rating. Before determining apportionment, the physician needs to verify that all the following information is true for an individual:
>
> 1. There is documentation of a prior factor.
>
> 2. The current impairment is greater as a result of the prior factor (ie prior impairment, prior injury or illness).
>
> 3. There is evidence indicating the prior factor caused or contributed to the impairments, based on a reasonable probability (>50% likelihood).”

34. Section 10.2 of Guidelines provides that Chapter 8 (pp 209-222) of AMA 4 are adopted for the Guidelines without significant change.

35. Section 1.27 of the Guidelines provides:

> “The degree of permanent impairment resulting from pre-existing impairments should not be included in the final calculation of permanent impairment if those impairments are not related to the compensable injury. The assessor needs to take account of all available evidence to calculate the degree of permanent that pre-existed the injury.”

36. Section 1.28 of the Guidelines provides:

> “In assessing the degree of permanent impairment resulting from the compensable injury/condition, the assessor is to indicate the degree of impairment due to any previous injury, pre-existing condition or abnormality. This proportion is known as “the deductible proportion” and should be deducted from the degree of permanent impairment determined by the assessor. For the injury being assessed, the deduction is 1/10th of the assessed impairment, unless that is at odds with the available evidence.”

37. In *Cole*, Justice Schmidt was considering a case where a worker had previously suffered an injury which would have resulted in at least a 10% whole person impairment. The majority of the Appeal Panel had made a deduction merely because there was a pre-existing impairment. When quashing the Appeal Panel's decision, her Honour said:

> "29….For a deduction to be made from what has been assessed to have been the level of impairment, which resulted from the later injury in question, a conclusion is required, on the evidence, that the pre-existing injury, pre-existing condition or abnormality caused or contributed to that impairment.
> 30. Section 323 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, irrespective of outcome, contribute to the impairment flowing from any subsequent injury. The assessment must have regard to the evidence as to the actual consequences of the earlier injury, pre-existing condition or abnormality. The extent that the later impairment was due to the earlier injury, pre-existing condition or abnormality must be determined…

31.**The reason for this statutory approach can readily be seen. It is entirely possible that a person could suffer such a catastrophic injury, that the presence or absence of any previous injury, pre-existing condition or abnormality, would make no difference at all to the impairment which resulted from the later injury**. An injury which results in death, is an obvious example, albeit not one which would arise for consideration under this section. A more relevant example, in this case, is a second injury which severed the spine. Or, as was discussed in the authorities, an earlier injury which was asymptomatic, may or may not contribute to the impairment which results from a second injury. That is a matter of fact to be assessed on the evidence led in each case. An assumption of the kind here made, namely that surgery to the lumber spine, irrespective of outcome, must always result in a level of residual impairment which contributes to the level of impairment which follows a later injury, has no role to play in that assessment. What must be determined on the evidence is whether any proportion of the permanent impairment present after the second injury was due to the earlier injury." (emphasis added)

38. In Ryder *v Sundance Bakehouse* [2015] NSWSC 526, Justice Campbell said:

"[45] What section 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 will be due to the pre-existing abnormality (even if the proportion can't 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 greater than it otherwise would 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."

39. Garling J in *Pereira v Siemens Ltd* [2015] NSWSC 1133 summarised at [81]-[90] the steps to be taken by a decision maker in respect of s 323 of the 1998 Act as follows:

"81. The assessment required by s 323 is one which must be based on fact, not assumptions or hypotheses: *Elcheikh v Diamond Formwork* (NSW) Pty Ltd (In Liq) [2013] NSWSC 365 at [89]; *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284 at [33]; *Ryder v Sundance Bakehouse* [2015] NSWSC 526 at [40] (*Ryder*).

82. The process encompassed by s 323 requires the application of each of the following steps before reaching the ultimate conclusion of the existence of a pre-existing injury which has an impact on the assessment of the injury the subject of the worker's claim.

83. The first step requires a finding of fact that the worker has suffered an injury at work which has resulted in a degree of permanent impairment which has been assessed pursuant to s 322 of the 1998 Act: see *Elcheikh* at [125].

84. The second step which needs to be addressed is, assuming such an injury has been sustained and impairment has resulted, what is the extent of that impairment expressed as a percentage of the whole person: see *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [38] (*Cole*); *Elcheikh* at [126].

85. The third matter to be addressed is whether the worker had any previous injury, or any pre-existing condition or abnormality. The previous injury does not have to be one in respect of which compensation is payable under the 1998 Act. If the phrase 'pre-existing condition or abnormality' is to be relied upon, then such condition or abnormality must be a diagnosable or established clinical entity: *Fire & Rescue NSW v Clinen* [2013] NSWSC 629.

86. A finding of the existence of a previous injury can be made without the presence of symptoms, but there must be evidence which demonstrates the existence of that pre-existing condition: *Mathew Hall* at [31]-[32].

87. The pre-existing injury or condition must, on the available evidence, have caused or contributed to the assessed whole person impairment: see *Matthew Hall* at [32]; *Cole* at [29]-[31]; *Elcheikh* at [88] and *Ryder* at [42].

88. It cannot be assumed that the mere existence of a pre-existing injury means that it has contributed to the current whole person impairment: *Clinen* at [32]; *Cole* at [30]; *Elcheikh* at [91]. What must occur is that there must be an enquiry into whether there are other causes of the whole person impairment which reflect a difference in the degree of impairment: *Ryder* at [45].

89. Next in dealing with the application of s 323, the extent of the contribution, if any, of the pre-existing condition to the current impairment must be assessed in order to fix the deductible proportion. If the extent of the deductible proportion will be difficult or costly to determine, an assumption is made that the deductible proportion will be fixed at 10%, unless that is at odds with the available evidence: s 323(2) of the 1998 Act.

90. Each of these steps, and considerations, is a necessary element of a determination that an assessed whole person impairment is to be reduced by a deductible proportion by virtue of the application of s 323 of the 1998 Act."

40. The appellant submitted that the AMS simply assumed that because there was a pre-existing impairment that there should be a deduction of an amount equal to that impairment. The appellant further argued that the AMS failed to properly consider the cause of the current impairment and consider or explain how it was that the pre-existing impairment in fact contributed to the current impairment.

41. The Appeal Panel reviewed the evidence in this matter.

42. Dr Delaney in his report dated 6 June 2019 noted that the appellant said that the left eye had no useful vision and that had not changed since childhood. Dr Delaney noted that Dr David Manning's multiple reports confirmed that the appellant apart from suffering from bilateral retinopathy of prematurity affecting the left eye much more than the right, he had bilateral nystagmus and shallow anterior chambers which had necessitate bilateral laser peripheral iridectomles to prevent acute glaucoma.

43. Dr Delaney wrote:

> "In addition, he had undergone a right cataract surgery in about September 2014 to further reduce the risk of acute angle closure glaucoma due to increasing lens volume. Dr Manning had carried out this operation and his vision was recorded as being 6/15 in the report dated December 2014. Following this Mr Cornally underwent a YAG laser capsulotomy for posterior capsular opaciflcation in April 2015 and his vision had remained stable through this time until the events of early February 2017. The further proof that his vision was stable are the enclosed visual fields which show on 23 February 2016 -that the vision field changes in the right eye had changed very little from 2011 until 23 November 2016. · Dr Manning's reports also confirm, as noted above, that the vision was stable at between 6/15 and 6/18 (less than1/2 line difference) between these two readings of the visual acuity. There was no evidence at all of any ongoing inflammation of either uveitls or retinitis before the exposure to the active chicken pox on 5 February 2017."

44. Dr Delaney noted that when the appellant saw Dr Manning on 27 February 2017 he presented with loss of the visual field in the inferior part of the right eye, reduced vision and signs of severe inflammation inside the eye including an exudative retinal detachment, perivasculltis and other signs of severe intraocular inflammation. Dr Delaney considered that the appellant's current loss of vision was due directly to the acute retinal necrosis and detachment and its other complications.

45. In assessing WPI, Dr Delaney wrote:

> "The whole person impairment assessment set out below is based· on the fact that Mr Cornally's situation is most unusual. He has been totally blind from a practical point of view in the left eye since childhood and had poor vision in the right for most of his life. There is documented evidence showing visions of between 6/15 to 6/18 at the worst over the period from 2010 to 2017 when he contracted the retinitis. In fact, as far back as 1995 his visual acuity was recorded as 6/18 by Dr Manning. In view of this and in order to fairly assess his visual loss, I believe that the most appropriate way to assess this is to ignore the total loss of vision in the left eye as this had been present all his life. Mr Cornally should be assessed the change based on the pre-existing vision of 6/18 with some field loss before the retinitis to his now virtual total loss of vision as the final end point on which to calculate his whole person Impairment. This should not take into account further deductions for cataract surgery and the effects of other treatment as this was necessary to preserve what vision he had and in fact it did indeed maintain his best visual acuity at a stable level for many years.
>
> The whole person impairment is therefore assessed on his pre-existing vision with an allowance for the field loss before the retinitis compared to his current vision."

46. Dr Delaney wrote:

> "Mr Cornally's vision was reduced to 6/18 which is the best estimate of the visual acuity as there is available. This is a 38% impairment of vision of the right eye due to reduced visual acuity (Table 2, 8/211). In addition there is a 20% Impairment of vision of the right eye due to visual field changes (Table 5, 8/214). When these two Impairments are combined there is a 50% impairment of vision of the right eye, This-has produced a 13% impairment of the visual system when Ignoring the effects of the blind left eye as he only had vision from the right eye (Table 7, 8/212). This is 12% whole person Impairment (Table 6, 8/218).

Mr Cornally's is now virtually blind in the right eye with a 97% loss of vision of the right eye which is his only eye (Table 31 8/212). These impairments have caused a 90+% impairment of the visual system (Table 7, 8/219) which is an 85% whole person impairment. When the pre-existing impairment of 12% is subtracted from the current whole person impairment of 85% there Is a 73% whole person impairment due to the effects of the retinitis infection contracted at work."

47. In his report dated 20 March 2020, Dr Delaney stated that he agreed with the AMS's methodology in calculating the pre-existing WPI due to the effects of the pre-existing retinopathy of prematurity, his previous cataract surgery with the insertion of an intraocular lens and previous visual field defects. Dr Delaney stated that the AMS had applied AMA 4 Chapter 8 Guides in a "strictly correct manner". However, Dr Delaney considered that this method of assessment "unfairly skews" the outcome where there is a very large pre-existing whole person impairment in the right eye as the left eye was always totally blind. Dr Delaney explained that he had departed from this strict interpretation of AMA 4 because he believed that it would be unfair to assess the appellant on the basis of his significant pre-existing conditions except for the reduction in the visual acuity in the right eye. Dr Delaney said that this was the main thing that has changed with the virtually total loss of vision of the right eye and given that the left was always blind, this was the most important impairment that he has suffered as the result of his retinitis due to his exposure to the virus at work.

48. Dr Delaney acknowledged that the AMS's calculations were strictly correct but the most important point was that, in the appellant's right eye, the irreversible change was the reduction of vision from 6/18 (halfway up the chart) to vague perception of light or, in other words, being functionally and totally blind.

49. Dr Delaney noted that the other conditions that the appellant suffered from were cataract surgery, which automatically provides for a minimum of 50% loss of vision of the eye and visual field defects, but these had not changed from the time that he was accurately assessed by his previous treating doctor, Dr Manning, and his condition was stable. Dr Delaney therefore believed that the only thing that should be assessed was therefore the change in the visual acuity as he has not had any other change.

50. Dr Delaney noted that the AMS correctly pointed out that the left eye was always part of the visual system and he did not understand why it had been left out of Dr Delaney's calculations. Dr Delaney said that he did this deliberately and did not ignore it, but the appellant was blind from birth, and the harm that was done by the effect of the acute retinitis was greatly underestimated on the strict interpretation of AMA 4. Dr Delaney noted that the appellant had now lost all his vision and never having the left eye to rely on should be assessed on this impairment, which was not covered in a strict interpretation of the Guides. Dr Delaney referred to AMA 4 Guides at page 3 in Chapter 1, and in particular: "it should be understood that the Guides do not and cannot provide answers to every type and degree of impairment, because of the considerations noted above and the infinite variety of human disease". In the last paragraph it provides that the evaluator should understand a number of other considerations that will apply. Dr Delaney stated that he took this as an authority to deal with Mr Cornally's case based on the assessment of the vision only as the other pre-existing conditions unfairly skewed the outcome in favour of a significant pre-existing impairment and therefore reduced WPI significantly even though he has suffered a catastrophic injury, being taken from able to function with reduce visual acuity to be totally and absolutely blind.

51. In a report dated 9 September 2019, Dr Harry Stern made a diagnosis of retinal vasculitis together with acute retinal necrosis and atrophic retinal detachment with complications. Dr Stern noted that the appellant had been born with retinopathy of prematurity of both eyes, partially in the right eye and completely in the left eye resulting in blindness in the left eye from birth.

52. Dr Stern wrote:

> "He was corrected with glasses for the right eye from eight months of age and always required glasses for driving and looking at the screen. He was on treatment for diabetes and blood pressure. He was seen by an ophthalmologist and optometrist around birth and has continued to see them regularly from then on. He said his vision was stable when he was young and he was checked annually and his glasses changed when required. He was able to drive day and night and initially had a restricted licence which was changed to an unrestricted gold licence. He said the visual acuity in the right eye was 6/12 with correction and stayed at 6/18 to 6/12 vision. He watched television and used a computer and iPhone, and was able to play tennis and squash. He had double Master's University Degrees in Special Education, Teaching and Psychology, and started working at the end of 1998 as a General Teacher. In 2001, he obtained an extra degree as a Special Needs Teacher."
>
> The vision remained the same. His treating ophthalmologist was Dr Manning and he repeated his visual fields annually from 02/11/2011 until 23/11/2016. Dr Manning noted in the enclosures, that he had bilateral retinopathy of prematurity affecting the left eye much more than the right and bilateral nystagmus. He also had narrow drainage angles for which Dr Manning performed bilateral laser peripheral iridectomies to prevent acute glaucoma. On 20/09/2014, due to advancing right cataract, he performed a right cataract extraction and intraocular lens implantation.
>
> In April 2015, he had YAG laser capsulotomy for posterior capsular opacification. The visual field findings were stable from 02/11/2011 to 23/11/2016. Dr Manning in a letter dated 29/11/2010 noted a diagnosis of bilateral narrow angles, retinopathy of prematurity, bilateral nystagmus and posterior sub-capsular cataract left more than right. On 23/11/2016, Dr Manning noted marked myopic astigmatism with a corrected visual acuity in the right eye of 6/15-2. On 27/01/2017, (sic) in his clinical notes, Dr Manning noted cloudy vision and losing vision in bottom left quadrant. Visual acuity on this day was 6/18-. He diagnosed peri-vasculitis and referred him to Sydney Eye Hospital immediately. I believe it is fair to base his pre-existing visual acuity and visual field, on the visual acuity of 6/15- and the visual field finding both recorded on the 23/11/2016."

53. Dr Stern assessed pre-existing impairment as follows:

> "The right visual acuity distance was 6/15-2 (23/11/2016) and reading vision is assumed to be J1/J2 as none was recorded. The visual field of 23/11/2016 was used. He was pseudophakic (cataract extraction 2014), however, this was disregarded as it was performed in a pre-injury eye and was not related to the injury at the time.
>
> His right visual acuity loss was 14% (Table 3, Page 212, AMA4, Chapter 8) and right visual field loss was 35% (Table 5, Page 214).
>
> The Total Visual Loss Right Eye equates to 44% (CVC Page 322).
>
> Visual loss left eye equals 100% (CVC Page 323) and therefore Visual Impairment both eyes equals 58% (Table 7, Page 220) which in turn equates to 55% WPI (Table 6, Page 218)."

54. Dr Stern assessed a total of 85% WPI and deducted 55% for pre-existing condition pursuant to s 323 which resulted in an assessment of 30% WPI as a result of the injury on 5 February 2017.

55. Dr Stern noted that visual acuity pre-injury was sufficient for the appellant to study at university, to work as a special needs teacher, play tennis and squash, watch TV, use a computer and iPhone and he was able to drive on an unrestricted licence.

56. The Appeal Panel were satisfied that the AMS erred in failing to properly consider the cause of the current impairment and consider or explain how it was that the pre-existing impairment in fact contributed to the current impairment. In particular, the AMS failed to consider whether the impairment resulting from the work injury has been made greater because of the pre-existing impairment.

57. The Appeal Panel considered the question of a deduction pursuant to s 323 for pre-existing condition. The Appeal Panel noted that the appellant had retinopathy of prematurity, partially in the right eye and completely in the left eye, as well as mild field defect in the right eye, cataract surgery in the right eye and laser capsulotomy for posterior capsular opacification in the right eye. However, despite those problems, the appellant managed very well in terms of function, holding an unrestricted driver's licence, obtaining several degrees and being employed as a special needs teacher.

58. The Appeal Panel agreed with the AMS that there was a pre-existing condition in both the right eye and left eye. The next question to be considered was whether the pre-existing condition had in fact contributed to the current impairment.

59. In relation to the right eye, the Appeal Panel concluded that all of the impairment assessed resulted from the exposure to the chicken pox virus. Once the appellant contracted the chicken pox virus it caused a total retinal necrosis and a blind right eye. The impairment in the right eye would have been the same regardless of whether the appellant had a healthy right eye or an eye that had previous cataract surgery and field loss. These pre-existing conditions were immaterial in terms of the cause of the current level of impairment in the right eye. The Appeal Panel was not satisfied that the pre-existing condition in the right eye contributed to current impairment, that being blindness of the right eye. In other words, the Appeal Panel were satisfied that the impairment resulting from the work injury had not been made greater because of the pre-existing impairment in the right eye.

60. The Appeal Panel concluded that no deduction should be made pursuant to s 323 in respect of the pre-existing condition in the right eye.

61. In relation to the left eye, the Appeal Panel noted that the appellant had been blind since birth having retinopathy of prematurity. It was significant that there was no viable retina in the left eye for the virus to invade and indeed there was no evidence that the virus did invade the left eye. Dr Manning referred to significant intraocular inflammation in the right eye but made no mention of any problem in the left eye in his report dated 27 February 2017. The virus would not automatically affect both eyes particularly in a case where there was no viable retina in the left eye to be affected.

62. The Appeal Panel concluded that the pre-existing condition in the left eye caused loss of vision in that eye and a deduction should be made pursuant to s 323 for total loss of vision in the left eye. The Appeal Panel considered that the pre-existing condition in the left eye made a difference to the outcome in terms of the degree of impairment resulting from the work injury. The Appeal Panel was satisfied that but for the pre-existing abnormality in the left eye, the degree of impairment resulting from the work injury would not have been as great.

63. The total assessment was 85% WPI. A deduction is to be made of 24% WPI for the pre-existing condition in the left eye (Table 6 Page 8/218 AMA 4) provides that total loss of vision in one eye is 25% loss of visual system or 24% WPI). This results a total WPI of 61% as a result of the injury on 5 February 2017.

64. For these reasons, the Appeal Panel has determined that the MAC issued on 19 March 2020 should be revoked, and a new MAC should be issued. The new certificate is attached to this statement of reasons.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **594/20**
Applicant: **Matthew John Cornally**
Respondent: **Secretary, Department of Education**

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 Michael Steiner 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 4 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.Visual System	5 February 2017		Tables3,6,7 Combined Values Chart	85%	24%	61%
Total % WPI (the Combined Table values of all sub-totals)					**61%**	

Carolyn Rimmer
Arbitrator

Dr Frank Bors
Approved Medical Specialist

Dr Ian Wechsler
Approved Medical Specialist

22 June 2020

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE MEDICAL ASSESSMENT CERTIFICATE OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

R Gray

Robert Gray
Dispute Services Officer
As delegate of the Registrar