WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-1834/20**
Appellant:	**Jason Nicholls**
Respondent:	**The Good Guys Warehouse (Australia) Pty Ltd**
Date of Decision:	**5 January 2021**
Citation No Decision:	**[2021] NSWWCCMA 4**

Appeal Panel:	
Arbitrator:	**Catherine McDonald**
Approved Medical Specialist:	**Dr Margaret Gibson**
Approved Medical Specialist:	**Dr Phillipa Harvey-Sutton**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 23 September 2020, Jason Nicholls lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tim Anderson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 26 August 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 grounds of appeal on which the appeal is made.

4. The Workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (the Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. Mr Nicholls suffered an injury to his back on 6 October 2016 in the course of his employment with the Good Guys Warehouse (Australia) Pty Ltd (the Good Guys) while moving heavy, boxed refrigerators using a trolley. He felt his left buttock tighten. He continued to work and was treated by Dr T Sui, neurosurgeon, who referred him for perineural injections. Mr Nicholls developed pain radiating down his left leg and Dr Sui recommended surgery. When he developed difficulty urinating, Mr Nicholls was transferred by air ambulance from Coffs Harbour to Sydney and Dr Sui performed an L4/5 microdiscectomy and rhizolysis on 23 January 2017.

7. Mr Nicholls' pain improved but by September developed right sciatica and Dr Sui diagnosed recurrent L4/5 disc herniation causing new canal and bilateral recess stenosis. After a further referral for an injection, Dr Sui recommended lumbar laminectomy which was carried out in late 2017.

8. Mr Nicholls said in his statement dated 13 March 2020 that he continued to suffer pain in his back and right thigh and calf and that he no longer worked.

9. The AMS assessed 14% whole person impairment (WPI), assessing Mr Nicholls in DRE Lumbar Category III (10%) and adding 2% for the impact of the injury on his activities of daily living. He allowed 2% for a second operation and said that no radiculopathy had been identified. He said that Mr Nicholls' scar was an uncomplicated scar from a standard surgical procedure and made no assessment in respect of it.

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.

EVIDENCE

11. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

12. Dr Philippa Harvey-Sutton of the Appeal Panel conducted an examination of the worker on 18 December 202 and reported to the Appeal Panel. A copy of her report is attached to these reasons.

13. 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

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

15. In summary, Mr Nicholls submitted that the AMS erred in not making assessments in respect of radiculopathy and scarring as his independent medical examiner, Dr A Hopcroft had done. With respect to radiculopathy Mr Nicholls noted that the AMS found irritation of the S1 nerve root on the right and the L4 and L5 nerve roots on the left and imaging findings on an MRI scan after the surgery.

16. Mr Nicholls said that the scar warranted an assessment of at least 1% under the Table for the Evaluation of Minor Skin Impairment (TEMSKI)

17. In reply, the Good Guys submitted that it was a matter for the AMS to determine if the criteria for radiculopathy were satisfied and whether the scarring warranted an assessment of impairment. The submissions said that Mr Nicholls' submissions stemmed from a difference of opinion between Dr Hopcroft and the AMS and that a difference of opinion was not a ground of appeal.

FINDINGS AND REASONS

18. 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.

19. 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.

The MAC

20. The AMS recorded the following symptoms described by Mr Nicholls:

> "Difficulty with urination. There seems to be a very reduced sensation of the need to urinate.
>
> Low back pain with radiation down his right leg which has existed since the first surgical procedure.
>
> Occasionally he has spasm in the muscles in his back. This has an effect which he believes would be similar to quite a severe electric shock. Occasionally there is radiation down the left leg."

21. The findings made by the AMS on physical examination included:

> "Sensation to pinprick was slightly reduced over the lateral side of the right ankle and over the anterior and the medial side of the left ankle. This suggests irritation of the S1 nerve root on the right and the L4 and L5 nerve roots on the left. No other neurological feature was identified. His straight leg raising assessment was conducted in the sitting position on the edge of the couch. He could fully extend each knee without difficulty.
>
> The reflexes were present and equivalent at the knees (L4) and at the ankles (S1). Power of the extensor hallucis longus (L5) was equivalent."

22. The AMS reviewed the MRI scans and noted that the last scan on 4 April 2018 did not identify any further compressive neuropathy.

23. The AMS summarised the injuries and his diagnoses:

> "Mr Nicholls gives a history of sustaining discogenic pathology at L4/5 and to a lesser extent, L5/S1 while moving heavy fridges in early October 2016. Initially there was radiculopathy radiating down the left leg. Ultimately this was managed by a discectomy. Initially this seemed to give him limited improvement, although very soon afterwards there was further deterioration, this time with radiation down the right leg. This also was managed by a surgical intervention in December 2017. This gave him improvement, although ever since then there has been continuing low back dysfunction with neurological irritation radiating down both legs."

24. The AMS said that Mr Nicholls' scar was an uncomplicated scar from a standard surgical procedure. He did not otherwise describe the scar. The failure to do so is an error because he has failed to give adequate reasons for his assessment.

25. The AMS explained his calculations in respect of Mr Nicholls' back:

> "Mr Nicholls' low back condition is addressed in AMA 5 Page 384, Table 15-3. He has had two surgical procedures to his lumbar spine although there is no fusion and no continuing radiculopathy. This therefore places him into Lumbar Category III, which carries a whole person impairment ranging between 10% and 13%, depending on the activities of daily living. For this, he would attract a further 2%, giving him 12%. As

advised, there has been a second surgical procedure which gives a further 2%. This is addressed in the SIRA Guidelines, Page 21, Table 4.2. No radiculopathy has been identified and only one level has been managed by surgery, therefore there is no further modification."

26. The AMS explained that he disagreed with Dr Hopcroft's assessment because he was unable to demonstrate the radiculopathy Dr Hopcroft observed. He noted an error in Dr Hopcroft's calculations. The AMS disagreed with Dr Doig's deduction in respect of a pre-existing condition and with respect to scarring, though arrived at the same assessment.

27. The AMS provided a very short summary of the MRI scan report dated 4 April 2018, stating merely that it showed "previous L4/5 surgery. No further compressive neuropathy is identified."

Reasons

28. The criteria for assessing radiculopathy are set out at paragraphs 4.27 and 4.28 of the Guidelines:

> "Radiculopathy is the impairment caused by malfunction of a spinal nerve root or nerve roots. In general, in order to conclude that radiculopathy is present, two or more of the following criteria should be found, one of which must be major (major criteria in bold):
>
> **(a)** **loss or asymmetry of reflexes**
> **(b)** **muscle weakness that is anatomically localised to an appropriate spinal nerve root distribution**
> **(c)** **reproducible impairment of sensation that is anatomically localised to an appropriate spinal nerve root distribution**
> **(d)** positive nerve root tension (AMA5 Box 15-1, p 382)
> **(e)** muscle wasting – atrophy (AMA5 Box 15-1, p 382)
> **(f)** findings on an imaging study consistent with the clinical signs (AMA5, p 382).
>
> Radicular complaints of pain or sensory features that follow anatomical pathways but cannot be verified by neurological findings (somatic pain, non-verifiable radicular pain) do not alone constitute radiculopathy."

29. The AMS identified that Mr Nicholls' suffered impairment of sensation which suggested impairment of sensation corresponding to the S1 nerve root on the right and the L4 and L5 nerve roots on the left. That finding constitutes the major criteria in paragraph 4.27(c).

30. The report of the MRI scan dated 4 April 2018 was reported as showing at L4/5:

> "L4/5: There is mild residual annular disc bulge and loss of disc height. There is mild endplate oedema, but no endplate erosion. There is moderate bilateral facet joint and ligamentum flavum hypertrophic degenerative change. This combination of findings causes residual bilateral L5 lateral recess stenosis, and residual moderate left L4 foraminal stenosis, on the current clinical asymptomatic side."

31. The combination of the examination findings and the detail of the MRI scan report which was consistent with the clinical signs showed that the AMS was in error not to assess radiculopathy, warranting a re-examination.

32. Dr Harvey-Sutton's report of the examination is attached and we adopt her findings. She observed one major and two minor criteria for the assessment of radiculopathy. Her description of the scar resulting from two operations does not represent an uncomplicated scar.

33. The resulting assessment for the lumbar spine follows.

34. Because he has had surgery, Mr Nicholls is assessed in DRE Lumbar category III, resulting in 10% WPI. The assessment made by the AMS of 2% for the impact on activities of daily living is appropriate and results in 12% WPI.

35. Paragraph 4.37 provides that modifiers are applied under Table 4.2 of the Guidelines being 3% for lumbar spinal surgery with residual symptoms and radiculopathy and 2% for a second operation.

36. When those figures are combined, the resulting impairment arising from the lumbar spine is 16%.

37. Under the TEMSKI, the best fit for the scarring described by Dr Harvey-Sutton is 1% and the resulting WPI is 17%.

38. For these reasons, the Appeal Panel has determined that the MAC issued on 26 August 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*.

A Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL
MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: **1834/20**
Applicant: **Jason Nicholls**
Respondent: **The Good Guys Warehouse (Australia) 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 [insert name of Doctor] 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)
Lumbar spine	6 October 2016	Chapter 4 pp 26-29, paragraphs 4.24-4.37	Table 15-3 p 384	16%	0	16%
TEMSKI	6 October 2016	Chapter 14, p 74, Table 14.1		1%	0	1%
Total % WPI (the Combined Table values of all sub-totals)					**17%**	

Catherine McDonald
Arbitrator

Dr Margaret Gibson
Approved Medical Specialist

Dr Philippa Harvey-Sutton
Approved Medical Specialist

4 January 2021

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*.

A Vermeulen

Anneke Vermeulen
Dispute Services Officer
As delegate of the Registrar

REPORT OF THE EXAMINATION BY APPROVED MEDICAL SPECIALIST MEMBER OF THE APPEAL PANEL

Matter No: **M1-1834/20**
Appellant: **Jason Nicholls**
Respondent: **The Good Guys Discount Warehouse (Australia0 Pty Ltd**

Examination Conducted By Dr Philippa Harvey-Sutton:
Date of Examination: **18 December 2020**

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1. The workers medical history, where it differs from previous records

He confirmed the previous history given.

2. Additional history since the original Medical Assessment Certificate was performed

No further accidents or injuries

3. Findings on clinical examination

Current symptoms

Before the surgery, complaints were pain in the back and pain and tingling in the left buttock which developed also in the left calf and tingling up and down the leg and then the whole leg went dead, numb and pain in the calf persisted and had pins and needles in the left foot.
After the first operation, still had some pain in the back and the pain in the left leg. And about a month later started having similar symptoms as he had in the right leg.

After the second surgery, his complaints in the left leg settled after about a month, but come back if he stands or walks for too long and he continues to have some sciatic type pain in the right thigh and right calf,

In relation to the activities of daily living, he is slower dressing; he has difficulty doing activities in the house and has restricted walking distances. He no longer does his recreational activities such as golf, ocean kayaking and going fishing in his boat.

Medications – Ibuprofen twice a day, sometimes Panadeine forte as well and occasionally Endone.

Physical examination.

He presented as a healthy man of stated age and solid physique and said that he had gained over 50 kg in weight and now weighs about 160 kg. He walked with an antalgic gait.

On examination of the back there was a vertical scar over the 4/5 level, of 5 cm in length and 1cm diameter. The scar was hyperpigmented with colour contrast and trophic changes. There was minor contour effect He was conscious of the scar and his wife has shown him pictures of the scar. There was no adherence. In summary the scar was a complicated scar.

He displayed reduction in full range of back governments with half normal range of movements of forward flexion and extension and half normal range of lateral flexion to the right and left. On examination of the lower limbs, there was normal muscle power. He could rise on his heels and toes.

The deep tendon reflexes were present and equal.

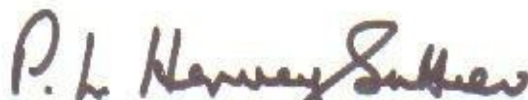
There was reduced sensation over the distribution of the L5 spinal nerve root on the right foreleg and dorsum of the right foot.

There was a positive nerve root tension test on the right side.

He presented in a genuine and straightforward manner.

4. Results of any additional investigations since the original Medical Assessment Certificate

Nil.

Signed: 

Date: 18th December 2020