

WORKERS COMPENSATION COMMISSION

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

Matter Number:	M1-3368/20
Appellant:	Kathleen Prudence
Respondent:	State of New South Wales (Department of Education)
Date of Decision:	4 February 2021
Citation No:	[2021] NSWCCMA 21

Appeal Panel:	
Arbitrator:	Catherine McDonald
Approved Medical Specialist:	Dr David Crocker
Approved Medical Specialist:	Dr Drew Dixon

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 26 November 2020, Kathleen Prudence lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Rob Kuru, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 20 October 2020.
2. Ms Prudence 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, being that in s 327(3)(d). 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. Ms Prudence was employed by the Department of Education as a mathematics teacher at Singleton High School. On 18 September 2014 on Year 12 Muck Up Day, she slipped, landing on her face. She had difficulty getting up and noticed significant pain in her left groin radiating down the thigh to her knee. She was referred to Dr G Workman and underwent a CT guided injection on 23 April 2015.

7. Ms Prudence underwent a left total hip replacement on 8 December 2016. In early 2017 she suffered three dislocations of the prosthesis which were reduced under anaesthetic. The first of those was the result of a fall in the course of her employment on 14 February 2017. In May 2017, she underwent a surgical revision of the prosthesis.
8. Ms Prudence made a permanent impairment compensation claim. A Commission arbitrator made orders by consent on 21 July 2020 which amended the date of injury to read "18 September 2014, aggravation on 14 February 2017." Ms Prudence was referred to the AMS and was examined on 13 October 2020.
9. The AMS assessed 20% whole person impairment (WPI) in respect of Ms Prudence's left lower extremity (hip) on the basis that she had a fair result from her hip replacement surgery. He deducted one tenth under s 323 of the 1998 Act. He assessed 1% for scarring under the TEMSKI.

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. 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 there is sufficient material in the file to determine the Appeal.

EVIDENCE

12. 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.
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, Ms Prudence submitted, through her solicitor, that the AMS erred in making a deduction under s 323 when there was no evidence of previous complaint arising from osteoarthritis and no evidence of osteoarthritis on the contemporaneous scans. She submitted that the AMS's description of the pre-operative x-ray on 2 November 2016 demonstrating osteoarthritis was incorrect. Ms Prudence noted that neither Dr C Harrington, qualified for the Department, nor Dr P Endrey-Walder, qualified on her behalf noted the presence of pre-existing osteoarthritis.
16. In reply, the Department submitted that there was evidence to support a deduction under s 323 and noted that Dr Workman considered it likely that Ms Prudence had osteoarthritic change in her hip in his report dated 31 August 2016 and that he had suggested she use her private health insurance to undergo surgery. The Department said that the fact that neither of the independent medical examiners had made a deduction did not preclude the AMS from making a deduction if he considered it appropriate.

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*¹ 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

19. The AMS described the history of the incident. He said:

“She went on to have an x-ray. The x-ray of her hip demonstrated little in the way of change. X-ray of the knee demonstrated osteoarthritis.

She was subsequently referred to Dr Workman, Orthopaedic Surgeon who undertook a steroid and anaesthetic injection into the hip joint. Unfortunately, she did not get any significant relief with this. She went on to have an MRI of the hip joint, which demonstrated osteoarthritis and lateral acetabular cysts. She went on to have a hip replacement on 8 December 2016.”

20. The AMS set out his findings on examination. He described the investigations he reviewed beginning with “2 November 2016, pre-operative x-ray of the hip demonstrating the changes of osteoarthritis.”
21. In the summary of injuries and diagnoses the AMS said:

“Ms Prudence stated injury of work where she fell, aggravating a previously osteoarthritic hip. She underwent a hip replacement for this but unfortunately had fallen again at work and sustained a dislocation of her hip. She had two further dislocations of her hip, which have gone on to require a revision total hip arthroplasty.”
22. The AMS did not specifically refer to Dr Workman’s opinion. He summarised the opinions of Drs Endrey-Walder and Harrington and set out where he differed though he did not mention that they did not make a s 323 deduction.
23. With respect to s 323, the AMS said that Ms Prudence suffered pre-existing osteoarthritis and that her injury was an aggravation of that condition. He did not provide reasons for those statements.

The evidence

24. Ms Prudence said in her statement that before the injury she was active. She went to the gym, walked long distances and travelled independently overseas. She owned a pedigree horse that she was no longer able to ride after the injury.
25. Dr Ruba was Ms Prudence’s general practitioner at the time of the injury. Her notes are handwritten but there is nothing to suggest that Ms Prudence had sought treatment in respect of her left hip or any possible manifestation of osteoarthritis before the injury.
26. The first x-ray report in the file is dated 20 January 2015. Dr Lewis, the radiologist, noted that Ms Prudence suffered tricompartmental osteoarthritic changes in her left knee. In respect of her left hip he said:

“LEFT HIP
Clinical notes: Fall at work.
There is no visible fracture or dislocation.

¹ [2006] NSWCA 284.

The hip and sacroiliac joints are symmetrically preserved, and the bony pelvis is intact.
COMMENT: No bony injury.”

27. An MRI scan was undertaken on 15 April 2015. Dr L Josey said in respect of Ms Prudence’s left hip:

“The osseous acetabulum is within normal limits, no fracture or aggressive skeletal lesion.

However, note is made of-a multiloculated intraosseous ganglion measuring approximately 13mm (trans) x 15mm (AP).

A complex tear is present within the anterosuperior and lateral labrum with the subsequent development of a multiloculated parameniscal cyst. This parameniscal cyst rests at the lateral aspect of the acetabulum and measures 29mm (AP) x 30mm (trans).

No joint effusion.

The chondral surfaces of the left hip are within relatively normal limits No full thickness fissuring or subcortical oedema.

No avascular necrosis of the femoral head or femoral neck stress fracture.

The periarticular musculature is within normal limits, although a mild insertional tendinopathy is present within gluteus medius, with no focal tear identified within the gluteus tendons.

The superior and inferior pubic rami are intact.

The sacrum is intact, with no fracture of the superior or inferior pubic rami.

No lateral mass lesions within the soft tissues of the pelvis.

The right hip is within normal limits.”

28. Dr Workman’s provisional diagnosis on 31 August 2016 was “left hip OA.” He wrote to Ms Prudence’s general practitioner and said:

“We have had a long conversation regarding her options. At this stage, it seems as though the arthritis in Kathleen's hip is starting to get the better of her in terms of symptoms. The only real way forward for her would be a total hip replacement that we have discussed previously.

At this point in time. Kathleen would like to go ahead with hip replacement surgery some time in early December in order to avoid disrupting her students progress.

We have also discussed the issue of WorkCover covering her surgery. In my opinion and as I have discussed with Kathleen. I do not think it would be appropriate to seek a WorkCover claim for a hip replacement in her case It is likely that she had some quite significant arthritic changes in her hip prior to her injury. Whilst we both accept that her falls did exacerbate that. I think she is far better off having her surgery performed utilising her private health insurance.”

29. An x-ray taken on 2 November 2016 for pre-operative planning was reported by Dr Cheema as showing that the alignment of the pelvis was normal and the hip joints have a normal appearance. It was this scan that the AMS said showed arthritis.

30. Dr Endrey-Walder examined Ms Prudence at the request of her solicitors and reported on 4 September 2018. He noted that the x-ray taken following the injury showed osteoarthritis in her knee but not her hip. He said that he had reviewed the films and that the changes in her knee were “fairly early.” He said:

“There is no good reason to consider this lady needing surgery for her left hip prior to the initial injury of September 2014, and I bring your attention to the initial x-ray of the hip which showed no evidence of even age appropriate degenerative changes. Thus, the need for the THR is directly and exclusively related to the accident of September 2014.”

31. Dr Endrey-Walder assessed Ms Prudence's WPI on the basis of a fair result. He assessed 20% WPI and allowed 1% for scarring under the TEMSKI.
32. Dr Harrington saw Ms Prudence at the request of the Department and reported on 4 November 2019. He assessed Ms Prudence's hip replacement outcome as a good result and assessed 15% WPI. He said there were "no deductions."

Consideration

33. The assessment of Ms Prudence's WPI as a fair outcome from hip arthroplasty is consistent with the history in the file and no appeal was brought in respect of it.
34. Any deduction under s 323 would be made in respect of the condition of Ms Prudence's hip before the injury in 2014. For the deduction to be made, there must be evidence that the pre-existing condition contributed to the impairment.² In *Cole*, Schmidt J said:

"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. The only exception is that provided for in s 323(2), where the required deduction 'will be difficult or costly to determine (because, for example, of the absence of medical evidence)'. In that case, an assumption is provided for, namely that the deduction 'is 10% of the impairment'. Even then, that assumption is displaced, if it is at odds with the available evidence."

35. In *Ryder*, Campbell J said:

"Section 323 as I have already said, requires there to be a deduction for any proportion of the impairment that is due to any pre-existing condition. This is an essential element of the section; indeed it is the pith of it. It is not enough to simply identify that there is a pre-existing condition and that there has been a subsequent impairment and therefore make a deduction under this section because of the existence of the pre-existing condition. Such reasoning fails to consider a necessary condition of the operation of the section; that a proportion of the permanent impairment is due to the pre-existing condition."³

36. In this case there is no evidence of the osteoarthritis to which the AMS referred. The imaging taken in early 2015 does not reveal degenerative changes. Ms Prudence said that she was active and asymptomatic and there is no evidence to suggest that there was pre-existing osteoarthritis.
37. Dr Workman's opinion is speculative and appears to be based on a preference for treatment under private health insurance rather than the evidence.
38. The AMS noted that the early x-ray "demonstrated little in the way of change" but did not list that x-ray in his review of the investigations. He said that the x-ray in November 2016 showed osteoarthritis but that is inconsistent with the radiologist's report.

² *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 (Cole), *Fire and Rescue NSW v Clinen* [2013] NSWSC 629, *D'Aelo v Ambulance Service of New South Wales* (1996) NSWCCR 139; *Echeikh v Diamond Formwork (NSW) Pty Ltd* [2013] NSWSC 365, *Ryder v Sundance Bakehouse* [2015] NSWSC 526 (*Ryder*) *Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416.

³ At [54].

39. The AMS failed to explain why he differed from the independent medical examiners with respect to the deduction and failed to explain his reasoning for his assessment that there was pre-existing osteoarthritis. The only reference to osteoarthritis is in Dr Workman's report.
40. The deduction which the AMS made is not warranted on the evidence. There is no evidence that any pre-existing osteoarthritis contributes to the permanent impairment suffered by Ms Prudence.
41. For these reasons, the Appeal Panel has determined that the MAC issued on 30 October 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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar



WORKERS COMPENSATION COMMISSION

APPEAL PANEL MEDICAL ASSESSMENT CERTIFICATE

Injuries received after 1 January 2002

Matter Number: 3368/20
Applicant: Kathleen Prudence
Respondent: State of New South Wales (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 Rob Kuru 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)
Left lower extremity (hip)	18.9.14 with aggravation on 14.2.17	Chapter 3	Chapter 17 page 548, Table 17.34 page 546 Table 17.33	20%	Nil	20%
Scarring TEMSKI	18.9.14 with aggravation	Chapter 14		1%	Nil	1%
Total % WPI (the Combined Table values of all sub-totals)						21%

Catherine McDonald
Arbitrator

Dr David Crocker
Approved Medical Specialist

Dr Drew Dixon
Approved Medical Specialist

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*.

G Bhasin

Gurmeet Bhasin
Dispute Services Officer
As delegate of the Registrar

