WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-1081/19**
Appellant:	**Unilever Australia (Holdings) Pty Ltd**
Respondent:	**David Thomas Bisson**
Date of Decision:	**25 October 2019**
Citation:	**[2019] NSWWCCMA 150**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Brian Noll**
Approved Medical Specialist:	**Dr Tommasino Mastroianni**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Mr David Bisson (the respondent) suffered injury deemed to have occurred on 3 August 2009 in the course of his employment with Unilever Australia (Holdings) Pty Ltd (the appellant).

2. The respondent brought proceedings claiming permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act). The body part claimed was the left lower extremity.

3. The appellant denied liability for the injury serving various notices pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).[1]

4. The respondent then commenced proceedings in the Commission. The matter was referred to a Commission Arbitrator who made consent orders and findings issued on 19 June 2019.

5. The "Consent Findings" made by the Arbitrator relevantly provided:

> "10. That the deemed date of injury on 3 August 2009 is the date upon which the applicant made his claim for lump sum compensation against the respondent.
>
> 11. The applicant's injury to his left knee on 3 August 2009 (deemed) is by way of aggravation of pre-existing constitutional degenerative changes."

6. The claim was then referred by the Commission to an Approved Medical Specialist (AMS)[2]. Dr Gregory McGroder was appointed as the AMS.

7. The AMS examined the appellant and provided a Medical Assessment Certificate dated 19 July 2019 (MAC). The relevant findings by the AMS pertinent to the various grounds of appeal are set out later in these Reasons. The AMS assessed the left lower extremity at 20% whole person impairment and made no deduction pursuant to s 323 of the 1998 Act.

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[1] See Application, pp 161, 181 and 189

[2] Referral dated 20 June 2019

8. The assessment of whole person impairment is undertaken in accordance with the fourth edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (fourth edition guidelines).[3] The fourth edition guidelines adopt the 5th edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (AMA 5). Where there is any difference between AMA 5 and the fourth edition guidelines, the fourth edition guidelines prevail.[4]

THE APPEAL

9. On 14 August 2019, the appellant filed an Application to Appeal Against a Medical Assessment (the appeal) to the Registrar of the Workers Compensation Commission (the Commission).

10. The Workers compensation medical dispute assessment guidelines (the 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 Guidelines.

11. The appellant claims, in summary, that the medical assessment by the AMS with respect to the assessment of the left lower extremity should be reviewed on the ground that the MAC contains a demonstrable error.

12. The Appeal was filed within 28 days of the date of the MAC. The submissions in support of the grounds of appeal are referred to later in these Reasons.

PRELIMINARY REVIEW

13. The Appeal Panel (AP) conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Guidelines.

14. The appellant submitted that no re-examination was required and that the matter could otherwise be determined on the written submission. The respondent agreed with that submission. For the reasons subsequently provided, the AP accepts that the matter can be re-determined without a need for a re-examination.

EVIDENCE

15. The AP has before it all the documents that were sent to the AMS for the original assessment and has taken them into account in making this determination. The evidence is referred to later in these Reasons.

[3] The 4th edition guidelines are issued pursuant to s 376 of the *Workplace Injury Management and Workers Compensation Act 1998*
[4] Clause 1.1 of the fourth edition guidelines

GROUND FOR APPEAL 1

"Demonstrable error in failing to accept the presence of a pre-existing condition in the left knee, and failure to make a deduction under Section 323 WIM Act 1998 required by the evidence for that pre-existing condition"

Submissions

Appellant's submissions

16. The appellant referred to the consent findings issued by the Arbitrator and the finding by the AMS that there was "no evidence of a pre-existing condition prior to this original injury".

17. The appellant referred to the Presidential decisions of *Jaffarie v Quality Castings Pty Ltd*[5] (*Jaffarie*) and *Inghams Enterprises Pty Ltd v Belokoski*[6] and submitted that the finding of injury "became binding upon the AMS" and the AMS was required to assess the degree of permanent impairment as a result of that injury.[7]

18. It was submitted that a demonstrable error occurred in failing to approach the matter in this way.[8]

19. The appellant conceded that a s 323 deduction can only occur if the pre-existing condition must contribute to the permanent impairment assessed: *Cole v Wenaline Pty Ltd*[9] (*Cole*). It is not necessary that the pre-existing condition be symptomatic in order for a deduction to be required: *Vitaz v Westform (NSW) Pty Ltd*[10] (*Vitaz*).

20. The appellant referred to the opinion of Dr Wilcox in his report dated 26 February 2018 who concluded that the history was compatible with a degenerate medial meniscus with a complex tear reaching a stage of becoming symptomatic and who also referred to the findings of Dr Dickison that showed chondral damage affecting the patella and early osteoarthritis in the knee by December 1998. Dr Wilcox concluded that "there was established osteoarthritis in 2 of Mr Bisson's compartments in 1998".[11]

21. The appellant accepted that an AMS is not bound to accept or adopt the opinion of an expert.[12] However, it was submitted that the opinion provided by Dr Wilcox supports the findings made by the Arbitrator whereas Dr Assem does not accept the presence of a pre-existing condition.

22. The appellant accepted "that the effects of the work injury also progressed over time and contributed to the need for the knee replacement."[13]

23. The appellant referred to the opinion of Dr Wilcox that a s 323 deduction would well exceed 50% and that a deduction "in that range would be required and is consistent with the evidence".[14]

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[5] [2014] NSWWCCPD 79 at [257] and [259]
[6] [2017] NSWWCCPD 15 at [221]-[222]
[7] Appellant's submissions at [12]
[8] Appellant's submissions at [14]
[9] [2010] NSWSC 78 at [48]
[10] [2011] NSWCA 254 at [43]
[11] Appellant's submissions at [18]
[12] Appellant's submissions at [19]
[13] Appellant's submissions at [23]
[14] Appellant's submissions at [24]

Respondent's submissions

24. The respondent submitted that the "cause of the injury was the nature and conditions of employment without limiting the period" and was the entirety of the Respondent Worker's working life.[15] This means that the pre-existing condition had to exist prior to 1978.

25. The respondent had no problems with his knee until 1998 which followed a gradual onset of pain and led to arthroscopy surgery on 5 December 1998.

26. There was no evidence of a condition prior to 1978 or when the respondent commenced working with the appellant. In these circumstances, the pre-existing degenerative change could only be minimal and unlikely to be of any significance with respect to the current impairment.[16]

27. The nature of the pre-existing change was not identified and the AMS "did not have to proceed on the basis that it was any particular condition so long as it conformed with the description found by the Arbitrator."[17] This was said to be a consequence of the decision of the Court of Appeal in *Bindah v Carter Holt Wood Products Australia Pty Ltd*[18] (*Bindah*) and the Presidential decision in *Jaffarie*.

28. The respondent submitted that the appellant was unable "to point to any evidence of the existence of a constitutional condition" and the reference to the opinion of Dr Wilcox which was "misconceived".[19]

29. It was submitted that the pre-existing condition had to pre-date "work in Australia" in 1978 or otherwise to "pre-date employment with the Respondent in July 1996.

30. The respondent submitted that the AMS otherwise considered and rejected the opinion of Dr Wilcox. Dr Wilcox concluded that the employment did not contribute to the arthritis and the AMS explained why he disagreed with that opinion.

31. It was submitted that the AMS correctly found that the increasing arthritic changes developed following the original surgery. A consideration of the evidence would reach the same conclusion, that there is no s 323 deduction. Dr Wilcox did not make a s 323 deduction but opined that the arthritis is unrelated to injury.

Reasons

32. Both parties referred to *Bindah* and the 2014 presidential decision in *Jaffarie* although did not refer to the subsequent analysis by the Court of Appeal in *Jaffarie v Quality Castings Pty Ltd* (*Jaffarie No 2*)*[20].*

33. In *Jaffarie No 2*, White JA observed that the jurisdiction of the Commission, as opposed to the AMS, extended to a finding on "the nature of the injury sustained"[21]. His Honour noted that similar observations were made by Meagher JA in *Bindah*.[22]

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[15] Respondent's submissions, paragraph 2
[16] Respondent's submissions, paragraph 7
[17] Respondent's submissions, paragraph 8
[18] Respondent's submissions, paragraph 8
[19] Respondent's submissions, paragraph 10
[20] [2018] NSWCA 88
[21] At [80]-[82], Macfarlan and Leeming JJA agreeing on this point
[22] *Jaffarie No 2* at [72] applying *Bindah* at [26] (Ward JA also agreeing with Meagher JA)

34. White JA stated:[23]

> "What was said by Emmett JA at [109], quoted above at [70], must be understood in the context of the issues before the court in *Bindah*. I do not understand his Honour to mean that anything which falls within the definition of 'medical dispute' in s 319 will necessarily be outside the jurisdiction of an arbitrator.
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> Under s 105(1) of the WIM Act the Commission has exclusive jurisdiction to examine, hear and determine all matters arising under the WIM Act and the *Workers Compensation Act*. This is subject to specific exclusions contained in both the WIM Act and the *Workers Compensation Act*. The specific exclusion in s 65(3) of the *Workers Compensation Act* does not extend to any medical dispute within the meaning of s 319 of the WIM Act, but only to a subset of such disputes, being a dispute about the degree of permanent impairment of an injured worker. Even a medical dispute concerning permanent impairment of an injured worker cannot be referred for assessment under Pt 7 of Ch 7, except by the Registrar and then where liability is not in issue, or, if in issue, liability has been determined by the Commission (ss 293(3)(a) and 321(4)(a)). The medical assessment is conclusive only in respect of the matters referred to in s 326 which are not as extensive as the matters falling within the definition of medical dispute in s 319."

35. His Honour endorsed the proposition that the jurisdiction of the Commission, as opposed to that of the AMS, is to determine "the nature of the injury sustained"[24] and noted that this was consistent with the orders of the earlier decision of the Court of Appeal in *Jaffarie v Quality Castings*[25] remitting the matter for re-determination in accordance with the reasons of the Deputy President in *Jaffarie*.

36. The consent finding made by the Arbitrator fell within the meaning of s 4 and the "nature of the injury sustained". The finding was of "an aggravation of pre-existing constitutional degenerative changes".

37. We do not understand the respondent to submit other than that the arbitrator had power to make the finding on injury. What is the nature of the aggravation is unclear particularly in circumstances where we do not accept the appellant's submission based on acceptance of Dr Wilcox' opinion. We return to that aspect later in these reasons.

38. The AP observes that the distinction purportedly made by the respondent that the consent finding was "a pre-existing constitutional condition", that is "something born with" and not a "developmental condition", that is "something that developed", is rejected.[26] The clear meaning of the words is that the "pre-existing constitutional degenerative changes" must pre-date the period of injury. It is sufficient to fall within this concept if the pre-existing constitutional changes arose at birth or developed constitutionally prior to injury. The respondent may be mistaking the meaning of "constitutional" with "congenital".

39. The respondent made submissions that there was no evidence of a pre-existing condition because the condition did not exist prior to 1978 when the respondent commenced this type of work in Australia. It may be, although it is unclear from the submissions, that the respondent was referring to s 68B(3) of the 1987 Act which provides that where s 16 of the 1987 Act applies, there "is to be no deduction under section 323 of the 1998 Act for any proportion of the impairment that is due to the worker's employment in previous relevant

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[23] [2018] NSWCA 88, Macfarlan and Leeming JJA agreeing on this point
[24] at [80]
[25] [2015] NSWCA 335
[26] Respondent's submissions at [9]

employment". The previous relevant employment must be of employer who is "liable under section 16 to contribute". There was no discussion by the respondent concerning how the prior employment in Australia falls within the concept of previous relevant employment.

40. The difficulty with accepting the respondent's submission is that he has agreed in a consent finding that there was an aggravation of a pre-existing constitutional degenerative condition. Whether the correct date is 1996 or 1978, the respondent has accepted that finding.

41. The meaning of the consent finding is to be construed "in the light of the circumstances surrounding the making of the orders": *Bindah*[27].

42. The AP proceeds on the basis that there was no previous relevant employment as the evidence does not establish that the prior employment contributed to the aggravation.

43. The period in which the respondent had a pre-existing condition is determined to be the date of commencement of work with the appellant in July 1996 as it is accepted that the work from that date caused injury.

44. The AMS stated that "there is no evidence that he had a pre-existing problem prior to" the date of the initial injury in 1998.[28] It was submitted by the respondent that "condition" meant a "medical condition" and a "problem" meant "symptoms and disability".[29] It was submitted that the AMS did not find that there was no pre-existing condition and therefore did not make a finding inconsistent with the arbitrator's consent findings on injury.

45. It is unclear on what basis the respondent has defined these words.

46. The AP accepts the need for caution in construing minutely with an eye for finding error in the terms expressed by Mason P in *Marina Pitsonis v Registrar of the Workers Compensation Commission*[30]*.* Similar observations were made by Handley AJA in *Lukacevic v Coates Hire Operations Pty Limited*[31] and recently by the Court of Appeal in *Vannini*.[32]

47. In our view, the statement by the AMS that there was "no evidence that he had a pre-existing problem prior to [his initial injury in 1998]"[33] must be read in the terms it has been used by the AMS. The statement is inconsistent with the consent findings issued by the arbitrator. We do not read the statement, as the respondent submits, as consistent with a finding that there was no pre-existing condition. If anything, it is likely that the AMS equated "problem" with symptoms and/or the condition.

48. It is highly unlikely in our view that, as the respondent submitted, the AMS meant "problem" as the disability that results from the condition. This is because the AMS is assessing the impairment as at the date of the assessment and inquiring whether any pre-existing condition contributed to the assessed impairment. An AMS is not assessing the pre-existing impairment prior to injury.

49. The AP also rejects the respondent's submission that there was "no evidence" of a pre-existing condition prior to 1978. This is because the parties have agreed that there was a pre-existing condition, whether that be in 1978 or when employment commenced with the appellant in 1996.

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[27] Emmett JA at [95]; see also Meagher JA at [22]
[28] MAC. paragraph 10(b)
[29] Respondent's submissions, paragraph 22
[30] [2008] NSWCA 88; McColl JA and Bell JA (as their Honours then were) agreeing at [31]
[31] [2011] NSWCA 112 at [107], Hodgson JA agreeing
[32] [2018 NSWCA 324 at [1], [94] and [113]
[33] MAC, paragraph 10(b)

50. The AMS has not considered the issue of s 323 in the context of the accepted finding that that there were pre-existing constitutional degenerative changes aggravated by injury. His comment that there was "no evidence of pre-existing problem prior to that" is a rejection of the parties' consent finding on injury.

51. Section 327(3)(d) provides that the error must be "demonstrable". In *Vannini v Worldwide Demolitions Pty Ltd* (*Vannini*),[34] Gleeson JA observed that, consistent with the observations of Basten JA in *Mahenthirarasa v State Rail Authority of New South Wales,* a "demonstrable error must be apparent in findings of fact or reasoning contained in the medical assessment certificate, although the error may be established in part by reference to materials that were before the approved medical specialist".[35]

52. For these reasons, we accept that the AMS made a demonstrable error in finding that there was no pre-existing condition which was inconsistent with the consent injury finding issued by the Commission.

53. This ground of appeal is upheld.

GROUND FOR APPEAL 2

"Demonstrable error in failing to find that the worker suffered further injury with subsequent employers, which contributed to the need for the knee replacement, and thereby failing to exclude impairment not caused by the work injury"

Submissions

Appellant's submissions

54. The appellant referred to the acceptance by the respondent that the claim for permanent impairment compensation was made on 3 August 2009. It also referred to the consent finding at paragraph 13 and the notation at paragraph 14.

55. It was submitted that the effect of these findings and notations "are significant". The liability of the appellant is in respect of injury up until 3 August 2009 and that this injury "does not include injury with employers post that date."[36]

56. The appellant also referred to the medical opinion of Dr Wilcox which was consistent with the Arbitrator's finding and the respondent's admission.

57. The appellant submitted that the conclusion reached by the AMS that there was no subsequent injury was incorrect and inconsistent with the finding made by the Arbitrator. It was submitted that the "evidence called for an exclusion of subsequent injuries sustained by the worker".[37]

58. The appellant submitted that the AMS has apparently concluded that the injury referred for assessment was the sole cause of the need for a knee replacement which was contrary to the findings on that issue made by the Arbitrator.

[34] [2018] NSWCA 324 (*Vannini*) at [90]
[35] *Vannini* at [86]
[36] Appellant's submissions at [31]
[37] Appellant's submissions at [35]

59. The appellant accepted that the work injury "was a cause of the need for the knee replacement surgery"[38] but that the need for treatment may have multiple causes: *Taxis Combined Services (Victoria) Pty Ltd v Schokman*[39].

60. The appellant submitted:[40]

> "[T]he AMS should have accepted the presence of further injury. As the further injury/ies has been found to have contributed to the need for surgery and therefore contributed to the degree of impairment, the appellant submits that a proportion of the impairment should be determined to flow from the subsequent injuries sustained by the worker, and therefore should be excluded from the impairment assessed."

61. The appellant submitted that "an amount in the vicinity of 10%-30% should be excluded/deducted"[41].

Respondent's submissions

62. The respondent submitted that the appellant's submissions are "wrong in law" and that compensation is payable if the impairment results from the injury. Reference was made to various cases in support of this submission but specifically to the decision of Garling J in *Johnson v NSW Workers Compensation Commission*[42] (*Johnson*).

63. The respondent submitted:[43]

> "The position is that all of the impairment results from the injury so long as the injury materially contributed to the impairment. Subsequent aggravations do not create a basis for making any deduction from the assessment. As Justice Garling said, section 323 provides an exception to the general position however it only applies in respect of prior injuries, pre-existing conditions and abnormalities. Section 323 has no application in respect of subsequent aggravations."

64. The respondent noted that the only time a subsequent injury affects the assessment of impairment is when it constitutes a novus actus, which was not suggested in this case[44].

Reasons

65. As the respondent correctly submitted, the relevance of a subsequent as opposed to previous injury or condition was recently discussed by Garling J in *Johnson*. In that case the worker suffered a compensable injury and a subsequent non-compensable injury. The Appeal Panel held that both injuries contributed to the overall impairment and then made an apportionment between the two incidents. The Court quashed the decision of the Appeal Panel. In the course of his reasons, Garling J stated:

> "66. It is significant that the Panel did not conclude that the later injury was of a kind or nature that severed the causal chain between the NSW Education injury and the plaintiff's impairment. If it had come to such a conclusion, then it was obliged to find that there was no impairment as a result of the NSW Education injury. However, to the contrary, it concluded that the plaintiff's impairment resulted from the NSW Education injury and the later Hostels injury.

[38] Appellant's submissions at [39]
[39] [2014] NSWWCCPD 18 at [53]
[40] Appellant's submissions at [40]
[41] Appellant's submissions at [41]
[42] [2019] NSWSC 317
[43] Respondent's submissions at [38]
[44] Respondent's submissions at [39]

> 67. The task required by ss 9 and 9A of the 1987 Act is for a determination to be made about whether the relevant employment was a substantial contributing factor to the injury. If it was, then the AMS or the Panel is to assess the permanent impairment, by a clinical assessment of the claimant, as they present on the day of the assessment having regard to the matters set out in Clause 1.6 of the Guidelines. That task does not involve any process of apportionment between injuries.
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> 68. Section 323 of the 1998 Act provides an exception to that general approach, but only in the limited circumstances which that provision contemplates. Here those provisions did not apply."

66. We are bound by the decision of *Johnson*. We otherwise repeat and adopt the decision of the Appeal Panel decision in *State of New South Wales v Worland*[45] (*Worland*) which was constituted by two of the present Panel members.

67. The reasoning in *Johnson* is entirely consistent with the High Court decision in *Calman v Commissioner of Police*[46] (*Calman*) concerning the effect of a subsequent non-work injury in the assessment of weekly compensation. The authorities establish that the same test of causation applies with respect to weekly compensation, medical expenses and/or permanent impairment compensation.

68. The other authorities cited by the respondent are referred to in the Appeal Panel decision of *Worland*.

69. The appellant relied on the consent finding recorded as follows:[47]

> "That the need for the surgical treatment on or about 15 November 2011 (by way of unicondylar medial partial knee replacement) was materially contributed to by the further injuries and aggravations to the applicant's left knee resulting from his duties as a maintenance fitter with the employer subsequent to the respondent."

70. There were no relevant submissions that this "consent finding" was beyond the jurisdiction of the arbitrator. It was not a finding on liability and was purportedly a consent finding on subsequent employers who were not parties to the proceedings. This consent finding appears to be directed solely to the determination required by the AMS as it was unnecessary for the arbitrator to make this decision.

71. In *Bindah* Emmett JA observed:

> "A finding made by a person without jurisdiction cannot bind a person or persons who have jurisdiction (see *Haroun v Rail Corporation New South Wales* [2008] NSWCA 192 at [16] and [19] - [21])."

72. Similar observations could be made with respect to this consent finding. We do not see how the "finding"[48] addresses any issue before the arbitrator as the subsequent injuries and aggravations against other employers were not a matter requiring a decision.

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[45] [2019] NSWWCCMA 98 [158] - [168]
[46] [1999] HCA 90
[47] Order 13
[48] Set out at paragraph [69]

73. The appellant accepted that the knee replacement was causally related to the deemed date of injury[49]. It has otherwise not submitted that the subsequent "injuries" constituted a novus actus.

74. In these circumstances, there is no legal basis to conclude that there should be some contribution and/or deduction by reason of the subsequent incidents which aggravated the left knee condition. The appellant did not refer to any evidence that supports the submission that this deduction should be made.

75. As it is necessary to reassess in respect of the first ground of appeal, the AP again addresses this matter later in these reasons. However, on the basis of the appellant's submissions, we do not exclude or deduct a further proportion of up to 30% by reason of the subsequent injuries and aggravations referred to in the further consent finding

REASSESSMENT

76. Having found error, the AP is required to reassess according to law: *Drosd v Nominal Insurer.*[50]

77. A deduction pursuant to s 323 of the 1998 Act is required if a proportion of the permanent impairment is due to previous injury or due to pre-existing condition or abnormality: *Vitaz v Westform (NSW) Pty Ltd (Vitaz)*[51]; Ryder *v Sundance Bakehouse* (*Ryder*)[52]*; Cole v Wenaline Pty Ltd* (*Cole*)[53].

78. The appellant correctly submitted that a deduction can be made despite the fact that the worker is asymptomatic prior to injury. In *Vitaz* Basten JA stated:[54]

> "42. The appeal to the Appeal Panel did not expressly identify an erroneous failure to give reasons. Rather, the submissions on the appeal, which appear to set out the grounds of challenge, complained that there can be no deduction under s 323, as a matter of law, in the absence of a pre-existing physical impairment. It was further submitted, by reference to the opinion of three medical commentators in a local publication:
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> > 'If a worker develops permanent pain and symptoms due to work consistent with spondylosis in the neck region, that condition might be assessed at DRE II. Although the spondylosis is likely to have been degenerative, if there were no symptoms in the period prior to the work-related complaint, then there was no rateable impairment at that time. So, nothing would be subtracted from the current impairment.'
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> 43. That opinion contained a legal assumption which is inconsistent with the approach adopted by this Court in, for example, *D'Aleo v Ambulance Service of New South Wales* (NSWCA, 12 December 1996, unrep) (quoted by Giles JA, Mason P and Powell JA agreeing, in *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284; 21 NSWCCR 34 at [30]-[32] and, more recently, by Schmidt J in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [13]). The resulting principle is that if a pre-existing condition is a contributing factor causing permanent impairment,

[49] Appellant's submissions, paragraph 39
[50] [2016] NSWSC 1053
[51] [2011] NSWCA 254
[52] [2015] NSWSC 526 (*Ryder*) at [54]
[53] [2010] NSWSC 78 at [29] - [30]
[54] At [42]-[43], McColl JA and Handley AJA agreeing

a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury."

79. More recently in *Vannini v Worldwide Demolitions Pty Ltd*[55] Gleeson JA suggested that an Appeal Panel, when considering the reasoning of an Approved Medical Specialist on the question of causation under s 323, was required to determine "whether any proportion of the impairment was due to any previous injury, or pre-existing condition or abnormality" and if so, "what was that proportion".[56]

80. The AP proceeds on the basis of the consent finding of injury which provides that the injury was "by way of an aggravation of pre-existing constitutional degenerative changes". That finding is premised on the fact that there were pre-existing constitutional degenerative changes.

81. The respondent did not explain, despite its submission to the contrary[57], why the pre-existing condition had to arise from the commencement of work in Australia in 1978 as opposed to the commencement of work with the respondent in July 1998.

82. The respondent stated that he commenced work with the appellant in July 1996. The work required a lot of squatting, kneeling and ascending and descending ladders.[58] In about August 1998 the respondent began to experience left knee problems which would swell and hurt with work activities such as crouching, kneeling or walking up and down stairs.

83. The respondent first consulted Dr Dickison in December 1998. An x-ray is reported by Dr Dickison as demonstrating no bony abnormality and an ultrasound was reported as normal.[59] The doctor agreed with Dr Ireland's initial thoughts that the respondent had a tear of the medial meniscus caused by the nature of the work as a fitter and turner tending to overload the posterior horn of the medial and lateral menisci.

84. Dr Dickison operated on 15 December 1998 when he performed and arthroscopy of the left knee, partial medial meniscectomy and chondroplasty. The doctor identified a complex tear of the posterior half of the medial meniscus. The patella surface showed some roughening. The articular surfaces of the medial compartment were well preserved.[60]

85. In mid-1999 the respondent reported increasing left knee pain following a good recovery following previous surgery. A repeat MRI scan was organised which did not show evidence of a residual or recurrent tear. Dr Lucas, Radiologist, opined that the articular cartilage in both the medial and lateral femoral tibial compartments were well maintained with no osteochondral injury identified. The doctor noted minor subchondral sclerosis.[61]

86. The respondent returned to Dr Dickison in September 2000. Recent x-rays were described as showing a slight reduction in the medial joint space.[62]

87. Dr Dickison performed a further arthroscopy of the left knee on 10 October 2000. At that time, the doctor noted clear fluid and a deal of fine chondral debris. The articular surfaces on the medial edge of the patella and the medial compartment "showed some patterns of early wear and overload."[63]

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[55] [2018] NSWCA 324 (*Vannini*) at [90]
[56] At [90]
[57] Respondent's submission, paragraph 10
[58] Application, p 155
[59] Application, p 114
[60] Application, p 112
[61] Reply, p 36
[62] Application, p 97
[63] Application, p 93

88. At that time Dr Dickison opined that there were early degenerative changes occurring in the medial compartment secondary to the medial meniscal tear.

89. The respondent was reviewed by Dr Dickison in September 2007. The history at that time was of increasing left knee pain around the medial aspect over the past six months. X-rays demonstrated slight reduction in the medial joint space.[64]

90. An MRI scan of the left knee dated 11 October 2007 is reported by Dr Ng as showing the previous partial meniscectomy of the medial meniscus with no evidence of re-tear and a "mild degree" of osteoarthrosis in the medial compartment.[65]

91. The respondent returned to Dr Dickison in December 2007. The doctor commented at that time:[66]

> "His knee is really not (word missing) to speed and it is showing signs of early deterioration in the medial compartment. (Word missing) that the problems in his knee are secondary to the injuries that occurred with the original meniscal tears."

92. The respondent was seen by Dr Sorrenti, Orthopaedic Surgeon on a number of occasions in 2008. The doctor performed a further arthroscopy on 17 March 2008 which showed the previous partial medial meniscectomy with a healthy rim, damage to the medial tibial plateau down to the bone with the bone wearing out.[67]

93. In a short report dated 11 September 2009, Dr Sorrenti referred to Dr Wilcox' opinion as "basically simply his opinion".[68]

94. On 1 December 2008. Dr Sargent, Radiologist reported that an x-ray showed:[69]

> "There is moderate narrowing of the medial compartment consistent with the history of previous medial meniscectomy."

95. In 2011 the respondent underwent a unicondylar medial partial knee replacement.

96. In an earlier report Dr Dixon did not accept that there was prior degeneration in the left knee as the respondent had no apparent symptoms prior to 1998. He otherwise accepted Dr Wilcox opinion that the respondent's body weight "would contribute to the development of arthritic change in a weight bearing joint".[70]

97. In a report dated 22 October 2012, Dr Dixon opined that the respondent had "developed post traumatic arthritis of his knee requiring arthroscopic review and hemiarthroplasty".[71]

98. The respondent's solicitors also qualified Dr Assem. The doctor provided a report dated 22 November 2017 when he opined that the incident in August 1998 resulted in a complex tear of the medial meniscus and the development of accelerated degenerative changes in the medial compartment of the left knee requiring further arthroscopic surgical procedures and a unicondylar knee replacement.[72]

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[64] Application, p 78
[65] Application, p 63
[66] Application, p 65 – portions of the right-hand side of the page have been cut off
[67] Application, p 36
[68] Application, p 34
[69] Application, p 35
[70] Application, p 21
[71] Application, p 14
[72] Application, p 7

99. In a further report the doctor opined that removal of a meniscus causes late secondary arthritis which usually takes 10 to 20 years to develop. Where secondary arthritis occurs, the knee was more prone to aggravation.[73] Dr Assem opined that the respondent's condition was due to the "single event in 1998 with a progressive deterioration due to the nature and conditions of his employment".

100. In January 2017, Dr Law opined:[74]

> "The reason he has medial compartment osteoarthritis is that he had a partial meniscectomy in his left knee in 1998 after an injury at work in August 1998 which resulted in a complex tear of his medial meniscus. This has predisposed him to the development of osteoarthritis in the medial compartment of his left knee."

101. Dr Wilcox was qualified by the respondent and has provided a series of reports. The doctor opined in the report dated 10 February 2009 that the respondent suffered a complex tear of a degenerative posterior horn of the medial meniscus and over many years he has been gradually developing osteoarthritis. The doctor opined that the tearing of the medial meniscus was largely a degenerative process[75] where there could have been some aggravation from the nature and conditions of employment.[76]

102. In a further report dated 27 November 2009, Dr Wilcox addressed the opinion of Dr Dixon and Dr Sorrenti.[77] He concluded that the respondent had osteoarthritis in the medial and patellofemoral compartments was principally caused by excessive weight prior to 1998.[78]

103. In a further report dated 11 February 2013, Dr Wilcox concluded that the osteoarthritis pathology was developing prior to mid-1998 and a major risk factor was excessive body weight.[79] He observed that osteoarthritis of the knees occurs throughout the population[80] and concluded that this was developing irrespective of injury.

104. Dr Wilcox concluded that the injury was responsible for the partial meniscectomy which was assessed at 1% whole person impairment. He otherwise concluded that the need for the knee replacement was unrelated to injury and due to "the degenerative disease affecting the left knee which has slowly progressed over the past 20 years."[81]

105. The AMS concluded that the initial injury in 1998 led to four surgical procedures culminating in a partial knee replacement. He opined that the "requirement for the replacement was the gradual development of arthritis following the initial surgical procedure and aggravated by the nature and conditions of his work." He made no deduction pursuant to s 323 of the 1998 Act.

106. The parties made no submissions that the assessment of whole person impairment is other than 20%. We adopt the findings made by the AMS on overall assessment. The appellant otherwise accepted in its submissions that the deemed date of injury was causative of the need for the knee replacement.[82]

107. We note the notation in the Consent Orders in respect of further injuries and/or aggravations of the left knee. The appellant did not submit that these further injuries and/or aggravations amounted to a novus actus.

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[73] Application, p 9
[74] Application, p 18
[75] Reply, p 6
[76] Reply, p 7
[77] Reply, p 10
[78] Reply, p 13
[79] Reply, p 20
[80] Reply, p 20
[81] Reply, p 34
[82] Appellant's submissions, paragraph 38

108. Adopting the appellant's concession, which we otherwise agree is correct, the injury deemed to have occurred on 3 August 2009 results in a 20% whole person impairment.

109. We accept and apply the consent finding that the respondent sustained an injury by way of aggravation of pre-existing constitutional degenerative changes. The symptoms reported on observation by Dr Dickison in late 1998 and the scan evidence in mid-1999 do not suggest significant arthritic change in the left knee. We do not accept the appellant's submissions that there was significant compartmental osteoarthritis at that time.

110. The scan evidence and the observations of various treating doctors, such as Dr Dickison and Dr Sorrenti, show that the subsequent deterioration was in the compartment of the original meniscectomy. That observation suggests that the subsequent arthritic deterioration was due to the original tear and partial meniscectomy.

111. The preponderance of the medical evidence, apart from Dr Wilcox, supports the conclusion that the partial meniscectomy led to the subsequent development of osteoarthritis in the medial compartment. It is highly relevant, in the expert medical view of the AP, that the deterioration was evident in the compartment of the meniscectomy. The most likely explanation for this deterioration is the partial meniscectomy affecting the load bearing within the knee joint. These changes were specifically observed by Dr Dickison in 2000 at the time of the second arthroscopic procedure.

112. In his report dated 26 February 2018, Dr Wilcox stated:[83]

> "On arthroscopy Dr Dickison describes chondral damage affecting the patella which he smoothed back as well as the complex posterior meniscal tear. Early osteoarthritis was affecting the knee in December 1998. By 10 October 2000 when Dr Dickison did a further arthroscopic debridement the articular cartilage changes had advanced.
>
> There were Grade 1/11 changes on the medial edge of the patella with other abnormalities. Dr Dickison wrote that "in the medial compartment again there was Grade1/11 chondral loss. However, the medial meniscus appeared quite stable.
>
> Surely the use of the word again implies that similar articular cartilage abnormalities were seen during the first arthroscopy 22 months earlier. Therefore, there was established osteoarthritis in 2 of Mr Bisson's knee compartments in 1998."

113. The observation of Dr Dickison in his operation report dated 15 December 2018 was that there was "Grade II damage on the medial ridge slightly towards the lateral side of the patella which was smoothed with a chrondrotome" as well as a complex tear of the posterior half of the medial meniscus.[84]

114. The observations at surgery in 1998 support only arthritic changes in the patella-femoral joint and not the tibial-femoral joint.

115. In December 1998 Dr Dickison reported the x-ray as showing no bony abnormality and the ultrasound as being normal.

116. The 12 August 1999, MRI arthrogram reports that the "articular cartilage in both medial and lateral femoral tibial compartments is well maintained."[85]

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[83] Reply, pp 31 - 32
[84] Application, p 111
[85] Reply, p 36

117. In the operation report for the second arthroscopic procedure undertaken on 10 October 2000, Dr Dickison stated:[86]

> "In the medial compartment, again there was some slight loss on the medial femoral condyle Grade I/II and appearance of thinning and irregular nature of the articular surface on the posterior part of the medial tibial plateau."

118. In the report dated 10 October 2000 Dr Dickison stated:[87]

> "The articular surfaces on the medial edge of the patella and also in the medial compartment showed some patterns of early wear and overload and these roughened areas were smoothed down."

119. We do not agree with Dr Wilcox inference that the use of the word "again" by Dr Dickinson in the operation report of October 2000 establishes that there were changes seen in the tibial femoral compartment in December 1998, principally because Dr Dickinson did not report those changes in his December 1998 reports. Dr Dickinson also commented in December 1998 that the scan evidence at that time was normal. An MRI arthrogram undertaken in August 1999 did not show damage in the tibial femoral compartment.

120. The tibial femoral compartment comprises the medial compartment.

121. For these reasons, we do not agree with Dr Wilcox' view that pre-existing degenerative changes were seen by Dr Dickinson in the tibial femoral compartment in December 1998.

122. The signs in the tibial femoral compartment seen by Dr Dickison in October 2000 were described by as showing "patterns of early wear and overload". This comment is entirely consistent with the medical view that the changes in that compartment developed following the 1998 surgery.

123. The arthritic changes in that compartment continued to progress. In December 2007 Dr Dickison reported that the medial compartment was showing "signs of early deterioration".

124. We agree with Dr Dickison's opinion, shared by Dr Assem, Dr Dixon and Dr Law that the arthritic changes in the medial compartment were secondary to the meniscal surgery.

125. The preponderance of the medical evidence and the medical expertise within the AP supports the conclusion that there was an absence of degenerative changes in 1998 within the tibia-femoral joint which includes the medial compartment where the meniscus was damaged. There was no degeneration cited by Dr Dickison associated with the complex tear of the meniscus.

126. The respondent's work duties, were, in our view, sufficient to cause this tear through repetitive kneeling, squatting and the climbing of ladders.

127. However, we are obliged to accept and apply the consent finding of injury "by way of aggravation of pre-existing constitutional degenerative changes". The consent finding does not identify the extent of the "pre-existing constitutional changes". We accept it would be inconsistent with this consent finding to hold that there were no pre-existing constitutional degenerative changes in relation to the tibial femoral component of the knee joint.

[86] Application, p 92
[87] Application, p 93

128. The developing osteoarthritis subsequent to arthroscopic surgery in 1998 inevitably led to the situation that the respondent required a partial knee replacement as the knee condition deteriorated to one of bone on bone. That condition existed as at 2009 when further surgery was performed. The condition will inevitably lead to the need for a total knee replacement.

129. Our opinion is that, consistent with the consent finding, the pre-existing constitutional degenerative changes were extremely minor. In these circumstances, we largely reject the opinion expressed by Dr Wilcox.

130. However, we are obliged to accept from the consent finding that there must be some contribution from the pre-existing degenerative condition to the need for the partial knee replacement as the parties agreed that there were some pre-existing changes prior to injury. The pre-existing changes were a minor, albeit contributory part, to the subsequent post-traumatic osteoarthritic development.

131. In these circumstances, we make a deduction pursuant to s 323. We accept that the proviso in s 323(2) of the 1998 Act can be applied and that it is appropriate to make a one-tenth deduction. We apply the proviso because we do not accept Dr Wilcox' opinion on causation. Otherwise, the virtual unanimous medical opinion makes no deduction based on an absence of any pre-existing condition. Based on our reasons, we consider the nature of the pre-existing condition contributing to the need for the partial knee replacement was minor.

132. We otherwise decline to make any deduction based on the appellant's argument of contribution by the subsequent injuries. A cause of the partial knee replacement, as the appellant conceded in its written submissions, was the injury deemed to have occurred in the employ of the appellant. In our view, the meniscal trauma in 1998 with arthroscopic surgery and the consequential arthritic condition was the primary cause for the loss of cartilage in the medial compartment and the need for a partial knee replacement.

133. Accordingly, the respondent's whole person impairment of 20%, less the s 323 deduction, results from the deemed date of injury with the appellant.

134. The exacerbation to the condition by subsequent employment had little effect on the condition set in train in 1998 and deteriorating throughout the years during the employ of the appellant.

135. Applying the statutory test in s 66 of the 1987 Act and the reasoning in *Johnson* to these factual conclusions, there is no basis for making a further deduction based on the consent finding[88] that further injuries and aggravations to the left knee from subsequent employers also resulted in the need for the partial knee replacement.

136. We are satisfied, given the duration of symptoms, that the impairment is permanent.

DECISION

137. For these reasons, the Medical Assessment Certificate given in this matter is revoked. A further medical assessment certificate is attached to these Reasons.

[88] Set out at [69] herein

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

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL

MEDICAL ASSESSMENT CERTIFICATE

Matter No: **1081/19**
Applicant: **David Thomas Bisson**
Respondent: **Unilever Australia Ltd**

This Certificate is issued pursuant to section 328(5) of the *Workplace Injury Management and Workers Compensation Act 1998.*

The Appeal Panel revokes the Medical Assessment Certificate of Dr Gregory McGroder and issues this new Medical Assessment Certificate as to the matters set out in the Table below:

Body Part or system	**Date of Injury**	**Chapter, page and paragraph number in NSW workers compensation guidelines**	**Chapter, page, paragraph, figure and table numbers in AMA5 Guides**	**% WPI**	**WPI deductions pursuant to S323 for pre-existing injury, condition or abnormality (expressed as a fraction)**	**Sub-total/s % WPI (after any deductions in column 6)**
Left Lower Extremity	3/8/09 (deemed)	Page 21 Table 17.35	Chapter 17 Page 547 Table 17.33	20%	1/10th	18%
Total % WPI (the Combined Table values of all sub-totals)					**18%**	

John Harris
Arbitrator

Dr Brain Noll
Approved Medical Specialist

Dr Tommasino Mastroianni
Approved Medical Specialist

25 October 2019

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

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar