WORKERS COMPENSATION COMMISSION

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

Matter No:	**M1-2877/19 and M2-2877/19**
Applicant:	**Helen Lecopoulos**
Respondent:	**Draft FCB Sydney Pty Ltd (deregistered)**
Date of Decision:	**26 November 2019**
Citation:	**[2019] NSWWCCMA 173**

Appeal Panel:	
Arbitrator:	**Mr John Harris**
Approved Medical Specialist:	**Dr Margaret Gibson**
Approved Medical Specialist:	**Dr Brian Noll**

BACKGROUND TO THE APPLICATION TO APPEAL

1. Ms Lecopoulos (the applicant) suffered injury on 6 February 2002 in the course of her employment with Draft FCB Sydney Pty Ltd (the respondent).

2. The respondent served a notice dated 26 October 2018[1] pursuant to s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). In summary the respondent denied that the applicant had suffered compensable injuries to the right or left knee. The respondent did not dispute liability in respect of the injury to the left foot.

3. The applicant commenced proceedings claiming permanent impairment compensation pursuant to s 66 of the *Workers Compensation Act 1987* (the 1987 Act) for the left and right lower extremities and associated scarring.

4. As there was a liability issue, the application was referred to a Commission Arbitrator. The Arbitrator determined the liability issues by consent and remitted the matter to the Registrar for referral to an Approved Medical Specialist (Consent Orders).[2]

5. The assessment of permanent impairment was then referred by the Registrar to Dr Harvey-Sutton, an Approved Medical Specialist (AMS), who examined the applicant and provided the Medical Assessment Certificate dated 18 September 2019 (MAC). The relevant findings made by the AMS pertinent to the various grounds of appeal are set out later in these Reasons.

6. The AMS assessed the applicant as having a 15% whole person impairment (WPI) of the right lower extremity less a one-tenth deduction pursuant to s 323 of the 1998 Act. The left lower extremity (knee) was also assessed at 15% WPI with a 10% deduction pursuant to s 323 of the 1998 Act, the left foot was assessed at 6% WPI with no deduction and the scar was assessed at 1%. The combined WPI was assessed at 30%.

[1] Reply, pg 14
[2] Consent Orders dated 12 August 2019

7. 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 guidelines prevail.[4]

THE APPEALS

8. On 25 September 2019, the applicant filed an Application to Appeal Against a Medical Assessment (the applicant's appeal) to the Registrar of the Workers Compensation Commission (the Commission).

9. On 16 October 2019, the respondent filed an Application to Appeal Against a Medical Assessment (the respondent's appeal) to the Registrar of the Commission.

10. Whilst there are separate appeals filed by the parties, it is convenient to describe Ms Lecopoulos as the applicant and the employer as the respondent in these reasons.

11. The WorkCover Medical Assessment Guidelines (the Guidelines) set out the practice and procedure in relation to appeals to Medical Appeal Panels under s 327 of the 1998 Act.

12. The applicant claims, in summary, that the medical assessment by the AMS should be reviewed on the ground that the MAC contains a demonstrable error and/or the assessment was made on the basis of incorrect criteria.

13. The respondent claims that the medical assessment was determined on the basis of incorrect criteria and/or that the MAC contains a demonstrable error.

14. The Appeals were 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.

15. Given the issues raised on appeal by the parties, it is necessary to first address the respondent's grounds of appeal.

PRELIMINARY REVIEW

16. 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. As a result of that preliminary review, the AP determined, for the reasons provided subsequently, that some of the grounds of appeal had been made out.

17. The parties did not request a re-examination by an AMS who is a member of the AP. Whilst the AP is satisfied that a new certificate should be issued, we otherwise agree that this can be done without a new assessment. This is because the resolution of the issues on appeal do not require further examination and can be determined from an analysis of the evidence.

EVIDENCE

18. The AP has before it all the documents that were sent to the AMS for the original assessment and has referred to portions of the evidence and taken them into account in making this determination.

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

[4] Clause 1.1 of the fourth edition guidelines

19. The applicant sustained an injury on 6 February 2002 when she tripped over a box and fell injuring her left foot.

20. Dr Mark Horsley operated on 22 February 2002 when the applicant underwent an open reduction and lateral fixation of a mid-foot dislocation[5].

21. The applicant stated that right knee pain commenced in the middle of 2002.[6] She said that as a result of her left foot injury her mobility was restricted and she put on weight. Prior to the injury the applicant participated in sports such as netball, tennis and other activities.

22. In August 2002 Dr Horsley recorded that the applicant complained of right knee pain related to hopping around on one leg following the use of crutches[7].

23. In June 2003, Dr Martin Sullivan opined that the applicant may have post-traumatic arthritis involving the base of the second metatarsal.[8]

24. Dr Linklater commented on an x-ray and MRI scan of the left foot dated 4 July 2003. He opined that there was a development of advanced osteoarthritic changes in the navicular-medial cuneiform and minor post-traumatic degenerative changes in the navicular-intermediate cuneiform articulation and a scarred Lisfranc ligament with plastic deformation.[9]

25. In a report dated 23 July 2003 Dr Sullivan opined that the applicant had developed post traumatic arthritis involving the navicular medial cuneiform joint as a result of the Lisfranc injury.[10]

26. In December 2003 Dr Sullivan performed an arthrodesis with bone graft and internal fixation.[11]

27. Dr Kalev Wilding was qualified by the respondent and provided a report dated 25 November 2003. The doctor agreed with Dr Sullivan's opinion that the applicant developed post traumatic arthritis in the navicular-medial cuneiform joint as a result of the Lisfranc injury.[12] He opined that the injury on 6 February 2002 was the only contributing factor to the proposed arthrodesis surgery.

28. Dr Wilding provided a further report dated 3 April 2005 where his opinion remained unchanged. He then accepted the link between the left foot injury and the weight gain.[13]

29. In April 2004, Merren Coad, Physiotherapist recorded that the applicant had put on 25 kilograms since the injury.[14]

30. In May 2005 Dr Sullivan commented that the CT scan revealed established pseudarthrosis involving the medial cuneiform navicular joint and at the base of the second metatarsal. Revision surgery was recommended. The doctor noted that the amount of pain made weight loss difficult.[15] He then recorded the applicant's weight at around 130 kilograms.

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[5] Application, p 13-14
[6] Application, p 2
[7] Application, p 19
[8] Application, p 25
[9] Application, p 27
[10] Application, p 28
[11] Application, p 30
[12] Reply, p 41
[13] Reply, p 46
[14] Application, p 32
[15] Application, p 39

31. In August 2006 Dr Jacqueline Korner opined that the applicant was unable to lose weight and was unable to exercise because of the severe pain.[16] The general practitioner observed that the applicant had put on an enormous amount of weight since injuring her foot at work.[17]

32. Dr Stephen Gibson recorded in September 2006 that the applicant had put on 45 kilograms in the four years since the injury.[18]

33. Susan Pervan, Psychologist, recorded in November 2006 that the applicant was complaining of bilateral knee pain.[19]

34. Dr Cyril Wong was qualified by the applicant and provided a report dated 25 May 2018. He made no deduction for either knee or the left foot pursuant to s 323 of the 1998 Act.[20]

35. Dr Greg Bruce was qualified by the respondent and provided a report dated 29 August 2018.[21] The doctor opined that the applicant had naturally occurring genu varus of the knees progressing to osteoarthritis which were unrelated to the injury.

36. Dr Bruce opined that the impairment of the knees was unrelated to the work injury and that 100% of the impairment of the left foot was due to the work injury.[22]

37. Dr Bruce provided an updated report dated 18 July 2019. The doctor repeated his opinion that the applicant had genu varus which increased weight bearing through the medial compartment of the knees resulting in thinning of articular cartilage and narrowing of the medial joint space.

38. Dr Bruce referred to the right knee x-rays taken on 5 August 2002 which showed longstanding changes present for a number of years. The doctor opined that the varus deformity and osteoarthritis in the medial compartment of the right knee were progressing well before any changes in gait occurred.

39. Dr Bruce noted that subsequent x-rays of the left knee showed identical changes to the right knee and opined that it was highly probable that the applicant had similar problems in the left knee prior to the injury.

40. Dr Bruce confirmed his opinion that there was no literature which supports a link between altered gait increasing either genu varus and osteoarthritis in the knees.

41. Dr Bruce referred to a paper authored by Dr Ian Harrington[23] which was attached to this report. The paper noted that altered gait did not produce problems with the normal leg unless there were major displacements of the centre of gravity, there was significant leg length discrepancy or the alteration of the gait pattern occurred over a prolonged period. Dr Harrington opined that increased body weight has a detrimental effect on both lower extremities and magnifies the risk factors associated with altered gait over a prolonged period.[24]

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[16] Application, p 48
[17] Application, p 51
[18] Application, p 55
[19] Application, p 61
[20] Application, p 172
[21] Reply, p 48
[22] Reply, p 62
[23] "Symptoms in the Opposite or Uninjured Leg", Dr Ian Harrington, August 2005
[24] Respondent's late application, p 23

42. The applicant provided a supplementary statement dated 12 July 2019, when she stated that she weighed approximately 95 kilograms at the time of the accident and the weight increased by 25 kilograms as at April 2004, increasing to 136 kilograms when gastric band surgery was undertaken in October 2006.[25] There were various fluctuations in weight following two gastric sleeve surgeries with the weight plateauing at 120 kilograms.

43. The applicant stated that due to her left foot condition she has walked with an altered gait which placed strain on both the left and/or the right knee.

RESPONDENT'S GROUND OF APPEAL – Section 323 deduction of the left and right knees

Submissions

Respondent's submissions

44. The respondent submits that the assessment was made on the basis of the incorrect criteria as the one-tenth deduction "was at odds with the available evidence".

45. The respondent referred to s 322(2) of the 1998 Act and paragraphs 1.27-1.28 of the fourth edition guidelines and noted the following evidence:

    (a) The AMS recorded that there was a significant pre-existing mechanical load on both knees prior to the accident as a result of the applicant's weight and pre-existing degenerative changes which contributed to the need for the total knees replacement;

    (b) The AMS recorded that the applicant weighed approximately 95 kilograms at the time of the accident placing her in the obese range with a body mass index of 35;

    (c) This history is consistent with that recorded by Dr Horsley in 2002;

    (d) The x-ray taken on 5 August 2002 is reported by the AMS as demonstrating narrowing of the medial compartment;

    (e) The x-ray taken of the left knee on 22 November 2010 demonstrated significant progression of osteoarthritis. This was medically consistent with the right knee x-ray taken in 2002 which would have shown degenerative changes "because of the bi-pedal nature of walking"[26];

    (f) Subsequent x-ray investigations of the knees in 2014[27] show progression of osteoarthritic change, particularly in the medial and patellofemoral joints;

    (g) The opinion expressed by the AMS that pre-existing obesity and medial compartment narrowing contributed to the need for the total knee replacement is supported by the evidence, including the opinion expressed by Dr Bruce, that the knee replacement surgeries were necessary as a result of naturally occurring osteoarthritis which was secondary to genu varus[28];

    (h) The applicant would not have progressed to bilateral knee replacement if not for the pre-existing degenerative changes and pre-existing weight, the extent of the deduction is at odds with the available evidence;[29]

[25] Applicant's late Application filed 15 July 2019
[26] Respondent's submissions, paragraph 2.12
[27] Reply, pages 64-66 and 68-70
[28] Reply, pg 48-63
[29] Respondent's submissions, paragraph 2.16

(i) The AMS has applied the one-tenth deduction on the basis that it was "difficult to determine" rather than on the basis that the deduction was consistent with the available evidence.[30]

46. The AMS has failed to provide sufficient reasons as to why a deduction of more than one-tenth ought not to apply given that that the pre-existing condition contributed to the need for bilateral knee replacements. Reference was made to the decision of *State of New South Wales v Kaur*[31] (*Kaur*) which referred to the decision of the High Court in *Wingfoot Australia Partners Pty Ltd v Kocak*[32]. It was also submitted, by reference to the Court of Appeal decision of *Campbelltown City Council v Vegan*[33], that where more than one conclusion was open, it was necessary to explain why that one conclusion was preferred. In that respect the respondent emphasised that the deduction of one-tenth was at odds with the available evidence.[34]

47. The respondent submitted that the AMS had failed to provide adequate reasons why a deduction of more than one-tenth should not apply.

48. It was finally submitted that, even if adequate reasons had been provided, the extent of the deduction was at odds with the evidence and that a deduction of 50% was appropriate.

49. The respondent also submitted that the failure to apply an "appropriate deduction consistent with the medical evidence resulted in a demonstrable error."[35] Reference was made to the decision of *Merza v Registrar of the Workers Compensation Commission*[36] that a demonstrable error is one "readily apparent" from examination of the MAC.

50. It was submitted that the AMS failed to "appropriately determine the relevant 'deductible proportion' based upon the medical evidence before her".[37] The error in not making a greater deduction than one-tenth was in not "having regard to the extent of the pre-existing condition of the left and right knees, including the respondent's weight and increased mechanical loading at the time of injury and evidence supporting that her degenerative condition and weight have materially contributed to the need for bilateral knee replacements".[38]

Applicant's submissions

51. The applicant submitted that she was 37 years of age at the time of the injury and asymptomatic.

52. The applicant referred to her pre-injury weight of 95 kilograms and submitted that the claim for consequential condition was based on both altered gait and the substantial increase in weight caused by the injury. Reference was made to the record by Dr Horsley of the onset of right knee symptoms shortly after the injury and in 2006 by Susan Pervan, Psychologist who recorded bilateral knee pain.

53. The applicant also referred to various medical records which corroborated the applicant's evidence of weight increase following the injury.

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[30] Respondent's submissions, paragraph 2.18
[31] [2016] NSWSC 346 at [25]
[32] [2013] HCA 43 at [55]
[33] [2006] NSWCA 284
[34] Respondent's submissions, paragraph 2.23
[35] Respondent's submissions, paragraph 2.33
[36] [2006] NSWSC 93
[37] Respondent's submissions, paragraph 2.37
[38] Respondent's submissions, paragraph 2.39

54. The applicant referred to the Consent Orders issued by the Commission remitting the matter to an approved medical specialist for assessment of the impairment of both knees and the left foot.

55. The applicant referred to Dr Bruce's acceptance that both increased weight loading and altered gait can increase symptoms.

56. It was submitted that the consequential condition arose over an extended period from 2002 up until the date of surgery and it "would certainly be a difficult matter to assess as it is arisen over so many years". [39]

57. The applicant submitted that Dr Harvey-Sutton explained the basis for the one-tenth deduction given the observation of narrowing of the medial compartment of the right knee shown by x-ray and the mechanical load on both knees.

58. The applicant submitted that there is no evidence to support the respondent's submission that the she would have come to bilateral knee replacements and that "submission is merely an exercise in speculation." [40] It was submitted that, consistent with the observations of Schmidt J in *Cole v Wenaline Pty Ltd*[41], that is was impossible to know the outcome of the applicant's bilateral knee condition in the absence of injury.

Reasons

59. Section 323 of the 1998 Act relevantly provides:

> "(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.
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> (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.
>
> (3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the approved medical specialist in connection with the medical assessment of the matter."

60. 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)*[42]; Ryder *v Sundance Bakehouse* (*Ryder*)[43]*; Cole v Wenaline Pty Ltd* (*Cole*)[44].

61. A deduction can be made despite the fact that the worker is asymptomatic prior to injury. In *Vitaz* Basten JA stated:[45]

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[39] Applicant's submissions, p 4
[40] Applicant's submissions, p 5
[41] [2010] NSWSC 78
[42] [2011] NSWCA 254
[43] [2015] NSWSC 526 (*Ryder*) at [54]
[44] [2010] NSWSC 78 at [29] - [30]
[45] At [42]-[43], McColl JA and Handley AJA agreeing

"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:

> '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.'

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

62. In *Vannini v Worldwide Demolitions Pty Ltd*[46] Gleeson JA stated 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".[47]

63. In relation to the answer to the first question set out above, his Honour stated:[48]

> "The first question involved an assessment by the Panel, substantially of fact by reference to the evidence, although in part informed by the exercise of a clinical judgment. Such an assessment may be characterised as an evaluative judgment or conclusion based on findings of fact. Nonetheless, the legal criterion applied to reach that conclusion on causation demands a unique outcome, rather than tolerates a range of outcomes. Accordingly, the reasoning and finding of the medical specialist attracts the correctness standard of review by a Panel."

64. However, in respect of the extent of the deduction, Gleeson JA observed that a finding as to the degree of proportion of permanent impairment due to a previous condition or abnormality "involves matters of degree and impression". His Honour stated:[49]

> "The position may be different in relation to the second question. A finding as to *the* proportion of permanent impairment due to previous injury, pre-existing condition or abnormality involves matters of degree and impression. The applicable standard of the "proportion" of contributory contribution under s 323 permits some latitude of opinion such as to admit of a range of legally permissible outcomes. That is not to say that such a conclusion is necessarily beyond review by an Appeal Panel on the ground

[46] [2018] NSWCA 324 (*Vannini*) at [90]
[47] At [90]
[48] At [91]
[49] At [92]

> of demonstrable error. However, the resolution of that question should be left to a case where it is dispositive."

65. The AMS concluded that a portion of the impairment of the right and left knees was due to a pre-existing condition or abnormality. Accordingly, there can be no suggestion of error that the AMS failed to conclude that there should be a deduction pursuant to s 323 of the 1998 Act.

66. The relevant finding made by the AMS on the extent of the deduction was as follows:[50]

> "The pre-existing significant mechanical load on both her right knee and left knee prior to the accident - at the time of the accident she weighed about 95 kilograms and her weight was in the obese range - BMI 35 (Heart Foundation) contributed to her impairment of the total knee replacement. Furthermore, the X-ray of the right knee already had narrowing of the medical compartment and medically consistent that the X-ray of the left knee, had it been done at the time, would have shown degenerative changes because of the bi-pedal nature of walking."

67. The AMS noted the onset of right knee pain in 2002 when an x-ray was taken which revealed medial joint compartment narrowing. That x-ray was brought to the examination undertaken by the AMS who confirmed that it showed narrowing of the medial compartment of the right knee.[51]

68. The right knee x-ray taken on 5 August 2002 was reported by the AMS as showing:[52]

> "[n]arrowing and osteophyte formation of the medial compartment of the right knee and early degenerative changes in the patellofemoral joint.
> There was early varus deformity with loss of physiological valgus."

69. The AMS applied the statutory deduction provided by s 323(2) of the 1998 Act.

70. We agree with the applicant's submissions that the extent of the deduction is difficult to determine. However, the 10% deduction cannot be made if it is "at odds with the available evidence". That conclusion requires an analysis of the evidence in order to determine whether a 10% deduction is appropriate.

71. Section 323(3) provides that the evidence referred to in s 323(2) is the evidence "accepted or preferred by the approved medical specialist".

72. The AMS referred to the 2002 right knee x-ray and applied it to the facts of the case, particularly as showing that the applicant had degenerative changes and that these changes were probably bilateral. The AMS also concluded that the pre-existing changes contributed to the need for total knee replacement.

73. The AP specifically endorses these opinions.

74. The AP accepts the applicant's submission that the Consent Orders determines the issue of liability.

[50] MAC, p 9
[51] MAC, p 2
[52] MAC, p 5

75. The question of the respective roles of the Commission and an AMS have been discussed in a number of recent decisions of the Court of Appeal including *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine*[53] (*Hine*) and *Bindah v Carter Holt Harvey Wood Products Australia Pty Ltd* [54] (*Bindah*).

76. In *Inghams Enterprises Pty Ltd v Belokoski*[55] Deputy President Snell referred to the reasoning of Roche DP in *Jaffarie v Quality Castings Pty Ltd* (*Jaffarie No 1*)[56] and stated that "the Commission (in the bifurcated system) has jurisdiction to determine whether a worker suffered injury, and the nature of the injury."[57]

77. More recently in *Jaffarie v Quality Castings Pty Ltd (Jaffarie No 2)* White J stated:[58]

> "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."

78. 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"[59] and noted that this was consistent with the orders of the earlier decision of the Court of Appeal in *Jaffarie v Quality Castings*[60] remitting the matter for re-determination in accordance with the reasons of the Deputy President in *Jaffarie No 1*.

79. This reasoning is otherwise consistent with the approach taken by the Court of Appeal in *State of New South Wales v Bishop* (*Bishop*)[61] where it was held that the determination of a consequential condition was a matter for a Commission Arbitrator.

80. The liability finding expressed in the Consent Orders is inconsistent with that part of Dr Bruce's opinion that the altered gait and weight gain made no contribution to the need for bilateral total knee replacements. However, the liability finding of itself does not mean that the AMS should or must make a deduction of 10% pursuant to s 323. The question of the extent of the deduction was a matter for the AMS examining the evidence and taking into account the consent finding on liability.

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[53] [2016] NSWCA 213
[54] [2014] NSWCA 264
[55] [2017] NSWWCCPD 15
[56] [2014] NSWWCCPD 79 at [259] – [261]
[57] at [222]
[58] [2018] NSWCA 88, Macfarlan and Leeming JJA agreeing on this point
[59] at [80]
[60] [2015] NSWCA 335
[61] [2014] NSWCA 354 (Basten JA at [20]), (Emmett JA at [84]-[85], Gleeson JA agreeing at [93])

81. Dr Wong expressed a bare opinion that there was no s 323 deduction in respect of either knee. His report does not refer to the August 2002 right knee x-ray[62] and does not comment on the existence or otherwise of a pre-existing condition. This opinion provides little assistance in the resolution of this issue.

82. The AP does not accept that the AMS addressed whether the 10% deduction is at odds with the available evidence, particularly the 2002 x-ray which showed significant osteoarthritic changes in two compartments of the right knee, osteophyte formation and varus deformity. These changes were significant and pre-existed the work injury as the x-ray was taken a little over six months after the injury. It is medically impossible for the changes shown in the x-ray to have developed in that time period.

83. The applicant referred to the fact that she was only 37 years of age at the time of injury. The fact that the applicant was then only 37 years of age only emphasised that there was a significant pre-existing constitutional condition.

84. Subsequent x-rays in 2010 and 2014 show a similar condition with respect to both knees. Consistent with the opinion of the AMS, it is likely that the left knee had similar pathological changes to that shown in the right knee as at the date of injury.

85. We agree with the respondent's submission that the AMS did not address whether the pre-existing constitutional changes were of such significance that they were inconsistent with the statutory deduction of 10% provided by s 323(2). We observe that the applicant's submissions, whilst addressing the issue of whether the appropriate deduction is "difficult to determine", do not adequately address the respondent's contention whether the 10% deduction was "at odds with the available evidence".

86. The AP accepts that the AMS failed to provide adequate reasons in accordance with the test described in *Kaur*.

87. We further accept the respondent's submission that the significant changes of the right knee shown in the August 2002 x-ray suggest that a one-tenth deduction is not appropriate.

88. For these reasons, the AP is satisfied that there are demonstrable errors in the failure provide adequate reasons on the issue of whether the evidence is at odds with a 10% deduction and a demonstrable error in concluding that the evidence showed that a 10% deduction was otherwise appropriate. The errors also amount to an application of incorrect criteria when the AMS inferentially concluded that the deduction is not at odds with the available evidence.

89. This ground of appeal is successful. Having found error, the AP is required to reassess according to law: *Drosd v Nominal Insurer.*[63] We subsequently address the appropriate deduction later in these Reasons.

RESPONDENT'S GROUND OF APPEAL 2 – Incorrect s 323 deduction of the left foot

Submissions

Respondent's submissions

90. The respondent submitted that the AMS failed to consider whether a deduction was applicable to the left foot "in light of the pre-existing left foot degenerative condition".[64]

[62] Application, p 173
[63] [2016] NSWSC 1053
[64] Respondent's submissions, paragraph 2.25

91. It was submitted that whilst the applicant's symptomatic condition was relevant but not determinative of this issue. Reference was made to *Vitaz*, *Cole* and *Ryder*. It was submitted:[65]

> "[T]hat the available medical evidence supports that but for the applicant's worker's pre-existing osteoarthritic left foot condition, the degree of impairment resulting from the injury sustained on 6 February 2002 would not have been as great."

92. The respondent referred to the investigations of the left foot in 2003 which "confirmed extensive and well-established osteoarthritic changes in the lower limb"[66] and "consistent findings were recorded at the time of investigation in 2005". It was submitted that the AMS "also took a history of osteoarthritis initially confirmed on investigations on 13 April 2002 at page 5 of the MAC."[67]

93. The respondent submitted that, having regard to the pre-existing condition evidenced on investigations, the AMS ought to have made a deduction in accordance with the fourth edition guidelines and s 323 of the 1998 Act. It was submitted that "but for the pre-existing degenerative condition, the extent of the impairment in the left foot assessed would not have been as great."[68] A deduction of one-tenth ought to have been applied.

94. The respondent further submitted that the failure to make a deduction was a demonstrable error. The respondent repeated its submissions under the application of incorrect criteria "with respect to the extent of the pre-existing condition and as evidence for the fact that but for such, the extent of the impairment assessed would not have been as great."[69]

95. The respondent submitted that the failure by the AMS to apply the relevant deductible proportion under s 323 for the left foot resulted in a demonstrable error. It was submitted that a deduction "of at least one-tenth ought to have been applied".[70]

Applicant's submissions

96. The applicant submitted that the respondent's submissions were contradicted by Dr Bruce who was qualified by the respondent.

97. The applicant observed that the respondent's reference to post injury osteoarthritis was provided in a report of Dr Linklater dated 4 July 2003 which was not evince of pre-existing degenerative changes but an opinion of "post-traumatic degenerative changes".

98. The applicant also referred to the reports of Dr Sullivan dated 25 June 2003 and 25 July 2003 where the doctor opined that the applicant had developed post-traumatic arthritis involving the navicular medial cuneiform joint.

99. The applicant submitted that there was no evidence of any pre-existing condition and no evidence that any degree of the impairment arose from any condition other than the work injury.

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[65] Respondent's submissions, paragraph 2.29
[66] Respondent's submissions, paragraph 2.30
[67] Respondent's submissions, paragraph 2.30
[68] Respondent's submissions, paragraph 2.32
[69] Respondent's submissions, paragraph 2.43
[70] Respondent's submissions, paragraph 2.44-2.45

Reasons

100. The respondent's submissions that there should be a s 323 deduction were made in the absence of medical opinion and where at least two doctors qualified by it did not opine that there was a pre-existing cause.

101. The medical opinion of the treating doctors following the injury, particularly that expressed by Dr Sullivan, show that the osteoarthritis in the left foot was post traumatic and caused by the accident. Dr Wilding, qualified by the respondent in 2003, agreed with this view.

102. The reliance by the respondent of the July 2003 MRI scan as supporting the contention that there was a pre-existing degenerative condition in the navicular cuneiform joint is misconceived. The AMS properly recognised, consistent with the medical opinion, that this scan shows developing post traumatic arthritis caused by the injury.

103. The AP also observes that Dr Bruce does not suggest that there should be a s 323 deduction in relation to the left foot impairment.

104. The applicant suffered a discrete Lisfranc injury which resulted in the need for an arthrodesis which solely and directly caused the impairment of the left foot. The AP observes that this was a significant injury to the left foot.

105. The only possible suggestion of a pre-existing condition, that is osteoarthritis of the first metatarsophalangeal joint shown in a left foot x-ray in April 2002, had nothing to do with the injury and the need for the arthrodesis. There is otherwise no evidence to support the respondent's submissions set out at paragraphs 91 and 93 herein.

106. The AP rejects the respondent's submission that there was any suggestion of a s 323 deduction in respect of the impairment of the left foot. In the circumstances of this case there was no suggestion or contest in the medical evidence that the applicant had a pre-existing condition contributing to impairment of the left foot. In this respect, the AP notes the observations by Basten JA in *Vitaz*[71] of the absence of any medical evidence establishing a contest on s 323 of the 1998 Act. His Honour stated:[72]

> "In the absence of any medical evidence establishing a contest as to whether the pre-existing condition did contribute to the level of impairment, the complaint about a failure to give reasons must fail. An approved medical specialist is entitled to reach conclusions, no doubt partly on an intuitive basis, and no reasons are required in circumstances where the alternative conclusion is not presented by the evidence and is not shown to be necessarily available."

107. This ground of appeal is rejected.

APPLICANT'S GROUND OF APPEAL – Incorrect rounding of s 323 deduction

Applicant's submissions

108. The applicant referred to the findings made by the AMS that there should be a one-tenth deduction of the impairment of both knees and that the AMS erred by increasing the one-tenth deduction, calculated at 1.5%, to 2%. Consistent with paragraphs 1.26 and 1.28 of the fourth edition guidelines, it was submitted that the one-tenth should have been deducted from the 15% arriving at 13.5%. The 13.5 % should have been rounded up to 14% rather than the figure of 13% arrived at by the AMS.

[71] [2011] NSWCA 254
[72] at [43], with whom McColl JA and Handley AJA agreed

109. The applicant referred to various Medical Appeal Panel decisions[73] which supported its submission. It was submitted that this was both a demonstrable error and an application of incorrect criteria.

Respondent's submissions

110. The respondent accepted the "calculation error" raised by the applicant. It sought that its grounds of appeal be determined prior to correcting that error.

Reasons

111. The AP accepts the parties' agreed submission that there was error in respect of calculation of impairment after the s 323 deduction. The manner in which the AMS calculated the impairment by rounding up the deduction rather than rounding up the final impairment, amounts to an error within the meaning of s 327(3)(c) of the 1998 Act: see *Marina Pitsonis v Registrar of the Workers Compensation Commission of New South Wales*[74] applying Basten JA in *Campbelltown City Council v Vegan*.[75]

112. The AP agrees with the applicant's submission that the effect of paragraphs 1.26 and 1.28 of the fourth edition guidelines requires the s 323 amount to be deducted from the overall impairment and the final figure to be rounded up if the value is 0.5 or above.

113. In the present case the correct method was to take the one-tenth from 15%, resulting in a figure of 13.5%, and then increasing that figure to 14%.

114. It is unnecessary to decide whether this also amounts to a demonstrable error.

REASSESSMENT

115. The AP is satisfied that we can properly perform the statutory function to reassess in the absence of a re-examination. This conclusion is in accordance with the common submission that a re-examination was unnecessary. We observe that our findings on error in the MAC does not detract from the precise findings made by the AMS on examination.

116. In these circumstances we adopt the findings on assessment by the AMS of overall impairment. Neither party submitted to the contrary.

117. There is no basis to make any s 323 deduction for the whole person impairment of the left foot impairment. The AP repeats its reasons in rejecting the respondent's ground of appeal alleging that there was a pre-existing condition of the left foot which contributed to impairment.

118. The outstanding issue is the extent of the s 323 deduction for the impairment associated with the bilateral knee replacements.

119. We accept that the Commission has issued the Consent Orders establishing the respondent's liability for the consequential condition to the left and right knee.

120. The AP make the following findings of fact referable to the extent of the s 323 deduction.

121. We accept that the applicant was asymptomatic prior to the injury.

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[73] See for example *SAI Global Ltd v Sefin* [2019] NSWWCCMA 132

[74] [2008] NSWCA 88 (*Marina Pitsonis*) at [40]-[42], McColl and Bell JJA (as their Honours then were) agreeing

[75] [2006] NSWCA 284 at [94], McColl JA agreeing

122. The applicant's left foot injury resulted in significant pain, los of activities and altered gait. This led to a significant and ongoing increase in weight which is described earlier in these Reasons.

123. The findings shown in the August 2002 right knee x-ray are significant and show extensive pre-existing degeneration and varus deformity. As we stated earlier, the time between the injury and this scan meant that these changes existed prior to injury. We also accept that, at the time of the injury, the applicant's pre-existing weight was in the order of 95 kilograms which contributed to pre-existing degeneration. These changes are extensive given the applicant's age of 37 years at the time of injury and likely show that the applicant had an established pre-existing constitutional osteoarthritic condition.

124. It is likely that the changes were bilateral for the reasons provided by the AMS, that is the bi-pedal nature of walking. We also accept that, consistent with Dr Bruce's opinion, that subsequent x-rays in both knees showed similar changes in the knees. In this respect the AP refers to the 2010[76] and 2014[77] x-rays of the knees which are reported as showing similar changes in the left and right knees.[78]

125. We specifically endorse the AMS findings that the pre-existing condition contributed to the need for bilateral knee replacements.

126. We also accept the applicant's submissions that there was both altered gait and significant weight gain over an extensive period which contributed to the need for total knee replacements and the resultant impairment.

127. The AP previously noted that Dr Wong provided no reasons as to why he did not make any s 323 deduction in respect of the impairment of the knees. This unreasoned opinion does not assist in making a finding as to the extent of the pre-existing deduction that contributed to impairment.

128. The AP is also of the view that a 10% deduction is at odds with the available evidence referred to herein, particularly the significant pre-existing degenerative changes and varus deformity that was a significant factor in the applicant eventually undergoing total knee replacements.

129. We find that a deduction in the order of 30% in respect of the impairment of both knees is appropriate. We have made this deduction noting that the pre-existing changes were significant and may have warranted a higher deduction. However, given the other factors such as significant weight increase, the absence of pre-existing symptoms and altered gait which contributed to deterioration, we consider a deduction in that order as appropriate.

130. The whole person impairment of each knee, after the s 323 deduction, is 10.5% which is rounded up to 11%.

131. The impairment of the left lower extremity is obtained by combining the impairment of the left foot impairment (6%) and the left knee (11%). This results in a combined whole person impairment of the left lower extremity of 16% using the combined tables in AMA 5.[79]

132. The WPI of the skin is 1% in accordance with the reasons provided by the AMS.

133. We are satisfied, given the duration of symptoms, that the impairments are permanent.

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[76] Reply, p 55 and AMS at p 5
[77] Reply, p 64 and AMS at p 5
[78] See
[79] See Chapter 3 of the fourth edition guidelines and AMA 5, p 604.

DECISION

134. For these reasons, the Medical Assessment Certificate given in this matter for WPI is revoked and a new Medical Assessment Certificate is issued. The new Medical Assessment 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 MEDICAL APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

A Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar

WORKERS COMPENSATION COMMISSION

APPEAL PANEL

MEDICAL ASSESSMENT CERTIFICATE

Matter No: **2877/19**
Applicant: **Helen Lecopoulos**
Respondent: **DraftFCB Sydney Pty 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 Harvey-Sutton 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)**
Right lower extremity	6.02.2002	Chap 3, pp 13-23	Chapter 17, Table 17-33 and 17-35	15%	3/10th	**11%**
Left lower extremity	6.02.2002	Chap 3, pp 13-23	Chapter 17, Table 17-33 and 17-35	15% (knee) 6% (foot)	3/10th nil	11% 6% --------- **16%**
Skin	6.02.2002	Table 4.1 p 74		1%	nil	**1%**
Total % WPI (the Combined Table values of all sub-totals)						**26%**

John Harris
Arbitrator

Dr Margaret Gibson
Approved Medical Specialist

Dr Brian Noll
Approved Medical Specialist

26 November 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 Shaw

Andrew Shaw
Dispute Services Officer
As delegate of the Registrar