WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-5715/19**
Appellant:	**Coles Supermarkets Australia Pty Ltd**
Respondent:	**Carol Hanson**
Date of Decision:	**19 May 2020**
Citation:	**[2020] NSWWCCMA 89**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr David Crocker**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 10 March 2020, Coles Supermarkets Australia Pty Ltd, the appellant, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Tommasino Mastroianni, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 11 February 2020.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the assessment was made on the basis of incorrect criteria
    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

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

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

RELEVANT FACTUAL BACKGROUND

6. It is convenient to extract the history reported by the AMS at Part 4 of the MAC,

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:

Ms Hanson states that she joined Coles in 1992. For the first 6 months she worked on the checkouts and then went to the Meat Department where she has been working since. In the Meat Department she did packing, wrapping and also displayed the products on the shelves.

She states that in 2005, she slipped in her backyard and fell on her right knee. The knee was sore, and it continued to trouble her on and off. In 2008, Dr Ho did an arthroscopy. She said that the knee was better after the operation but by the end of the working week it was sore.

In 2013, she lifted a crate of chickens to put onto a trolley. As she turned to place the chickens on the trolley she hit the right knee on the trolley. The knee was very sore after this incident.

She consulted the local doctor and she was treated with medication, physiotherapy and hydrotherapy.

The knee did not settle and it progressively got worse. She consulted Dr Ho who previously operated on the knee and he recommended that she continue with conservative treatment and considered her too young to consider total knee replacement.

By 2018, the pain was severe and she had difficulty walking. On 13 August 2018, she had a total knee replacement."

PRELIMINARY REVIEW

7. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.

8. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination for the reasons given below.

EVIDENCE

Documentary evidence

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

Medical Assessment Certificate

10. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

SUBMISSIONS

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

Appellant

12. In summary, the AMS has erred in applying 1/10 deduction under s 323 of the 1998 Act.

13. The Panel should make a greater deduction of at least 1/2 for the unrelated incident injury to the right knee in approximately 2005.

Respondent

14. The AMS was correct to apply 1/10 deduction to the assessment under s 323 because the evidence does not support a greater deduction.

FINDINGS AND REASONS

15. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment, but the review is limited to the grounds of appeal on which the appeal is made.

16. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

Ground of appeal - section 323 of the 1998 Act deduction

17. For a deduction to be properly made under s 323 there must be evidence that there is a pre-existing injury; condition; or abnormality and that this element contributes to the impairment and "assumption will not suffice".[1]

18. As noted above, the correct approach to be taken by an AMS with s 323 of the 1998 Act was reiterated by Campbell J *Greater Western Area Health Service v Austin* [2014] NSWSC 604 (*Austin*),

> "An Approved Medical Specialist's task is to assess the whole person impairment with which the injured worker presents. Whether it be caused by the injury or whether its cause is from an unrelated source, nonetheless the impairment should be recorded. If it is the opinion of the AMS that the losses, or part of them, had been caused for other reasons then an AMS has the power to make an appropriate deduction under s.323 of the 1998 Act, or to vary his assessment as provided at [8(g)] of the MAC."

19. In *Ryder v Sundance Bakehouse* [2015] NSWSC 526 Campbell J explained the requirements for a deduction (emphasis in original),

> "What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the *degree* of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the *degree* of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to the pre-existing abnormality."

20. A pre-existing condition can be asymptomatic before the injury, providing the evidence establishes when it occurred and that it forms part of the impairment.[2]

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[1] *Fire & Rescue NSW v Clinen* [2013] NSWSC 629

[2] *Vitaz v Westform (NSW) Pty Limited* [2011] NSWCA 25.

21. The authorities require that no deduction can be made under s 323 of the 1998 Act without evidence establishing a pre-existing injury, condition, or abnormality and when it occurred. In this matter there is a complete absence of evidence to establish an injury or condition before the employment with the respondent in 1980.

22. Ms Hanson had a fall in approximately 2005 and hurt her right knee. This is described in her statement as being on a train, and in the history taken by the AMS as being at "in her backyard". In any event, there was later an arthroscopy performed on 4 June 2008, and Dr Ho reported,

> "EUA the knee is stable. The arthroscopy showed Grade II changes in the retro-patella, trochlea and also in the medial compartment, in both the femur and tibia.
>
> The operation was done by the Registrar. He could not find any obvious tear of the medial meniscus, therefore it was not done."

23. The AMS says about this element,

> "There is a history of an injury to the knee in 2005 outside of the workplace and symptoms post this fall for which she had an arthroscopy. In my opinion that injury is a pre-existing condition and subsequently affected by the nature and conditions of her work and the specific incident at work.
>
> I am of the opinion that the pre-existing condition is a component of the current impairment guided by the history and review of the medical evidence, I have deducted one-tenth in accordance with section 323(2). This equates with 1.5% WPI. She therefore has 13.5% WPI which rounds off to 14%."

24. The AMS accepted that there was a pre-existing condition in the right knee that was aggravated by the duties undertaken in the course of employment with the respondent and by the incident with the crate of chickens on 1 August 2014. (The AMS has 2013 for this incident, which the appellant notes is incorrect, but nothing hinges on it).

25. The appellant submits that the s 323 deduction should be at least 50%. The appellant also relies on a medical Panel determination in *Lend Lease Project Management & Construction (Australia) Pty Limited v Charles Usher* [2019] NSWWCCMA 198 (*Usher*) because there had been in that case an arthroscopy unrelated to work.

26. The Panel notes that the circumstances in this matter are different to those in *Usher*. Each case must turn on its own facts. The appellant refers to the MRI of 29 May 2007 which was followed by the arthroscopy in June 2008. Contrary to the MRI report the surgeon did not find a tear in the meniscus, and only mild osteoarthritic changes throughout, with no surgical treatment being reported. The findings at surgery were in fact consistent with what had been seen in the x-ray of 8 May 2007, comprising "Early mild osteoarthritis."

27. The AMS considered the s 323 element in accordance with the authorities discussed above. He found that there was a pre-existing condition which is consistent with the evidence. The nature of the injury as pleaded in the Application to Resolve a Dispute and as reflected in the report of Dr Oates is that of aggravation, acceleration, exacerbation, or deterioration of a disease. That disease is degenerative osteoarthritis which arose from the incident away from work in approximately 2005. The AMS notes he considered the historical evidence, and the Panel notes this includes the x-ray of 8 May 2007, the MRI of 29 May 2007 and the June 2008 operation report of Dr Ho.

28. What was observed at the 2008 surgery is consistent with the gradual progression of degenerative osteoarthritis due to the work duties from the time of the 2005 incident resulting by that time in mild osteoarthritic changes with no meniscal tear. The employment duties continued to affect the degenerative changes as did the incident on 1 August 2014 (noted as 2013 in the MAC and elsewhere) which caused a significant increase in symptoms, and Ms Hanson eventually came to total knee replacement on 13 August 2018.

29. The AMS explains why he arrived at 1/10 deduction pursuant to s 323(2) of the 1998 Act. The Panel notes it is difficult to ascertain what proportion of the current impairment is represented by the pre-existing injury. The application of subsection (2) is not at odds with the evidence. The appellant concedes in submissions that the complete deduction of Dr Machart may not be indicated, but at least 1/2 is deductible.

30. The AMS says he does not agree with Dr Machart, and he finds the same deduction as Dr Oates. The Panel notes that Dr Machart is under the impression that there was a repair of the medial meniscus at the arthroscopy in June 2008. This impression is probably due to the MRI report of 29 August 2007. It appears Dr Machart did not have before him the arthroscopy report of Dr Ho noting there was in fact no tear of the meniscus, and therefore no repair was carried out. This has resulted in Dr Machart being under the impression there was greater damage from the 2005 incident than was the case, which undermines the value of his opinion.

31. The AMS is in any case not required to adopt any medical opinion relied upon by the parties; and a difference of opinion is not a ground of appeal. The finding of 1/10 deduction pursuant to s 323(2) of the 1998 Act was open to the AMS.

Findings

32. The grounds of appeal are not made out. The Panel discerns no demonstrable error on the face of the Certificate. The assessment was not based on incorrect criteria.

33. For these reasons, the Appeal Panel has determined that the MAC issued on 11 February 2020 is confirmed.

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar