WORKERS COMPENSATION COMMISSION

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

Matter Number:	**M1-62/19**
Appellant:	**Bogdan Fabik**
Respondent:	**State of NSW (Department of Education)**
Date of Decision:	**30 July 2019**
Citation:	**[2019] NSWWCCMA 101**

Appeal Panel:	
Arbitrator:	**Mr William Dalley**
Approved Medical Specialist:	**Dr James Bodel**
Approved Medical Specialist:	**Dr Mark Burns**

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 2 April 2019, Bogdan Fabik (Mr Fabik/the appellant) lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Margaret Gibson, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 18 March 2019.

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

   - the MAC contains a demonstrable error.

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

4. The WorkCover Medical 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 WorkCover Medical Assessment Guidelines.

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

RELEVANT FACTUAL BACKGROUND

6. Mr Fabik has been employed as a teacher since 1993. He commenced employment with the Department of Education (the respondent) in 1999 teaching manual arts.

7. Mr Fabik suffered injuries to his low back in a motor vehicle accident in 2008 following which he returned to work on permanently modified duties. He suffered a further injury to his lumbar spine on 9 September 2013 in the course of his employment while handling supplies of timber.

8. Subsequently, Mr Fabik suffered aggravation to his back condition on 25 August 2014 due to repetitive lifting materials in the workplace and prolonged standing. Mr Fabik ceased work following that aggravation and over time the effects of the aggravation diminished and he reported that he had returned to the level of symptoms which he had been experiencing following the injury on 9 September 2013 (the subject injury).

9. Mr Fabik made a claim for workers compensation benefits which was accepted by the insurer as resulting from the subject injury. On 26 November 2018 Mr Fabik was examined by Dr Charles New, orthopaedic surgeon, at the request of Mr Fabik's solicitors for the purpose of assessment of the degree of whole person impairment arising from the subject injury.

10. Dr New had previously treated Mr Fabik on referral from Mr Fabik's general practitioner, Dr Kazmierczak, and had first seen Mr Fabik in July 2015.

11. Dr New provided a report dated 28 November 2018 in which he assessed whole person impairment arising from the subject injury at 26%. That assessment comprised assessment of the lumbar spine as DRE III attracting an assessment of 10%, interference with activities of daily living assessed at 3% and the further assessment of "gait derangement" assessed pursuant to table 17-5 of AMA 5 at 15% whole person impairment. Applying the Combined Table the total assessment was 26% with no deduction for previous injury or pre-existing condition or abnormality. He tabulated his assessment:

Body Part or System	**Chapter, Page, Paragraph & Table in SIRA 4th edition 1 April 2016**	**Paragraph & Table in AMA Guides 5th edition**	**% Whole Person Impairment**	**% WPI Deductions pursuant to s.323 for per-existing injury condition and abnormality**	**Sub-total/s % WPI in whole numbers (after any deductions in Column 5)**
Lumbar spine		Page 384, Section 15.4, Table 15.3 – DRE III	10%	No deduction	10%
Impact of ADL	Page 28, Section 4.34 – Impact of activities of daily living self-care		3%		3%
Gait derangement		Page 529, Section 17c, Table 17.5 – Mild – (c)	15%		15%
Total % WPI (the Combined Table values of all sub-totals in whole numbers) Page 604: 15 + 10 = 24; +3 = 26%					26%

12. On 10 December 2018, Mr Fabik's solicitor made a claim for lump-sum compensation in respect of 26% whole person impairment as assessed by Dr New. The claim was declined by the insurer on the basis that the insurer's independent medical expert, Dr James Vote, had assessed 0% whole person impairment although the independent medical expert did not accept that Mr Fabik had reached maximum medical improvement.

13. Mr Fabik's solicitors filed an Application to Resolve a Dispute in the Commission alleging injury on 9 September 2013 to the lumbar spine. The Application included a claim for lump-sum payment particularised as:

Date of injury	Body Parts/Systems Claimed	percentage	Amount claimed
9/9/2013	Lumbar Spine	26%	$66,580

14. The respondent filed a Reply maintaining its dispute on the grounds that Mr Fabik's condition had not reached maximum medical improvement and was below the threshold for payment in respect of lump-sum compensation. The Reply submitted "Any referral to an AMS should only be in relation to the applicant's lumbar spine."

15. On 7 February 2019, the parties participated in a telephone conference with a Commission Arbitrator. The parties agreed that the dispute should be referred to an AMS and a Certificate of Determination was issued in the following terms:

    "The matter is remitted to the Registrar for referral to an Approved Medical Specialist (AMS) as follows:

    Date of injury: 9 September 2013

    Body Part: Lumbar Spine

    Method of Assessment: Whole Person Impairment"

16. A 'Referral for Assessment of Permanent Impairment to Approved Medical Specialist' (the Referral) was issued by a delegate of the Registrar in the same terms as set out in the Certificate of Determination issued on 7 February 2019.

17. The AMS assessed Mr Fabik as having 13% whole person impairment in respect of the lumbar spine. The AMS deducted two fifths of that assessment pursuant to s 323 of the 1998 Act in respect of a pre-existing condition resulting in assessment of 8% whole person impairment (after rounding) resulting from injury on 9 September 2013.

PRELIMINARY REVIEW

18. 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.

19. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination because no demonstrable error was found.

EVIDENCE

Documentary evidence

20. 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

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

SUBMISSIONS

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

23. The appellant submitted:

"DEMONSTRABLE ERROR

1. The Applicant had been assessed by Dr New who in his report dated 28/11/2018 found 26% WPI.

2. The AMS at the foot of page 9 states "I agree with Dr New's impairment assessment, but deduction needs also to be made" ie she agrees the Applicant has a 26% WPI prior to any deduction.

3. The AMS in paragraph 11 states that no deduction is to be made due to pre-existing condition or abnormality.

4. On Assessment Certificate, she states 13% WPI (which should read 26% if agreement with Dr New's assessment as above) and a 40% deduction without explanation and contrary to statement in paragraph 11 that no deduction is applicable or to be made.

In any event if any deductions be made would be assumed to be 10% (section 323 (2) *Workplace Injury Management and Workers Compensation Act 1998*)."

24. The respondent submitted that the AMS had correctly assessed Mr Fabik in accordance with the body part/system referred. The respondent's submission was filed out of time but not objected to by the appellant. The submission does no more than point to an obvious difficulty with the appellant's submission.

FINDINGS AND REASONS

25. 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.

26. 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.

27. The appellant relies upon the ground of demonstrable error. In *Merza v Registrar of the Workers Compensation Commission and Another*[1] Hoeben J said:

> "39 I do not propose to, nor is it necessary, that I define what is 'demonstrable error' for the purposes of s327 of the Act in an exhaustive way. It is sufficient for the purposes of this matter that I conclude that 'demonstrable error' is an error which is readily apparent from an examination of the medical assessment certificate and the document referring the matter to the AMS for assessment."

28. That statement was approved by the Court of Appeal (Mason P, McCall JA and Bell J) in *Pitsonis v Registrar of the Workers Compensation Commission and Another*[2]*.*

[1] [2006] NSWWSC 939 at [39]
[2] [2008] NSWCA 88 at [49]

29. Examination of the MAC and the document referring the matter to the AMS discloses that the AMS assessed the medical dispute in accordance with the referral. That referral was limited to the lumbar spine and did not include the additional body part or system comprehended by the assessment of “gait derangement” provided by Dr New.

30. Dr New assessed whole person impairment in respect of the lumbar spine and added a further assessment of impairment in respect of interference with activities of daily living. That latter assessment forms part of assessment of lumbar spine impairment as set out in the Guidelines at paragraphs 4.33 to 4.36 in Chapter 4 “The spine”.

31. Dr New also assessed “gait derangement” pursuant to Table 17-5 and paragraph 17.2c of AMA 5. That is an assessment with respect to the lower extremities. Paragraphs 3.10 to 3.12 of the Guidelines specify how Table 17-5 is to be applied with respect to gait derangement in Chapter 3, “Lower extremity”.

32. The appellant submits that the AMS accepted the assessment of Dr New of 26% whole person impairment. The AMS summarised Dr New’s reports of 14 September 2015 and 28 November 2018 noting that Dr New “found 10% WPI for the lumbar spine and then added 3% WPI for ADL.”

33. The AMS said “I agree with Dr New’s impairment assessment, but deduction needs also to be made.” That statement follows the comment as to the assessment by Dr New of the lumbar spine, including interference with activities of daily living.

34. The Panel accepts that, in agreeing with Dr New’s impairment assessment, the AMS was intending to refer to the specific assessment of the lumbar spine and interference with activities of daily living. The AMS had not been called upon to address gait derangement.

35. The consent award and the referral are both clearly limited to consideration of the lumbar spine. The assessment of that body part incorporates interference with activities of daily living by operation of the Guidelines but does not permit assessment of gait impairment.

36. The latter was not the subject of referral and the AMS would have fallen into error had she made an assessment pursuant to Table 17-5 of AMA 5 or otherwise in respect of gait derangement.

37. The appellant has pointed to the apparent contradiction between the deductions assessed pursuant to s 323 and the statements in paragraph 11 of the MAC reasons. Paragraph 11 of the MAC is as follows:

> “DEDUCTION (IF ANY) FOR THE PROPORTION OF THE IMPAIRMENT THAT IS DUE TO PREVIOUS INJURY OR PRE-EXISTING CONDITION OR ABNORMALITY.
>
> **N/A**
>
> a. In my opinion, the worker suffers from the following relevant previous injuries, pre-existing conditions or abnormalities: –
>
> (i) Nil
>
> b. the previous injury, pre-existing condition or abnormality directly contributes to the following matters that were taken into account when assessing the whole person impairment that results from the injury, being the matters taken into account in 10a, and in the following ways: –
>
> (i) Nil”

38. The appellant correctly observes that this is at odds with the assessment of two fifths deduction pursuant to s 323 of the 1998 Act. However, the Panel is satisfied that this is a slip as the AMS was clearly of the view that there was a pre-existing condition. In paragraph 10a of the MAC the AMS said:

> "Therefore, there is DRE Lumbosacral Category III (Table 15-3 of AMA5), so 10% WPI. And for the interference of activities of daily living, including self-care there is a further 3% so 13% WPI.
>
> However, there is a pre-existing condition which based on the evidence is likely to be greater than 10% deduction.
>
> This is because there were significant degenerative changes and pre-existing permanent ongoing condition which I believe to have been at least equivalent to DRE II, but there was insufficient evidence to confirm pre-existing ADL restrictions. Therefore, 2/5 deduction is reasonable, this is 5.2% and rounds to 5% WPI."

39. With respect to Dr Coroneos' assessment the AMS commented: "I agree there is evidence of significant pre-existing spinal degenerative changes prior to the subject accident and these changes, by their nature worsen over time."

40. With respect to the report of Dr Rimmer the AMS commented:

> "I am less in agreement with the premise that the effects of the subject accident had ceased. And in relation to the earlier (motor) accident there would appear to have been some degree of permanent impairment, because he required permanent work restrictions. There were in saying this I would note that impairment doesn't necessarily equate to disability."

41. With regard to Dr New's reports the AMS said "I agree with Dr New's impairment assessment, but deduction needs also to be made."

42. When read as a whole the AMS's reasons clearly establish that the answers provided by the AMS in paragraph 11 do not accurately express her view as to possible deduction pursuant to section 323. Taken as a whole the report of the AMS clearly provides an assessment of pre-existing condition which contributes to the level of impairment assessed. The AMS provides clear reasons for her view.

43. The AMS also provides reasons why she regards a deduction of one tenth as "at odds with the available evidence" (s 323(2)).

44. For these reasons, the Appeal Panel has determined that the MAC issued on 18 March 2019 should be confirmed.

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

A MacLeod

Ann MacLeod
Dispute Services Officer
As delegate of the Registrar